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Third Evaluation Round

Second 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 71st Plenary Meeting
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I. INTRODUCTION

1. The Second Compliance Report assesses the measures taken by the authorities of the United States of America since the adoption of the Compliance Report in respect of the recommendations issued in the Third Round Evaluation Report on the United States, 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). The subsequent Compliance Report was adopted at GRECO's 63rd Plenary meeting (24-28 March 2014) and made public on 23 April 2014 (Greco RC-III (2014) 6E).

3. As required by GRECO's Rules of Procedure, the authorities of the USA submitted their Second Situation Report with additional information regarding the implementation of recommendations that were partly implemented or not implemented, according to the Compliance Report. The Second Situation Report, received on 29 October 2015, served as the basis for the Second Compliance Report.

4. GRECO selected Ireland and Lithuania to appoint rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Andrew MUNRO (Ireland) and Mr Paulius GRICIUNAS (Lithuania). They were assisted by GRECO's Secretariat in drawing up the Second Compliance Report.

II. ANALYSIS

5. It is recalled that all three recommendations addressed to the United States in respect of Theme II had been dealt with in a satisfactory manner at the time of the adoption of the Compliance Report. The analysis of the current report is thus limited to Theme I.

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. Recommendation vi was considered dealt with in a satisfactory manner in the Compliance Report. Compliance with the remaining 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. It is recalled that this recommendation had not been implemented at the time of adoption of the Compliance Report, since no tangible steps had been taken towards ratification of the Criminal Law Convention on Corruption nor to signature or ratification of the Additional Protocol.

9. The authorities now report that the United States has still not ratified these instruments. They stress that the delay for doing so is, in part, the result of legal concerns about the U.S. constitutional limitations on the ability of the federal government, which would be signatory to the Convention, to implement legislation that may be deemed necessary to conform to the strict letter of the Convention, as opposed to implementing the Convention in a functionally equivalent manner. These concerns have not been resolved, so there has been no subsequent progress towards ratifying the Convention or its Additional Protocol. The authorities furthermore note that the principal concern raised in the ratification process derives precisely from the reasons for the U.S.'s only partial compliance with the remaining five recommendations set out in GRECO's Compliance Report.

10. The authorities also submit that the Constitution of the United States limits Congress' authority to enact legislation, including criminal legislation, to specifically enumerated powers. Congress does not have a general power to legislate in respect of incriminations; these powers being limited to the legislation and regulation of matters related to taxes, foreign and inter-state commerce, misuse of federal funds, including bribery related to programmes receiving federal funds. Even criminal laws such as firearms offences and money-laundering require a relation to inter-state commerce or federally insured financial institutions. Despite this legal restriction, the authorities argue that federal prosecutorial schemes establish the functional equivalent of the crimes described in the Criminal Law Convention, because the federal government's institutions are increasingly pervasive within the states and are specifically capable of regulating foreign commerce. Moreover, the enforcement programmes of the U.S. and of the 50 states to fight corruption demonstrate that the United States has adopted the functional equivalent of the Convention, notwithstanding its formal failure to ratify it to date, according to the authorities.

11. GRECO takes note of the explanations given by the U.S. authorities for not complying with the recommendation. It repeats its regret that no progress has been reported in order to ratify the Criminal Law Convention on Corruption and its Additional Protocol and notes with concern that this Convention was signed by the United States already in 2000. It urges the authorities to further pursue this matter.

12. GRECO concludes that recommendation i remains not implemented.

Recommendation ii.

13. *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.*

14. It is recalled that this recommendation was partly implemented in the Compliance Report; more particularly, GRECO found that the U.S. had complied with part iii of this recommendation, but had only partially implemented parts i and ii.

