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Groupe d'États contre la corruption

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Corruption prevention in respect of
members of parliament, judges and prosecutors

EVALUATION REPORT UNITED STATES OF AMERICA

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EXECUTIVE SUMMARY

1. The Constitution of the United States separates the government into three distinct branches, the legislature, the judiciary and the executive power. All three branches are covered to some extent by the current report. It has long been recognised, in the United States, that corruption represents a constant threat to the proper functioning of any of these branches and, as a consequence, considerable resources are devoted to its prevention. In addition to the strict separation of powers under the U.S. Constitution which, in itself, entails prevention of corruption and a solid legal framework, several institutions and measures are in place to specifically target and prevent risks of corruption through criminal legislation and enforcement, codes of ethics, disclosure requirements and the like. Such measures are also to be seen within the broader framework of general transparency of all branches of the federal government, based on substantial requirements for transparency of information and of processes.

2. The United States is commended for the statutory framework in place regulating the legislative process in Congress – in the Senate as well as in the House of Representatives. Each house has a code of conduct that covers such topics as gifts, partiality, conflicts of interest, relationship with lobbyists, outside activities, negotiating for employment after Congressional service and post-employment, there are requirements for public financial disclosure, a system of confidential counselling and training. Furthermore, there are ethics committees in place and non-criminal enforcement mechanisms in both chambers of Congress. While the process leading up to the introduction of a bill in Congress is not much transparent, because Members of Congress may accept and use legislative proposals from any source, the legislative process, once a bill is introduced in Congress by a Member, is subject to a high degree of transparency; bills are made available to the public and the debates, at committee or plenary levels, are open to the public as a main rule. Furthermore, as a result of the existence of a large lobbying industry, the United States established, a long time ago, far reaching lobbying disclosure rules in respect of lobbyists' contacts with Members and other representatives of Congress. While there are far reaching regulations in place preventing conflicts of interest through different regimes of periodic and annual disclosure, Members of Congress should also disclose unforeseen conflicts of interest as they appear (*ad hoc*). In addition, the efficiency of the internal supervisory bodies in Congress (the "Ethics Committees") need to be reinforced as well as the training of Members in certain respects.

3. The principle of judicial independence, as enshrined in the U.S. Constitution, is a fundamental feature of the United States. That said, the fact that appointments of federal judges are made by the President and confirmed by the Senate, clearly provides a political dimension to this process; however, this is deeply rooted in the U.S tradition of democracy, and the selection and recruitment procedure of judges is far from being a purely political one. The suitability, as well as the integrity of the nominees, are scrutinised thoroughly at various instances and, once appointed, judges enjoy independence from the legislature and the executive branch, which is also confirmed by public opinion surveys. Distinct from the judges with plenary jurisdiction ("Article III judges"), who enjoy Constitutional safeguards, such as life tenure, there is concern about the lack of similar protection being provided to magistrate judges and bankruptcy judges, who are also entrusted with judicial decision-making in their own capacity, even if only in certain domains. It is acknowledged that the judiciary has its own code of ethics as adopted and continuously updated by the Judicial Conference. The Code is formally applicable to judges of the lower federal courts, while the Justices of the Supreme Court are not bound by it.

4. The Department of Justice (DOJ), which is a Cabinet level department, provides the prosecution service in the United States. This means that the prosecution system is part of the executive branch of government and that it cannot, as such, be regarded as an

agency independent from this power. That said, the prosecution functions are guided by numerous checks and balances within the system, as well as externally, and ultimately through the powers of an independent judiciary. While the leadership of the DOJ consists of political appointees, the prosecutorial work is carried out primarily by career prosecutors, belonging to the civil service. Considering the strong hierarchical structure of the DOJ and, the fact that prosecutorial decisions are subject to far-reaching discretionary powers, it is particularly important to provide safeguards, such as obliging the DOJ to maintain justifications for critical decisions, e.g. not to prosecute or to move prosecutors from a case. Moreover, it appears that disciplinary investigations and sanctioning of prosecutorial staff need to be carried out by entities enjoying adequate autonomy and independence and that transparency vis-à-vis the general public be safeguarded appropriately in order to be, and to be seen to be, fair and effective.

I. INTRODUCTION AND METHODOLOGY

5. The United States of America joined GRECO in 2000. Since its accession, the country has been subject to evaluation in the framework of GRECO's First (in March 2004), Second (in October 2006) and Third (in December 2011) Evaluation Rounds. The relevant Evaluation Reports, as well as the subsequent Compliance Reports, are available on GRECO's homepage (www.coe.int/greco).

6. GRECO's current Fourth Evaluation Round, launched on 1 January 2012, deals with "Corruption prevention in respect of Members of parliament, judges and prosecutors". By choosing this topic, GRECO is breaking new ground and is underlining the multidisciplinary nature of its remit. At the same time, this theme has clear links with GRECO's previous work, notably its First Evaluation Round, which placed strong emphasis on the independence of the judiciary, the Second Evaluation Round which examined, in particular, the executive branch of public administration, and the Third Evaluation Round, which focused on the incriminations of corruption (including in respect of parliamentarians, judges and prosecutors) and corruption prevention in the context of political financing.

7. Within the Fourth Evaluation Round, the same priority issues are addressed in respect of all persons/functions under review, namely:

- ethical principles, rules of conduct and conflicts of interest;
- prohibition or restriction of certain activities;
- declaration of assets, income, liabilities and interests;
- enforcement of the applicable rules;
- awareness.

8. As regards parliamentary assemblies, the evaluation focuses on Members of national (federal) parliaments, including all chambers of parliament and regardless of whether the Members of parliament are appointed or elected. Concerning the judiciary and other actors in the pre-judicial and judicial process, the evaluation focuses on prosecutors and on judges (federal level), both professional and lay judges, regardless of the type of court in which they sit, who are subject to national (federal) laws and regulations.

9. In preparation of the present report, GRECO used the responses to the Evaluation Questionnaire (Greco Eval IV (2016) 5E) by the United States, as well as other data, including information received from civil society. In addition, a GRECO evaluation team (hereafter referred to as the "GET"), carried out an on-site visit to the USA on 2-6 May 2016. The GET was composed of Mr Alastair BROWN, Sheriff of Tayside Central and Fife Sheriff's Chambers (United Kingdom), Mr Jean-Christophe GEISER, Scientific Consultant, Federal Office of Justice (Switzerland), Mr Rainer HORNUNG, Deputy Chief Prosecutor, Lörrach Prosecution Office (Germany), and Mr Christian MANQUET, Head of Department for Criminal Law, Federal Ministry of Justice (Austria). The GET was supported by Mr Björn JANSON, Deputy Executive Secretary of GRECO.

10. The GET interviewed representatives of the Congress, including officials of the Senate Committee on Rules and Administration, the Senate Ethics Committee, the House Ethics Committee and the Office of Congressional Ethics. Furthermore, the GET met with representatives of the judiciary, including judges of courts of appeals, district courts and bankruptcy courts, and representatives of the Judicial Conference and the Federal Judicial Center. The GET also interviewed officials of the U.S. Department of Justice, various departments, including public prosecutors and representatives of the Federal Bureau of Investigation. The GET's meetings also included representatives of civil society (e.g. American Bar Association, Association of Assistant U.S. Attorneys, Campaign Legal

Center, Common Cause, Project on Government Oversight, Government Affairs Lobbyists, Public Citizen), academics and a variety of media representatives.

11. The main objective of the present report is to evaluate the effectiveness of measures adopted by the authorities of the United States in order to prevent corruption in respect of Members of Congress, judges and prosecutors at the federal level and to further their integrity in appearance and in reality. The report contains a critical analysis of the situation in the country, reflecting on the efforts made by the actors concerned and the results achieved, as well as identifying possible shortcomings and making recommendations for further improvement. In keeping with the practice of GRECO, the recommendations are addressed to the authorities of the United States, which are to determine the relevant institutions/bodies responsible for taking the requisite action. Within 18 months following the adoption of this report, the U.S. shall report back on the action taken in response to the recommendations contained herein.

II. CONTEXT

12. GRECO noted in its First Evaluation Round Report¹ on the United States a high degree of recognition of the potential risks of corruption, the need for dedicated anti-corruption mechanisms, including preventive measures and a well-developed transparency policy. Corruption prevention was furthermore dealt with in GRECO's Second Evaluation Round Report² on the United States according to which it is acknowledged by the U.S. authorities that corruption poses a constant threat to the proper functioning of public administration at all levels of government and, consequently, that considerable resources are devoted to its prevention.

