



Groupe d'Etats contre la corruption  
*Group of States against corruption*

**DIRECTORATE GENERAL I - HUMAN RIGHTS AND RULE OF LAW**  
**INFORMATION SOCIETY AND ACTION AGAINST CRIME DIRECTORATE**



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## **Third Evaluation Round**

# **Evaluation Report on the United States of America Transparency of Party Funding**

(Theme II)

Adopted by GRECO  
at its 53<sup>rd</sup> Plenary Meeting  
(Strasbourg, 5-9 December 2011)

## I. INTRODUCTION

1. The United States of America joined GRECO in 2000. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2003) 2E) in respect of the United States at its 17<sup>th</sup> Plenary Meeting (22-25 March 2004) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 10E) at its 30<sup>th</sup> Plenary Meeting (9-13 October 2006). The afore-mentioned evaluation reports, as well as their corresponding compliance reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current 3<sup>rd</sup> Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption, 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).
3. The GRECO Evaluation Team for Theme II (hereafter referred to as the "GET"), which carried out an on-site visit to the United States from 4 to 6 May 2011, was composed of Mr Igor ŠOLTES, Chairman, Court of Audit (Slovenia), Mr David WADDELL, Secretary, Standards in Public Office Commission (Ireland) and the scientific expert, Ms Patricia PENA, Former Director of Regulatory Services of the UK Electoral Commission (United Kingdom). The GET was supported by Mr Wolfgang RAU, Executive Secretary of GRECO and Mr Björn JANSON, Deputy to the Executive Secretary. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2011) 3E, Theme II) as well as copies of relevant legislation.
4. The GET met with officials from the following US Government Executive Branch agencies: the Federal Election Commission (FEC) (including the Chair, Vice Chair and several offices), the Internal Revenue Service (IRS), the Office of Government Ethics (OGE) and the Departments of State and Justice. Furthermore, the GET met with representatives of the following political organisations: the Democratic National Committee, the Libertarian National Committee, the National Republic Senatorial Committee and, in this context, with representatives of various law firms ("Skadden Arps", "Perkins Coie", "Wiley Rein"), and a political accounting firm ("Huckaby Davis Lisker"). The GET also met with the following non-governmental organisations: "Campaign Legal Center", "International Foundation for Electoral Systems (IFES)", "Center for Responsive Politics" and "Campaign Finance Institute".
5. The present report on Theme II of GRECO's Third Evaluation Round - transparency of party funding - was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the United States' authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation and a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to the United States of America in order to improve its level of compliance with the provisions under consideration.

6. Theme I of the Third Evaluation Round (Incriminations) is dealt with in a separate document (Greco Eval III Rep (2011) 2E Theme I).

## **II. TRANSPARENCY OF PARTY FUNDING**

### Introduction

7. The United States is a federal constitutional democracy in which the President (Head of State and Government) and the Congress are elected through federal elections. Voter registration and elections in the United States are managed at the state and local levels, not primarily at the federal level and there are many variations among the states and territories in this respect.
8. Considering the size of the USA and its specific legal system where the competences are divided between the federal and state level – including political financing which is the subject of the current report – and taking into consideration the limits of the evaluation visit, the present report focuses principally on the transparency and means for supervision of political financing at the federal level in the United States.

### Presidential elections

9. Elections for President and Vice President are indirect elections in which voters cast ballots for a slate of electors of the U.S. Electoral College, who in turn directly elect the President and Vice President. They occur quadrennially and coincide with the general elections at federal, state and local levels. These elections are regulated by both federal and state laws. Each state is allocated a number of Electoral College electors equal to the number of its Senators and Representatives in Congress; additionally, Washington D.C. is given a number of electors equal to the number held by the smallest state. Under the Constitution, each state legislature is allowed to designate a way of choosing electors. Thus, the popular vote on the election day is conducted by the various states and not directly by the federal government. The Congress is the final judge of the electors.
10. The nomination process, including the primary elections and the nominating conventions, were never specified in the Constitution, and have instead been developed by the states and the political parties.
11. The U.S. Constitution contains the criteria qualifying who can be elected President: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States” (U.S. Const. art II, § 1, cl. 5). The most recent presidential elections were held on 4 November 2008.

### Congressional elections

12. The United States Congress is the bicameral legislature of the federal government, consisting of the Senate and the House of Representatives. The Senate is the “upper house” composed of 100 senators, two from each state. Senators serve staggered<sup>1</sup> six-year terms. The House of Representatives, “the lower house”, represents the states in proportion to the population of each

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<sup>1</sup> The terms are “staggered”, so every two years, approximately one-third of the Senate is up for election.

state; the total number of representatives is fixed at 435. Each of these represents a particular district and is elected for a two-year term. While it is theoretically possible to have total turnover in the Senate every six years and in the House of Representatives every two years, the actual turnover is much less since most incumbents seek re-election. Both senators and representatives are chosen through direct elections.

13. Each state determines its own criteria for ballot access and, consequently, these criteria vary from state to state. Most candidates represent a political party that has automatic ballot access in the state. If not, candidates would be required to gather a specified number of signatures from registered voters in their jurisdiction; however, the qualifications for a party to have assured ballot access also vary from state to state.
14. There are no threshold rules for party representation in the national assemblies. A candidate who wins the election may serve regardless of party affiliation or if not affiliated with any party. However, the U.S. Constitution contains qualification criteria in respect of senators: “No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen” (U.S. Const. art I, § 3, cl. 3) and in respect of representatives: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen” (U.S. Const. art I, § 2, cl. 2).
15. The most recent congressional elections were held on 4 November 2008 (at the same time as the presidential elections) and on 2 November 2010 (“midterm elections”). At the following 112<sup>th</sup> Congress, the Senate consisted of 51 Democrats, 47 Republicans, 1 independent member and 1 independent Democrat. The House of Representatives consisted of 242 Republicans and 193 Democrats. Since the 112<sup>th</sup> Congress convened, 3 Democrats and 2 Republicans representative have resigned.

#### Overview of the political funding system

16. The U.S. Constitution makes no reference to the definition, role and funding of political parties and election candidates in the United States. Nonetheless, the tenth amendment states that the powers not conceded to the United States shall be delegated to particular states. In spite of this autonomy granted to the states, article VI of the Constitution, better known as the “Supremacy Clause”, noticeably overrules the authority of state legislation when federal law conflicts with state law. The First Amendment to the U.S. Constitution also protects the “Freedom of Speech,” stating that “Congress shall make no law . . . abridging the freedom of speech.”
17. The general political funding regulatory regime at the federal level is comprised in the Federal Election Campaign Laws, which are the Federal Election Campaign Act of 1971, as amended, (FECA), the Presidential Election Campaign Fund Act, as amended, and the Presidential Primary Matching Payment Act, as amended, contained in the United States Code (USC).
18. The FECA has been amended several times, in 1974, to limit the contributions to election campaigns and to establish a monitoring agency, the Federal Election Commission (FEC) to enforce the law. Further changes of the FECA to streamline the disclosure process were made in 1976 and 1979. The FECA was again amended, in 2002, by the passing of the “Bipartisan Campaign Reform Act” (BCRA) which aimed at limiting election campaign financing to money that complies with federal contribution limits, source prohibitions, and reporting requirements under

the FECA (“hard money”), as opposed to fundraising not regulated within the framework of the FECA (“soft money”). While federal law prohibited corporations and labour organisations from making contributions and expenditures prior to BCRA, BCRA amended the FECA to prohibit corporations and labour organisations from making electioneering communication<sup>2</sup>, defined below. See Bipartisan Campaign Reform Act, Pub. L. 107-55, Sec 201(a), 116 Stat. 81, 88. However, the prohibitions against corporations and labour organisations making independent expenditures and electioneering communications were declared unconstitutional by the Supreme Court in the case *Citizens United v. Federal Election Commission*, further explained below.

19. The statutory provisions concerning the financing of elections to federal offices, ie the offices of President and Vice President and senators and representatives of the United States Congress, are set forth in the FECA (2 U.S.C. §§ 431 – 457). The FECA contains limitations on the amounts persons may give to federal candidates and committees and prohibits contributions from certain sources. In addition, the FECA is a statute that requires public disclosure of, among other things, the receipts and disbursements of the candidates and entities engaged in the elections as well as the identities of persons/entities contributing above a certain threshold. The FECA also requires disclosure by those persons other than political committees who make certain independent expenditures and electioneering communications.
20. The financing of elections for federal offices, President, Vice President, members of or delegates to the House of Representatives and Senators is overseen and regulated by the Federal Election Commission (FEC or Commission) which is the central supervisory body of the system of political financing under the FECA. The FEC is the main body to enforce the provisions of the FECA and to provide for transparency of political financing at the federal level.
21. Political parties in the USA are broad structures which are rather loosely organised and the two major parties (the Democratic Party and the Republican Party) have, for example, no legal personality. Instead, they are represented at the national level by national party committees. For political finance purposes, FECA (2 U.S.C. 431(16)) defines a political party as “an association, committee, or organization which nominates a candidate for election to any federal office whose name appears on the election ballot as the candidate of such association, committee, or organization”<sup>3</sup>.
22. The FECA distinguishes between political parties and party committees. The political parties themselves are not directly involved in the political financing; that being carried out by the so called political committees which are the formal organisations that political parties are obliged to have for financing purposes. There are several different types of political committees (this is further explained below). For financing purposes, a political party committee represents a political party and must be registered with the Federal Election Commission (FEC). According to the Code of Federal Regulations (CFR), a party committee is “a political committee<sup>4</sup> which represents a political party and is part of the official party structure at the federal, state, or local

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<sup>2</sup> An electioneering communication is any broadcast, cable, or satellite communication that clearly refers to a Federal candidate and airs within a specified time frame before an election and is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A); 11 CFR 100.29(a).

<sup>3</sup> For purposes of public funding of Presidential campaigns, the Presidential Election Campaign Fund Act further defines the terms *major party*, *minor party*, and *new party*. See 26 U.S.C. 9002(6)-(8); 11 CFR 9002.6-.8.

<sup>4</sup> Generally speaking, a political committee is “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year . . . .” See 2 U.S.C. 431(4)(a); 11 CFR 100.5(a) and (c).

level” (11 CFR 100.5(e)(4)).<sup>5</sup> It is the political party committee of each political party that manages the finances of the party which involves, in particular, raising and spending money on behalf of the party; the political parties themselves have no or only limited financial activity outside the political committee structure.

23. An important feature of the US election system is that it is, to a large degree, candidate centred. Even though candidates are most often accredited as members of a particular party, they are entitled to a wide range of autonomy and candidates in the USA run their own campaigns as separate entities from any political party with which they may be associated. The parties naturally are involved in selecting their candidates and in trying to assure those candidates’ success, but the candidates run their campaigns as individuals associated with a party. Candidates who claim no party affiliation may also seek election to federal office subject to state ballot access laws. A candidate running for a federal office is obliged to designate a principal campaign committee (2 U.S.C. § 431(5)) to receive contributions and make expenditures on his/her behalf. Campaign committees have to register with the FEC. For purposes of determining whether an individual is a candidate, contributions and expenditures are aggregated on the basis of an election cycle. An election cycle begins on the first day following the date of the previous general election and ends on the date of the general election for the office the individual seeks (2 U.S.C. 431(25); 11 CFR 1003.3(b)). However, there is no specific period defined as a campaign period. Party committees file financial disclosure reports multiple times each year. Further, in election years, party committees (and any other “person”) who make certain types of expenditures must file additional reports regarding those expenditures. These reports disclose general operating expenses including salaries, rent, utilities and fundraising costs whether related to a particular election or not, and other general operating expenses. Also, party committees must report independent expenditures and the coordinated expenditures for specific candidates. 2 U.S.C. 441a(d). Parties at the state and local levels report their financial activity with respect to state and local elections based on the laws of the various states.
24. The FECA also provides for “authorized committees” (2 U.S.C. § 431(6)). Such a committee is the principal campaign committee or any other political committee authorised by a candidate to receive contributions or make expenditures on behalf of such a candidate, or which has not been disavowed.
25. Corporations and labour organisations may not make contributions to federal candidates and party committees. They may, however, establish political committees called separate segregated funds (SSF). Money contributed to an SSF is held in a separate bank account from the general corporate or union treasury. The corporation or union that sponsors an SSF is the SSF’s “connected organisation.” A connected organisation may use its general treasury funds to pay the costs of establishing, administering and soliciting contributions to its SSF, without those funds being considered to be contributions to the SSF. The restricted class of a corporation consists of the corporation’s executive and administrative personnel, stockholders and families of the two previous groups. A labour organisation’s restricted class consists of the union’s members, its executive and administrative personnel and the families of the two previous groups. SSFs may make contributions to federal candidates and party committees but must register with the FEC. Political Action Committees (PACs)<sup>6</sup> that are not

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<sup>5</sup> Federal law also defines national, state, district or local, and subordinate committees. See 11 CFR 100.13 and 100.14.