Part i

15. It is recalled that GRECO noted in the Compliance Report that the information provided resembled, to a large extent, the information included in the Evaluation Report. Furthermore, it was acknowledged in the Compliance Report that the requirement of a business relation in the FCPA is to be interpreted broadly; for example, that it would, according to the *Kay case*[1], encompass bribery of a foreign public official in order to obtain favourable tax treatment. That said, GRECO was 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 noted that the Travel Act could also be applicable, through its mail or wire fraud or money laundering provisions in order to prosecute these offences as those provisions are not necessarily limited to commercial activities and would, according to the U.S. authorities, reach the above offences of bribery "to the fullest extent permissible" under the U.S. Constitution and the federal system. GRECO did not contest that alternative offences, such as fraud or money laundering, may be used in an effective way for such situations. However, it was of the opinion that it was not substantiated that these provisions, standing alone, met 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 they rather concerned other types of offences, such as fraud and money laundering etc.

16. The authorities now submit, in respect of part i of the recommendation, that the United States have still not enacted any new legislation in relation to this recommendation, which they insist could well be complied with through existing legislation - in combination with established practice - as the enforcement of the existing laws is such that it meets the essential requirements of this part of the recommendation. The authorities stress that U.S. prosecutors can employ various federal statutes to cover corrupt activity. They also state that the bulk of foreign bribery cases are motivated by financial gain, so the FCPA covers the active side of the offence considering the broad interpretation of the business nexus of the FCPA. As the authorities have also stressed before, prosecutors are not limited to applying the FCPA; they now also refer to the case of *United States v. Ashe*[2], as to the use of other statutes to reach active and passive bribery of foreign officials. In that case (on-going), it is alleged that business interests in China paid bribes to a U.N. official to perform actions at the United Nations to benefit their private interests in China. The case was charged as (1) a conspiracy to pay bribes to an official of an organisation receiving federal funds (the U.N.), (2) a substantive violation of the bribery statute, (3) money laundering, and (4) tax evasion. The case identifies a series of wire communications and transfers that could possibly be the basis of additional charges. In the case, it is alleged that the U.N. official participated in both the passive receipt of bribes and in the passing of some of the bribe-money on to other officials for their agreement to promote the business interests. The authorities refer to the current FIFA-related prosecutions as another example of the U.S.'s use of statutes other than the FCPA to reach active and passive bribery, statutes which could be used against foreign officials. While the underlying conduct in the FIFA related cases includes bribery, the charges

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

[2] The recently announced prosecution of the former President of the United Nations General Assembly includes an accusation that he was involved in bribery relating to a programme receiving U.S. federal funds – specifically, the United Nations. See 18 U.S.C. § 666, and *United States v. Ashe (*15 May 3562 SDNY). The charges also included money laundering and tax evasion.

include both wire fraud and money laundering; the essence of a wire fraud charge being that there is a scheme to defraud, which comprises a scheme to deceive or cheat someone. The U.S. authorities also state that under the "honest services" theory of mail and wire fraud, the U.S. can prosecute individuals for violating or causing an employee or agent of another person to violate a duty to provide honest services to an employer. In furtherance of an honest services fraud scheme, the mails or the inter-state or foreign wires must be used, which include telephone calls, e-mails, money wire transfers, credit card transactions, ATM usage and similar financial activity and that it is difficult to conceive of a significant bribery case, whether for commercial purposes or not, in which wire transmissions are not involved; the use of the mail or wire communications need not be an essential part of the scheme to defraud, but may only be an incident to an essential part of the scheme, according to practice[3]. The authorities also refer to a number of other cases demonstrating that the use of the wires or the mail need not be an essential part of the fraud, nor must the mailing or wire communication be itself fraudulent; an email to schedule a meeting, the use of electronic banking, telephone calls from one state or country to another, if done in furtherance of the scheme, are sufficient to support a federal prosecution.

