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Third Evaluation Round

Compliance Report on the United States of America

"Incriminations (ETS 173 and 191, GPC 2)"

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"Transparency of Party Funding"

Adopted by GRECO
at its 63rd Plenary Meeting
(Strasbourg, 24-28 March 2014)

GRECO Secretariat
Council of Europe
www.coe.int/greco

F-67075 Strasbourg Cedex
☎ +33 3 88 41 20 00
Fax +33 3 88 41 39 55

Directorate General I
Human Rights and Rule of Law
Information Society and Action against Crime Directorate

I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of the United States of America to implement the nine recommendations issued in the Third Round Evaluation Report on the United States (see paragraph 2), covering two distinct themes, namely:

   - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).

   - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).

2. The Third Round Evaluation Report was adopted at GRECO's 53rd Plenary Meeting (5-9 December 2011) and made public on 26 January 2012, following authorisation by the United States (Greco Eval III Rep (2011) 2E, Theme I and Theme II).

3. As required by GRECO's Rules of Procedure, the authorities of the USA have submitted Situation Reports on the measures taken to implement the recommendations – on 24 and 31 July 2013 respectively and supplementary information on 18 and 23 February and on 11 March 2014. This information served as the basis for the Compliance Report.

4. GRECO selected Ireland and Lithuania to appoint rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Paulius GRICIUNAS, Vice Minister, Ministry of Justice (Lithuania) and Mr Andrew MUNRO, Principal Officer, Criminal Law Reform Division, Department of Justice and Equality (Ireland). They were assisted by GRECO's Secretariat in drawing up the Compliance Report.

5. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendations (partially or not implemented) will be assessed on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

II. ANALYSIS

Theme I: Incriminations

6. It is recalled that GRECO in its evaluation report addressed six recommendations to the United States in respect of Theme I. Compliance with these recommendations is dealt with below.

Recommendation i.

7. *GRECO recommended to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191).*

8. The authorities of the United States report that since receiving this recommendation, no steps have been taken to ratify the Criminal Law Convention on Corruption nor to sign or ratify the Additional Protocol. They note that in addition to being a member of GRECO, the United States is currently a party to three multilateral treaties focusing on corruption, the UN Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Inter-American Convention against Corruption.

9. GRECO regrets that no progress has been reported by the U.S. authorities in order to ratify the Criminal Law Convention on Corruption and its Additional Protocol, despite the fact that this Convention was signed by the United States already in 2000. It urges the authorities to further pursue this matter.

10. GRECO concludes that recommendation i has not been implemented.

Recommendation ii.

11. *GRECO recommended to ensure that federal legislation and/or practice in respect of bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts (Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173)) as well as bribery of foreign arbitrators and foreign jurors (Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) i) is not limited to commercial activities; ii) also criminalises the passive side of the aforementioned offences; and iii) to ensure that all forms of "undue advantages" in relation to these offences are covered by the relevant bribery offences.*

12. The U.S. authorities report that since the adoption of the Evaluation Report, the United States has not enacted new legislation or amended any of its criminal statutes in a way that is directly relevant to this recommendation. That said, they refer to the use by the prosecutorial authorities of a range of statutes available *in practice* in a way that is relevant for the individual elements (i-iii) of this recommendation.

13. As far as the first part of the recommendation is concerned – *to ensure that federal legislation and/or practice in respect of the enumerated offences is not limited to commercial activities* – the authorities note that the Foreign Corrupt Practices Act ("FCPA") is the primary legislation applicable. According to *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*Resource Guide*")[1], published in November 2012 jointly by the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), the FCPA can reach a broad array of conduct. The authorities also stress that the FCPA is not the only statute that can be used to reach the payment of bribes to foreign public officials, as specified in Articles 5, 6, 10, and 11 of the Criminal Law Convention and the Additional Protocol. The FCPA applies only to bribes intended to induce or influence a foreign official to use his/her position "in order to assist … in obtaining or retaining business for or with, or directing business to, any person" (the "business purpose test"). When amending the FCPA in 1988, Congress made clear that the business purpose element, and specifically the "retaining business" prong, was meant to be interpreted broadly: "*The Conferees wish to make clear that the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the*

[1]A pdf copy of the Resource Guide is available at http://www.justice.gov/criminal/fraud/fcpa/guidance/

purpose of obtaining more favorable tax treatment. The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials". Many enforcement actions involve bribes to obtain or retain government contracts. The FCPA also prohibits bribes in the conduct of business or to gain a business advantage. For example, bribe payments made to secure favourable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test.[2] In 2004, the U.S. Court of Appeals for the Fifth Circuit addressed the business purpose test in the case *United States v. Kay*[3] and held that bribes paid to obtain favourable tax treatment - which reduced a company's customs duties and sales taxes on imports - could constitute payments made to "obtain or retain" business within the meaning of the FCPA. The Court explained that in enacting the FCPA, "Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements." The Court in the Kay case found that "[t]he congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his/her beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement." Accordingly, it held that payments to obtain favourable tax treatment can, under appropriate circumstances, violate the FCPA: "*Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business"…"[W]e hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage".* The authorities add that in those rare situations where the FCPA might not reach a wholly "non-commercial" bribery scheme, other statutes, such as the Travel Act, mail or wire fraud or money laundering provisions, or otherwise, could reach such conduct[4]. None of those statutes are limited in their scope to "commercial activities" and thus bribery of foreign officials relating to non-commercial activities can be reached through federal legislation and in practice.

14. GRECO takes note of the information provided, which to a large extent resembles the information already included in the Evaluation Report (paragraph 151). The fact that the FCPA requires a business relation in order to be applicable remains the same. However, the additional information submitted further strengthens the position of the U.S. authorities that the business nexus is to be interpreted broadly; for example, it would according to the *Kay* case encompass bribery of a foreign public official in order to obtain favourable tax treatment. That said, GRECO is not convinced that a clear cut situation without a link to any form of contractual or business relation would be covered by the FCPA. GRECO notes the position of the authorities that then the Travel Act, mail or wire fraud or money laundering provisions could be applied in order to prosecute anyway as these provisions are not necessarily limited to commercial activities. This would, according to the US authorities reach these offences of bribery "to the fullest extent permissible" under the U.S. Constitution and federal system. GRECO does not contest that alternative offences, such as fraud or money laundering, may be used in an effective way for such situations.