13. Moreover, also in respect of political financing, GRECO has noted that the United States has in place mechanisms which ensure, overall, an extraordinarily transparent system in respect of the main stakeholders providing financing to politicians, as concluded in GRECO's Third Round Evaluation Report on the United States³. The findings of that Report connect to those of the current Report as far as politicians (Members of Congress) are concerned. GRECO's Third Round Report also indicate that the prosecution of corruption offenses is a high priority in the United States and the mechanisms and practices developed under the legal and enforcement regime are assessed as being effective in detecting, prosecuting and deterring corruption; there are to a large degree a variety of different possibilities to prosecute offenders engaged in various forms of corruption, which also adds to the list of measures aiming at prevention of this phenomenon.

14. Public perception of the level of corruption in the United States has been the subject of several surveys, but is not often (if at all) aiming at only the federal level, which is the sole focus of this Report. Analysing the methodology of the many anti-corruption surveys that include the United States, it appears that the measurements have often been taken of the whole country, rather than of the federal government, so results include the public's perception of corruption occurring at the local level. That being said, Transparency International's (TI) Corruption Perception Index places the United States as number 16 among 177 countries ranked and, according to TI's Global Corruption Barometer (2013), a majority of American interviewees consider that the level of corruption was increasing in the period 2011-2013 (2014-2016 not available), however, not as much as in previous surveys. In the World Bank's World-wide Governance Indicators, the U.S. control of corruption yields a score of 89.9, which is 20th among 191 rated nations.

15. Turning to the focus of GRECO's Fourth Round Evaluation, TI's Global Corruption Barometer similarly queried the public's perception of public services generally, and was not limited to the federal level. Its (2013) report indicates that, of the subjects of this review, political parties (76%) and the legislature (61%) top the list among institutions perceived as being most corrupt. The figures concerning officials of the executive branch (which in the United States includes prosecutors) are slightly better (55%). The figures concerning the judiciary are even more favourable (42%). Yet, as noted, each of those measures comprise responses concerning both federal and local public entities; nothing has focused on the federal level as such.

16. The relative level of trust or perception of corruption within these three institutions, however, as roughly indicated by the above surveys, follow to a large extent the trends in most other GRECO member states and these trends were generally "confirmed" during interviews held by the GET on site.

¹ Greco Eval I Rep (2003) 2

² Greco Eval II Rep (2005) 10

³ Greco Eval III Rep (2011) 2

III. CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT

Overview of the parliamentary system

17. The United States Congress has a bicameral legislature consisting of the Senate and the House of Representatives. The Senate (upper house) is comprised of 100 Members (Senators or Members of Congress); two Members elected by popular vote in each state. The House of Representatives is comprised of 435 Members elected by popular vote from population-based districts apportioned within each state based on results from the U.S. census (House Members or Members of Congress). Senators are elected for terms of six years and one third of the Senate stands for election every two years. Members of the House are elected for two year terms and the entire Membership stands for election every two years.

18. The Constitution provides that Senators must be at least 30 years of age and House Members at least 25; House Members must have been U.S. citizens for at least seven years, and Senators must have been U.S. citizens for at least nine years, prior to election. All Members of Congress must be residents in the state they are chosen to represent (U.S. Const. Art I, §§ 2 and 3).

19. Members of Congress are elected in order to represent the interests of the constituents in their respective states or congressional districts, as well as regional and national interests. Both Senators and Members of the House of Representatives are chosen through direct elections.

20. 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.

21. 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 to 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 House Members : "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).

22. Each chamber of Congress is responsible for establishing its own rules of conduct and discipline. However, the Constitution (Article 1, Section 5) explicitly authorises each chamber to expel any Member with a formal vote and concurrence of two thirds of its Members. The Constitution does not specify the grounds on which a formal vote for expulsion should take place. There are no statutory or regulatory provisions that authorise the recall of a Member of Congress.

Transparency of the legislative process

23. The Standing Rules of the Senate and the Rules of the House of Representatives outline the procedure for the legislative process in the Senate and House, respectively.

24. An idea for a bill may come from anybody; however, only Senators or House Members can introduce a bill in Congress and it can only be done when the legislature is in session. All bills indicate the name of the Senator or Member of the House who

proposes the legislation; legislation drafted and submitted by the executive branch will note that it is being introduced by that Member upon request. There are four basic types of legislative measures: bills, joint resolutions, concurrent resolutions and simple resolutions. Bills and joint resolutions are legislative measures that create new laws when passed by both houses in identical form and signed by the President. Concurrent resolutions are legislative measures passed by both houses in identical form, but do not have to be signed by the President. Concurrent resolutions are binding only on the Congress. Simple resolutions are legislative measures passed by only the Senate or the House. Simple resolutions do not have the force of law, but may be binding on the chamber that passed the resolution. A bill's type must be determined. A bill may either be public or private. A private bill affects a specific person or entity and a public bill is one that affects the general public. All types of legislation are subject to the same general transparency rules.

25. Once draft laws are introduced in the Senate or the House of Representatives they are made available to the public via <https://www.congress.gov> and the Government Publishing Office's Federal Digital System. Before the Senate or House plenary considers a bill, it is generally first reviewed and reported out by a committee. Thus, after introduction, new bills are then normally assigned to a committee or committees having jurisdiction over the subject matter for further review.

26. There are 23 House committees and 20 Senate committees, established by the Rules of the House and the Senate respectively, each have jurisdiction over different areas of public policy, such as agriculture, education, labour issues, justice, international relations etc. The membership of committees varies between 6 and 50. Each Committee is granted the authority to establish their own rules of procedure (Senate Rule 36 and House Rule 10).

27. Thousands of bills are introduced in every Congress; however, not every bill is actually considered by a committee of jurisdiction, and not every bill that is considered by a committee of jurisdiction is actually reported out by the committee. The committees of jurisdiction will usually hold hearings on significant bills. All committee meetings (Senate and House) are, as a general rule, open to the public and can only be closed where the rules exceptionally allow for closed meetings (e.g. for reasons of national security etc.). Committees must give public notice of their hearings at least one week in advance. The notice must give the date, place, and subject matter of the hearing, and the committees use the Senate and House webpages respectively for such notices. Furthermore, committees must make a video recording, audio recording or transcript of their meetings. These recordings are to be made available through publication on the Internet. A committee may also send a proposed bill to a subcommittee for further consideration. Subcommittee meetings are subject to the same transparency rules as full committees.

28. The committee debates the bill and may or may not make changes to it. If a bill includes many amendments, the committee may decide to introduce a new ("original bill") with a new number. Congress's website posts the status of every bill continuously and updates major action taken on the bill. Each version of the text of a bill is posted online. Committee reports are usually issued by House and Senate committees following the consideration of a specific piece of legislation. The report details the progress of the bill in the committee, including how the bill was amended, what amendments were adopted or rejected, the estimated cost of programmes proposed in the legislation, opinions of the minority and majority members of the committee, and the "legislative intent" of the piece of legislation⁴.

⁴ <https://www.congress.gov/congressional-reports>

29. Once a bill is submitted to the Senate or House of Representatives plenary, it is eligible to be brought up for further debate and ultimately a vote; however, not every bill reported out of a committee is taken up by the Senate or House of Representatives plenary. If the bill is adopted by the Senate or House it is then to be submitted to the other house to undergo a similarly transparent process of debate and approval/disapproval. All stages of these processes are recorded and updated continuously on the website of the Congress. Finally, after the adoption of a bill by the Congress, the U.S. President has the right to veto the bill, or sign it into a law. A bill or joint resolution that has been vetoed by the President can become law if two-thirds of the Members voting in the House and the Senate each agree to pass it over the President's objection.

30. Except when closed sessions are ordered for reasons of secrecy, all Congress plenary proceedings are open to the public. Furthermore, they are televised and available via webcast. Moreover, on all days where Congress is in session, a substantially verbatim report of proceedings is published in the Congressional Record.

31. The results of votes are announced in real time via television and webcast. Records of votes for each piece of legislation, and by a Senator or House Member, are publicly available on the Senate and House websites.