17. GRECO takes note of the information provided in respect of part i of this recommendation. No new legislation has been enacted since the adoption of the Evaluation Report, but the authorities now submit even more practical examples in the form of investigations and prosecutions and adjudicated cases, than they did for the Compliance Report, to argue that the U.S. legislation - as applied - is compliant with the requirement in part i of the recommendation. They stress the following: a) the business nexus in the FCPA is to be interpreted very broadly and b) other provisions, such as the Travel Act, mail or wire fraud or money laundering provisions may be used alternatively to prosecute bribery offences as these provisions are - contrary to the FCPA - not limited to commercial activities. This position is very clear to GRECO and it is in substance identical to the position held by the U.S. at the time of adoption of the Evaluation Report as well as in the Compliance Report. GRECO also wishes to stress that it accepts the argument a) that the business requirement is to be interpreted broadly; however, such an interpretation does not rule out completely the business requirement, which is not in full compliance with the Criminal Law Convention. GRECO does not deny argument b), namely that there is a broad range of alternative possibilities in addition to the FCPA; however, again, even if the use of inter-state travel, wire or mail in the Travel Act need not be an essential part of the offence, this requirement clearly limits these offences as compared with the Criminal Law Convention, which has no such requirement at all and, moreover, it has not been substantiated (not even argued) that the elements of the Travel Act are the same as those of bribery offences in the Convention. It appears that the cases referred to deal rather with various forms of fraud and money laundering. Full compliance with part i of the recommendation is not therefore the case.

Part ii

18. It is recalled that part ii of the recommendation was triggered by the U.S. position not to criminalise the solicitation or acceptance of a bribe by a foreign official under the FCPA, as such passive bribery should preferably be prosecuted domestically, according to U.S. standards. Furthermore, the U.S. position is 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. They have provided numerous examples of such cases, mostly concerning money laundering, sometimes in conjunction with felony bribery in violation of the FCPA. GRECO accepted that the law enforcement authorities in practice may deal with and prosecute in situations involving passive

[3] Schmuck v. United States, 489 U.S. 705 (1989)

bribery under other offences most often as money laundering. However, as it had not been established that the legislation and/or practice used to this end meet all requirements required for passive bribery under the Criminal Law Convention, full compliance with this part of the recommendation was not achieved.

19. The U.S. authorities now submit the same arguments as referred to above and add a reference to the *Ashe* case (referred to above), to demonstrate that the U.S. enforcement programme continues, as was noted in the Compliance Report, prosecuting passive bribe-taking by employing a variety of statutes, including (1) money laundering charges (as foreign corruption is a predicate offence to money laundering), (2) wire fraud, (3) racketeering, and (4) the Travel Act. They add that where the bribery is part of a scheme to violate another U.S. law, for example, drug trafficking, immigration fraud or bid rigging, all the parties, active and passive, could be and have been prosecuted as conspirators in the underlying offence. They furthermore state that the theoretical gap created by the need to prove travel or the use of inter-state or foreign wires, or invoking jurisdiction through the defendants' use of the U.S. financial system is not a practical impediment to successful enforcement in practice.

20. GRECO takes note of the information provided which indicates that the U.S. federal law remains unchanged. That said, the 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. GRECO already accepted 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. That said, it has still not been established that the legislation and/or practice used to this end meets all requirements for passive bribery of foreign public officials and others covered by this recommendation under the Criminal Law Convention. Moreover, the requirement to prove the use of inter-state travel or wire or mail, although most often not an obstacle to prosecution, remains a limitation as compared to the requirements of the Criminal Law Convention. It follows that this part of the recommendation is also no more than partly implemented.

21. To sum up, although GRECO accepts that there are a broad variety of possibilities for prosecuting offenders for alternative offences relating to those enumerated in the recommendation, there is not full compliance between that legislation/practice and the requirements of the Criminal Law Convention in a strict sense. The United States has therefore still only complied partly with the first and second parts of the recommendation, whereas the third part was complied with already in the Compliance Report.

22. GRECO concludes that recommendation ii remains partly implemented.

Recommendation iii.

23. *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).*

24. It is recalled that this recommendation was partly implemented in the Compliance Report. The United States had provided extensive case law indicating that bribery in the private sector is subject to federal prosecutions through the use of a combination of provisions, such as the Travel

Act, 18 U.S.C. § 1952, or mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346, which have a broad reach and may be used in prosecutions involving private sector bribery. GRECO acknowledged 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 had risen to 40 of the 50 states, which represented a slight increase since the adoption of the Evaluation Report. That said, GRECO noted 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 mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346, in order to prosecute instances relating to bribery as fraud cases. However, the application of these fraud offences is only possible when the U.S. mail or an inter-state wire has been used in furtherance of the offence which, even if this notion is to be interpreted broadly, brings a certain limitation for the use of this offence, as concluded by GRECO.