[2] See, e.g., Complaint, SEC v. Panalpina, Inc., No. 10-cv-4334 (S.D. Tex. Nov. 4, 2010), ECF No. 1

[3] United states v. Kay,359 F.3d 738, 755-56 (5th Cir. 2004)

[4] The U.S. authorities also refer to their response in respect of part (ii) of this recommendation.

However, the authorities have not substantiated that these secondary provisions, standing alone, meet all the requirements of the Criminal Law Convention in respect of the particular offences of bribery of foreign public officials and others mentioned in this recommendation, as these secondary provisions rather concern other types of offences, such as fraud, money laundering etc. Consequently, GRECO takes the view that the U.S. authorities have demonstrated that the commercial limitation of the FCPA is to be interpreted broadly, which is a step in the right direction, but not sufficient to fully rule out this limitation. Furthermore, evidence submitted does not make it clear that the secondary legislation referred to, as applied, would meet all the requirements of the Criminal Law Convention in respect of the particular offences mentioned in this recommendation. It follows that this part of the recommendation has not been more than partly implemented, because of the additional requirements to prove the use of inter-state travel or wire or mail.

15. As far as the second part of the recommendation is concerned - *to ensure that federal legislation and/or practice also criminalises the passive side of the aforementioned offences* – the U.S. authorities repeat what is already stated in the Evaluation Report (paragraph 152) that due to jurisdictional concerns and policy reasons, the United States does not criminalise the solicitation or acceptance of a bribe by a foreign official *under the FCPA*. They add that the country where the individual is an official is the most damaged by the acceptance of a bribe and should, if possible, prosecute that official domestically for taking the bribe and that the U.S. authorities actively share information that may help with the prosecution and assist in recovering assets of corrupt officials, providing a number of examples. That said, the authorities also submit that the United States can and has prosecuted foreign officials based on corruption through (1) money laundering charges (as foreign corruption is a predicate offence to money laundering), (2) wire fraud, and (3) the Travel Act. The authorities give numerous examples of cases in which situations of passive bribery of foreign public officials and members of international organisations have been successfully prosecuted, mostly for having committed money laundering, sometimes in conjunction with felony bribery in violation of the FCPA[5].

16. GRECO takes note of the information provided that no legal changes have taken place in respect of the foreign bribery provisions of the FCPA since the adoption of the Evaluation Report. However, the U.S. authorities have submitted a large number of cases which clearly indicate that situations comprising instances of passive bribery in respect of foreign public officials and members of international organisations can be and are being prosecuted successfully, mainly as money laundering in relation to which bribery under the FCPA is a predicate offence. On the basis of this, GRECO accepts that the law enforcement authorities in practice may deal with and prosecute in situations involving passive bribery of foreign public officials and others to a large extent; as it appears often as money laundering. As it has not been established that the legislation and/or practice used to this end meet all requirements required for passive bribery of foreign public officials and others covered by this recommendation under the Criminal Law Convention, it follows that this part of the recommendation is not more than partly implemented, because of the additional requirements to prove the use of inter-state travel or wire or mail.

17. In respect of the third part of this recommendation - *to ensure that all forms of "undue advantages" in relation to these offences are covered by the relevant bribery offences* - GRECO

[5] Cases referred to by the U.S. authorities: *United States v. Bethancourt*, No. 13 MAG 0683 (S.D.N.Y. Mar. 12, 2013), *United States v. Esquenazi*, No. 1:09-cr-21010-MGC (S.D. Fla. Dec. 4, 2009), *United States v. Siriwan*, No. CR 09 00081 (C.D. Cal. Jan. 28, 2009), *United States v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009), *United States v. Bahel*, No. 08-3327-cr, 662 F.3d 610 (2d Cir. 2011), *United States v. Sengupta*, No. 02-CR-040-RWR (D.D.C. Feb. 6, 2006), *United States v. Basu*, No. 1:02-CR-00475-RWR (D.D.C. May 30, 2008) and *aff'd*, No. 08-3031 (D.C. Cir. Dec. 2, 2009).

recalls that the reason for this part of the recommendation was that the FCPA makes an explicit exception for "facilitating and expediting payment" the purpose of which is to expedite or secure the performance of a routine action by a foreign official, from what is criminalised. This is contrary to the wording in the Criminal Law Convention on Corruption, which makes no explicit exception for such payments (Evaluation Report paragraph 153).

18. The authorities argue that the U.S. legislation is compliant with the Criminal Law Convention for the following reasons: First, the FCPA exception for "facilitating and expediting payment" corresponds to the use of the adjective "undue" advantages in the Convention, which according to the drafters of the Convention "…*aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts"*[6]. Second, the authorities argue that the FCPA proscribes a person, acting corruptly, from directly or indirectly offering, giving, promising to give, or authorising the giving of any money or anything of value. The FCPA's "anything of value" term is to be read quite broadly and covers economic and non-material benefits, including cash, travel, meals, entertainment, gifts, employment, charitable donations and non-pecuniary advantages (*See Resource Guide* at 14-19). Moreover, the authorities state that like the Criminal Law Convention, which explicitly provides for an intent requirement in all bribery offences, to establish a crime of bribery under United States law, there is a requirement of intent under the FCPA. "The corrupt intent requirement . . . target[s] conduct that seeks to improperly induce officials into misusing their positions" (*Resource Guide* at 15). Thus, in order to constitute a bribe, a payment must be intended to corrupt the recipient, meaning the payor(s) "acted…with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor" (*United States v. Kay*, 513 F.3d 432, 450 (5th Cir. 2007)). The payor of a facilitation payment, by definition, cannot be seeking an action to which s/he is not entitled; consequently, the "payor" would lack "corrupt intent" in such a situation. The U.S. authorities conclude that bribes of all forms of "undue advantages," are fully covered by the FCPA and/or other federal legislation and by practice, in line with the Criminal Law Convention.

19. GRECO notes that the exception of facilitating and expediting payments in the FCPA is not contained in the U.S. federal law dealing with bribery of domestic public officials. Furthermore, GRECO notes that in respect of the domestic bribery offence, the U.S. federal legislation applies to "anything of value" and that the "undue" qualification provided for in the Criminal Law Convention is not reflected in the text of the U.S law. It can therefore be argued that in respect of this offence the U.S. law is broader than what is required by the Convention. The fact that the text of the FCPA is more limited than the federal law with regard to domestic bribery is therefore not in itself sufficient to conclude that the FCPA is more restricted than the Convention. The United States argue that the exception contained in the FCPA is in line with the Convention, as this restriction should be interpreted as being similar to the reasoning in the Explanatory Report to the Convention where "undue" advantage is explained as *"something that the recipient is not lawfully entitled to accept*" (see footnote 6).