32. The GET commends the U.S. authorities for the statutory framework in place regulating the legislative process within both Chambers of Congress, which provides a high degree of procedural transparency once draft legislation has been formally introduced in Congress. Furthermore, the Lobbying Disclosure Act (LDA) of 1995, as amended (2 U.S.C. 1601 et. seq), requires lobbying firms and organisations to register and file quarterly reports regarding outside lobbying activities during both the pre-legislative phase and the legislative phases in Congress. That said, the GET is of the opinion that this positive view needs to be balanced with the fact that draft legislation in the United States may be, and to a large extent is, initiated by various interest groups or external consultants, law firms etc. (unlike the situation in most other GRECO member States, where the large part of drafting of legislation is done by governments) and that the professional lobbying industry may be very active, even before the bills are introduced in Congress. The reports filed pursuant to the LDA show that there are a large number of individuals and firms registered as lobbyists who do represent clients to Congress. Citizens, groups and lobbyists may not only try to persuade a Member to introduce legislation on a particular topic but may also present proposed texts to the Member for his/her use. The GET even came across the word "outsourcing" in the meaning that Members of Congress use external consultants (whether registered as lobbyists or not) to prepare draft legislation on their behalf.

33. The GET notes that Members of Congress have a gatekeeping role as the introduction of new bills in Congress can only be made by the Members; however, as noted above, draft legislation is most often preceded by extensive prior consultations and preparations and then subject to potential significant amendments. While such prior consultations may be included in a committee report when a bill is reported out of committee, there is no requirement or guidance in place to refer to such information in a bill, itself, as that contains only the text of the proposed law. Members of Congress are under no obligation to disclose any such information, including in respect of interest groups involved, lobbyists etc. Instead, Congress has mandated that lobbyists and lobbying organisations disclose the specific issues that they lobby on, including when available, the specific bills that their lobbying relates to and specific issues within the bills.⁵ These disclosures are made public; information about a registered lobbyist who may have participated may be found in LDA filings. In view of the particular situation in

⁵ The Lobbying Disclosure Act Section 3(8)(A)(i) defines "lobbying contact" to include "communications . . . with regard to the formulation, modification, or adoption of a Federal legislation (including legislative proposals)".

the United States, where legislative initiatives to a large extent is the result of private sector efforts (commercial or not) and despite the amount of information available to the public in respect of lobbyists under the LDA, the GET believes that providing more information in respect of the work leading up to the introduction of draft legislation would not only be a means to bring more transparency to the whole legislative process it would possibly also serve as a measure to shed more light on Members' contacts with third parties (in addition to the information to be disclosed under the LDA) in the pre-congressional stage of drafting legislation and thus prevent potential undue influences in this respect. In view of the foregoing, **GRECO recommends to consider increasing the transparency of the legislative process leading up to the introduction of new bills in Congress.**

Remuneration and economic benefits

34. The average annual wage for the year of 2014 across all occupations in the U.S.A. was \$47,230 (€42,350), according to the most recent report available (Bureau of Labor Statistics).

35. Since 2009, compensation for the majority of Senators and House Members has been \$174,000 (€156,000) annually. Moreover, the Speaker of the House has an annual salary of \$223,500 (€200,400) and the President *Pro Tempore* of the Senate and the majority and minority Leaders in both the Senate and the House have annual salaries of \$193,400 (€173,400).

36. It is generally understood that the job of a Member of Congress is a full time job. Both the Senate and House Codes of Conduct establish provisions restricting and in some instances prohibiting outside earned income and outside employment⁶. No Member of Congress may earn more than \$27,495 (€24,700) per year (CY 2016) from outside employment. Investment income does not count toward this limitation.

37. Members of Congress may not receive housing allowances or per diem expenses for their time spent in Washington, D.C. Members of Congress are permitted to deduct up to \$3,000 (€2,700) on their income taxes for living expenses incurred while away from their home state or congressional district. Members of Congress pay federal and state income taxes and property taxes.

38. Members of both the Senate and House are entitled to a pension benefit after five years of service. The benefits of the various pension programs vary depending on retirement plan, starting date, age and length of service. Members elected prior to 1984 had the option to enrol in the CSRS system (a defined benefit system) and those elected in 1984 or after in FERS (a defined contribution system). Health and retirement benefits may be available to Members of Congress after they leave office depending on the health and pension options chosen during employment, contribution, age and length of service. As of October 1, 2014 Members who retired under CSRS had completed, on average, 23.1 years of civilian federal service. Their average annual CSRS annuity in 2013 was \$72,660 (€65,200). Those who retired under FERS had completed, on average, 15.9 years of civilian federal service. Their average retirement annuity in 2014 was \$41,652 (€37,300).

⁶ The term "outside earned income" means any wages, salaries, fees etc. received as compensation for personal services actually rendered, other than the salary from the Congress, but does not include, for example, investment income (capital gains, interest etc.), provided that the individual's services do not materially contribute to the production of the income; income from enterprises in which the Member or his/her immediate family owns a majority interest so long as the personal services are managerial or supervisory in nature; copyright, royalties etc. "Investment income" refers to dividends, rental income, capital gains from sales of investments etc.

39. Further, both chambers of Congress are required to issue public reports of all receipts and expenditures online to increase transparency and accountability. The Senate has published the semi-annual report of the Secretary of the Senate since 1823 detailing receipts and expenditures for the Senate. Since 2010, these reports have been posted by the Secretary of the Senate on the Senate website.

40. The House publicly releases the Statement of Disbursements (SOD) quarterly of all receipts and expenditures for House representatives, committees, leadership, officers and offices. The House has been required by law to publish the SOD since 1964, and has, since 2009, been published online. The Chief Administrative Officer of the House publishes the SOD within 60 days of the end of each calendar year quarter.

41. The budget for all Members of Congress and committees of the Senate and House comes from public funds and is allocated using a set formula. For Senators, the allocation varies by the size of the population of the state the Senator represents. For House Members, the allocation varies by distance between a House Member's district and Washington, D.C. and the cost of office space in the House Member's district.

42. Each fiscal year the legislative branch appropriations bill allocates the Senators' Official Personnel and Office Expense Account (SOPOEA) to assist Senators in their official and representational duties. The SOPOEA for each Senator is calculated based on three components: an administrative and clerical assistance allowance, a legislative assistance allowance and an official office expenses allowance. The SOPOEA is only authorized to support each Senator's official duties and may not be used to defray any personal, political, or campaign-related expenses. Senators are responsible for the payment of any expenses that exceed this allowance. The appropriation for SOPOEA has decreased in recent years, from \$422.0 million in FY2010 to \$390.0 million in FY2014, a decrease of 7.6%. The FY2015 Senate-reported legislative branch appropriations bill (H.R. 4487) and the FY2015 act (P.L. 113-235) continued the FY2014 level. This level represents the lowest funding since the \$373.4 million provided to Senate offices in FY2008. The FY2015 allowance for individual Senators ranged from \$2,984,433 to \$4,722,299, with an average SOPOEA of \$3,235,422.

43. House Members have one consolidated allowance, the Members' Representational Allowance (MRA), to operate their offices. The MRA was first authorized in 1996 and was made subject to regulations and adjustments of the Committee on House Administration. House Members have a high degree of flexibility to use the MRA to operate their offices in a way that supports their congressional duties and responsibilities, and individual office spending may be as varied as the districts House Members represent. The appropriation for the MRA decreased from a high in FY2010 of \$660.0 million to \$554.7 million in FY2014, FY2015, and the House-passed FY2016 bill (H.R. 2250). This reduction has corresponded with reductions to the individual MRA for each House Member, which is available for expenses incurred from January 3 of each year through January 2 of the following year. In the 112th Congress, the House agreed to H.Res. 22, which reduced the amount authorized for salaries and expenses of House Members, committees and leadership offices in 2011 and 2012. This resolution, agreed to in 2011, stated that the MRA allowances for these years may not exceed 95% of the amount established for 2010. Individual MRAs were further reduced 6.4% in 2012 and 8.2% in 2013, before increasing 1.0% in 2014. The 2014 allowances for individual House Members ranged from \$1,195,554 to \$1,370,009, with an average MRA of \$1,255,909. The GET took note of detailed instructions regulating the use of MRA, e.g. that MRA may only be used for official expenses and not for events primarily of a social nature, for personal expenses, campaign expenses etc. Pursuant to 18 U.S.C. § 1913 certain activities requires authorization by Congress.