25. The U.S. authorities now repeat the position already stated in the Compliance Report, namely that all federal legislation requires the presence of federal jurisdiction, which derives from a power delegated to the Congress by the States. Nevertheless, private sector bribery is constantly being prosecuted in the United States, using a variety of statutes: money laundering, honest services fraud using inter-state mails or wires, and the Travel Act, 18 U.S.C. § 1952. More specifically, Section 1952(b) (2) prohibits travel in inter-state or foreign commerce or using the mail or any facility in inter-state or foreign commerce, with the intent of furthering 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)). Looking at the predicate offences to the Travel Act, the authorities again stress that at least 40 of the 50 U.S. States have specifically criminalised commercial bribery, and others have criminalised commercial bribery in the context of sport. The authorities also reiterate that in the relatively rare instances where the Travel Act does not apply, federal prosecutors would look to other statutes such as money laundering and mail or wire fraud, as already mentioned in the Compliance Report. The U.S. authorities also refer to a recent FIFA related indictment as an example of a case where commercial bribery is prosecuted. The essence of that case is private sector bribery, occurring largely outside the United States; while the term "commercial bribery" is not invoked, prosecutors use the statutes available to charge the corrupt activity, capturing its full unlawfulness by another offence (in this instance, fraud and money laundering). The authorities refer to a long list of cases, including new cases since the adoption of the Compliance Report.

26. GRECO takes note of all the information provided; on the one hand, that the applicable legislation 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 detailed elements and requirements of Articles 7 and 8 of the Criminal Law Convention. On the other hand, the United States has provided extensive case-law for the Compliance Report, which has been extended for the current report, indicating that bribery in the private sector in practice can be subject to federal prosecutions through the use of a combination of provisions. It appears that the primary statutes used to this end are the Travel Act, 18 U.S.C. § 1952, and mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346, which have a broad reach and may be used in prosecutions involving private sector bribery. GRECO already acknowledged in the Compliance Report that the Travel Act, which can only be applied in this respect in combination with state legislation criminalising bribery in the private sector, had gained a broader coverage as the number of states criminalising private sector bribery had increased to 40 (out of the 50 states), representing a slight increase since the adoption of the Evaluation Report. GRECO maintains its position from the Compliance Report 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 mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346, in order to reach such offences; however, most commonly as fraud or money laundering offences. That said, GRECO cannot disregard the fact that the application of honest services fraud is only possible when the U.S. mail or an inter-state wire was used in the furtherance of the offence. GRECO accepts that this notion is to be interpreted broadly; nevertheless, it brings a certain limitation to the use of this offence in comparison with the requirements of private sector bribery in the Criminal Law Convention. In this situation, GRECO sees no need to further scrutinise every single element of Articles 7 and 8 of the Convention with those of the 18 U.S.C. § 1341, 1343 and 1346. GRECO maintains its position that the U.S. authorities have shown that, in practice, offences related to private sector bribery can be reached - through a combination of the Travel Act and state provisions - even on 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 are more restricted than, and not in full compliance with, the elements of Articles 7 and 8 of the Criminal Law Convention.

27. GRECO concludes that recommendation iii remains partly implemented.

Recommendation iv.

28. *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).*

29. It is recalled that this recommendation was partly implemented in the Compliance Report. GRECO noted in essence 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 including, firstly, influence peddlers who defraud their clients by accepting payment under false pretences and failing to perform the services paid for; as criminalised under the mail and wire fraud statutes (18 U.S.C. § 1346), provided an inter-state mail or wire is used in furtherance of the influence peddling scheme. Secondly, the authorities claimed that both the advantage provider and the influence peddler could be prosecuted for conspiracy to commit bribery under 18 U.S.C. 371 regardless of whether the public official is involved or not. Thirdly, in a situation where the influence peddler offers to corruptly influence a public official in exchange for a payment, then the payer, the peddler and the public official can all be prosecuted under 18 U.S.C. 201 (bribery of public officials). Fourthly, prosecution would also be possible through the use of the 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 and, 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. To support this, the authorities had submitted a large number of cases of bribery, fraud, false statement, conspiracy and conflict of interest to illustrate their determination to prosecute in these situations. GRECO did not doubt that there is a strong determination to deal with situations resembling trading in influence, in the USA, but noted that the provisions used refer to various situations of fraud and indirect corruption, using intermediaries and to other circumstances involving the exertion of improper influence. GRECO concluded that the U.S. authorities had shown that, in practice, situations of trading in influence can be prosecuted under 18 U.S.C. 371. However, GRECO noted that certain elements of the Criminal Law Convention were still 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, there was only partial compliance with the requirements of the Convention.