20. In the view of GRECO it is confusing that U.S. legislation is not fully consistent in respect of bribery offences committed in the domestic and foreign context. Furthermore, the exception for "facilitating and expediting payment" creates to some extent a "grey zone". However, it is to be noted that the Guidelines to the FCPA have been published in order to clarify the situation and that the Departments of Justice and Commerce actively discourage all facilitation payments in the foreign context. GRECO accepts that the clarifications made by the authorities in relation to the criminalised advantages under the FCPA correspond to what is meant by "undue" advantages

[6] Explanatory Report to the Criminal Law Convention on Corruption, paragraph 38

under the Criminal Law Convention. This part of the recommendation has therefore been implemented.

21. In view of the above, GRECO concludes that recommendation ii has been partly implemented.

Recommendation iii.

22. *GRECO recommended to ensure that federal legislation and/or practice complies with the requirements of bribery in the private sector, as established in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).*

23. The U.S. authorities express that, for the reasons given in the Evaluation Report, the United States does not have a stand-alone federal private sector bribery statute. That said, *in practice,* conduct covered by Articles 7 and 8 of the Criminal Law Convention is constantly being prosecuted in the United States, using a variety of statutes. Primarily, commercial bribery can be charged federally under the Travel Act, 18 U.S.C. § 1952. More specifically, Section 1952(b)(2) of this Act prohibits travelling in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to further any "unlawful activity", which is defined to include any bribery in violation of U.S. law or a law of a state in which an act in furtherance of the bribery scheme was committed (18 U.S.C. § 1952(b)(i)(2)). The authorities submit that, currently, at least 40 of the 50 U.S. States have criminalised commercial bribery. Furthermore, the legislative history of the Travel Act explains that Congress was concerned about criminal activity that crosses both state and international borders. The Supreme Court has in this context held that "Congress intended 'bribery… in violation of the laws of the state in which it was committed' to encompass conduct in violation of state commercial bribery statutes" (*Perrin v. United States*, 444 U.S. 37, 50 (1979) and *United States v. Welch*, 327 F.3d 1081, 1090-1103 (10th Cir. 2003)) holding that the Travel Act was designed to "impose criminal sanctions upon the person whose work takes him across state or National boundaries in aid of certain 'unlawful activities' and that a state commercial bribery statute can serve as a predicate for a Travel Act violation based on foreign commercial bribery (quoting H.R. Rep. No. 966, at 4 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666. The Supreme Court has further stated that the Travel Act is, "in short, an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce" (*Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972) (citing to H.R. Rep. No. 966, at 3)). In addition, a federal district court has held that the Travel Act applies to overseas private bribery (*United States v. Carson,* No. SACR 09-00077-JVS, 2011 WL 7416975, at *4-5 (C.D. Cal. Sept. 20, 2011). The authorities also list a large number of cases of prosecutions for commercial bribery under the Travel Act (between 2004 and 2013).

24. The U.S. authorities furthermore argue that in the Evaluation Report (paragraph 157), it appears to be incorrectly assumed that the corrupt transaction must be *effected* through the use of a facility of interstate or foreign commerce. The authorities state in this respect that the facility of interstate or foreign commerce provision is much broader than that as it is not limited to the actual payment or receipt of a bribe; the use of the facility does not need to be *central* to the crime; rather, it must only be *"in furtherance of"* the bribery scheme, a notion that is, in itself, read very broadly by U.S. courts. In addition, the interstate or foreign commerce nexus covers a wide variety of mechanisms that may cross state or national borders. Thus, a single mailing, shipment, wire transfer, facsimile, e-mail, use of the internet, text, instant message, mobile telephone call, long distance (interstate or foreign) call on landline telephones, use of a federally insured or interstate financial institution, or travel or physical movement of any means across states or U.S. boundaries *in furtherance of the scheme – e.g.* to negotiate, demand, or convey terms, set up a

meeting or schedule a time to discuss an issue related to the scheme, make a payment, withdraw money to make a payment in cash, discuss or send the documentation relating to or purporting to explain the payment, or transfer or receive information or other *quid pro quo* from the bribe recipient – would meet the jurisdictional nexus. It is also unnecessary for the prosecution to prove that the defendant knew of the use or intended use of such a facility of interstate commerce.

25. The authorities add, that even in the rare situation where no act in furtherance of the bribery scheme touched on any of the states with a commercial bribery statute and the Travel Act could not be used, commercial bribery could still be punished federally under various U.S. criminal statutes, including but not limited to those proscribing mail and wire fraud, antitrust violations, racketeering, conspiracy, and securities fraud, depending upon the facts of a given case. For example, sections 1341 and 1343 of Title 18 of the U.S. Code criminalise mail fraud and wire fraud, respectively. Specifically, these sections criminalise a "scheme or artifice to defraud" when a mail or interstate wire is used in furtherance of the scheme. Section 1346 of Title 18 of the U.S. Code defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services. To this end, the authorities have provided information regarding the broad reach and common usage of the "honest services theory" of mail and wire fraud that has been used to prosecute bribery for more than 60 years in the USA, sometimes referred to as "honest service bribery", which derives its elements from federal bribery statutes (United states v. Ring, 706 F,3d 460 (D.C. Cir. 2013)). They furthermore state that unlike regular mail and wire fraud, honest services fraud does not require that the perpetrator causes a financial loss or harm to anyone or that s/he obtains a financial benefit, the core elements being for passive bribery: a) duty of loyalty, b) solicits or accepts a thing of value, c) in exchange for doing something in violation of his/her duty of loyalty. In respect of active bribery the elements are: a) offers or provides a thing of value, b) to a person with a duty of loyalty, c) in exchange for him/her doing something in violation of his/her duty of loyalty. The authorities furthermore explain that in an honest services fraud case the element to defraud is satisfied with the mere pretense that the employee is loyal when s/he is not, in fact, loyal. Under honest services mail and wire fraud, the full reach of federal jurisdiction to prosecute offenders for any bribery scheme may be applied so long as the U.S. mail or an interstate wire is used. The authorities refer to a number of cases in support of this end. Finally, they state that the conduct is often punishable under various state anti-corruption and fraud laws, as well as unfair trade practices laws that define bribery as an improper means of gaining a competitive advantage. Also, in this respect, a large number of cases are referred to (between 1975 and 2013).