44. Federal law and House and Senate rules prohibit "unofficial office accounts," including private donations, in cash or in kind, in support of official Senate or House

activities or expenses. A Member of Congress may only use appropriated, personal (meaning the Member's own money), or excess principal campaign funds (meaning the Member's campaign funds) to pay for official Senate and House business or activities. In very limited circumstances third parties may pay for a specified expense (e.g., payment for reasonable travel expenses for a fact-finding trip if preapproved by the respective Ethics Committee).

Ethical principles and rules of conduct

45. Article I, Section 5 of the U.S. Constitution grants each Chamber of Congress the authority to determine their own Rules of Procedure, to enforce and sanction its Members within such a framework and, with the concurrence of two thirds, expel a Member. GRECO was pleased to note that through this authority, the Senate as well as the House of Representatives have subsequently established their respective codes of conduct. The provisions of subsequent statutes, for example, the Ethics in Government Act, as amended, and the Honest Leadership and Open Government Act have formed the basis of a number of provisions in each code.

46. The Code of Ethics for Government Service was first adopted in 1958⁷. The Senate Code of Conduct⁸ and the House Code of Conduct⁹ were first adopted in 1968. The initial adoption of, and any subsequent changes to the Code of Conduct or other rules of the Senate or House must be approved by either the full Senate or House, respectively.

47. Senate Resolution 338, adopted in 1964, created the first Senate Ethics Committee, called the Select Committee on Standards and Conduct, comprised of an even number of Senators from the majority and minority parties. In 1968, the Senate adopted four additions to the Standing Rules of the Senate, creating the Senate Code of Conduct. In 1977, following Senate-wide committee reorganisation, the Select Committee on Standards and Conduct became the Select Committee on Ethics. At this time, the full Senate voted to adopt substantial revisions and amendments to the Code of Conduct. Over the years, the Senate has adopted a number of revisions to the Code of Conduct.

48. In 1993, the Senate Ethics Committee formed the Ethics Study Commission, whose membership included all members of the Ethics Committee and other current and former Senators. The Commission recommended that the Committee augment its efforts to educate Senate Members, officers, and employees about ethics issues. As a part of that effort the Senate Select Committee on Ethics later published a manual compiling all forms of the Committee's previously issued advice and rulings.

49. In 1967, the House of Representatives established the Committee on Standards of Official Conduct, to be composed of an even number of House Members of the majority party and the minority party. The Committee was directed to recommend such changes in laws, rules, and regulations as necessary to establish and to enforce standards of official conduct for House Members, officers, and employees. One year later, the House Rules were amended to include a Code of Official Conduct (currently codified as House Rule 23) and an annual financial disclosure requirement (currently codified as House Rule 26). At the same time, the Committee was made into a permanent standing committee with authority to investigate alleged violations of the Code of Official Conduct and to issue advisory opinions interpreting its provisions.

50. In 1997, following the resolution of a Committee investigation of the Speaker of the House, the House of Representatives established the Ethics Reform Task Force. The Task Force was directed to review procedures governing the ethics process and to recommend

⁷ See the Code of Ethics for Government Service: <https://www.law.cornell.edu/cfr/text/34/part-73/appendix-iii1>

⁸ See the Senate Code of Conduct:

http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf

⁹ See the House Code of Conduct: <http://clerk.house.gov/legislative/house-rules.pdf>

appropriate reforms. In 1997, the House adopted the recommendations of the Ethics Reform Task Force with amendments (H.R. 168). In 2007, pursuant to the Honest Leadership and Open Government Act (HLOGA), the Senate and House Codes of Official Conduct were further amended.

51. In order to implement the values of these codes, Members of Congress are subject to introductory ethics training as well as in-service training and advice provided by the Ethics Committees, which is described in more detail below ("Advice, training and awareness").

52. Further, Senate and House Rules give the Senate Select Committee on Ethics and the House Committee on Ethics the authority to enforce the Codes of Official Conduct; investigate allegations of improper conduct, violations of law and regulations of the respective body relating to conduct of Members of Congress and to recommend disciplinary action be taken by the full Senate or House, as the case may be, when and where appropriate.

53. The Committees are also authorised to recommend additional rules in order to ensure that proper standards of conduct are in place; and to issue advisory opinions and interpretative rulings for the purpose of clarifying the application of laws, rules and regulations regarding standards of conduct.

54. The GET wishes to commend the U.S. authorities for having in place, since long, ethical guidelines/standards for Members of Congress and that their implementation is under the responsibility of the ethics committees. Part of making a code of conduct and the various interpretative materials and guidance public and easily accessible is to help establish joint expectations with the public. The GET understood that while there was substantial transparency of the rules and guidance, there was some delay in putting these materials together in either an up-to-date manual or other compilation. Easily accessible and usable materials for the public as well as the Members would support a better understanding of the substantial rules and guidance that is in place and would also reinforce a proper understanding of those rules and procedures through increased training and guidance. Consequently, **GRECO recommends that guidance materials to the codes of ethics used by the Senate and by the House of Representatives be brought up-to-date and made available in a user friendly fashion.**

Conflicts of interest

55. The authorities explain that a conflict of interest is generally defined as a situation in which an official's private financial interests conflict or appear to conflict with the public interest. This definition comes from the 1989 report of the House of Representatives Bipartisan Task Force on Ethics. Any private financial interest of an official could potentially create a conflict of interest or the appearance of a conflict of interest if that private financial interest could be affected by an official act.

56. Members of Congress are subject to a wide range of legislation, regulations and rules for their conduct aiming at preventing conflicts of interest. These instruments deal with issues such as participation in side-activities and business outside their congressional functions, the acceptance of gifts and other benefits, representing others in a personal capacity before the U.S. government, or making use of their official position for any other personal reason. The conflicts of interest rules may also cover the period after a Member of Congress has left this position in the form of post-employment restrictions etc.

57. Furthermore, the U.S. Criminal Code criminalises activities involving conflicts of interest in the Chapter entitled Bribery, Graft and Conflicts of Interest, which is applicable in respect of Members of Congress, including asking for or receiving gifts, money or other

things of value in connection with the performance of official duties. Bribery occurs when a federal official “directly, or indirectly, corruptly” receives or asks for “anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.” An illegal gratuity results when an official directly or indirectly seeks or receives personally anything of value in return for or because of any official act performed or to be performed. U.S. law also criminalises Members of Congress, officers, and employees from privately representing others before the federal government and imposes a “cooling-off period” of two years for former Senators and one year for former House Members after their service. During this period former Members of Congress may not seek official action on behalf of anyone else by either communicating with or appearing before specified current officials with the intent to influence them. Thus, during the cooling-off period, a former Member of Congress may not seek official action from any current Member of Congress, officer, or employee of either the Senate or the House, or from any current employee of any other legislative office.

58. There are also mechanisms in place aimed at preventing conflicts of interest before they arise; the authorities refer to public disclosure of assets, financial interests, outside positions, liabilities, gifts, and investments, which have been required personally or jointly as the preferred methods of regulating possible conflicts of interest of Members of Congress. Public disclosure is intended to provide the information necessary to allow Members’ constituencies to judge their official conduct in light of possible financial conflicts with financial holdings of their spouse and dependent children. Members of Congress must also disclose gifts they receive over a certain dollar amount.

59. In addition, the Senate and House Ethics Committees provide guidance and training regarding conflicts of interest and require pre-approval for participation in certain activities. Further, in instances where there may be a conflict of interest or the appearance of a conflict of interest, the Ethics Committees may advise Members of Congress to recuse themselves from certain matters.

60. As a means of avoiding potential conflicts of interest, Members of Congress may create a Qualified Blind Trust (QBT), which allows them to have an independent trustee make investment decisions for the individual’s benefit without the individual’s knowledge. When a QBT is established, an individual gives up the management of the assets to an independent trustee, who makes investment decisions for the individual’s benefit without the individual’s knowledge. To ensure the independence of the trustee, they may not have a pre-existing business relationship with the Member of Congress, nor may they be a relative. By turning over the management of assets to an independent trustee, a QBT generally allows the grantor to be fully invested in the market without worrying about potential conflicts of interest and the possibility of having to recuse oneself from handling official business. Additionally, a QBT may help avoid even the appearance of a conflict of interest. Under the Ethics in Government Act of 1978, as amended, a QBT must be approved by the Ethics Committee prior to its execution. When establishing a QBT, the grantor must file the executed trust agreement, a list of assets contained in the QBT at the time of the Committee’s approval and the trustee fee schedule for public disclosure.