<sup>6</sup> “Political action committee” (PAC) is not a defined legal term. Rather, “PAC” is used to describe “a political committee that is neither a party committee nor a candidate committee. PACs sponsored by a corporation or labour organisation are called

SSFs (i.e., non-connected committees) may solicit contributions from the general public. A PAC may contribute in turn to a federal candidate(s) or party committee or make expenditures to influence the outcome of an election independently of a candidate. Both SSFs and non-connected committees are required to register with the FEC.

26. There are some 11,000 political committees registered with the FEC (October 2011) and these are all subject to the monitoring of the FEC, according to the FECA. As of 11 November 2011, approximately 400 political party committees were registered with the FEC. Most of these party committees represent the Democratic and Republican parties and are part of the official party structure at the national, state or local level.
27. As follows from the text above, the pertinent requirements of federal political finance law apply to political committees, of which party committees are a subset, rather than to political parties more generally. For example, political committees must have a treasurer, who is obliged to fulfil certain record keeping and reporting obligations (2 U.S.C. 432). Federal law also imposes limits and prohibitions on the contributions a person may make to “political committees established and maintained by a national political party” or by a “state committee of a political party” ( 2 U.S.C. 441a(a)(1)(B) and (a)(1)(D)). At the federal level, national party committees and their agents may not raise and spend funds outside the source prohibitions, amount limitations, and reporting requirements of the FECA. As for property, some parties own a building where they are housed and necessary office furniture and equipment, but little else. The purchase of such assets is considered an “expenditure” and as such is to be reported through the relevant committee. At the state and local level funds raised and spent for non-federal elections as well as the purchase of office buildings is left to state law.
28. At the federal level, those organisations that qualify as “political committees” under FECA must register with the Federal Election Commission and report their financial activities to that Commission; 2 U.S.C. 433 (registration) and 434 (reporting). A political party organisation becomes a “political committee” under the FECA when its activity, in connection with a federal election, exceeds one of several registration thresholds of either \$1,000 or \$5,000 in federal income or expenditures or certain other political party activities, see 2 U.S.C. 431(4) (“political committee” definition).
29. Political committees (including various types of committees, such as party committees) must file a statement of organisation to the FEC within 10 days after becoming a political committee, 2 U.S.C. 433(a) (when the income/expenditure exceeds a certain amount (either \$1,000 or \$5,000)). A statement of organisation is to include the name, address, type of committee, identity of the treasurer and custodian of records and accounts for the committee, list of any connected organisations or affiliated committees<sup>7</sup> and list of all banks or depositories used by the committee

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separate segregated funds (SSFs); PACs without a corporate or labour sponsor are called “non-connected committees.” Federal Election Commission Campaign Guide — Non-connected Committees, May 2008, available at <http://www.fec.gov/pdf/nongui.pdf>.

<sup>7</sup> Committees may be considered affiliated in various contexts. For example, “[a]ll contributions made by the political committees established, financed, maintained, or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee” (11 C.F.R. 110.3(b)(3)). The FEC has explained 11 CFR 110.3(b)(2) to mean that “a State party committee and the local party committees in that State are affiliated with each other and hence share one limit on contributions they receive” (Advisory Opinion 2005-02). Separate segregated funds established by the same corporation will also be deemed affiliated. As explained in Advisory Opinion 2007-12, “the Act and Commission regulations provide that political committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person, or group of persons, including any parent, subsidiary,

(see also Federal Election Commission, Campaign Guide: Political Party Committees (2009), available at <http://www.fec.gov/pdf/partygui.pdf>. Registration for political finance purposes does not grant any political party any recognition beyond the political committee status and the ability to take advantage of political party contribution limitations.

30. A political committee may incorporate for liability purposes only (11 CFR 114.12, see also Advisory Opinion 2005-15, WV Republican Committee); Federal Election Commission, Campaign Guide: Political Party Committees (2009), available at <http://www.fec.gov/pdf/partygui.pdf>.
31. (A list of all political parties that had candidates on the ballot in the 2010 federal elections could be created by consulting the state election officials identified in the FEC's publication, *Combined Federal/State Disclosure and Election Directory 2010*, Attachment 6, and available at <http://www.fec.gov/pubrec/cfsdd/cfsdd.shtml>.)

## Public Funding

### *Direct Public funding*

32. At the federal level, public funding is available only in connection with presidential elections. There have been a number of proposals to extend public funding also to Congressional elections since the introduction of Presidential public funding in 1976. None has been enacted by Congress.
33. Presidential public funding is provided for qualifying party nominating conventions, presidential general election candidates and presidential primary election candidates in that order of priority. All public funding is voluntary and some candidates choose not to participate. The public funding programme is contained in 26 U.S.C. 9001 to 9042.
34. The primary and general election presidential candidates may be funded for their electoral campaigns; the convention funding is provided to partially offset the cost of each party's presidential nominating convention. In general, in order for an expense to be eligible for payment with the public funds it must be in connection with or in furtherance of, the candidate's campaign or the party's presidential nominating convention and must not be illegal (e.g. fines resulting from the violation of law, or expenditures for an illegal purpose).
35. The conditions that must be met vary somewhat depending on whether the recipient is a candidate for his/her party's nomination for president, a candidate for president in the general election, or the party receiving funds for its presidential nominating convention. One common feature for obtaining public funding is that the recipient must agree to limit the spending. The law sets a base amount for each spending limitation that is adjusted annually for inflation. In the 2008 Presidential election the limitations were \$42.05 million for primary election candidates (\$10,000,000 base amount times the cost of living adjustment), \$16.82 million for major party

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branch division, department, or local unit thereof, are affiliated. Contributions made to or by such political committees are considered to have been made to or by a single political committee (2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)). However, in contrast to affiliation, a connected organisation is any organisation which is not a political committee but which directly or indirectly establishes, administers, or financially supports a political committee (2 U.S.C. 431(7)). In Advisory Opinion 2010-16, the FEC stated that "Corporations, labor organizations, membership organizations, cooperatives, and trade associations may serve as connected organizations of their separate segregated funds". Payments by a connected organisation for the establishment, administration, or solicitation of contributions to its separate segregated fund are exempt from the definitions of contribution and expenditure (2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii)).

nominating conventions (\$4,000,000 base times the cost of living adjustment), and \$84.1 million for Presidential general election candidates of a major party (\$20,000,000 base times the cost of living adjustment). In addition, candidates seeking public funding must agree to limit their personal campaign spending to no more than \$50,000. Primary election candidates must also agree to limit campaign spending in each state. Those limitations in the 2008 election ranged from a minimum of \$841,000 (\$200,000 base times the cost of living adjustment), to a maximum of \$18,279,300. The variation between states is caused by the differences in voting age population of the states. Each recipient must also agree to repay any amounts that the Commission determines were not properly spent, or to which they were not entitled, to keep records of receipts and disbursements, to cooperate and facilitate an audit of the entities' books and records and pay any civil penalties resulting from the campaign's activity.

36. Concerning *presidential primary election candidates*, the public funding system in the primary election period is a contribution matching programme. Only \$250 per contributor may be matched. To gain entrance to the programme, a candidate must be seeking the nomination of a political party and, in order to demonstrate a broad base of support, have received contributions from the residents of at least 20 states that total \$5,000 per state counting no more than \$250 per contributor. The maximum amount that may be received by the candidate is one-half of the applicable spending limitation.
37. Concerning the *presidential nominating convention*, the entities that arrange the nominating convention for the major political parties (Republican and Democratic Parties) are each eligible for a public funding grant. The grant equals the spending limitation. Minor parties may also receive partial funding based on the percentage of votes the party's candidate for president received in the previous election compared to the average number received by the major party candidates. Non-major party conventions have been funded once since the programme's inception in 1976.
38. In respect of the *presidential general election candidates*, the nominees of the two major parties are eligible for the general election grant equal to the applicable spending limitation. Fundraising is limited to a special fund used to defray limited compliance-related legal and accounting costs that are not subject to the spending limitation. Minor party<sup>8</sup> and new party<sup>9</sup> candidates may also receive partial funding based on the percentage of votes the candidate or the party's candidate for president received in the previous election compared to the average percentage received by the major party candidates. The candidate of a minor or new party may also qualify for post election funding based on the percentage of votes received by the presidential candidate in the current election. A candidate that is eligible under both provisions will receive the greater of the amounts calculated under the two new and minor party provisions. Minor and new party candidates may supplement public funds with private contributions and may exempt some fundraising costs from their expenditure limit, they are otherwise subject to the same spending limit and other requirements that apply to major party candidates (2 U.S.C. 9003 and 11 CFR 9003.3).
39. The money used for public funding is set aside by individual tax payers. Each natural person (other than a resident alien) who files a tax return is eligible to set aside \$3 per year for the purpose of providing funds for the system described above. These funds accumulate over the

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<sup>8</sup> A minor party candidate is the nominee of a party whose candidate received between 5 and 25 percent of the total popular vote in the preceding Presidential election. 26 U.S.C. 9002(7).

<sup>9</sup> A new party candidate is the nominee of a party that is neither a major party nor a minor party. 26 U.S.C. 9002(8).

four-year presidential election cycle and are disbursed during the election season. No other funds are available. The allocation of the funds is specified by law: the nominating conventions are to be funded first, the general election candidates second and the presidential primary election candidates last. Should there be a shortage, the available funds are distributed equitably between the candidates. For example, if all candidates are entitled to receive \$1 million on a specific date and candidate A is entitled to \$250,000, candidate A will receive one-quarter of the funds available. There have been election cycles where sufficient funds were not available to pay all of the presidential primary candidates in a timely fashion, but all candidates to date have been paid their full entitlement. No other allocation system is used.

40. In the 2008 election, both eligible parties accepted funding for their nominating conventions. In the primary election, eight candidates accepted matching funds. Approximately \$30 million was disbursed. Not included among the candidates accepting primary election public funds were then Senators Barack Obama, Hillary Clinton and John McCain. Each of these candidates was able to raise significantly more in contributions than they would have been permitted to spend if they had participated in the public funding system. In the 2008 election, for the first time since the programme's inception in 1976, a candidate of one of the two major political parties chose not to accept public funding for the general election, namely Barack Obama. The spending limitation in the 2008 election for publicly funded candidates, primary and general elections combined, was approximately \$126 million plus some allowances for primary fundraising costs and legal and accounting expenses. President Obama's campaign was able to raise contributions totalling \$745 million.

#### *Indirect public funding*

41. There is no provision for indirect public funding in the form of free air time or the use of premises by parties or candidates and the like. However, presidential campaigns may be provided with security measures by the US Secret Service. In the general election period, the two major party candidates have security provided and other candidates may be entitled to similar security based on policies determined in advance by the Secret Service. As a matter of national security, the President and Vice President travel on government aircraft and other vehicles. However, their campaigns are required to reimburse the Government for such services provided.

#### Private Funding under the FECA

##### *General framework*

42. The most substantial source of political financing during the last general Presidential election, and the exclusive source of funding in relation to elections to Congress, is private funding; the most dominant private funding comes from contributions by individuals, followed by funding from political action committees, according to the US authorities.
43. The FECA defines *contributions* as any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing an election for federal office or the payment of compensation for personal services rendered to a political committee without charge (2 U.S.C. 431(8)(A)). The FECA also contains a detailed list of what the term contribution does not include (2 U.S.C. 431(8)(B)), *inter alia*, services provided by volunteers on behalf of a committee or candidate or the use of certain private premises etc provided that

the cumulative value of such events does not exceed \$1000 in respect of a single election or \$2000 per year.