26. GRECO notes, on the one hand, that the statutory situation remains the same now as at the time of adoption of the Evaluation Report, i.e. there is no specific legal provision at federal level on bribery in the private sector which could be compared with the requirements of Articles 7 and 8 of the Criminal Law Convention. On the other hand, the United States has provided extensive case law indicating that bribery in the private sector is subject to federal prosecutions through the use of a combination of various provisions. It appears that the primary statutes used to this end are the Travel Act, 18 U.S.C. § 1952, and honest services fraud, 18U.S.C. § 1346, which have a broad reach and may be used in prosecutions involving private sector bribery. GRECO acknowledges that the Travel Act, which can only be applied in this respect in combination with state legislation criminalising bribery in the private sector, has a broader coverage now than at the time of adoption of the Evaluation Report, as bribery in the private sector currently is an offence in 40 of the 50 states, which is a slight increase since the adoption of the Evaluation Report. GRECO notes, however, that there may still be situations where the Travel Act cannot be applied, in which the United States instead may have to use other means, such as honest services mail or wire fraud, 18 U.S.C. §§ 1341, 1343 and 1346, in order to prosecute instances of

bribery as fraud cases. A detailed analysis in respect of each element contained in Articles 7 and 8 of the Criminal Law Convention is provided in the Evaluation report (paragraphs 72-79 and 155-157). What has now been submitted in respect of honest services mail or wire fraud adds some information to that picture; however, GRECO recalls that the application of honest services fraud is only possible when the U.S. mail or an interstate wire was used in furtherance of the offence. Even if this notion is to be interpreted broadly, it brings a certain limitation for the use of this offence.

27. To sum up, GRECO takes the view that the U.S authorities have shown that in practice private sector bribery is possible to reach through a combination of the Travel Act and state provisions, even at a broader scale than indicated in the Evaluation Report. When that is not possible, federal honest services fraud provisions may be applied as well. That said, these supplementary fraud provisions as applied in practice do not fully comply with Articles 7 and 8 of the Criminal Law Convention, because of the additional requirements to prove the use of inter-state travel or wire or mail.

28. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

29. *GRECO recommended to ensure that federal legislation and/or practice complies with the requirements of trading in influence as established in Article 12 of the Criminal Law Convention on Corruption (ETS 173).*

30. The authorities state that lobbying, or petitioning government officials, is a constitutionally protected activity in the United States. Gifts provided with an intent to cultivate a business relationship or political friendship, as distinguished from an intent to corruptly influence, are also protected activity (*United States v. Sawyer*, 85 F.3d 713, 731 & 741, 1st Cir. 1996). Offering or accepting gifts with the intent to corruptly influence, however, is prohibited by U.S. bribery statutes, even when the gift is given by a lobbyist, someone who is petitioning the government or someone who trades in influence. The authorities submit that the United States has successfully prosecuted lobbyists who "cross the line" and offer gifts to government officials with the intent to corruptly influence their official acts. They refer to a case in which a lobbyist, pleaded guilty to conspiracy, aiding and abetting honest services mail fraud and tax evasion for having provided things of value, such as luxurious vacations, exclusive tickets to concerts and sporting events, and expensive meals, to public officials in order to secure favourable action for his clients (*United States v. Abramoff*, 06-CR-0001-ESH, D.D.C. 2006). In addition, the United States successfully prosecuted more than 20 co-conspirators in the above case. The authorities also submit that the United States has prosecuted trading in influence cases through its mail and wire fraud statutes and has provided cases in which it has done so successfully.

31. The authorities furthermore submit that while it is clear that the public official who takes the bribe and the influence peddler who offers the bribe can be prosecuted, practice shows that also the particular situation when the influence peddler accepts the advantage and does nothing for it (no contact with the public official) can be reached in a prosecution. The U.S. authorities stress that both the influence peddler and the "client" (mandator) can be prosecuted under U.S. law. Firstly, the influence peddler can be prosecuted for defrauding a client under 18 U.S.C. § 1346, if the lobbyist does not provide actual services to the paying client (*United States v. Scanlon*, 753 F. Supp. 2d 23, 24, 28 (D.D.C. 2010) *aff'd*, 666 F.3d 796 (D.C. Cir. 2012. The authorities add that this precedent has been recently utilised to prosecute trading in influence schemes in which the

influence peddler provides a finder's fee or kickback to a third party (*United States v. DeMizio*, 08-CR-336 JG, 2012 WL 1020045 (E.D.N.Y. Mar. 26, 2012) *aff'd,* 12-1293, 2014 WL 292121 (2d Cir. Jan. 28, 2014). In this case, the court held that "if a scheme involves bribery or kickbacks, as those terms are defined with reference to all appropriate federal legal sources, then it may be prosecuted as honest services fraud under *Skilling*." *Id.* (citing *Scanlon*, 753 F. Supp. 2d at 26). The court further emphasised that the government does not need to prove that the recipient of the alleged kickback "performed no legitimate work in exchange for it… ". Secondly, both the "client" (mandator) and the influence peddler could be prosecuted for conspiring to bribe a public official, regardless of whether or not the actual bribery scheme was carried through or was successful (*United States v. O'Keefe*, 252 F.R.D. 26 (D.D.C. 2008). Moreover, conspiracy was the vehicle to prosecute agreements between a trader in influence and a client to corruptly influence a government official (*United States v. McNair*, 605 F.3d 1152, 1187 (11th Cir. 2010) ("[I]nfluence" under § 666 could be exercised indirectly and it was sufficient that the defendants intended to influence the agent by causing a middleman to authorise the agent to issue payments etc.)

32. The U.S. authorities add that, in 2007, Congress passed the Honest Leadership and Open Government Act ("HLOGA"), which strengthens public disclosure requirements concerning lobbying activity and funding, places more restrictions on gifts for members of Congress and their staff, and provides for mandatory disclosure of earmarks in expenditure bills. It also increases criminal and civil penalties for violations of the Lobbying Disclosure Act. Specifically, the HLOGA categorically prohibits lobbyists and their clients from giving anything of value to a member of Congress or staff unless an exception in the gift rules would expressly permit it. It also imposes such restriction on lobbyists and their clients, in addition to the public officials. In sum, the HLOGA aims at reducing the ability of lobbyists to improperly and corruptly trade on their influence with Members of Congress and their staff.