61. Generally, spouses and other family members have substantial discretion in employment and investments although the spouse’s employment and the assets of the spouse and dependent children are required to be reported on the Member’s public financial disclosure report. However, federal law, 5 U.S.C. § 3110, prohibits a federal official, including a Member of Congress, from appointing, promoting or recommending for appointment or promotion any “relative” of the official to any agency or department over which the official exercises authority or control, which includes the Member of Congress’ office and committees upon which he or she serves.

62. The GET notes that in respect of potential conflicts of interest, i.e. those that are “capable of leading to conflicting interests, but not yet in existence”, are rigorously dealt

with in the form of preventive measures in the U.S. system. To this end, Members of Congress are required to report information such as entities with which they are affiliated, outside activities, receipt of gifts, travel, and their spouse's employer on their Public Financial Disclosure forms. This reporting allows the public to identify conflicts of interest beyond those created by assets, liabilities or sources of income. The GET was told that the annual reporting of such financial and other interests is the primary mechanism for preventing and detecting conflicts of interest. Thus, public officials have a duty to exercise appropriate caution to ensure that the potential conflicts do not "ripen" into a real conflict in violation of his/her public responsibility.

63. The GET learned that in addition to the well-developed system of annual reporting of potential conflicts of interest through their public financial disclosure reports, Members of Congress must also file periodic transaction reports disclosing the purchase or sale of certain financial holdings within thirty days of the transaction (2012 STOCK Act). The U.S. authorities explained that situations of actual conflicts of interest appear only rarely when a public official has a significant and pervasive financial, familial or personal interest, the very existence of which poses an unacceptable conflict with the relevant public interest that s/he has a duty to protect at all times. Furthermore, the authorities stated that an actual conflict of interest requires immediate action on behalf of the Member of Congress to eliminate the conflict, but there is no specific requirement that Members engage in any form of disclosure before proceeding with a debate on a matter and it is extremely rare that a Member would recuse him/herself. The GET welcomes that actual conflicts of interest require immediate action for their removal. However, it notes that there is no general requirement upon Members of Congress to report conflicts as they appear. It is of the firm opinion that situations which are not foreseen in the current periodic and annual reporting requirements (even if rare) where the Member has a material or personal interest, for example, in a matter being discussed or voted and where the conflict remains, the Member should disclose the situation on an *ad hoc* basis. In the light of the foregoing, **GRECO recommends that *ad hoc* disclosures be introduced for situations when an undisclosed conflict between specific private interests of individual Members of Congress may emerge in relation to a matter under consideration in Congressional proceedings.**

Prohibition or restriction of certain activities

Gifts

64. Article I, Section 9, Clause 8 of the Constitution prohibits Members of Congress from receiving any present, emolument, office, or title of any kind from a foreign state or a representative of a foreign government without the consent of the Congress. Congress has consented, through the vehicles of the Foreign Gifts and Decorations Act (FGDA) and the Mutual Educational and Cultural Exchange Act (MECEA), to the acceptance of certain gifts from foreign governments.

65. The FGDA authorises the acceptance of gifts from foreign governments of "minimal value" when given as a souvenir or mark of courtesy. The FGDA implements this Constitutionally-based restriction on foreign gifts to any officer or employee of the United States including those in the executive and legislative branches. The FGDA includes a provision requiring that the limits be adjusted every three years based on economic criteria. The current limit for foreign gifts is \$375 (€336). The statute does, however, allow each House of Congress to set a limit that is lower than that, should they choose. The Senate set such a limit years ago and has not adjusted it upwards; its foreign individual gift limit is \$100 (€90) or less. The House has chosen to follow the statutory limit of \$375 (€336) applicable to executive and judicial branch officers and employees. Members of Congress may accept, but not retain, gifts of more than the minimal value when refusal would cause offense or embarrassment. Within 60 days of acceptance of such a gift, the recipient must turn over the gift to the Secretary of the Senate or the

Clerk of the House or for disposal and disclose receipt of the gift to the Ethics Committees. The MECEA allows Members of Congress and staff to accept travel expenses from a foreign government in the context of education and cultural exchanges between countries.

66. In addition to the constitutional and statutory provisions regarding gifts from foreign governments, Senate Rule 35 and House Rule 25 place restrictions on the permissibility of accepting gifts from any source other than a foreign government. Members of Congress may not accept a gift valued at \$50 (€45) or more, may not accept gifts from any one source with a cumulative value of \$100 (€90) or more in a calendar year, and may not accept any gifts from registered federal lobbyists or foreign agents, or private entities that employ or retain such individuals. Gifts of nominal value, generally less than \$10 (€9) do not count towards this annual limit.

67. The Senate and House Gifts Rules define the term gift to include a gratuity, favour, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

68. A Member of Congress who inadvertently accepts a gift with a value in excess of the referred limits may choose to either pay the donor the fair market value of the gift or to return the gift to the donor. Gifts over a certain value must also be publicly disclosed on a Member of Congress' annual financial disclosure statement.

Incompatibilities and accessory activities, post-employment restrictions

69. Members of Congress may not use their official position for personal gain and may not undertake any outside activity that creates a conflict of interest (Senate Rule 37, House Rule 23).

70. Members of Congress may not assist in passing legislation, when the principal purpose is to further the official's own, or an immediate family Member's financial interests, or the financial interests of a limited class to which such individuals belong (Senate Rule 37, House Rule 23).

71. Members of Congress must notify the Ethics Committees in writing within three business days of commencing negotiations for future employment with a non-governmental employer (Senate Rule 37, House Rule 37).

72. Members of Congress must receive prior written approval from the Ethics Committees for any teaching positions, and are subject to restrictions on outside employment and outside earned income (Senate Rules 36 & 37, House Rule 25).

73. Members of Congress are not permitted to participate in any business or professional activity outside of their congressional service for compensation that is inconsistent or in conflict with the conscientious performance of their official duties. Both federal law and House and Senate Rules restrict the amount and source of outside earned income that Members of Congress may accept (Senate Rule 37, House Rule 25).

74. Members of Congress may not receive compensation from foreign governments or act as agents of a foreign principal; may not receive any compensation, nor permit any compensation to accrue to their benefit, by virtue of the improper exertion of official influence (except for gifts of a certain value, see "gifts" above) (Senate Rule 37, House Rule 23).

75. Federal law and Senate and House Rules prohibit Members of Congress from receiving compensation for affiliating with or being employed by outside organisations for the purpose of providing professional services involving a fiduciary relationship (e.g., consulting, medical, real estate, insurance, or legal services); permitting his/her name to be used by an outside business providing professional services for compensation; providing professional services involving a fiduciary relationship for compensation; and accepting a teaching position without prior written approval from the Ethics Committees (Senate Rules 36 & 37, House Rule 25 and 5 U.S.C. App. §501).

76. Senators may not serve as officers or members of the board of any publicly-held or publicly-regulated company, except for the following cases: a specifically designated non-profit organisation, if unpaid; an organisation principally available to Senate individuals and their families, if unpaid; an organisation on whose board the person served for at least two years prior to coming to the Senate, if time required is minimal and the Member of Congress is not on a committee with legislative jurisdiction over the relevant regulatory body. However, Senators may not serve on the board of any organisation, even if unpaid, that receives federal funding from an agency that is subject to the appropriation or oversight functions of a committee on which the Senator sits or otherwise has an interest in matters under such committee's jurisdiction. (Senate Rule 37 and 5 U.S.C. app. 4 § 502(a)).

77. House Members may serve on boards, but they may not be paid any directors' fees or other compensation for that service (House Rule 25, clause 2 and 5 U.S.C. app. 4 § 502(a)).

78. The GET was pleased to note that in respect of future private employment, Senators are to file a signed public statement with the Secretary of the Senate within 3 days of the beginning of negotiations or arrangements for private employment or compensation. Senators who file the disclosure form must also recuse themselves whenever there is a conflict of interest or an appearance of a conflict with respect to the private entity identified on the form, and notify the Senate Ethics Committee in writing of such recusals. Similarly, House Members must notify the House Committee on Ethics within three business days after they commence any negotiation or agreement for future employment with a private entity. In addition, House Members must recuse themselves from "any matter in which there is a conflict of interest or an appearance of a conflict" with the private entity with which they are negotiating or have an agreement for future employment or compensation, and they must notify the Ethics Committee in writing of such recusal. All Members of Congress must also divulge on their financial disclosure reports the general terms of future employment. (See Senate Rule 37 and House Rule 27.)