30. The U.S. authorities now state that while offering or accepting gifts with the intent to corruptly influence a government official is prohibited by U.S. bribery statutes, lobbying, or petitioning government officials, is a constitutionally protected activity in the United States. Accordingly, the prosecution of "trading in influence" is typically addressed through other statutes like mail and wire fraud. 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 the 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 to public officials in order to secure favourable action for his clients *(United States v. Abramoff*, 06-CR-0001-ESH, D.D.C. 2006). More than 20 co-conspirators were also convicted in that case. The authorities also refer to the recent *Ashe case* (referred to above) in which a co-defendant is charged not only for paying bribes, but also as a conspirator for having served as an intermediary for third parties to whom he is alleged to have transmitted bribes. The authorities also submit that when analysing "trading in influence" cases, law enforcement officials will look at the facts and determine if any of the federal statutes match the conduct. Where an individual claims that s/he can trade in influence, that representation is either true or false. Where it is true, the influence peddler can be prosecuted as conspirator to bribery or a kickback scheme. (*United States v. O'Keefe*, 252 F.R.D. 26 (D.D.C. 2008); *United States v. McNair*, 605 F.3d 1152, 1187, 11th Cir. 2010). That is so whether or not the public official cited by the influence peddler is ever corrupted. Where the representation is true and the influence is actually traded, the peddler, his client and the public official can all be prosecuted under 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 201 (bribery). Where the office holder is a federal official, there is also the option of prosecuting the case as conspiracy under 18 U.S.C. § 371, alleging a scheme to defeat, obstruct or impede the lawful functioning of government. Where the public official is involved in a federally funded project, whether or not the official is himself a federal official, there is the option of prosecuting under 18 U.S.C. § 666. Where the representations of the influence peddler are false, the peddler can be prosecuted for defrauding his or her client under 18 U.S.C. § 1341 and 1346, because in such an instance, the lobbyist will have not provided actual services to the 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 also state that the case of *United States v. D'Amiano* shows precisely how such a case is prosecuted. In that case, the defendant claimed he could influence local and state government officials, including the governor. The facts established that he had accepted money to pay bribes, that he had paid some bribes, but did not show that he had actually bribed the governor. He was charged with, among other things, extortion in violation of 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 1952, and mail and wire fraud for depriving his lobbying firm of his honest services by engaging in activity that purported to bribe government officials 18 U.S.C. § 1341. He pled guilty to mail fraud.

31. GRECO takes note of the information provided. Similar to what was the case at the adoption of the Compliance Report, the U.S. authorities have put forward a wide range of ways to prosecute offenders involved in situations which more or less resemble situations of trading in influence. Again, GRECO has no doubt that several components of trading in influence might be covered by using alternative measures available under federal law. That said, GRECO finds that the applicable legislation in the United States in respect 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. Just as at the time of the adoption of the Compliance Report, the authorities argue that by using a mix of federal and state laws it is possible to prosecute all offenders having participated in the particular scheme of trading in

influence. The U.S. authorities have now submitted even more details 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 offences such as bribery, fraud, false statement, conspiracy and conflict of interest to illustrate their determination to prosecute in these situations. GRECO would like to stress that it has no doubt about the determination and capabilities to deal with situations resembling trading in influence in the USA. However, again, GRECO cannot disregard that none of the provisions referred to standing alone, or even used in conjunction with other provisions cover all the details required by Article 12 of the Criminal Law Convention. The provisions referred to are to a large extent geared towards other offences, such as fraud (when public officials are not involved) and indirect corruption, using intermediaries and to other circumstances involving the exertion of improper influence, conspiracy to corruption or the like but not to the particular offence of trading in influence, which has specific elements contained in the Criminal Law Convention. Moreover, some of the provisions referred to are subject to certain limitations, such as the use of mail or an inter-state wire in furtherance of the offence. GRECO cannot see that all elements of Article 12 of the Criminal Law Convention are fully met. Consequently, there is only partial compliance with the requirements of the Convention.