44. *Expenditures* are defined in the FECA as any purchase, payment, distribution, loan, advance, deposit, or gift of money made by any person or a written contract, promise or agreement to make an expenditure for the purpose of influencing any election for federal office (2 U.S.C. 431(9)(A)). The law also contains a detailed list of what is not included, *inter alia*, news or editorials distributed through media unless such media (newspapers etc) is owned by the political party, committee or candidate etc (for further details, consult the law). It is to be noted that generally the law does not provide any monetary limitations in respect of expenditures/spending, which is a fundamental principle confirmed in 1976 by the United States Supreme Court when it determined that such limitations would violate any person's free speech rights under the US Constitution (See *Buckley v. Valeo*, 424 U.S. 1, 23 (1976)).
45. The FECA also contains reporting requirements upon the various political committees to the Federal Election Committee (FEC), which is the monitoring mechanism, and public access to such reports, which is explained under the specific part of "Transparency", below.

#### *Anonymous donations*

46. No anonymous contributions in excess of \$50 may be accepted by any candidate or candidate's political committee, 2 U.S.C. 432(c)(2); 11 CFR §110.4(c)(3). No one may make a contribution in another person's name (2 U.S.C. 441f).

#### *Cash and in-kind donations*

47. Contributions in cash of more than \$100 are prohibited (2 U.S.C. 441g).
48. The monetary value of an in-kind contribution is subject to the same limits as monetary contributions. Their value is determined at normal commercial purchase, rental etc price. In accordance with 11 CFR 100.52(a) and (d), in-kind contributions include: goods and services offered free of charge (such as equipment and facilities); goods and services offered at less than the usual and normal charge; payments by a third party of committee bills; and advances of personal funds.

#### *Party memberships subscriptions*

49. Under 11 CFR 100.52(a), a *subscription* falls within the definition of a contribution: "A gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office is a contribution." As such, it is subject to the amount limitations and source prohibitions that apply to contributions. However, political parties in the United States generally do not charge membership fees.

#### *Income from property and party business*

50. The issue of income from property has been subject to consideration by the Federal Election Commission. The following principles apply according to its "Campaign Guides". When a political committee sells or leases an asset (such as a mailing list), the full amount received from the purchaser is generally considered to be a contribution to the committee unless the committee had purchased or developed the asset for the committee's own use rather than as a fundraising item;

the asset has an ascertainable market value; rental of the asset comprises only a small percentage of the committee's overall use; and the purchaser pays the usual and normal charge. Any payment in excess of that is considered a contribution. (Advisory Opinion 2002-14 (Libertarian National Committee)).

51. A state or local party committee may lease a portion of its office building at the usual and normal charge. If the building is purchased or constructed with any funds not subject to the limits, prohibitions and reporting requirements of the FECA, all rental income must be treated the same way. Conversely, if the building is purchased or constructed solely with funds subject to the limits, prohibitions and reporting requirements of the FECA, the income may be treated as such funds.
52. Political committees may raise money by earning interest and dividends on invested funds, 11 CFR 103.3(a). For example, a committee may invest contributions it has received in a savings account, a money market fund or a certificate of deposit. Interest and dividends are not contributions (and are therefore not subject to limits) but they must be reported (11 CFR 104.3(a)).

#### *Loans*

53. A loan or line of credit from a bank is not considered a contribution provided that 1) the loan bears the bank's usual and customary interest rate for the category of loan involved; 2) the loan is evidenced by a written instrument; 3) the loan is subject to a due date or amortisation schedule; and 4) the loan is made on a basis which assures repayment (2 U.S.C. 431(8)(B)(vii)).
54. In addition, there are separate provisions governing loans that are the result of an advance on a candidate's brokerage account, credit card, home equity line of credit or other line of credit available to the candidate (2 U.S.C. 431(8)(B)(xiv)).
55. Other loans, including a loan to the campaign from a member of the candidate's family, are considered a contribution to the extent of the outstanding balance of the loan (11 CFR 100.52(b)(2)). An unpaid loan, when added to other contributions from the same contributor, must not exceed the contribution limit (11 CFR 100.52(b)(1)). Repayments made on the loan reduce the amount of the contribution, and once repaid in full, a loan no longer counts against the contributor's contribution limit (11 CFR 100.52(b)(2)). However, a loan exceeding the limit is unlawful even if it is repaid in full (11 CFR 100.52(b)(1)). Besides being reported as a contribution, a loan must be continuously reported as a debt until it is fully repaid (11 CFR 104.3(d)).
56. An endorsement or guarantee of any loan also counts as a contribution in respect of the outstanding balance of the loan (11 CFR 100.52(b)(3)). Repayments made on the loan reduce the amount of the contribution. Once the loan is repaid in full, the endorsement or guarantee no longer counts against the endorser's or guarantor's contribution limit. If a written loan agreement does not stipulate the portion for which each endorser or guarantor is liable, then individual contributions are calculated by dividing the amount of the loan by the number of persons who have endorsed or guaranteed it.
57. An extension of credit outside of a creditor's ordinary course of business is considered a contribution (11 CFR 116.3). If the creditor is incorporated, an extension of the credit beyond the ordinary course of business would result in a prohibited contribution.

### *Fundraising activities*

58. A national committee of a political party “may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions and reporting requirements” of the FECA 2 U.S.C. 441i(a)<sup>10</sup>. Federal candidates, officeholders, and their agents generally may not “solicit, receive, direct, transfer or spend funds in connection with an election for federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act” (2 U.S.C. 441i(e)(1)).<sup>11</sup> However, federal officeholders and candidates “may attend, speak at, or be a featured guest at a fundraising event for a state, district, or local committee of a political party” (2 U.S.C. 441i(e)(3)). Amounts spent by a national or state committee of a political party to raise funds that will be used for federal election activity must be from funds subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. 441i(c).
59. The full purchase price of a fundraising item or tickets to a fundraising event (provided/hosted by a political committee) is considered a contribution. For example, when a person buys a \$50 ticket to a fundraising dinner, the amount of the contribution is \$50, regardless of how much the meal costs the committee. A person who buys several tickets to a fundraiser makes a contribution in the amount of the total purchase unless the contribution is intended as a joint contribution (11 CFR 100.53).

### *Contributions from entities related to a party*

60. Party political committees may contribute funds directly to federal candidates, subject to the contribution limits (2 U.S.C. 441a(d)). National and state party political committees may make additional "coordinated expenditures", subject to limits, to help their nominees in general elections (11 CFR 109.30). Party political committees may also make unlimited "independent expenditures" to support or oppose federal candidates. National party political committees, however, may not solicit, receive, direct, transfer, or spend funds that are not subject to the limits, prohibitions and reporting requirements of the FECA, 2 U.S.C. 441i(a). Finally, while state and local party political committees may spend unlimited amounts on certain grassroots activities specified in the law without affecting their other contribution and expenditure limits (for example, voter drives by volunteers in support of the party's presidential nominees and the production of campaign materials for volunteer distribution), they must use only funds subject to the limits, prohibitions, and reporting requirements of the FECA when they finance "Federal election activity." (See *definition of Federal Election Activity*, 75 Fed. Reg. 55,257 (Sept. 10, 2010); see also 11 CFR 100.24 and 300.31.)

### *Contributions from corporate entities and labour organisations*

61. Corporations and labour organisations are prohibited by 2 U.S.C. 441b from making contributions to federal candidates and party committees. (Political committees that are incorporated for liability purposes may make contributions (see paragraph 28 above). However, in the case *Citizens United v. Federal Election Commission*, the Supreme Court held that corporate expenditures independent of candidates and party committees, as well as electioneering communications,

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<sup>10</sup> Also, state and local party committees must use funds “subject to the limitations, prohibitions, and reporting requirements of the Act” when they expend or disburse that money for Federal election activity. 2 U.S.C. 441i(b).

<sup>11</sup> Federal candidates, officeholders and their agents are also restricted in the funds they may “solicit, receive, direct, transfer or spend in connection with” a non-federal election. 2 U.S.C. 441(e)(1)(B).

cannot be limited as that would violate the right to freedom of speech under the US Constitution. This judgment (voted 5-4) has triggered a debate in the United States as it has opened up the possibility of independent corporate spending in elections, which in the past was not allowed as a principle. However, the Court's decision did not alter the disclosure obligations of federal candidates and political committees.

62. Corporations and labour organisations may establish separate segregated funds (SSF's), SSF's are political committees that solicit voluntary contributions from a restricted class of individuals associated with the corporation or labour organisation and use those funds to support federal candidates and political committees. Like other political committees they file financial disclosure reports with the FEC that are publicly available (2 U.S.C. 441b(b)(2), 441a(a)(1)-(5)).
63. Limited Liability Partnerships and Limited Liability Companies taxed as partnerships may make contributions that are attributed to the members of those companies (11 CFR 110.1(g)). Unincorporated businesses and partnerships may, however, contribute to political committees and candidates within the limits prescribed by FECA (11 CFR 110.1(e)).

#### *Contributions from contractors to the public service*

64. It is prohibited for any person who enters into any contract with the United States or any department or agency thereof, entailing the provision of goods and/or services to the federal government to make any contribution to any political party, committee or candidate in connection with a federal election (2 U.S.C. 441c).

#### *Foreign contributions*

65. Foreign nationals may not make contributions or donations to influence federal, state or local elections (2 U.S.C. 441e). FECA defines "foreign national" as either a "foreign principal" under 22 U.S.C. 611(b) or an "individual who is not a citizen of the United States or a national of the United States who is not lawfully admitted for permanent residence" (2 U.S.C. 441e(b)). The term "foreign principal" includes governments of foreign countries, political parties of foreign countries, and various business associations "organized under the laws of or having [...] principal place of business in a foreign country".

#### *Independent political campaign expenditures (not under control of a party or candidate committee)*

66. Under federal law, individuals and groups other than those identified above may make unlimited "*independent expenditures*" in connection with federal elections. An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified federal candidate and which is made independently from the candidate's campaign (2 U.S.C. 431(17)). To be considered independent, the communication must not be made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or his/her authorised committee or a political party, or any of their agents. While there is no limit on how much anyone may spend on an independent expenditure, the law does require persons making independent expenditures to report those expenditures in excess of certain amounts and to disclose the sources of the funds they used, 2 U.S.C. 434(c). The public can review these reports at the FEC's Public Records Office or on the FEC's Web site.

*Limits in respect of contributions*

67. Federal election law establishes a general framework that applies similarly to all political committees. This framework includes contribution limits and source prohibitions. As noted above, a significant distinction under the FECA is whether the entity is a “political committee” and if so, of what sort. “Affiliated” political committees (as defined in 2 U.S.C. §441a(a)(5) and 11 CFR §100.5(g)) share a contribution limitation both in terms of what they can receive from a contributor and in terms of how much they may contribute to candidates or other political committees as if they were a single political committee.
68. As long as the separate contributions themselves do not violate the amount limitations and source prohibitions of the Act, there is no limit to the total amount of contributions a political committee may receive, or to the amount a political committee may spend to influence an election, as long as the spending does not constitute a contribution to another political committee. Publicly financed presidential committees are the exception: they must agree to limit spending in order to qualify for public funds.
69. The FECA places limits on contributions provided by individuals and groups to candidates, party committees and political action committees (PAC) (when the PAC will use those funds to make contributions to candidates and party committees). 2 U.S.C. 441a; 11 CFR Part 110. The chart below shows how the limits apply to the various participants in federal elections.

<b><u>Contribution Limits 2011-12</u></b>	To each candidate or candidate committee per election	To national party committee per calendar year	To state, district & local party committee per calendar year	To any other political committee per calendar year	Special Limits
Individual may give	\$2,500	\$30,800	\$10,000 (combined limit)	\$5,000	\$117,000 overall biennial limit: <ul style="list-style-type: none"> <li>• \$46,200 to all candidates</li> <li>• \$70,800 to all PACs and parties</li> </ul>
National Party Committee may give	\$5,000	No limit	No limit	\$5,000	\$43,100 to Senate candidate per campaign
State, District & Local Party Committee may give	\$5,000 (combined limit)	No limit	No limit	\$5,000 (combined limit)	No limit
PAC (multicandidate) may give	\$5,000	\$15,000	\$5,000 (combined limit)	\$5,000	No limit
PAC (not multicandidate) may give	\$2,500	\$30,800*	\$10,000 (combined limit)	\$5,000	No limit
Authorized Campaign Committee may give	\$2,000	No limit	No limit	\$5,000	No limit

### Tax deduction etc

70. Contributions for federal elections are not tax deductible for federal tax purposes. Deductibility for state and local tax purposes is a matter of state and local legislation and may vary from jurisdiction to jurisdiction.