79. The GET was also informed that Senators who want to negotiate or have an employment arrangement for jobs involving lobbying after they leave office must wait until after their successor has been elected. The GET saw this as an additional safeguard to prevent conflicting interests in Congress, but noted with concern that such a rule does not apply to House Members.

80. Furthermore, according to Senate Rule 37, House Rule 27, Ethics Reform Act of 1989, 18 U.S.C. § 207, Honest Leadership and Open Government Act of 2007, former Members of Congress are prohibited during a specified period immediately following their service as a Member from communicating with or appearing before any current Member of Congress or employee of the Senate or House of Representatives with the intent to influence official actions. The GET noted that in respect of Senators such a ban is two years and for House Members one year. The ban applies regardless of whether or not the former Member is a registered lobbyist or is retained or employed by those who lobby. The difference in length was explained by the authorities as (at least in part) being based on the different length of terms of office and the size of the body in which they serve.

The GET was also told by the authorities that former Members who register as lobbyists are not granted many of the privileges enjoyed by other former Members, such as access to the Senate or House floor. (Senate Rule 23 and House Rule 4.c;.4(a).

81. The GET is of the opinion that cooling-off periods ("quarantine") and the rules on access are important measures to regulate the phenomenon of "revolving doors" in respect of former Members of Congress moving into the private sector, for example, as consultants or lobbyists in their own capacity or as employed. This appears particularly important in the United States where the lobbying industry is an extensive feature of political life and where the move by former Members of Congress to become lobbyists is very frequent; the GET learned that the number of former Members of Congress, having registered as lobbyists after leaving the Congress was as high as 43% of 198 former Members between 1998 and 2005¹⁰. Since then, the "revolving door phenomenon" has increased¹¹.

82. To sum up, the GET notes that there are important restrictions in place in the United States to prevent conflicts of interest relating to "revolving doors" and lobbying, in particular in the form of cooling-off periods ("quarantine"). The GET also notes that cooling-off periods and rules on access are in place and a violation of the cooling-off restrictions is criminal in nature – in respect of former Members as well as their new employers. Furthermore, as described above, there are restrictions on lobbyists to access the Senate and House floors, and Senators, but not House Members, are restricted when they wish to negotiate future employment with a lobbyist. Having said that, the GET did not find that the difference between the election cycles (six years in the Senate and two years in the House) justify the difference in the cooling off periods as, in reality, the vast majority of the Members of both Houses are being re-elected to a large extent (More than 80% of Senators have been re-elected in recent years and the re-election rate is even higher in respect of House Members. Moreover, the GET came across academic debate and criticism in respect of the length of the "quarantines" according to which periods of up to seven years had been suggested to render it effective¹² and in 2010 and 2015 bills were introduced in Congress to completely ban Members of Congress from becoming lobbyists¹³. The GET is not in a position to take a stand on what would be a reasonable time period, but it could not disregard that the efficacy, including the length, of the current cooling-off periods was subject to relevant criticism.

83. In view of the foregoing, **GRECO recommends that consideration be given to the efficacy of the current regime of Congress' rules relating to "revolving doors" - such as those concerning House Members possibilities to initiate employment negotiations to become lobbyists after leaving Congress and the quarantine periods applying to former Members of Congress to carry out lobbying activities with representatives of the Congress.**

Financial interests, contracts with State authorities, misuse of public resources, third party contacts (lobbying)

84. There is no prohibition or restriction on the holding of financial interests by Members of Congress more than that they may not sell, trade, or profit from the knowledge or possession of material, non-public information. Further, Senators and House Members may not purchase securities that are the subject of an initial public offering in any manner other than is available to Members of the public generally. (See the Stock Act.)

85. Federal criminal law (18 U.S.C. §§ 431-432) prohibits Members of Congress from contracting with the federal government, and precludes Members of Congress from

¹⁰ Public Citizen report "The Journey from Congress to K Street" (2005)

¹¹ E.g. Politico, 07/03/16, "The Lobbying Reform that Enriched Congress"

¹² E.g. Harvard Magazine, July/August 2012, "A Radical Fix for the Republic"

¹³ <https://www.bennet.senate.gov/?p=release&id=3418>

directly or indirectly holding, executing, undertaking, or enjoying in part or in whole, any contract with the government. Members of Congress generally may not represent others in a private capacity before the government.

86. 31 U.S.C. § 1301(a) directs that appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. Federal criminal law including 18 U.S.C. §§ 641, 1343, 1346, prohibits stealing or converting to personal use government funds and resources. Accordingly, official resources, including staff and facilities, may only be used for official purposes.

87. Senate Rule 38, House Rule 24, and 2 U.S.C. § 59(e)(D) prohibits “unofficial office accounts,” that is, private donations, cash or in kind, support of official activities or expenses. Only appropriated funds, the Member of Congress’ excess principal campaign funds, or his/her personal funds may be used to pay for official business.

88. It is stated in House Rule 23.8 that a House Member may not retain an employee who does not perform duties for the offices of the employing authority commensurate with the compensation such employee receives.

89. All expenditures by a House Member from his/her representational allowance (“MRA”) must comply with regulations issued by the Committee on House Administration. Those regulations are set forth in the *Members’ Handbook* issued by that Committee. The *Handbook* provides that “[o]nly expenses the primary purpose of which [is] official and representational” are reimbursable from the MRA, and that the MRA may not pay for campaign expenses or political expenses (or any personal expenses).

90. Similarly, all House committees, in spending their official funds, are to comply with the regulations set forth in the *Committees’ Handbook* issued by the Committee on House Administration. The *Handbook* provides that only expenses “the primary purpose of which [is] official” are reimbursable from the official funds provided to a committee, and that committee funds may not be used to pay any “political or campaign-related expenses” (or any personal expenses). The regulations governing committee expenditures as well as those governing Members of Congress’ expenditures derive in large part from both 31 U.S.C. § 1301(a), which provides that official funds are to be used only for the purposes for which appropriated, and the statutory authorizations for the allowances.

91. As far as the topic of third party contacts and lobbying is concerned, the authorities submit that Members of Congress are elected to serve the public; as such their offices are open to the public and there are no restrictions on who Members of Congress may meet with. Senate and House Rules, however, significantly restrict the interactions between Members of Congress and the public, including lobbyists. For example, Members have restrictions on the acceptance of gifts from the public and are generally barred from accepting gifts from lobbyists, as detailed above.¹⁴ Further lobbyists are barred from planning and organising privately-sponsored travel for Members¹⁵, and lobbyists are not permitted to accompany Members on privately-sponsored travel.¹⁶ Also a Member whose spouse is a lobbyist must prohibit the Member’s staff from engaging in any lobbying contacts with the spouse.¹⁷ In addition, no campaign sponsor or donor shall receive special access or preferential treatment because of their case or in-kind contribution to the Member’s political campaign committee.¹⁸

¹⁴ House Rule 25, cl. 5(a)(1)(A)(ii), and Senate Rule 35

¹⁵ House Rule 25, cl. 5(c)(2), and Senate Rule 35

¹⁶ House Rule 25, cl. 5(c)(1)(A) and Senate Rule 35

¹⁷ House Rule 25, cl. 7, and Senate Rule 35

¹⁸ Code of Ethics for Government Service, Clause 5 and Senate Rule 43.3

92. There are several federal statutory laws, as well as rules of the Senate and House that either apply to lobbying directly, or are relevant to congressional lobbyists because the provisions bear upon a Member of Congress' or congressional employee's dealings with those who attempt to influence the legislative process. In particular, the Lobbying Disclosure Act of 1995 (LDA), as amended (2 U.S.C. § 1601 et. seq.), requires that a lobbyist or lobbying firm must register within 45 days of making a lobbying contact or being employed for such activities, whichever occurs first. In order to register, lobbyists must file with the Secretary of the Senate and the Clerk of the House and disclose the following information:

- the name, address, telephone number and principal place of business of the registrant and a general description of its business or activities;
- the name, address and principal place of business of the registrant's client and a general description of its business or activities (if different from registrant);
- the general issues on which the organisation intends to engage in lobbying activities and the specific issues, including specific pieces of legislation and the issues within each such piece of legislation, that are likely to be addressed;
- each employee whom the organisation expects to act as a lobbyist;
- the identity of any organisation that provides more than \$5,000 (€4450) in support in a three month period and plays a major part in the supervision of the registrant's lobbying activities;
- the identity of a foreign entity that influences the registrant's lobbying activities, directly or indirectly, or is an affiliate of the client and has a direct interest in the outcome of the lobbying activity.