32. GRECO concludes that recommendation iv remains partly implemented.

Recommendation v.

33. *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).*

34. It is recalled that this recommendation was partly implemented in the Compliance Report. GRECO noted that domestic bribery of arbitrators was criminalised in the same way as bribery in the private sector and that the scope for using the Travel Act in combination with state legislation had been slightly expanded as some more states had criminalised private sector bribery (see recommendation iii). The application of honest services mail or wire fraud statutes (also mentioned under recommendation iii) were also considered. Nothing new was reported in respect of bribery of foreign arbitrators. GRECO noted that prosecution under the FCPA would be possible provided the foreign arbitrator is to be considered a public official, but again, this Act does not criminalise passive bribery. Furthermore, the Travel Act or the fraud statutes were not 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 requirement to prove the use of inter-state travel or wire or mail in connection with the offence.

35. The U.S. authorities now repeat their earlier position that the FCPA may be applied in order to prosecute foreign arbitrators when they exercise official duties. As far as domestic bribery of arbitrators is concerned they state that the domestic bribery statute (18 U.S.C. § 201) is not applicable as arbitrators in the U.S. are mostly not considered to be public officials. Instead, such cases would be treated as a form of commercial bribery, and would be subject to prosecution under such statutes (private sector bribery, see also recommendation iii). However, if the arbitration is related to federal funds, additional statutes would be available relating to fraud, conspiracy and bribery. In addition to private arbitrators, many courts in the United States employ a mandatory arbitration process, designed to resolve cases that have been filed in court. Because the arbitration process in those cases is an instrumentality of the justice system, obstruction of justice charges may be applicable in such circumstances. For example, with respect to cases in the federal court system, 18 U.S.C. § 1512(c)(2) states: “Whoever corruptly ... obstructs,

influences, or impedes any official proceeding or attempts to do so … shall be fined or imprisoned … " and 18 U.S.C. § 1503 states: "whoever … corruptly … influences obstructs or impedes … or endeavors to influence, obstruct, or impede the due administration of justice … shall be punished … " Many states are more specific, according to the authorities, for example, South Carolina Code § 16-9-270 specifically criminalises the acceptance of bribes or gratuities by anyone appointed as an arbitrator. The authorities again stress that the limitations to applying the various provisions, such as "the business limitation" in respect of the FCPA and the honest services fraud which requires that the U.S. mail or an inter-state wire has been used in furtherance of the offence, are more to be considered as theoretical caps in the legislation which do not pose an actual impediment to prosecution, according to the authorities.

36. GRECO notes that the factual situation in respect of this recommendation remains largely the same now as it was at the time of adoption of the Evaluation Report, i.e. domestic bribery of arbitrators is criminalised in the same way as bribery in the private sector. The scope for using the Travel Act in combination with state legislation was slightly expanded as already described in the Compliance Report, as some more states had criminalised private sector bribery than at the time of adoption of the Evaluation Report, which makes for partial compliance with the recommendation. 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. However, in respect of bribery of foreign arbitrators, no new developments have occurred. 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 are not 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 (as was already concluded in the Compliance Report).

37. GRECO concludes that recommendation v remains partly implemented.

III. CONCLUSIONS

38. **In view of the conclusions contained in the Third Round Compliance Report and 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.

39. With respect to Theme I – Incriminations – recommendation vi has been dealt with in a satisfactory manner, recommendations ii, iii, iv and v remain partly implemented and recommendation i remains not implemented. With respect to Theme II – Transparency of Party Funding, all recommendations were dealt with in a satisfactory manner, as concluded in the Compliance Report.