### Limits in respect of expenditure

71. While there are limits on contributions by individuals and groups to candidates, party committees and political action committees, when the PACs use those funds to make contributions to candidates and party committees as demonstrated above, there are generally no limitations on campaign spending in the US system. In its 1976 decision in *Buckley v Valeo*, the Supreme Court held that such limitations would violate the freedom of speech provisions of the Constitution (424 U.S. 1, 23 (1976)). Therefore, with the exceptions noted below, there are no quantitative limitations on spending (The FECA, however, does provide some qualitative restrictions. For example, no candidate may use campaign contributions for “personal use.”).
72. There is a coordinated party expenditure limitation for national and state party committees. These allow national and state party committees to spend on their candidate’s election campaign and to make such expenditures in consultation, coordination or cooperation with those candidates, 2 U.S.C. 441a(d). The limitations are adjusted annually to account for changes in the cost of living index and in some cases the voting age population of the candidate’s constituency. The 2011 Coordinated Party Expenditure Limits were \$88,400 for nominees to the House of Representatives in respect of states with only one representative and \$44,200 for such nominees in all other states. The limits in respect of Senate nominees range from \$88,400 to \$2,458,500, depending on each state’s voting age population.
73. In addition to these limitations, party committees may make contributions to candidates within the limitations noted in the table above, and may make unlimited expenditures independently on behalf of, or in opposition to, candidates. Other types of expenditure that a party makes on behalf of itself and its candidates include the party’s overhead, administrative and fundraising expenses and relevant expenses exempted from the definition of expenditure at 11 CFR 100.30 to 100.55. The national committee of a political party has a coordinated party expenditure limitation for its candidate for the Office of President as well as its candidates for national legislative office. State committees of political parties only have coordinated party expenditure limits for elections to federal legislative offices.
74. There are also provisions at state and local level relating to spending on elections at these levels; the same Constitutional free speech protection applies to those elections as at the federal level.
75. As noted above, in exchange for public funding, presidential candidates and political party national nomination conventions agree to abide by spending limitations. Similarly, there are few qualitative restrictions on spending by political committees and candidates that participate in the presidential public funding programme; candidates are prohibited from converting campaign funds to personal use and 2 U.S.C. 439a(a) specifies a number of specifically authorised uses of contributions by candidates as well as the prohibition on conversion to personal use and on the use of those funds for travel on certain non-commercial aircraft.

### III. TRANSPARENCY OF PARTY FUNDING - SPECIFIC PART

#### i) **Transparency (Articles 8, 11, 12 and 13b of Recommendation Rec(2003)4)**

##### Books, accounts, records and reporting

76. As stated above, the financing of political parties is channelled through the so called *political committees* (and not the political parties as such) and these are subject to record keeping and reporting requirements. All political committees, as well as all other parties, committees, associations, funds, or other organisations that are organised and operated primarily for the purpose of influencing the election of candidates for public office, fall under the category “political organisations” under section 527 of the Internal Revenue Code and can qualify for tax exemption under that section if, where required, they adhere to certain disclosure and reporting requirements. While this status provides certain tax benefits, it does not in any way lessen or alter an organisation’s reporting requirements under federal election law.

##### *Political committees*

77. Organisations that according to 2 U.S.C. 431(4) qualify as political committees (i.e. they receive contributions or make expenditures over certain thresholds, e.g. \$1,000 for state level associations or group of persons, party etc, or \$5,000 for a local unit of an association and thus have to register with the FEC) are subject to the record keeping and reporting requirements under the FECA. The record keeping requirements for all political committees are very similar.

##### *a) Record keeping*

78. As a main rule, entities are required to report all receipts and all disbursements to the Federal Election Commission if they qualify as “political committees” under the FECA. There is no distinction between income for regular party operations and campaign expenses unless a contributor specifies, or “earmarks”<sup>12</sup> a contribution for a particular candidate (11 CFR 110.6).

79. There are several provisions in federal political finance law and implementing regulations that relate to record keeping of political committees. The basic provisions (2 U.S.C. 432(c) and 11 CFR 102.9.) require that the treasurer of a political committee shall keep an account in respect of all contributions received by the committee. In respect of contributions in excess of \$50 the account must also include the name and address of any person who makes such a contribution together with the date of the contribution and the amount. Moreover, the accounts are to include the identification (name, address, occupation, and the name of the contributor’s employer) of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution, and these must be listed individually. Contributions that, aggregated over a calendar year or election year, do not meet the \$200 threshold are reported in the aggregate. However, contributions from other political committees must always be detailed regardless of amount.

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<sup>12</sup> An earmark is an instruction or designation that results in a contribution being made to, or money being expended on behalf of, a clearly identified federal candidate, 2 U.S.C. 441a(a)(8).

80. All loans, regardless of source, are detailed in the reports of the recipient committee. All other types of receipts, (refunds received, inter committee transfers, interest income etc), are reported. Depending on their nature, they are all detailed in the reports if not subject to the \$200 threshold (11 CFR 104.3). Specific additional record keeping requirements apply to loans received from a lending institution and those obtained for a campaign by the candidate (11 CFR 104.14(b)(4)). Added to these specific requirements for individual transactions, the implementing regulations require each person obliged to file disclosure reports to maintain records to allow those reports to be verified, explained, clarified and checked for accuracy and completeness. Examples of such records include bank account statements, vouchers, worksheets, receipts, bills and accounts (11 CFR 104.14(b)(1)). As noted above, the definition of expenditure includes promises to pay and so the same record keeping requirements that apply to expenditures apply to debts, 2 U.S.C. 431(9). Loans have specific and detailed record keeping requirements. Loans that are not from commercial lenders are considered as contributions and are subject to the contribution record keeping rules. Generally, loans and other debts that are forgiven are also considered as contributions and are reported as such. However, when the debtor is unable to satisfy those debts and provision is made to settle debts for less than full value, such settlements are reviewed by the Federal Election Commission to assure that they are commercially reasonable in order not to constitute a contribution. The settlement must be disclosed, 11 CFR Part 116. Assets that are acquired by a political committee are subject to the disbursement record keeping requirements when purchased. Except for items donated to a political committee for sale (securities, artwork etc.), there are no separate provisions for the reporting of, or record keeping for, assets other than cash.
81. Concerning disbursements the accounts are to include the name and address of the payee, the date of the disbursement, the amount disbursed and the purpose of the disbursement. If the disbursement is made as a contribution to a candidate's campaign, either monetary or non-monetary, the identity of the candidate and the office s/he is seeking is to be noted. As parties at various levels are permitted to spend a limited amount in coordination with the candidate and an unlimited amount independently of a candidate, these disbursements must identify the benefiting candidate in the records and political finance reports. In addition to the accounting of disbursements, for all disbursements in excess of \$200, the records must include a receipt or invoice from the payee or a cancelled cheque to the payee. There are separate provisions for disbursements made by credit card. However, there are allowances for limited volunteer activities, voter registration activities and "get out the vote activities" that refer to a candidate that need not disclose the identity of the candidate or candidates referenced. Only very minor amounts may be disbursed in currency.
82. As a main rule, both monetary and non-monetary contributions are to be covered by the record keeping and reporting requirements. However, there are a number of exemptions designed to promote participation by individuals in the electoral process. Among these exemptions are the time and some incidental expenses of volunteers, if not otherwise compensated. Non-monetary contributions are valued at their usual and normal charge and contributions resulting from the provision of goods and services at less than the usual charge are valued at the difference between the amount paid and the normal charge. If the contribution is non-monetary, the goods or services must be described and recorded as both a contribution and a disbursement, 11 CFR 100.51 to 100.57 (defining "contribution" under the FECA) and 11 CFR 100.71 to 100.94 (providing exceptions to the definition of "contribution").

*b) Reporting requirements (filing reports with the FEC)*

83. The FECA (2 U.S.C. 434) provides detailed rules in respect of the submission of the financial reports to the Federal Election Commission according to the following:
84. *Principal campaign committees of a congressional candidate:* a pre-election report is to be filed 12 days before any election in which that candidate participates; post election report 30 days after the general election; and quarterly reports during the election year. In other calendar years, they are to submit quarterly reports. Principal campaign committees are to report, within 48 hours of receipt, any contributions of \$1,000 or more received by any authorised committee of that candidate during the period beginning 20 days before any election and ending 48 hours before the election.
85. *Principal campaign committees of a candidate for the office of President:* monthly reports are to be filed if they have received contributions or had expenses exceeding \$100,000, otherwise quarterly; a pre-election report is to be filed 12 days before the general election and a post election report 30 days after the general election. In other calendar years, they are to submit monthly or quarterly reports. Principal campaign committees are to report, within 48 hours of receipt, any contributions of \$1,000 or more received by any authorised committee of that candidate during the period beginning 20 days before any election and ending 48 hours before the election.
86. *Political committees (other than authorised committees):* quarterly reports are to be filed; a pre-election report is to be filed 12 days before a primary election if the committee had contributions or expenditures in connection with that election and before a general election; a post election report is to be filed 30 days after the election; all during the election year. In other calendar years, these committees are to submit semi-annual reports. Alternatively, they may file monthly reports.
87. National Party Committees must file monthly reports in both election and non-election years.
88. *Authorised committees:* Authorised campaign committees' information is contained in the reports of the principal campaign committee, noted in paragraph 84 above.
89. The FEC prescribes the forms that the political committees use (see <http://www.fec.gov/info/filing/shtml> for examples of these forms). Most reports are filed electronically and there are very specific filing requirements for such reports. Electronically filed reports may be viewed as if they were filed on paper forms or may be searched or copied electronically. However, the Senate campaign expenditures are not submitted directly to the FEC and as these are not filed electronically there are delays in providing such information to the FEC.

*Entities other than political committees*

90. The record keeping and reporting requirements described above generally apply to political committees. However, other organisations and individuals who make expenditures or disbursements in connection with federal elections are also required to make reports of those expenditures or disbursements for independent expenditures and for electioneering communications when certain reporting thresholds are triggered (2 U.S.C. 434(c) and 2 U.S.C. 434(f)).

91. Entities that do not qualify as political committees, for example, issue based groups, state-level political committees and ballot initiative groups, may be subject to reporting requirements at the federal level based on federal tax law, or may be subject to reporting requirements at the state or local level for political activity.
92. The Internal Revenue Code imposes certain activity and reporting requirements on organisations that wish to be tax exempt. Section 527 of the IRC provides tax exemption for parties, committees, associations, funds, or other organisations that are organised and operated primarily for the purpose of influencing candidate elections. These organisations provide information regarding contributors and expenditures to the FEC if they meet the test of a “political committee”. Section 527 organisations that are not required to report their contributor and expenditure information to the FEC (or to report to a state), are still required to report the following information to the IRS on a publicly-available form 8872: for contributors whose contributions aggregate more than \$200 during the calendar year, the report must include the name and address of the contributor and the date and amount of the contribution(s). If the contributor is a natural person, the report must also include the contributor’s occupation and the name of his or her employer. Contributions that do not meet the \$200 threshold are reported by the organisation in the aggregate. These reporting requirements, and the concomitant recordkeeping requirements, are consistent with the FEC’s reporting and recordkeeping requirements and each such organisation’s reports are posted on the website of the IRS.
93. Certain other types of tax-exempt organisations also may participate in political campaign intervention<sup>13</sup> but only to a limited extent. These include for example, 501(c)(4) social welfare organisations (such as environmental or civil rights issue organisations), 501(c)(5) labour organisations (such as unions or farm bureaus), and 501(c)(6) business leagues (such as trade associations). However, to retain their tax exempt status, these organisations must be “primarily engaged in activities” that further their exempt purposes. Political campaign intervention does not further their exempt purposes. Therefore, political intervention activity plus all other non-exempt activity must be secondary to activities that further their tax exempt purposes. If these organisations make a contribution to a candidate or party committee in an amount that meets the public reporting threshold for any contribution, that committee must include the receipt of that contribution on its public filings with the FEC. In addition, these organisations must report their political spending to the IRS on their publicly-available annual information return; they are also required to report the names and addresses of donors who contribute more than \$5,000 in a year. The donor information is tax information and pursuant to IRC 6103 cannot be made public by the IRS. The GET learned that the “501(c)-organisations” were particularly at the forefront of the debate on transparency of political funding in the USA as these may engage in lobbying and influencing of elections as long as that is not their primary purpose and it was mentioned by a number of interlocutors that such organisations were being used as vehicles for anonymous fundraising in federal elections. These entities are subject to FECA transparency or monitoring requirements if they meet the FECA definitions.