93. These reports are published online and are available to the public. Additionally, the Senate and House issue guidance regarding the Lobbying Disclosure Act that is available to the public online. This joint guidance directs that lobbying disclosures "must always contain information that is adequate, standing alone, to inform the public of the specific lobbying issues."¹⁹ While there are no requirements for disclosure of involvement by non-lobbyists, when a committee holds a hearing, records of testimony from lobbyists and non-lobbyists, both oral and written statements may be included as part of that public record. The GET welcomes that the United States has developed far going registration and reporting requirements upon lobbyists, although these rules do not cover all types of lobbyists; there are exceptions for those who earn below a certain limit and for part time lobbyists etc. However, overall, the level of transparency is commendable.

94. The GET was repeatedly reminded of the fact that Members of Congress are increasingly dependent on campaign financing to be re-elected and that this also increases their need for connections with the lobbying industry. While the strict regulations in place prohibiting Members from receiving undue gifts, as well as the submission of declarations also apply in respect of donations from lobbyists, the fact that lobbyists' may contribute to Members' of Congress election campaigns²⁰ is important to be aware of as that appears to "institutionalise" a potential channel for financial influence. This is also a matter of particular concern in public discussions in the United States. That said, the GET is also aware that the contributions made or collected by a lobbyist are subject to strict public disclosure rules (as detailed in GRECO's Third Evaluation Round Report on the U.S.A.). With the adoption of the 2007 amendments to the LDA, the registration requirements were strengthened in that lobbyists must also file, with the Clerk of the House and Secretary of the Senate, a semi-annual report (LD-203) listing any campaign contributions to federal candidates and expenses related to events that honour a Member of Congress. There are significant search capabilities for information in each of these on-line systems.

¹⁹ Lobbying Disclosure Act Guidance, rev. June 15, 2016, at p. 19

²⁰ There is a right to contribute to a Congress Member's election campaign under the Constitution, "free speech"

95. Aware that the lobbying industry in the United States is large, relatively speaking, and well-developed, the GET notes that lobbying disclosure is subject to extensive regulations in the United States, probably more than in any other country. The overall aim of the regulatory framework is to provide transparency in respect of lobbyists and the actions taken by them, to a large extent through registration and reporting obligations. This is to be welcomed. However, while this information can certainly provide transparency and context to the Member's relationship with lobbyists, the focus of this Evaluation Report is rather on standards applicable to Members of Congress, and not directly on those private entities which seek to influence them. The GET is aware of the variety of rules applicable to Members of Congress (e.g. restrictions on gifts, negotiating and post-employment restrictions, sponsoring of travel, access to the House and Senate floor etc., as noted above). But apart from these precise restrictions there is not much guidance in place applying specifically to Members of Congress in relation to their contacts with third parties and lobbyists. The GET acknowledges that Members are elected to serve the public and that their offices should be open to the public and that there are therefore no or few restrictions in this respect. The GET also takes the view that considering the importance and impact of the lobbying industry in the United States, each House need to be continually mindful of potential additional steps that might be taken to address the seemingly strong negative public perception in the United States about Members' dependence on, and relationships with, lobbyists. An understanding of the current restrictions should therefore be reinforced and - to the extent necessary - consider whether current rules be complemented with further guidelines and ethical standards. Consequently, **GRECO recommends that additional guidance and training materials for Members of Congress on how the current restrictions applicable to their interactions with lobbyists and other third parties seeking to influence the congressional process, be included in the training of Members of Congress.**

Misuse of confidential information

96. The STOCK Act (Stop Trading on Congressional Knowledge Act of 2012) affirms and makes explicit the fact that "insider trading" regulations apply to Members of Congress, congressional employees, or any federal officials. The law also expressly affirms that all federal officials have a duty of trust and confidentiality with respect to material, non-public information which they may receive in the course of their official duties and a duty not to use such information to make a private profit.

97. In addition to the STOCK Act, which covers all Members of Congress, each chamber of Congress has specific rules regarding the misuse of confidential information. These rules generally designate as confidential specific work product relating to national security, intelligence or investigations. The Senate and House Rules²¹ outline procedures to be used to investigate if there has been a breach of confidentiality or an unauthorised disclosure.

98. Furthermore, House Rule 23 provides that before a Member, delegate, resident commissioner, officer, or employee of the House may have access to classified information, the following oath (or affirmation) is to be executed: "*I do solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorised by the House of Representatives or in accordance with its Rules.*" Copies of the executed oath (or affirmation) are to be retained by the Clerk as part of the records of the House. The Clerk shall make the signatories a matter of public record, causing the names of each Member who has signed the oath during a week (if any) to be published in a portion of the

²¹ Senate Res. 338, Subpart C, Standing Orders of the Senate Regarding Unauthorized Disclosure of Intelligence Information, S. Res. 400, 94th Congress, Provisions Relating to the Select Committee on Ethics; Senate Rule 29, and House Rule 7: Confidentiality

Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspection in an appropriate office of the House. There is not an equivalent Senate rule. However, Senate Rule 29, Clause 5 proscribes that “[a]ny Senator, officer or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate. . . shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.”

Declaration of assets, income, liabilities and interests

99. The Ethics in Government Act (EGA) regulates that financial information is to be reported annually by Members of Congress²² (in the same way as by judges and senior officials of the executive branch, including senior officials of the Department of Justice). The relevant requirements are found in title 1 of that Act. EGA requires that the disclosures contain:

- Description of each source, type, and amount of investment income reported (indicating the proper category of amount and whether the income is from interest, dividends, rent and royalties, and/or capital gains), where the amount exceeds \$200. There are nine categories of amounts beginning with \$201-\$1000 and ending with over \$5,000,000.
- Description of each source, type, and the actual amount of any other type of income not described above, where the amount exceeds \$200.
- Identity of the source, the value, and a brief description of gifts and travel reimbursements worth over \$150 received from that source, when gifts or travel reimbursements with an aggregate value in excess of \$375 have been received from that source in the period covered.
- Identity and category of value of any interest held for the production of income, if the value is in excess of \$1,000. This includes the category of value of any qualified blind trust. The threshold-reporting amount for deposits in banks and other similar types of regulated financial institutions is \$5,000. Exceptions to reporting requirements include a personal residence (e.g. a personal residence not generating any income) and financial instruments of indebtedness from certain Members of the family²³ There are ten categories of value beginning with \$1001-\$15,000 and ending with over \$50,000,000.
- Identity (including interest rate, date and term) and category of value of total liabilities owed to any creditor, if the liabilities exceeded \$10,000 at any time during the reporting period. Exceptions include a mortgage on a personal residence, except that the President, Vice President, Members of Congress, and certain Presidential appointees confirmed by the Senate and nominees to those positions (including the Attorney General, U.S. Attorneys, and other such appointees or nominees at the Department of Justice) must report such mortgages; loans secured by personal motor vehicles, household furniture, or appliances, when the loans do

²² Instructions and forms for Senate financial disclosure can be found at <http://www.ethics.senate.gov/public/index.cfm/financial-disclosure-forms> and for the House at <https://ethics.house.gov/forms/information-and-forms>.

²³ According to the U.S. authorities, a personal residence that is not rented out to others at any time or in any part is not considered an “asset held for the production of income” for purposes of EIGA section 102(a)(3) and thus it is not reportable. (If the filer rents a portion of the residence or rents the residence for a few months a year, it then produces income and becomes reportable.) With regard to financial instruments of indebtedness from certain members of the family, the law specifically states that when the debt is owed to the filer by his or her “spouse, parent, brother, sister, or child”, that ‘asset’ of the filer is not required to be reported. These exceptions address concerns for personal and family privacy, a concern which also is reflected in the similar reporting requirements of transactions with family -members and gifts from family members.”

not exceed the purchase price of the item that secures it; and liabilities to certain specified family Members. There are ten categories of value beginning with \$10,001 - \$15,000 and ending with over \$50,000,000.