33. GRECO finds that the statutory situation in terms of the offence trading in influence remains the same now as it was at the time of adoption of the Evaluation Report, namely that this offence is not criminalised *per se* under U.S. federal law. As at the time of the adoption of the said report, the authorities continue argue that by using a mix of various federal and state laws (as described more in detail above) it is possible to prosecute all offenders having participated in the particular scheme of trading in influence. GRECO recalls that while the active side of this offence is similar to active bribery, it differs in one important aspect, namely that the advantage is not given to the public official (and cannot be considered as an indirect advantage) but to the influence peddler and the possible action or inaction of the public official is not linked to the advantage offered to the influence peddler. In respect of the passive side of this offence, trading in influence resembles passive bribery, but again the influence peddler is the final receiver of the undue advantage, not the public official.

34. In this context, GRECO notes that the authorities have submitted detailed information in the form of extensive case-law to indicate that U.S. federal law may be applied in various ways in order to cover a variety of situations of trading in influence that would fall outside the scheme of "traditional" bribery. Firstly, the authorities indicate that the United States criminalises influence peddlers who defraud their clients by accepting payment under false pretences and failing to perform the services paid for (no contact with the public official). Such situations are criminalised under the mail and wire fraud statutes, so long as an interstate mail or wire is used in furtherance of the influence peddling scheme. Secondly, the authorities claim that both the advantage provider and the influence peddler can be prosecuted for conspiracy to commit bribery under 18 U.S.C. 371 regardless whether the public official is involved or not. Thirdly, when an influence peddler offers to corruptly influence a public official in exchange for a payment, then the payor,

the peddler and the public official can all be prosecuted under 18 U.S.C. 201 (bribery of public officials). Fourthly, the U.S. authorities also refer to the use of honest services fraud and extortion in particular situations when the influence peddler exerts influence to such a degree that s/he effectively controls government function. Fifthly, both the influence peddler and the advantage provider can be prosecuted for conspiracy to defraud the United States if the influence peddler offers or attempts to influence a government office to make a decision based on an improper basis, rather than on the merits as required by law. This is referred to as "Klein conspiracy", and it enables the United States to prosecute schemes to defeat, obstruct, or impede the lawful functioning of a government office. In a clear cut case of trading in influence, the influence peddler is never exerting anything more than his/her influence over the public official, and there is not any intention from anyone to give the public official any advantage, ie in these offences the only intent of the advantage provider is to offer the peddler the undue advantage for using his/her improper influence over the public official. To support this, the authorities have submitted a large number of cases of bribery, fraud, false statement, conspiracy, conflict of interest to illustrate their determination to prosecute in these situations. GRECO does not doubt that there is a strong determination to deal with situations resembling trading in influence, in the USA. These examples refer to various situations of fraud (when the public officials are not involved) and indirect corruption, using intermediaries and to other circumstances involving the exertion of improper influence. Consequently, the U.S. authorities have shown that, in practice, situations of trading in influence can be prosecuted under 18 U.S.C. 371. However, GRECO notes that certain elements of the Criminal Law Convention are not met. For example, the U.S. provision would not always cover the improper influencing of state or local government officials, nor would it cover the improper influencing of foreign public officials. Consequently the requirements of the Convention are only partly complied with.

35. GRECO concludes that recommendation iv has been partly implemented.

Recommendation v.

36. *GRECO recommended to ensure that federal legislation and/or practice complies with the requirements of bribery of domestic and foreign arbitrators as established in Articles 2–4 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).*

37. The U.S. authorities report that domestic arbitrators in the United States are not considered to be public officials so they are not covered under the domestic bribery statute, 18 U.S.C. § 201. Furthermore, there is no specific statute that is applicable to bribery of an arbitrator. A person that bribes an arbitrator and an arbitrator that solicits or accepts a bribe can, however, be reached under other statutes including state commercial bribery laws, mail and wire fraud and money laundering statutes, and the Travel Act, in the same way as in respect of bribery in the private sector (see reasoning under recommendation iii). The U.S. authorities have not submitted any cases involving bribery of arbitrators.

38. The authorities add that with regard to foreign arbitrators, the Foreign Corrupt Practices Act (FCPA) defines a "foreign official" to include "any person acting in an official capacity for, or on behalf of, any such government or department agency, or instrumentality or for, or on behalf of, any such public international organisation" (15 U.S.C. 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), and 78dd-3(f)(2)(A)). Thus, any foreign arbitrator (i) appointed by a court or other department, agency, or instrumentality, or a public international organisation, (ii) acting for or on behalf of such an entity, or (iii) otherwise exercising official authority, is covered by the FCPA. For those arbitrators whose actions might not be covered by the FCPA (such as those who act wholly at the request of private

parties), such misconduct could be reached under other statutes including state commercial bribery laws, mail and wire fraud and money laundering statutes, and the Travel Act, see above.

39. GRECO notes that the situation in respect of this recommendation remains the same as at the time of adoption of the Evaluation Report, ie domestic bribery of arbitrators is criminalised in the same way as bribery in the private sector, which is discussed at length under recommendation iii, above. As concluded in relation to that recommendation, the scope for using the Travel Act in combination with state legislation has been slightly expanded as some more states have criminalised private sector bribery currently than at the time of adoption of the Evaluation Report. What has been submitted in respect of the application of honest services mail or wire fraud statutes under recommendation iii (private sector bribery) is equally relevant here. This part of the recommendation may therefore only be seen as partly complied with. However, in respect of bribery of foreign arbitrators, nothing new has been reported. This offence could be prosecuted under the FCPA if the foreign arbitrator was to be considered a public official, but again, this Act does not criminalise passive bribery. Alternatively, it is asserted that private sector corruption provisions could be applied, the Travel Act or the fraud statutes, but, in line with what is discussed above, they do not appear to be in full compliance with the requirements of private sector bribery, nor with those foreseen in Articles 2-4 of the Additional Protocol to the Criminal Law Convention, because of the additional requirements to prove the use of inter-state travel or wire or mail (see also paragraphs 14, 16 and 27).