#### *Individual contributors and lobbyists*

94. Under the FECA, contributors are not required to report contributions, except for political committees that are required to report all of their financial activity. Individual contributors are

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<sup>13</sup> Political campaign intervention for purposes of the Internal Revenue Code means “participat[ing] in, or intervene[ing] in (including the publishing or distributing of statements) any political campaign or behalf of (or in opposition to) any candidate for public office.”

subject to limitations on the aggregate amount of contributions that may be made in a two-year election cycle, but no recording or reporting obligation is imposed on the contributors, 2 U.S.C. § 441a(a)(3); 11 C.F.R. § 110.5.

95. Under the Lobbying Disclosure Act of 1995, Pub. L. 104-65, 109 STAT. 691 (1995), as amended (“LDA”), some contributors are required to report contributions they give. Registered lobbyists and their employers (known as “registrants” under the LDA) must file semi-annual reports of the information with the Secretary of the Senate and the Clerk of the House of Representatives, LDA, § 5(d) (codified at 2 U.S.C. § 1604(d)): the date, recipient and amount of funds contributed (including in-kind contributions) to any federal candidate or officeholder, leadership PAC or political party committee (registered with the FEC), if the aggregate during the period to that recipient equals or exceeds \$200.

#### *Preservation of records*

96. At the federal level, records supporting transactions in political finance reports are required to be maintained by the political committees for a period of three years after the report is filed, 2 U.S.C. 432(d). At the state and local levels, each regulatory body has its own rules. The FEC does not possess records relating to political parties and other political committees unless obtained in the course of an audit or investigation. Those that are the result of such audits or investigations are to be maintained for 10 years. Copies of political finance disclosure reports are required to be maintained for 10 years except those relating to the House of Representatives which need only be maintained for 5 years, 2 U.S.C. 438(a)(5). However, such reports are maintained by the Federal Election Commission electronically and indefinitely.

#### **ii) Supervision (Article 14 of Recommendation Rec(2003)4)**

97. There are three different institutions which have monitoring functions in respect of political financing: i) the *Federal Election Commission* (FEC), which is the major monitoring mechanism; ii) the *Internal Revenue Service* (IRS), which has a monitoring function in respect of a limited number of organisations not covered by the FEC and iii) the *Department of Justice* (DOJ), which enforces criminal violations relating to political financing.
98. Jurisdiction over the Federal Election Campaign Act (FECA) is shared by two components of the United States Government: the Federal Election Commission (FEC) and the United States Department of Justice. The FEC has exclusive civil jurisdiction over all violations of the FECA, including those committed negligently or knowingly and wilfully (2 U.S.C. § 437c(b)). The Department of Justice has exclusive jurisdiction over all FECA crimes, that is, violations that are committed with criminal intent and involve \$2,000 or more in a calendar year. 2 U.S.C. § 437g(d).

#### Auditing

99. There is no requirement at the federal level for any of the listed entities to undergo internal audits or to engage an independent auditor to conduct any audit of their accounts. However, the FEC has the authority to conduct audits, see below.
100. At the state and local levels there are a variety of audit requirements and authorities that are not addressed here.

## Monitoring

### *Federal Election Commission*

101. The Federal Election Commission (FEC) was created in 1975 by Congress to administer and enforce the Federal Election Campaign Act (FECA). The overall mission of the FEC is to prevent corruption in the federal campaign process by disclosing campaign finance information, to enforce the provisions of the FECA such as the limits and prohibitions on contributions and formulating policy with respect to the federal campaign finance statutes and to oversee the public funding of presidential elections. However, the FEC is not charged with dealing with any activity that is considered criminal. Criminal issues are the exclusive province of the Department of Justice.
102. The FEC is an independent regulatory agency comprised of six members appointed by the President of the United States with the advice and consent of the United States Senate, 2 U.S.C. 437c(a). No more than three of the Commissioners may belong to the same political party and four votes are required to act. Commissioners are appointed to a single six-year term. The "Hatch Act" establishes executive branch-wide standards of conduct that restrict the partisan political activities of Commission employees. Moreover, Commissioners and Commission employees are subject to further restrictions. For example, the Commissioners must terminate or liquidate "any other business, vocation, or employment" within 90 days after appointment to the Commission 2 U.S.C. 427c(3). Also, Commissioners and FEC employees are subject to an FEC regulation that requires them to "avoid any action which might result in, or create the appearance of giving favourable or unfavourable treatment to any person or organisation due to any partisan or political consideration. The GET was also informed that, while Commission employees retain the right to participate in various political activities, Commission employees generally may not perform political activities in conjunction with a political party, partisan political group or a candidate for partisan political office.
103. The FEC is organised under four offices: 1) the Office of the Staff Director (general management), 2) the Office of the General Counsel (policy, enforcement, litigation, and general law and advice), 3) the Office of Inspector General (detection and prevention of fraud waste and abuse etc), and 4) the Office of strategic planning and financing. The Commission is staffed by approximately 350 people and made up of attorneys, IT professionals, auditors and individuals with other skills as needed. The FEC's budget is determined through the Congressional appropriations process. The budget for Fiscal Year 2011 was approximately \$66 million. The GET was told that in the current budgetary environment the current level of funding was sufficient to allow the Commission to support its mission.
104. The FEC's work is divided into four main categories of activity: i) administering the public funding programme, ii) facilitating disclosure of campaign finance reports, iii) clarifying the law and iv) enforcing the law. The Commission makes public the reports filed by political committees, as well as its own analysis and data generated from those reports. The Commission also clarifies the FECA by issuing regulations, advisory opinions and other forms of public guidance.

### *FEC procedure*

105. As noted above, the FECA includes detailed requirements concerning the reporting of financial activity of political committees, 2 U.S.C. 434. Those reports are received by the Federal Election Commission, primarily in an electronic form, and immediately made available for public inspection

and copying. The authorities explained to the GET that in recent years, the Commission's web site has become the most frequently used method for accessing financial disclosure reports by the public.

106. More in detail, the Commission makes its process and the results of its work public as either a matter of law or policy in accordance with the following. At the most basic level, political finance disclosure reports and related statements are required to be available for public inspection in the Commission's offices and on the Internet within 48 hours of the Commission's receipt, 2 U.S.C. 438(a). Most reports are filed electronically and are available on the Commission's web site within 24 hours. When the initial review of those reports and statements disclose possible errors and omissions a request for clarification is generated. Those are posted to the internet when issued. The Commission is also required to develop and maintain various indices that make the information filed with the Commission more usable by the public, 2 U.S.C. 438(a)(6). Audits and enforcement cases are subject to confidentiality requirements until the case is closed. Once closed, the final settlement and numerous supporting documents are made available for inspection as placed on the Internet. The Commission's meetings are held in both public and closed sessions. In closed sessions, the Commission primarily discusses enforcement cases, litigation and audits at the preliminary stages. Open session meetings are for the consideration of Advisory Opinions, regulations and policy determinations, and the final disposition of audits.
107. The Commission also has the authority to conduct audits of a political committee's financial disclosure reports and underlying records. Any political committee that receives public funding is to be audited by the Federal Election Commission (FEC). However, the large majority of the political committees receive private funding; such committees may be subject to audit by the FEC if, based on a review of their political finance reports, the Commission determines that they have failed to meet the threshold for substantial compliance. The FEC maintains a staff of 35-40 auditors to carry out the necessary audit work. See also 2 U.S.C. 438(b), 26 U.S.C. 9007(a), and 26 U.S.C. 9038(a). Audits are based on a review of the financial disclosure reports filed, 2 U.S.C. 438(b).
108. Anyone who suspects a violation in respect of federal political financing rules may file a complaint with the FEC. The Commission may also start an enforcement matter on its own; however, most Commission enforcement matters originate as complaints. Once either is started, the FEC will proceed with the objective of determining whether a violation occurred or seeking conciliation if there has been a violation. If the matter is not successfully conciliated, the Commission can seek judicial action. The enforcement procedures are described in 2 U.S.C. 437g and 437h and at 11 CFR 111.1 to 111.24. Although pending enforcement cases are covered by a confidentiality requirement, as soon as the case is completed, the settlement and various supporting documents are made public. The average time to complete an enforcement case is about 300 days. The file of closed enforcement cases is searchable on the Website: <http://www.fec.gov/em/mur.shtml>. Moreover, the FEC possesses exclusive civil jurisdiction to enforce the FECA, including powers to investigate and file suit in federal court, 2 U.S.C. 437d. The FEC has the authority to depose witnesses and subpoena testimony and documentary evidence in the course of its investigations. If the Commission concludes that a violation of the law has occurred, the FEC must attempt to resolve the matter through a conciliation agreement, which may require the payment of a civil penalty or other remedial measures, 2 U.S.C. 437g. However, if such an agreement cannot be reached with the respondent, the Commission has the authority to bring suit in federal court, 2 U.S.C. 437g(a)(6). The conciliation process is generally not applied in respect of violations of 2 U.S.C. 434(a) relating to the timely filing of political finance disclosure reports and statements, but the FEC has the authority to impose civil penalties in such cases, 11 CFR 111.30 to 111.46. The

Commission may also refer cases to the Department of Justice for criminal prosecution, 2 U.S.C. 437g(a)(5)(C).

*FEC measures and statistics*

109. As noted, the FEC enforces provisions of the FECA through a civil process of conciliation rather than prosecution and conviction. Some cases handled by the enforcement division of the Office of the General Counsel do not require a formal investigation to establish the relevant facts, others do. If the facts are well established in the complaint or internal referral, it is possible to proceed directly to the conciliation stage without a formal investigation. If a conciliation agreement cannot be reached, the Commission can seek judicial action. The chart below lists the number of matters conciliated by year, the number of investigations by year, and the number referred for litigation.

Years	Conciliations	Investigations	Transferred to Litigation
2000	54	9	4
2001	29	22	0
2002	29	12	7
2003	34	33	4
2004	23	44	0
2005	33	33	4
2006	50	33	2
2007	51	15	4
2008	17	5	0
2009	24	10	1
2010	18	15	1
2011, until 31 October	17	16	0

110. In addition to the enforcement system of the FEC, some cases are handled under the system of Alternative Dispute Resolutions (ADR), described in more detail under “sanctions”, below. This process, which has been in place since 2000, is less formal than the enforcement system and it produces, if successful, a negotiated settlement that focuses more on correcting behaviour than on penalties. The chart below reflects the number of cases per year handled by alternative dispute resolution since its beginning in October of 2000.

Year	Cases Referred to ADR
2000	13
2001	54
2002	39
2003	46
2004	72
2005	83
2006	68
2007	65
2008	40
2009	53
2010	23
2011, until 31 October	38

111. The FEC also has the authority to impose penalties on political committees that fail to file disclosure reports or file those reports late. The Commission refers to this as the Administrative Fine Program, described in more detail under sanctions, below. The following chart shows the number of cases handled through this system since 2000.

Year	Administrative Fine Cases
2000	58
2001	328
2002	154
2003	384
2004	133
2005	210
2006	107
2007	255
2008	105
2009	248
2010	64
2011, until 31 October	308

*Department of Treasury, Internal Revenue Service*

112. The US Department of the Treasury plays a role in the administration of federal campaign finance law, jointly with the FEC, by administering the Presidential Election Campaign Fund. The Department establishes the fund from contributions collected through federal income tax returns and disburses funds to candidates as certified by the FEC. 26 U.S.C. 9005-06 and 26 U.S.C. 9036-37. Neither the Department of the Treasury nor the IRS plays any other role in the administration of federal campaign finance law but certain public reporting requirements for tax-exempt organisations provide some transparency of campaign finance information, for example, in respect of so called “527 organisations” and “501(c) organisations”. Organisations that wish to be treated as tax-exempt under the tax code must meet the applicable requirements both for types of activities and information reported. Organisations which are found to have failed to maintain the standards required for their tax exempt status, for example through their activities or their failure to meet reporting requirements, are subject to penalties under the IRC.