40. GRECO notes that the substantial issues dealt with in the current report only concern Theme I (incriminations), more precisely to what extent United States federal legislation, practice and measures comply with the pending recommendations, which in turn are based on certain shortcomings identified in respect of U.S. federal legislation as compared with certain provisions in the Criminal Law Convention on Corruption and its Additional Protocol. Closely linked thereto is the recommendation to ratify the Criminal Law Convention on Corruption and to sign and ratify

the Additional Protocol thereto. As far as signature and ratifications are concerned, no progress has been achieved, which has been explained by the authorities as being the result of constitutional limitations on the ability of the United States to implement legislation that will conform in a strict sense with the Convention and the Protocol, as opposed to implementing these instruments in a functionally equivalent manner. No new federal legislation of relevance for the pending recommendations has been enacted or even considered since the adoption of the Evaluation Report. As already stressed in the Compliance Report and in contrast to other GRECO members, the approach for criminalising corruption offences through legislation appears to be rather limited in the United States as the U.S. Constitution reserves significant powers in this regard to the individual states themselves. In reality, legislation at the state level is also the most substantial basis for incriminations and the limitation to federal jurisdiction only covers parts of the entire range of incrimination possibilities in the United States. Apart from some minor legislative developments in a few states, where the criminalisation of bribery in the private sector has been extended, the United States has largely relied on extensive federal case-law in respect of their compliance with the Convention. This was also clearly acknowledged in the Compliance Report. For the assessment in the current report, the authorities have complemented their earlier information with even more case law. Taking all this information into account, GRECO recognises that U.S. compliance with the Convention and its Additional Protocol goes beyond the situation as assessed in the Evaluation Report. Moreover, GRECO accepts that the substantial case-law referred to by the United States to a large extent indicates that federal legislation - as applied in practice - provides for a considerable degree of "functional compliance" with the provisions at stake. For the current Report, that case-law has been even further complemented in a way that even more justifies the conclusions in the Compliance Report of partial compliance with the recommendations. However, this case-law cannot be considered sufficient to conclude full compliance with the pertinent provisions of the Convention and the Protocol in a strict sense, although GRECO accepts that U.S. federal law, as applied, provides a considerable degree of consistence with these instruments through a method of combining various laws (often leading to prosecutions for fraud, money laundering etc.) to fill gaps in the current legislation. Moreover, the extensive practice in respect of corruption related offences shows the high priority given in the United States to prosecuting corruption related offences in a way which appears to be effective.

41. Regarding Theme II (political financing), it is recalled from the outset that constitutional requirements, legislation and regulations ensure an extraordinarily transparent system in the United States according to GRECO's Evaluation Report. Only three recommendations were addressed to the USA under this Theme and these were all dealt with in a satisfactory manner, according to the Compliance Report. Several legislative attempts to require Senate campaign committees to file campaign finance reports electronically had been made in order to make this particular financing more easily accessible and in line with congressional and presidential election campaign financing, where electronic filing is the rule. Another concern was the use of certain types of so-called 501(c) – organisations as means for the financing of election campaigns. Spending by and through such organisations was not always subject to the same disclosure requirements as apply in respect of the political committees under the Federal Election Campaign Act, and could thus potentially be used to circumvent some public disclosure rules on political financing. In this respect, efforts to bring more transparency through legislation had been sought and draft legislation was pending before Congress. Furthermore, the criticised effects of evenly divided votes (so called "deadlocks") of the Federal Election Commission (FEC) as a result of the partisan composition of this body had been subject to some measures by the FEC itself through a series of public events to discuss agency operations. The results thereof had been posted online and were subject to analysis. In addition, the Senate had organised hearings linked to this issue.

42. In light of what has been stated above, the United States is encouraged to further pursue its efforts to ensure that its federal legislation and/or practice fully comply with the requirements of the Criminal Law Convention on Corruption and the Additional Protocol thereto, as well as to strive for the ratification of these instruments. In view of the fact that five out of nine recommendations (in total) are still not fully complied with, GRECO, in accordance with Rule 31, paragraph 9 of its Rules of Procedure, requests the Head of delegation of the United States to submit additional information concerning the implementation of recommendations i-v (Theme I – Incriminations) by 31 December 2016.

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