40. GRECO concludes that recommendation v has been partly implemented.

Recommendation vi.

41. *GRECO recommended that the authorities of the United States consider the feasibility and the effectiveness to the extent that is consistent with the fundamental principles of the federal legal system, to promote legislation which would, on the face of the statute, establish as criminal offences the various matters dealt with in the current report without additional elements dealing with such things as the mode by which a corrupt transaction is effected.*

42. The U.S. authorities state that as a consequence of GRECO's evaluation of the USA, an inter-agency working group has met several times to consider potential action on this recommendation which is linked to the other recommendations. The group was composed of experts from the Department of Justice (Public Integrity Section, which prosecutes domestic corruption cases, and Fraud Section, which, *inter alia*, prosecutes foreign bribery cases), Office of Government Ethics, and State Department. With regard to this recommendation, the group concluded that promoting legislation would not be feasible because of U.S. constitutional constraints, and that there was no significant loss of effectiveness in regards the operation of the current legislative framework and prosecutorial practice. White House officials responsible for U.S. international anti-corruption policy were briefed on the outcome of the inter-agency discussions. Likewise, the State Department team responsible for international anticorruption policy did not consider this recommendation suitable for possible inclusion in the second U.S. Open Government Partnership National Action Plan, when potential commitments were being developed within the inter-ministerial community. The authorities have provided the following reasoning for the conclusions reached by the group. The Constitution of the United States limits the possibilities to enact a national anti-corruption statute; the federal structure of the U.S. Government distributes power between the federal Government and the states. Article I of the Constitution limits Congress' authority to enact legislation to specifically enumerated powers and Congress does not have general criminal jurisdiction. The remaining powers are reserved for the states and the field of

criminal law has traditionally belonged to them (U.S. Const. amend. X). Federal criminal statutes require a jurisdictional basis on one of Congress' enumerated powers. These powers include authority to legislate and regulate matters related to commerce and taxes[1]. Furthermore, the Commerce Clause of the Constitution allows Congress to regulate commerce with foreign nations and among the states (U.S. Const. art I, § 8). This provision underlies Congress' authority to enact laws such as criminal statutes, civil rights laws and environmental laws based on a theory that certain activities have a substantial relation to foreign or interstate commerce. For example, it is a federal offence to steal from any shipment being transported in interstate or foreign commerce (18 U.S.C. § 659). The Commerce Clause gives Congress immense latitude to enact legislation, but Congress' power is still finite. For example, when Congress passed the Gun-Free School Zones Act of 1990, making it a federal offence to carry a gun near schools, the United States Supreme Court ruled that the law was unconstitutional because the prohibited activity was not substantially related to interstate commerce (*United States v. Lopez*, 514 U.S. 549 (1995). However, Congress has passed a number of criminal statutes, pursuant to its commerce and spending powers that prohibit bribery and corruption in the public and private sector, some of which have been in relation to the previous recommendations.

43. Finally, the authorities state that the government structure established by the United States Constitution prevents the federal Government from enacting a national, general anti-corruption statute "without the additional elements dealing with such things as the mode by which a corrupt transaction is effected". Pursuant to its limited authority in this respect, the federal government has passed several laws criminalising corruption and the majority of states have exercised their authority to enact anti-corruption statutes that apply to both the public and the private sectors. It is not considered feasible, nor necessary to go any further in this respect as, in practice, the United States can and does implement the provisions of the Criminal Law Convention to a large extent.

44. GRECO takes note of the information and reasoning provided by the U.S. authorities and recalls the statement that "functional equivalence" is often the most realistic ambition for the relationship between U.S. federal legislation and some international treaty provisions relating to corruption (Evaluation Report, paragraph 163). GRECO maintains its position that it would be preferable if the U.S. law and practice were based on clearer federal provisions so that a more definite position about the compatibility with the Criminal Law Convention and its Protocol could be reached in respect of certain provisions. That said, GRECO fully respects the constitutional limitations concerning federal legislation and the explanations and considerations given by the U.S. authorities and acknowledges that this recommendation and its relation to the other recommendations have been considered. Still, GRECO urges the authorities to pursue this matter to the extent possible.

45. GRECO concludes that recommendation vi has been dealt with in a satisfactory manner.

Theme II: Transparency of Party funding

46. It is recalled that GRECO in its Evaluation Report addressed three recommendations to the United States in respect of Theme II. Compliance with these recommendations is dealt with below.

[1]Congress has other important powers related to foreign policy, national defence, coining money, establishing judicial courts and enforcement of civil rights. Those powers are not relevant to this discussion.

Recommendation i.

47. *GRECO recommended that the US authorities pursue their efforts to provide for electronic filing and thus speedier processing in respect of public disclosure of financial reports concerning Senate elections.*

48. The U.S. authorities report that both the President of the United States and the Federal Election Commission have recommended to Congress that a law be enacted that would require Senate Campaign Committees to file campaign finance reports electronically with the Federal Election Commission; the President's annual budget submission to Congress for the fiscal year 2013 (submitted in 2012)[7] and for the fiscal year 2014 (submitted in 2013)[8] have both included such proposals noting that such a move would include substantial savings. Furthermore, the Federal Election Commission in its legislative recommendations of May 2012[9] also recommended electronic filing of Senate reports, citing not only the financial savings but the resulting increased speed of public availability of such information. At the time of the submission of the Commission's 2012 legislative recommendations, a bill to that end had already been introduced in the Senate. Subsequently, the pertinent Senate Committee held a hearing on the Bill (S. 219). However, despite these efforts, the Bill was not enacted by the 112th Congress.

49. The authorities also submit that during the 113th Congress, at least five bills requiring Senate Campaign Committees to file information electronically were introduced. S. 375, the Senate Campaign Disclosure Parity Act, introduced in February 2013, contains such a requirement as the only provision of the bill; the bill has been reported out of committee and is pending on the Senate calendar. A separate bill, S. 791, "Follow the Money Act", introduced in April 2013 has a provision that would require all designations, statements and reports to be filed under the Federal Election Campaign Act (FECA) to be filed with the Federal Election Commission (FEC); similarly H.R. 268 and H.R. 269 require all filings under FECA to be filed with the FEC. Requiring filings under FECA to be filed with the FEC would make those filings subject to mandatory electronic filing. An appropriations bill (S.1371) also would have made Senate filings subject to the electronic filing requirement, and it was reported out of committee; however, another appropriations measure passed in its place. The other three bills, H.R. 268, H.R. 269 and S.791, are pending before Senate and House committees. In December 2013, the FEC unanimously approved again a legislative recommendation to make Senate reports subject to mandatory electronic filing.