*Department of Justice*

113. The US Department of Justice (DOJ) possesses the authority to investigate and prosecute criminal violations of federal election and patronage laws, 2 U.S.C. 437g(a)(5)(C); 18 U.S.C. 594-610. The Department of Justice is a cabinet-level executive agency administered by the Attorney General, who is appointed by the President of the United States with the advice and consent of the United States Senate. As a member of the President’s cabinet, the Attorney General reports to the President.
114. Prosecution of FECA crimes is handled by the Justice Department’s 94 United States Attorneys’ Offices throughout the country and by the Public Integrity Section of the Criminal Division at Department headquarters in Washington, DC. The Public Integrity Section is charged with prosecuting public corruption cases, including campaign financing fraud in violation of the FECA. The Section has an Election Crimes Branch, which is responsible for supervising the investigation and prosecution of FECA crimes by the United States Attorneys’ Offices. The Election Crimes Branch also periodically publishes an election crime manual for the guidance of Department

prosecutors and FBI special agents, Federal Prosecution of Election Offences, Seventh Edition (May 2007)(revised August 2007). The manual is available to the public at <http://www.justice.gov/criminal/pin/docs/electbook-rvs0807.pdf>.

115. The GET was provided with the following statistics of cases concerning political financing violations, 2 USC 431 THRU 457 (extracted from the United States Attorneys' Case Management System):

YEAR	DEFENDANTS FILED	DEFENDANTS TERMINATED <sup>14</sup>	DEFENDANTS GUILTY
2007	3	4	3
2008	2	0	0
2009	4	7	7
2010	3	2	2
<b>TOTAL</b>	<b>12</b>	<b>13</b>	<b>12</b>

These statistics do not include convictions under 18 U.S.C. 371 (conspiracy) or 1001 (false statements) for conspiring to impede the FEC and making false statements to the FEC.

*State and Local level*

116. Some states and some municipalities maintain their own election and campaign finance laws. States and municipalities use a variety of mechanisms and officers, including Secretaries of State, Attorneys-General and local officials, to clarify and enforce election and campaign finance law at that level.

**iii) Sanctions (Article 16 of Recommendation Rec(2003)4)**

*Federal Election Commission*

*Administrative Fines Program*

117. The FEC is authorised to impose civil sanctions (fines) for violations of federal election law involving the failure to file a report on time, the failure to file a report at all and the failure to file within 48-hour notices, 2 U.S.C. 437g(a)(4); 11 CFR 111, Subpart B. If the Commission finds, by an affirmative vote of at least four of its members, that there is "reason to believe" that one of the above listed violations has occurred, the Commission is to send a notification to the political committee and its treasurer, 11 CFR 111.32. Such a notification would include the factual and legal basis for the finding, the schedule of penalties, notice of violations in the current or immediately previous election cycle, a proposed civil penalty and an explanation of the right to challenge the finding and penalty. The respondent must pay the amount or challenge the finding within forty days. If the respondent challenges the determination and the Commission votes to uphold its initial determination, the respondent may challenge the final determination within thirty days before a federal court.
118. The Commission considers four factors when determining a civil money penalty:
- the election sensitivity of a late report;
  - whether the report is considered filed late or not filed;

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<sup>14</sup> The term « terminated » includes investigations that were closed without prosecution, convictions, and acquittals.

- actual level of activity on the report filed late or the estimated level of activity on a report not filed; and
- the number of previous violations in the administrative fines programme.

### *MUR Process and Litigation*

119. The Commission may also investigate alleged violations of campaign finance law through the “matter under review” (MUR) process. The Commission receives complaints of violations from the public, through its internal review of disclosure reports, by referral from other government agencies, and by individuals who believe that there have been violations of the campaign finance law. If the Commission determines that there is a “reason to believe” that a violation *may* have occurred, the Commission staff will investigate the matter, 2 U.S.C. 437g(a)(2). After an investigation, the Commission votes on whether there is “probable cause to believe that any person has committed, or is about to commit, a violation of this Act”, 2 U.S.C. 437g(a)(4)(A)(i). The GET was informed that the Commission may, and often does, use pre-probable cause conciliation when the facts relating to the violation and the conciliation process are reasonably clear.
120. Once the Commission makes a probable cause determination, it is required to enter into conciliation negotiations. A conciliation agreement may require the respondent to pay a monetary penalty, 11 CFR 111.18. The FECA and Commission regulations provide that the maximum penalty may be no more than \$7,500 or “an amount equal to any contribution or expenditure involved”, 11 CFR 111.24(a)(1). However, if a respondent has knowingly and wilfully violated the FECA, the Commission may require a civil penalty that “shall not exceed more than “\$16,000 or an amount equal to 200% of any contribution or expenditure involved in the violation”, 11 CFR 111.24(a)(2)(i). A knowing and willing violation of 2 U.S.C. 441f – contributions made in the name of another – may result in a civil penalty “not [] less than 300% of the amount involved in the violation and shall not exceed the greater of \$60,000 or 1000% of the amount of any contribution involved in the violation” (11 CFR 111.24(a)(2)(ii)).
121. If the Commission and respondent cannot negotiate a conciliation agreement, the Commission may institute a civil action for relief against the respondent in a federal court. The Commission may seek a permanent or temporary injunction, a restraining order or any other appropriate order including a civil penalty, 2 U.S.C. 437g(a)(6).
122. The Commission and the Department of Justice (DOJ) have concurrent jurisdiction to enforce FECA violations. Whereas the Commission has exclusive civil jurisdiction over all FECA violations, DOJ only has criminal jurisdiction over knowing and wilful FECA violations aggregating \$2,000 or more in a calendar year (2 U.S.C. Section 437g (d)). DOJ’s jurisdiction in this regard is not exclusive; knowing and wilful violations can be addressed both civilly by the FEC and criminally by DOJ. The cases most often seen with criminal and civil overlap are (1) Section 441f, conduit reimbursement schemes, (2) Section 439a, embezzlement schemes, (3) Section 441h, fraudulent representation/solicitation schemes, and (4) Section 434, intentional misreporting to the FEC. It was explained to the GET that since Congress enhanced the criminal and civil penalties for knowing and wilful reimbursement schemes in its enactment of the Bipartisan Campaign Reform Act (BCRA, which amended the FECA in 2002), “441f-violations” have been on of the DOJ’s law enforcement priorities in terms of criminal prosecution of FECA violations.

### *Alternative Dispute Resolution (ADR)*

123. The ADR Office, which operates as part of the FEC's Compliance Division, receives cases either by referral from the Office of General Counsel (OGC), the Reports Analysis Division (RAD), the Audit Division (Audit) or by assignment from the Commissioners. The ADR Office will conduct an initial review and evaluation to determine whether or not a case is appropriate for ADR. In order to have a case considered for processing in the ADR programme, the respondent may file a response to the complaint or referral, but must agree, in writing, to the terms for participation in the ADR. The terms require that the respondent agrees to: (1) participate in good faith in the ADR process; (2) set aside the statute of limitations while the case is in the ADR Office; and (3) participate in interest-based negotiations and, if appropriate, mediation. While the ADR programme's negotiation process is similar to the procedures used in the enforcement process described above to obtain a conciliation agreement, there are some important differences; a conciliation agreement usually includes civil penalties and an admission of having violated the FECA. While an agreement reached by the ADR Office may contain a monetary penalty, its primary focus will be the remedial terms negotiated by the parties. Furthermore, ADR tends to place more emphasis on remedial measures, such as hiring compliance specialists or having persons responsible for FEC disclosure attending Commission educational conferences. Also, agreements reached in ADR may modify or exclude an admission of having violated the FECA.

### *Responsible subjects*

124. The Commission may investigate and sanction any person whom the Commission has reason to believe has violated federal campaign finance law, 2 U.S.C. 437g(a). The definition of person at 2 U.S.C. 431(11) includes an individual, partnership, committee, association, corporation, labour organisation, or any other organisation or group of persons, but does not include the federal Government. When the Commission initiates an enforcement action against a political committee, the treasurer is usually named as a respondent along with the committee itself (*Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3, 3 (Jan. 3, 2005)). The treasurer can be named and found liable in his/her official capacity as a representative of the committee. Also, the treasurer can be named and found liable in his/her personal capacity if s/he knowingly and wilfully has violated the FECA or intentionally deprives himself/herself of the operative facts giving rise to the violation. Even when an enforcement action alleges violations that occurred during the term of a previous treasurer, the Commission usually names the current treasurer as a respondent in the action. The treasurer as well as the committee itself can be charged as responsible subjects and political committees may be responsible whether or not they have incorporated.

### *Internal Revenue Service*

125. The Internal Revenue Code provides sanctions for violation of the tax law, including various fees, penalties, and additional taxes due. For tax-exempt organisations, noncompliance also can result in the revocation of their tax exemption. In appropriate circumstances, the IRS can also refer organisations and individuals to the Department of Justice for criminal tax prosecution.
126. The IRS maintains a regular examination program that reviews information submitted on Form 990 and selects organisations for examination. In addition, all allegations of noncompliance by exempt organisations are reviewed by IRS staff to determine whether they warrant further action. When the allegations involve political campaign intervention, a second review is conducted by a

committee of career civil servants. If further action is warranted, the case is referred for examination.

*FEC statistics*

127. The chart below shows the amounts collected in civil penalties from enforcement cases, alternative dispute resolution cases and administrative fine cases for each year starting in 2000. As noted above, these are the result of agreements signed by respondents at the end of the conciliation process.

Years	Civil Penalties			Total
	Enforcement	Alternative Dispute Resolution	Administrative Fine Program	
2000	\$563,680.00	\$850	\$96,305	\$660,835.00
2001	\$579,513.00	\$32,793	\$515,565	\$1,127,871.00
2002	\$1,864,325.00	\$25,000	\$390,143	\$2,279,468.00
2003	\$2,184,375.00	\$27,950	\$751,839	\$2,964,164.00
2004	\$2,356,895.00	\$90,150	\$320,690	\$2,767,735.00
2005	\$1,807,769.27	\$169,300	\$509,810	\$2,486,879.27
2006	\$6,018,300.00	\$119,099	\$229,403	\$6,366,802.00
2007	\$4,779,878.00	\$81,100	\$343,927	\$5,204,905.00
2008	\$504,143.00	\$76,995	\$130,956	\$712,094.00
2009	\$956,500.00	\$130,400	\$368,892	\$1,455,792.00
2010	\$584,600.00	\$87,100	\$63,527	\$735,227.00
2011, until 31 October	\$444,925.00	\$47,200	\$450,099	\$942,224

Other questions

128. There are no immunities under campaign finance law allowing for any persons to avoid proceedings or sanctions for violating political funding regulations.
129. Both the FEC and the Department of Justice have a five-year statute of limitation period for bringing actions, which is measured from the time of the violation, 2 U.S.C. 455; 28 U.S.C. 2462 (civil); 18 U.S.C. 3282 (criminal).

**IV. ANALYSIS**

130. Political financing in the United States has long been subject to a well developed and comprehensive system of regulations based on constitutional requirements, detailed legislation and caselaw at federal and state level. At the outset of this analysis some specific features of the US system are highlighted for a better understanding of the dynamics of the political financing model in the United States.
131. Political parties in the USA have broad structures and are not obliged to be organised in a certain way. The two dominating parties (the Democratic Party and the Republican Party) have, for example, no legal personality. The political parties as such are therefore not directly involved in the flows of political financing, that being the responsibility of the so called political party committees which are distinct organisations representing the parties. Moreover, the federal election model is extraordinarily candidate-centred and even if election candidates are accredited

as belonging to particular political parties, they enjoy extensive autonomy from the parties when running their campaigns, including the financing thereof. Candidates who are running for a federal office are obliged to designate one or more political committee(s) to channel the financial flows relating to their campaigning. Another type of organisation in respect of political financing are the so called Political Action Committees (“PACs”); these are neither party committees, nor candidate committees. The PACs, whose purpose is to influence candidate elections are significant stakeholders in political financing and they appear to play an increasingly important role in the overall financial contributions to election campaigning, whether they coordinate with candidates and political parties or act independently of these stakeholders.

132. The political finance system is subject to multi-level legislation; federal and state legislation have been developed separately and wherever there are overlaps or conflicts between the various levels the “*Supremacy Clause*” of the United States Constitution comes into play; it overrules the authority of state legislation at federal level. U.S. Constitution, Art. VI, cl. 2. The current report is limited to the federal system of political financing and the paramount legislation at this level is the Federal Election Campaign Act of 1971 (FECA), which has been amended several times since its inception. The purposes of the FECA are to regulate and provide for transparency of political financing and, to this end, it contains detailed regulations concerning matters such as limitations on donations, reporting requirements and rules on public disclosure. The FECA also establishes the Federal Election Commission (FEC), the primary agency tasked with interpreting, implementing and enforcing federal campaign finance law. In addition to the statutory rules, the system is based on caselaw and, as a consequence, the regulations do not only develop as intended by the legislature; a significant initiative also lies with those being subject to the regulations through their possibilities to challenge the law or the decisions of the FEC before a court of law. Consequently, the United States Supreme Court and the federal judiciary more generally also have a pivotal role in shaping the political financing regulatory framework.
133. Political financing in the USA is heavily reliant on private funding. Public funding is only available in respect of presidential elections; however, it is subject to certain conditions, in particular in relation to limitations on the spending by those who may benefit from it, and was not used by leading presidential candidates in the recent election. Furthermore, although there have been attempts to develop some forms of public funding in respect of congressional elections, these have never materialised. Neither is there any form of indirect public funding available. Foreign donations in all forms are prohibited under federal legislation. The GET was informed that, traditionally, the most dominant funding in federal elections has been contributions from individuals. However, while corporations and labour organisations are prohibited from making direct contributions to federal candidates and party committees, it appears that independent expenditures by corporations and unions – which in the past were prohibited under federal law – are gaining increasing importance as a result of a recent US Supreme Court ruling (“*Citizens United v. Federal Election Commission*” (2010) holding that limitations on independent spending from such entities are unconstitutional as they violate the *right to freedom of speech* of the US Constitution. This important court ruling is further discussed below under transparency.
134. While the FECA does provide for far reaching limits on the amounts of contributions to candidates and political committees, there are generally no limitations on campaign spending in the US system as the US Supreme Court has also held in this respect that such limitations would violate the *freedom of speech* provisions of the Constitution<sup>15</sup>. Consequently, the financial resources used in federal election campaigning in the USA have been considerable

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<sup>15</sup> “*Buckley v. Valeo*” (1976).

for a long time now and it would appear that this trend has even been reinforced in recent presidential and congressional elections; for example, spending in the midterm elections of 2010 was more than 4 times higher than it was in 2006, and the 2008 presidential elections were the most expensive in US history, exceeding \$5 billion (EUR 3,7 billion<sup>16</sup>); spending in 2012 is expected to surpass that amount<sup>17</sup>.

135. An overarching challenge in regulating political financing in the United States appears to be one of size and scale. There is a multitude of stakeholders; a vast web of legislation and regulations serves to define which organisations and which activities are subject to political financing disclosure rules. Accordingly, what appear to be very similar organisations in terms of purpose may sometimes be subject to different transparency and oversight requirements. The distinction between political financing to support particular candidates or parties on the one hand and the so called issue of advocacy (support of a cause) on the other is currently subject to much debate in the USA, not least in the aftermath of the "*Citizens United*" case referred to above.
136. The following analysis focuses on the three distinct areas of concern for the present evaluation, namely transparency of political financing, the supervision of such financing, the sanctions applicable when funding rules are violated and their enforcement.

### Transparency

137. The FECA provides a comprehensive legislative framework in respect of a big portion of the total political financing at the federal level in the USA. This law is applicable in respect of all types of "political committees", a term which is well defined in the law and which comprises committees established on behalf of political parties (party committees) and election candidates (principal campaign committees or other forms of committees authorised by candidates); the FECA is also applicable in respect of the so called "connected organisations" (often referred to as PACs) that are not political committees, but which directly or indirectly establish, administer or financially support political committees. The provisions of the FECA require, *inter alia*, that political committees are obliged to have a treasurer who must keep detailed accounts of all contributions received by the committee, whether monetary or in-kind. The bookkeeping requirements are very similar for all political committees. The FECA is clear and detailed in respect of what is to be considered a contribution, which, *inter alia*, comprises any gift, membership subscription, income from fundraising event, loan (except solid bank credits or the like), advance or deposit of money etc. Payments for personal compensation are also covered. The FECA contains clear definitions of what does not represent a contribution, for example, volunteer services provided without compensation. In addition to the FECA, there are guidelines issued by the FEC containing further details concerning matters such as what is to be considered income from property, leasing out of office space etc.
138. The FECA requires that the accounts of political committees contain the name and address of any person making a contribution in excess of \$50 (EUR 37) along with the date and the amount of the contribution. This implies that anonymous donations to political committees are not allowed in excess of that amount. Moreover, in respect of contributions exceeding \$200 (EUR 149) per year the required details are even stricter in that the contributor's identity (ie name, address, occupation, and employer) is to be noted in the accounts. No currency (bills or coins) contributions exceeding \$100 (EUR 75) are allowed. In addition, the FECA provides for a full

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<sup>16</sup> All exchange rates as of 6 December 2011

<sup>17</sup> Source: Center for Responsive Politics

range of limits as regards the amounts of the contributions that may be provided to the various forms of committees by individuals as well as by other committees<sup>18</sup>. Furthermore, the FECA prescribes that any disbursement over \$50 (EUR 37) is to be accounted for together with the name and address of the receiver. The accounts are to be held by the committee for at least three years.

139. The FECA obliges political committees to submit financial reports to the Federal Election Commission, which in turn makes them publicly available in person at the FEC in Washington, D.C. or on-line. There is no independent obligation upon any of the various political committees to make their accounts public themselves. The FEC has developed detailed standard forms to be used to this end, requiring, *inter alia*, precise information concerning contributions, donors, disbursements and receivers. In this context it is important to bear in mind that the US legislation does not make a distinction between routine party funding and campaign financing. All contributions to federal candidates are aggregated on the basis of an election cycle, which begins on the first day following the date of the previous general election and ends on the date of the election day, while contributions to political party and other political committees are based on a calendar year. Nevertheless, the intensity of the reporting may differ. For example, a national party committee is obliged to file monthly reports in both election and non-election years, a principal campaign committee of a congressional candidate must file a financial report 12 days before and another report 30 days after the election in addition to quarterly reports every year. The FECA prescribes that the financial reports are to be made public within 48 hours; however, the GET was told that in most cases the FEC manages to make reports available on-line within 24 hours.
140. The GET is of the opinion that the overall transparency of political financing under the FECA is of an exemplary high level and fully in line with the pertinent requirements of the Council of Europe *Recommendation Rec (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns* and it appears that there is also a generally high degree of compliance in practice with the relevant legislation and prescriptions of the FEC. The regulatory framework, which has evolved over four decades and is continually adapting to new legislation, court rulings and political financing practices, is broad and covers a wide range of actors, including in particular the various forms of political committees. The disclosure obligations are comprehensive, including the requirements to disclose detailed information at regular intervals. The Federal Election Commission plays a key role in ensuring transparency in political financing under the FECA; it manages a state-of-the art financial database and publishes the information on its website within very short timescales<sup>19</sup>. The GET wishes to stress that the FEC's website is an impressive source of information and financial information can be viewed and downloaded by anyone for further analysis.
141. In respect of congressional and presidential elections, financial information is submitted electronically to the FEC. However, the GET noted with some concern that in the case of Senate elections, the information is submitted in a PDF format to the FEC which posts those reports online, usually within 48 hours. Data from those reports used in the interactive information on contributors and recipients must be hand-entered before included in that system. This takes approximately 30 days. The GET was told that in the past, the FEC has recommended to Congress that electronic filings should be required for Senate elections as well, but this has not

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<sup>18</sup> For details see table in the Descriptive part, paragraph 68.

<sup>19</sup> The FEC website had more than 120 million "hits" in the fiscal year 2011 (October 2010 – September 2011); the figure is normally higher in an election year, according to the US authorities.

materialised to date. Furthermore, a general concern identified by a number of interlocutors met on-site relates to the sheer volume of data that is submitted to the FEC. While all this information is made publicly available, the vast quantity of information can, in practice, make it difficult and time-consuming to conduct analyses and identify problematic issues relating to political financing. The GET was informed that the FEC does not at present undertake any data analysis and that in many cases journalists and academics do not have enough time and/or resources available in order to undertake this kind of research. The GET understood that some think-tanks and academic projects are attempting to address this matter; however, more work could be beneficial in this area. Apart from these remarks, the GET did not come across any significant shortcomings and representatives of civil society met on-site did not flag any other major problems in respect of the general transparency under the FECA. The GET recommends **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.**

142. Leaving aside the well developed system for transparency under the FECA, the GET notes that not only the organisations covered by this particular legislation engage in political financing in the USA. Different types of other organisations that do not necessarily qualify as political committees under the FECA, and are thus not subject to FECA regulations relating to political committees, are also involved in political financing to various degrees. Of concern in this respect are two types of tax-exempt organisations, the so called “527-” and the “501(c)-organisations”, named after “their” respective sections in the federal tax legislation, the Internal Revenue Code (IRC).
143. Section 527 IRC comprises “political organisations”, including the various political committees regulated by the FECA and the so called PACs. All 527-organisations engaged in political activity at the federal level report publicly their contributions received and their expenditures; those that qualify as “political committees” (ie those raising funds for a specific party or a candidate) file with the FEC; those that do not, file with the IRS. The GET learned that 527-organisations may also be run by interest groups to raise funds to spend on candidate support or opposition outside the restrictions that apply to party or candidate committees. While such advocacy groups are independent from party and candidate committees, they could possibly coordinate amongst themselves to support the electoral campaigns of candidates and parties more broadly. Such 527-organisations report to the IRS. The US authorities have, however, stressed that the information about their donors and their expenditures is public, whether the 527s report to the FEC or the IRS.
144. The GET noted that the use of so-called “501(c)-organisations” in connection with federal elections is currently subject to controversy in the USA. Such organisations are non-profit and tax-exempt as defined in the IRC. This varied group includes, for example, social welfare organisations (501(c)(4) IRC), labour organisations (501(c)(5) IRC) and chambers of commerce (501(c)(6) IRC). To keep their tax-exempt status, they must be primarily engaged in activities that further their exempt purposes and they may raise money to support their tax-exempt purposes without limits. 501(c)-organisations may also engage in other activities that are not in furtherance of the exempt purposes, including for example political campaign activities, provided these are limited. The GET understood that, for example, a 501(c)(4)-organisation (primarily dealing with social welfare) can contribute financially to political election campaigns, as long as it is primarily engaged in other activities that do further exempt purposes, to an extent which is considered limited in comparison with its primary purpose, without being obliged to disclose publicly from where its funding comes as information on contributions to the 501(c)-organisation is protected

from disclosure by statute. Even though there appears not to be a strict rule for assessing what “*primarily engaged in furthering exempt activities*” means<sup>20</sup>, the GET understood that there is room for quite extensive political campaigning by such organisations without the activity being considered its “primary activity”. The GET was informed that expenditures for such purposes are to be reported by the 501(c)-organisations publicly<sup>21</sup> and that substantial contributors are to be reported to the IRS, however, the contributions are not made public. Moreover, the dialogue between tax authorities and the FEC is generally limited to educational efforts to help tax-exempt organisations understand which reporting requirements are applicable. It should also be mentioned that if a 501(c)(4)-organisation provides a contribution to a candidate or a party, that information is to be reported by the candidate or party committee to the FEC; however, the contributions provided to the 501(c)(4)-organisation remain not public. Consequently, it appears to be possible for a contributor, who does not wish to have his/her name disclosed to the public, to provide a general contribution<sup>22</sup> to the 501(c)-organisation, which in turn makes political expenditures. The GET learned from numerous sources and interlocutors that these 501(c)-organisations, some of which have significant financial resources at their disposal, serve as vehicles for so called “soft money” emanating from undisclosed donations to support parties and candidates.