50. GRECO takes note of the information provided. It recalls that the overall transparency of political financing under FECA where the, financial information is submitted electronically to the Federal Election Commission (FEC), was considered by GRECO to provide an exemplary high level of transparency (Evaluation Report, paragraph 140). However, this is still not the case with regard to Senate elections, which has a negative impact on the speed for making such information available to the public. That said, a number of legislative initiatives have been taken, including at the highest political level, to remedy this situation but unfortunately with no tangible results to date. Nevertheless, the U.S. authorities have substantiated that this matter has been pursued and that further efforts are underway.

51. GRECO concludes that recommendation i has been dealt with in a satisfactory manner.

[7] http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/oia.pdf (page 1342)
[8] http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/oia.pdf (page 1375)
[9] http://www.fec.gov/law/legrec2012.pdf

Recommendation ii.

52. *GRECO recommended to seek ways to increase the transparency of funding provided to organisations such as those defined in section 501(c) of the Internal Revenue Code (IRC) when the purpose of the donation/funding is intended to independently affect the election of a particular candidate or candidates.*

53. The U.S. authorities submit that over the last 18 months, several attempts have been made in Congress to enact legislation that would increase the transparency of funding provided to the organisations that are the subject of this recommendation. In the 112th Congress (2011-2012) three bills were introduced to that end. First, the bill H.R. 4010 *"DISCLOSE 2012 Act"* was introduced in the House of Representatives in February 2012; Second, the bill S. 2219, *"Democracy is Strengthened by Casting Light on Spending in Elections Act 2012,"* was introduced in the Senate in March 2012. The Senate Committee on Rules and Administration held a hearing on S. 2219 in March 2012. Third, the bill S. 3369, *"DISCLOSE 2012 Act,"* was introduced in July 2012. In addition, the Senate Judiciary Committee held a general hearing entitled "Taking Back our Democracy: Responding to *Citizens United* and the Rise of Super PACs." The White House issued strong statements in support of two of these bills. However, as none of these bills were enacted by the end of the 112th Congress (end of 2012), they effectively "died". In the current, 113th Congress (2013-2014), three bills have been introduced that would require increased transparency of funding provided to section 501(c) organisations that spend funds on certain political communications. Two bills would require reporting of the relevant disbursements/expenditures of those organisations as well as the sources of contributed funds which were used for those disbursements/expenditures. The first bill, HR 148, "*the DISCLOSE Act 2013*," was introduced on 3 January 2013 and has been referred to a committee for consideration. The second bill, S. 791, "*Follow the Money Act of 2013*," was introduced in the Senate on 23 April 2013 and has also been referred to a committee for consideration. A third bill, H.R.2670, would limit the amount of funds 501(c)(4) organisations are permitted to spend on certain political communications. This bill is also pending in committee. Finally, the authorities add that a proposal for what became S.791, *the Follow the Money Act*, was first posted on the website of the primary sponsor of the bill and public comments were sought before the bill was finalised. In that way, the sponsoring senators specifically reached out to the public and interested parties to seek ways to increase properly the transparency of funding provided to such organisations.

54. GRECO takes note of the measures taken from various ends to deal with the lack of transparency in respect of the so-called section "501(c)-organisations". It is recalled in this respect that the use of these types of organisations[10] as a means to circumvent public disclosure rules in political financing appears to be a "trend" in the USA (the authorities have asserted that this only concerns rather few organisations.) However, such organisations are separate legal entities and may not be under the control of candidates or parties in a strict sense, GRECO therefore limited its recommendation to "seek ways" for more transparency in respect of such entities. What has been reported represents a number of attempts to deal with this matter, through legislation, which so far have not had any tangible results. GRECO appreciates that efforts to bring more transparency into this area have been sought and that draft legislation in the form of three bills are currently pending before Congress.

55. GRECO concludes that recommendation ii has been dealt with in a satisfactory manner.

[10] The U.S. authorities have pointed out that it is primarily "501(c)(4)s – organisations" that are concerned and then only a small percentage of those.

Recommendation iii.

56. *GRECO recommended to study the effects of evenly-divided votes ("deadlocks") of the Federal Election Commission (FEC) and to consider introducing measures to prevent such situations to the extent possible.*

57. The U.S. authorities state at the outset that the Federal Election Campaign Act (FECA) is designed to require the affirmative vote of four of the FEC's six Members and that evenly-divided votes reflects a concern that a vote may split 3-3 along party affiliation/philosophical affiliation lines. They stress that the requirement of four affirmative votes, particularly for enforcement matters, is an intentional part of the law of a system which is dominated by two political parties, The authorities add that other requirements designed to temper the party/philosophical affiliation of the Members of the Federal Election Commission (FEC) include the fact that Members of the Commission are nominated by the President and confirmed by the Senate (which may or may not be controlled by the party of the President) and no more than three members of the Commission may at the time of appointment be affiliated with the same political party. The four vote requirement is one very basic way to ensure that those affiliated with one of the two predominant parties cannot use the authority of the Commission in an unwarranted fashion. Furthermore, the individual members of the Commission are not representatives of the two parties in the sense that the parties have or can have direction or control over their votes. The Commissioners certainly can and do have different views of the role of the Commission in the oversight of political finance under FECA. If Commission members simply voted along party lines, none of the actions that require four affirmative votes could move forward unless all six agreed. Statistics studied show that this has simply not been the case.[11]

58. In terms of actions taken since the adoption of the Evaluation Report, the authorities point out that the concern expressed in relation to the lack of four affirmative votes ("deadlocks") was primarily in the area of enforcement. To that end, they submit there have been a series of steps taken by the Federal Election Commission and United States Congress to evaluate the FEC's enforcement process that encompass the underlying concerns of this recommendation. First, the Federal Election Commission has held a series of informal public fora to discuss agency operations in the areas of compliance, disclosure, enforcement and policy. The meetings, in which commissioners and senior staff were present, were held on three occasions in February 2012 and dealt with issues such as compliance and audit; report analysis; administrative fines and alternative dispute resolution (ADR) programmes; disclosure of data (including campaign finance data) to the public; enforcement and advisory opinion process. On 18 January 2013, the Commission also posted a notice in the Federal Register (the U.S. Government's official daily publication) requesting public comments on its enforcement process. The notice for the request included background information on past Commission hearings and enforcement process reforms and ongoing reviews of enforcement procedures. This also provided another opportunity for anyone to comment on the four vote requirement in practice and, in fact, comments specifically on the topic were received. All comments received have been posted online and are currently being analysed. In addition, in 2013, a subcommittee of the Senate Judiciary Committee held a hearing entitled "Current issues in Campaign Finance Law Enforcement". The hearing included testimony from a panel