145. The use of 501(c)-organisations for political campaigning purposes is not unrelated to the much debated US Supreme Court decision in the case *Citizens United v. FEC* (2010) which eliminated the previous prohibition on corporations and unions from using their general treasury funds to make electioneering communications. It was explained to the GET that campaign spending in the 2010 midterm elections by groups not subject to the disclosure rules of the FECA had increased following the above Supreme Court decision and it was expected that such funding, e.g. for vast media campaigns, would further increase in the future. GET interlocutors also expressed the view that such funding provides a vehicle for more aggressive candidate-specific attack campaigns, without the corresponding accountability that arises with public disclosure of donors or funding sources.
146. To sum up, the GET concludes that the so called “issue advocacy” or campaigning for a particular cause, does not appear to be contradictory to the requirements of the Recommendation Rec (2003)4, which is directed towards the transparency of funding in respect of political parties and election candidates. However, candidate and political party campaigning by certain types of 501(c)-organisations raises concerns in the context of the Recommendation Rec (2003)4, as such organisations, which do not disclose their incoming contributions publicly, may contribute to candidate and party campaign activities. Although such organisations may not be under the control of candidates or parties in a strict sense, they can clearly be closely aligned with them for the purpose of supporting their campaigns. The use of such organisations may therefore be a means to circumvent public disclosure rules concerning contributions to political financing. The GET also notes that there is a growing unease in the United States that contributions from such organisations were becoming increasingly important in recent campaigns at the federal level and that there were signs of this trend to continue. However, as there may not be more than an indirect link between 501(c)-organisations and candidates or parties, the GET only recommends **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**

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<sup>20</sup> The US authorities have stated that there is not a precise percentage test in this respect because all facts and circumstances must be considered (such as volunteer time) rather than engaging in a pure monetary calculation.

<sup>21</sup> On the “Form 990”

<sup>22</sup> Such a contribution cannot be “earmarked” for such a purpose, according to the US authorities.

**the donation/funding is intended to independently affect the election of a particular candidate or candidates.**

## Supervision

### *Internal auditing*

147. There are no special requirements at federal level for the various forms of political committees or any other forms of organisations engaged in political funding to have their accounts or disclosure reports audited. However, the GET learned during the on-site visit that national party committees would only submit their accounts or reports after having had them certified by auditors and that auditors are used to check accounts and reports to a large extent in respect of other forms of political committees and organisations as well.

### *Monitoring*

148. The Federal Election Campaign Act (FECA) provides the primary responsibility for the monitoring and regulation of campaign financing to the Federal Election Commission (FEC). The FEC, which over the past 35 years has been supporting transparency and disclosure of political financing through its activities, is established as an independent agency with the main duties to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions and to oversee the public funding of Presidential elections. The Commission is made up of six members, who are appointed by the President and confirmed by the Senate. Members are according to the law to be chosen, *inter alia*, on the basis of their experience, integrity, impartiality and good judgment and they may not be part of the executive, legislative or judicial branches. Commissioners and other employees, once in office, are also subject to a number of restrictions, such as to retain the right to participate in political activities or other business that may appear to create conflicts of interest. Each member serves a single six-year term. On the basis of these legal requirements, the GET is of the strong opinion that the institutional independence of the FEC is well provided for under law.

149. The FEC has a wide scope of activities, including the publication of financial reports of political committees, enforcing the law, clarifying the law and regulating when necessary in the form of advisory opinions etc. The FEC appears to be a well-resourced organisation with some 350 employees and a budget of \$66 million (EUR 49 million), apparently adequate for its current tasks. The GET has already praised the high degree of transparency provided for by the FEC web page in respect of the financial reports which are, to a large extent, promptly made accessible on-line for public scrutiny. The GET furthermore notes that public scrutiny is an important part of the monitoring as most of the FEC investigations originate as complaints from the public. Anyone may submit a complaint to the Commission; however, the FEC may also initiate cases *sua sponte*. Currently, the FEC does not carry out random audits of the accounts of political committees (and does not have statutory authority to do so), its immediate control being limited to the checking of the disclosure forms, other information or complaints. In case the FEC starts an investigation, however, it may request the accounts and justifications for an in-depth audit of the finances of the political committee in question.

150. The GET furthermore notes that the FEC has a range of different measures at its disposal once violations of the financing regulations have been discovered. Above all, these measures focus on conciliation which includes public admissions of responsibility for violations of the law, civil financial penalties, and other measures such as assistance and education. A conciliation process

may start without any formal investigation if the facts are clear. It was explained to the GET that most cases are solved within the conciliation process which is largely about explaining how to apply the financing rules. Only very few cases go to litigation, and this is often in situations where the dispute is about the interpretation of the law, for example, whether to define an organisation as a political committee obliged to report to the FEC or as any other form of organisation subject only to the supervision of the Internal Revenue Service. The FEC decides whether to open an investigation as well as on the final result of an investigation: for example to agree on a conciliation agreement, on sanctions or whether to submit a case to the Department of Justice for criminal investigation and prosecution. The different possibilities to handle violations of the political financing legislation depend on the issue and level of complexity of the case. The variety of tools at the disposal of the FEC – some of which are also explained under “Sanctions” below – is a strength of the system and the GET is of the opinion that this monitoring, as established by the FECA, goes well beyond the requirements of Recommendation Rec (2003)<sup>4</sup>.

151. Having said that, the GET cannot disregard that the partisan composition of the six-member Federal Election Commission influences the nature of some of its decisions regarding political financing issues in practice and sometimes prevents the Commission from taking action. Under the existing legislation, no more than three members of the Commission may be affiliated with the same political party and at least four votes are required for the FEC to take official action. This setting may sometimes result in “deadlock” situations where the Commission is divided evenly on a decision and therefore no action can be taken. The GET was informed by interlocutors representing civil society as well as political committees, that the partisan nature of the FEC in conjunction with the possibility of an even number of Commissioners, might hamper the FEC’s ability to operate effectively in controversial cases. These interlocutors stated that FEC decisions as a result had occasionally been inconsistent, depending on the composition of the FEC. Other interlocutors, however, emphasised that this structure is appropriate given the partisan nature of the United States political system as a whole. The GET understood that the situations in which the Commission is evenly divided would typically appear in enforcement matters in relation to issues such as reporting requirements, political committee status and the like. When the Commission is evenly divided, it does not make an affirmative decision on a case and, in matters in which a potential criminal violation of FECA occurred, they do not make a referral to the Department of Justice (DOJ). All decisions of the Commission are public, and comments by the Commissioners as to their votes are also public. The GET is aware that the current structure of the Commission in combination with the voting requirements provided by the FECA has hampered the efficiency of the Commission<sup>23</sup>. There have been legislative attempts in the past to fix this problem by changing the number of Commissioners; these attempts have failed. The GET, which overall has a very positive view of the FEC and its efficiency, believes that the problem of evenly-divided Commission votes, which may appear in respect of crucial matters, requires further attention by the US authorities. The GET therefore recommends **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.**
152. While the FEC is the agency charged with enforcing federal campaign finance rules, the federal tax authorities (IRS) administer federal tax laws, including ensuring that organisations claiming tax-exemption adhere to the requirements for that. Organisations participating or intervening in federal political campaigns are accordingly subject to, and must comply with, both sets of rules and both agencies have concurrent, but separate, jurisdiction over these organisations. As stated above, under certain conditions 501(c)-organisations are only monitored by the IRS and not by

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<sup>23</sup> The US authorities argue that evenly divided votes do not necessarily affect the Commission’s effectiveness.

the FEC, although they contribute to political campaigns. Such organisations appear to play an increasingly important role in political campaign financing – through the provision of “soft money” – in various forms (see paragraphs 144-146). The GET is of the opinion that also this form of political funding, would merit a more profound monitoring, however, that issue needs to be considered in the light of the feasibility of providing more transparency of political financing through such organisations, as recommended above (paragraph 146).

## Sanctions

153. As already noted in this report, the FECA provides for various enforcement actions depending on the type of violation. Similarly, there are a number of possible civil sanctions available under the FECA, well connected to the actions taken by the FEC. Furthermore, the Department of Justice is responsible for the enforcement in relation to criminal infringements of the law and those sanctions are to be decided by the courts.
154. Once the FEC has taken a decision that there are reasons to believe that a violation has occurred, a notification is to be sent to the political committee and its treasurer, which includes the facts and legal basis of the case and the schedule of penalties and the proposed civil penalty. The level of the penalty is to be calculated on the basis of a well defined formula provided for in the law where factors such as how late a report has been submitted, or if it has not been submitted at all. The details of a report and the sensitivity of the reporting in relation to the election are taken into account in conjunction with the amounts involved. In the Administrative Fines context, the respondent has to pay the fine or challenge it before a court. In situations where the FEC chooses to enter into a conciliation process or an alternative dispute resolution process, a final agreement may be combined with a civil fine. This enables FEC officials to negotiate directly with individuals/organisations to resolve compliance issues in cases that do not set legal precedents. This allows for speedy resolution of cases and, particularly in the context of the ADR process, focuses on educating, rather than punishing those involved.
155. There is also the possibility for the FEC to refer cases to the Attorney General (Department of Justice) in order to have a case prosecuted following the criminal justice process, where possible sanctions include fines, restitution and imprisonment.
156. The GET concludes that the FEC has a rather impressive range of enforcement and sanction tools at its disposal, which can be used – and are apparently being used – in a flexible way depending on the particular situation. The fines available range from zero to hundreds of thousands of dollars. As an example the GET was informed that a national political party committee had received a \$75,000 fine for filing one day late. The Department of Justice also has a proven track record (appended to the report) of pursuing criminal cases concerning offences relating to political financing. Penalties have included prison sentences, probation, repayment of funds and fines. The GET also notes that the FEC may in principle investigate and sanction any person involved in violations of the law, including natural and legal persons. The various enforcement measures and sanctions available to the FEC allow for proportionality to reflect the nature of infringements and to encourage future compliance. This is a strength of the US system.
157. Finally, the GET wishes to stress that should the US authorities further consider the establishment of more in depth monitoring of organisations for political financing, currently under the purview of the federal tax authorities, such mechanisms would also need to be able to impose sanctions which are effective, proportionate and dissuasive.

## V. CONCLUSIONS

158. Political financing in the United States is subject to Constitutional requirements, detailed legislation, caselaw and regulations, which overall ensures for an extraordinarily transparent system in respect of the main stakeholders providing political financing at the federal level, the various forms of political committees, operating on behalf of political parties, election candidates or other interest groups. The Federal Election Campaign Act (FECA), which has been operational for more than 35 years, contains detailed regulations concerning limitations on donations, reporting requirements and public disclosure of contributions as well as the identity of contributors.
159. The enforcement of these rules is entrusted to the Federal Election Commission (FEC), a well resourced independent agency in charge of a wide scope of activities, most notably to supervise and publicise financial reports submitted by some 11 000 political committees and other organisations registered with the FEC. Moreover, this agency is also a regulatory body, equipped with tools for the effective implementation of the FECA regulations, *inter alia*, through processes of conciliation and education. The detailed disclosure of financial reports is particularly impressive. A more controversial matter highlighted in the report is the partisan composition of the Federal Election Commission which, in combination with the voting requirements of this agency to act (4 out of 6 votes required), sometimes leads to “deadlocks” (3-3) that prevent the Commission from taking action.
160. Moreover, the FECA provides the FEC with means to investigate any person suspected of violations of the political financing legislation and regulations as well as a wide range of proportionate and dissuasive sanctions, which may be adapted to reflect the nature and seriousness of the infringements and to encourage future compliance, e.g. following a conciliation process. This is a strength of the system.
161. While the FECA regulation of the flow of so called “hard money” deserves much praise for its transparency and efficient monitoring, there are stakeholders contributing financially in the election campaigning which are not covered by the rigorous regulations of the FECA. Political financing for a particular cause (“issue advocacy”) and not directly for or against a political party or a candidate is not covered by the transparency rules. Moreover, the report highlights in particular the so called “501(c)” – organisations under the Internal Revenue Code (IRS), which under certain conditions are not subject to the same public disclosure requirements as apply in respect of political committees. The potential use of such organisations as vehicles to escape public transparency for political financing (“soft money”) in respect of candidates appears to be an increasing phenomenon along with the general rise in the total election campaign spending in all federal elections.
162. In view of the above, GRECO addresses the following recommendations to the United States of America:
- i. **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 (paragraph 141);**
  - ii. **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 (paragraph 146);**

- iii. 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 (paragraph 151).**

163. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of the United States of America to present a report on the implementation of the above-mentioned recommendations by 30 June 2013.

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