[11] For example, the Commission has issued 39 advisory opinions from 12 December 2011 to 12 June 2013. With regard to enforcement decisions during that same period, the Commission found reason-to-believe in 36 enforcement matters and resolved an additional three matters through a "fast-track" procedure that requires Commission approval (i.e., four votes) but does not entail a reason-to-believe finding. In fiscal year 2012 (1 October 1 2011 – 30 September 2012), the Commission also concluded 41 matters through alternative dispute resolution and 49 matters through its administrative fines programme. Both of these mechanisms require four-vote approval. The FY2013 statistics for the alternative dispute resolution and administrative fines programmes have not yet been compiled.

representing government agencies involved in the campaign finance enforcement process as well as a panel of individuals from outside the government. And, finally, since the issuance of the evaluation report the President nominated and subsequently appointed two new members of the Commission after Senate confirmation. The Senate confirmation hearing was held July 24, 2013 and that hearing provided an opportunity for members of the Senate and those individuals nominated to be members of the Commission to discuss their views on various operational and enforcement procedures. Many of the members of the Senate Rules Committee which held the confirmation hearing, referenced these issues in their opening statements and/or in the questions they put to the nominees. As anticipated, the hearing provided for an opportunity for the Senate to explore each nominee's views on these topics in a public setting.

59. GRECO recalls that the reasons for this recommendation as spelt out at some length in the Evaluation Report (paragraph 151) were the partisan composition of the six-member Commission which sometimes prevents this body from going forward when the Commission is evenly divided (the so called "deadlocks"). GRECO is fully aware that the features of the Federal Election Commission are the results of the U.S. political system, dominated by two political parties. However, it also recalls that the issues raised by GRECO have been subject to criticism in the United States in the past but that attempts to address the issue of evenly divided votes have failed as being politically impossible; the recommendation was adapted to such a context. GRECO takes note of what has been reported by the U.S authorities. Since the recommendation was issued, the authorities have again paid attention and consideration to this situation in the larger context of the overall enforcement activities of the Federal Election Commission. The issue has been studied through the gathering of facts, comments and opinions and various stakeholders have been involved: the Federal Election Commission has engaged in public comment processes where the issue of its enforcement procedures was a part of a larger request for comment and the Senate, in two separate hearings, discussed campaign finance law enforcement processes including those specifically at the FEC.

60. GRECO concludes that recommendation iii has been dealt with in a satisfactory manner

III. CONCLUSIONS

61. **In view of the above, GRECO concludes that the United States of America has dealt with in a satisfactory manner four of the nine recommendations contained in the Third Round Evaluation Report**. Of the remaining recommendations four have been partly implemented and one has not been implemented.

62. More precisely, with respect to Theme I – Incriminations – recommendation vi has been dealt with in a satisfactory manner, recommendations ii, iii, iv and v have been partly implemented and recommendation i has not been implemented. With respect to Theme II – Transparency of Party Funding, recommendations i-iii have been dealt with in a satisfactory manner.

63. Concerning incriminations, it is noteworthy that the U.S. authorities have shown that the prosecution of corruption offences is a high priority in the United States and that the legal system and enforcement regime is effective to meet that priority. References to a large number of recent corruption cases are proof of that. The reference to case-law is also the major response by the U.S. authorities to the recommendations issued by GRECO in the Evaluation report. In contrast to most other GRECO members, the approach for criminalising corruption offences through legislation is more limited in the United States as the U.S. Constitution reserves significant

powers in this respect to the individual states as opposed to the federal authorities. State legislation is also a substantial source for incriminations. In addition, the court practice plays a significant role in furthering the law. Obviously, these particularities make it extremely difficult to introduce legislation at the federal level in respect of the shortcomings addressed by GRECO in its recommendations to the USA. Apart from the positive legislative development in a few states, which have criminalised bribery in the private sector recently, the United States have submitted extensive case-law in respect of most recommendations which to some extent goes beyond the situation as described in the Evaluation report: This is the case in respect of bribery of foreign officials and bribery in the private sector resulting in partial compliance with the relevant recommendations. It appears that trading in influence in the meaning of Article 12 of the Criminal Law Convention is still not fully criminalised under U.S. law. It is positive that the U.S. authorities, as a result of the recommendations under this Theme have established a broad inter-agency working group to reflect on the potential action to the recommendations, in particular on the feasibility to amend/establish federal anti-corruption legislation, GRECO would encourage further such initiatives, which could be instrumental for the ratification of the Criminal Law Convention on Corruption and its Additional Protocol by the United States.

64. Insofar as the transparency of political funding is concerned, it is recalled that constitutional requirements, legislation and regulations ensure an extraordinarily transparent system in the United States according to GRECO's Evaluation Report and that GRECO only addressed three recommendations to the USA under this Theme. The United States has dealt with these and it appears that draft legislation is currently pending aiming at introducing electronic filing of financial reports concerning election campaigns for the Senate. Measures appear to be underway to preventing the use of so called 501(c) – organisations to circumvent public disclosure rules on political financing and the effects of so called "deadlocks" of the Federal Election Commission is broadly debated. These recommendations have been addressed in a satisfactory manner by the authorities and even if the underlying end results have not been achieved, these political issues are subject to continuing debate.

65. In the light of what has been stated in paragraphs 47 to 49, GRECO notes that with the measures taken in respect of the recommendations in relation to party funding, the United States has achieved an overall acceptable level of compliance with the recommendations, despite the rather limited steps taken to meet the concerns raised in respect of Theme I - Incriminations. More needs to be done in this area. GRECO invites the Head of the delegation of the United States to submit additional information regarding the implementation of recommendations i-v (Theme I – Incriminations) by 30 September 2015.

66. GRECO invites the authorities of the United States to authorise, as soon as possible, the publication of the report.