- Description of each purchase, sale, or exchange of real property or securities, other than transactions between the filer and the spouse or dependent children and other than transactions involving the personal residence of the reporting individual, when the amount of the transaction exceeds \$1,000. Value is reported by category of amount. The same ten categories of values noted for interests held for the production of income are used.
- Identity and dates held of positions held (outside the U.S. Government) as an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any business enterprise, any non-profit organization, any labour organization, or any educational or other institution. The report does not require the reporting of positions held in religious, social, fraternal, or political entities or positions solely of an honorary nature.
- Description of the date, parties to, and terms of any agreement or arrangement with respect to future employment; a leave of absence during the period of the reporting individual's Government service; continuation of payments by a former employer other than the U.S. Government; and continuing participation in an employee welfare or benefit plan maintained by a former employer.
- For first-time filers, the identity of each source of compensation in excess of \$5,000 paid for the personal services of the filer (i.e. clients) in the two years prior to entering the government and a brief description of the nature of the services rendered.
- Filers must also include the information described above for spouses and dependent children for the following: investment income; gifts given and reimbursements received not totally independent of the relationship to the filer; interests held for the production of income; liabilities; and transactions. The report must also show the sources, but not amounts, of spousal earned income (other than honoraria which must continue to include the amount). The highest category of amount required to be used for the value of an asset, investment income, or liability held solely by or solely the responsibility of the spouse or dependent child is "over \$1,000,000" although higher categories may voluntarily be used²⁴.
- Within 45 days of any purchase, sale, or exchange of any stocks, bonds, commodity futures and other securities by the filer, spouse or dependent child, where the amount of the transaction exceeds \$1,000, those individuals in the Legislative branch and the Executive branch who are covered by the public disclosure requirements noted above must also file a report that identifies the security, note the type of transaction and the date it occurred, and the category of amount of the transaction. There are currently ten categories beginning with "\$1001-\$15,000" and ending with "Over \$50,000,000."

100. New filers are required to submit declarations within 30 days of assuming a position in the legislative branch, annual reports are required to be filed by 15 May each year, termination reports are required to be filed within 30 days of termination, and candidates must file reports within 30 days of becoming a candidate for nomination or election to the office of the United States Senate (Secretary of the Senate) and the House of Representatives (the Clerk of the House), respectively.

²⁴ According to the U.S. authorities, this limitation applies only to assets held independently by the spouse or dependent child. Furthermore, it has no effect on any conflict of interest analysis arising from the income, assets, or liabilities of a spouse or dependent child and provides some limited level of family privacy.

101. Financial Disclosure Reports are made public within 30 days of filing by the Clerk of the House and Secretary of the Senate to any requesting person. All reports filed by Members of Congress and candidates are available to the public on-line. Hard copies of reports may be requested through the Clerk of the House and the Secretary of the Senate, and any individual who requests a copy of a report may be required to pay a fee to cover the cost of reproduction and mailing. All Financial Disclosure Reports and Periodic Transaction Reports filed by Members are available for inspection by the public during six years after receipt. The Secretary of the Senate and the Clerk of the House maintain public files of Periodic Transaction Reports and Financial Disclosure Reports. These reports contain information regarding Members' assets, property, interest, earned income, investment income, loans, debts and gifts. The information required to be reported for the spouse and dependent children is contained on the Members' reports and is publically available with those reports.

102. Within 60 days of filing, financial disclosure reports are reviewed by the respective Ethics Committee to determine whether the report is in compliance with applicable laws, rules and regulations. If the review indicates an apparent error, omission or discrepancy in the report, the filer will be notified and asked to either correct or clarify the error, omission or discrepancy. In 2015, the Senate Ethics Committee reviewed over 3,000 financial disclosure and periodic transaction reports and the House Ethics Committee reviewed over 5,000 financial disclosure and periodic transaction reports.

103. Declarations are to be filed electronically. Generally Members file their financial disclosure statements by the due date. However, the Ethics in Government Act does provide that an extension of up to 90 days may be granted and some Members may take advantage of that extension.

104. The GET notes that with the adoption of the Ethics in Government Act (EGA) in 1978, public disclosure by Members of Congress and their immediate family in respect of financial assets, incomes, liabilities etc. was introduced as a mandatory obligation. There is no doubt that the level of detail required in this respect is very demanding, and that a good level of access is also provided for, as these declarations are to be filed electronically and are made public within 30 days of filing by the respective Ethics Committees of the Senate and the House of Representatives.

Supervision and enforcement

105. Members of Congress, like any U.S. citizen, are subject to criminal proceedings and civil proceedings and enjoy no general immunity.

106. That said, the *Speech or Debate Clause* of the U.S. Constitution provides a form of immunity in respect of Members of Congress in that Article I, Section 6 of the Constitution prevents Members of Congress from having their legislative acts used as evidence against them in a criminal prosecution. The Constitution provides in part that "for any speech or debate in either House, [Senators and House Members] shall not be questioned in any other place". In cases in which the Speech or Debate Clause applies, this privilege is absolute and cannot be defeated by an allegation of an improper purpose or motivation. The privilege is the prerogative of each Member to claim and the decision to assert or waive the protections of the Speech or Debate Clause belongs to the individual Member him/herself; the House and the Senate are not involved. It is also noteworthy that not only the Members are affected, but under certain circumstances the actions of or information held by their close staff may also be covered by this protection. The GET discussed this issue on-site and was informed that the protection provided by the Speech or Debate Clause was often seen by representatives of the law enforcement as an obstacle to investigations as it might cause delays, impair the efficiency of or even impede certain aspects of criminal investigations against Members of Congress. If

testimony or a document is covered by the Clause, a Member may not be compelled to provide that to the investigators/prosecutors.

107. The GET wishes to stress the importance of protecting the legislative process in any parliamentary assembly from undue influences and of protecting freedom of speech in such fora. This is also the reason for the fundamental Speech or Debate Clause, contained in the U.S. Constitution. The Clause has been recognised by the Supreme Court of the United States as not intended for the personal or private benefit of Members of Congress, but to protect the legislative process and the independence of legislators. Thus the purpose and intent of the "*Speech or Debate Clause*" protection is to insulate Members of Congress and the legislature from intimidation and reinforce their separation from other branches. That said, the GET takes seriously the allegations by law enforcement representatives that the Clause is sometimes used as a shield to criminal investigations where Members of Congress may be involved in one way or the other. That said, the Clause does not provide absolute immunity; there have been successful criminal prosecutions of Members of Congress and staff for their official acts²⁵. The Clause provides a Member with a basis for arguing to a court that certain types of evidence may not be gathered or must be excluded. Furthermore, there is quite a rich, but complex, case-law in this respect which develops over time. Even so, the substantial allegations that the Speech or Debate Clause is sometimes used as an obstacle to the investigation of corruption need to be taken seriously. In this respect, it is to be welcomed that the Congressional Research Service has put together a document aimed at informing Members of Congress of the objectives, reach, limits and repercussions of the Speech or Debate Clause. This document serves as a useful source of information which ought to be updated over time. Consequently, **GRECO recommends that updated information on pertinent case-law concerning the "*Speech or Debate Clause*" be provided on a periodic basis.**

108. Regardless of the Speech or Debate Clause, Members always remain accountable to the chamber of Congress in which they serve; subject to disciplinary proceedings and sanctions, including expulsion. Further, the protection under the Speech or Debate Clause may not be exercised within the Senate or within the House of Representatives.

109. The U.S. Constitution provides each chamber of Congress with the authority to establish rules, judge membership requirements and punish and expel Members of Congress. The Ethics Committees are designated by the Senate and House Rules as the bodies which conduct the investigative and adjudicatory functions which usually precede a vote by the full chamber regarding such punishment or expulsion.

110. As with other committees of the House and Senate, the Ethics Committees are composed of Members of their respective bodies. However, unlike other committees, the Ethics Committees are evenly divided, with an equal number of Members from the party that is in the majority and the minority. The Senate Ethics Committee is comprised of six Senators, three in the majority and three in the minority. The House Ethics Committee is comprised of ten House Members, five in the majority and five in the minority.

111. In 2008, the House of Representatives created the Office of Congressional Ethics (OCE), following years of efforts within and outside Congress to create an independent entity to investigate allegations of misconduct against Members. The OCE is composed of six board members from outside of Congress and, at least, two alternates, each of whom serves a four-year term. The Speaker and the minority leader are each responsible for the appointment of three board members and one alternate. The chairperson is selected by the Speaker and a co-chair is selected by the minority leader. Current House Members, federal employees, and lobbyists are not eligible to serve on the board. The

²⁵ According to the U.S. authorities, in the past 26 years, 25 Members and former Members of Congress have been convicted of crimes (four of these convictions involved actions that were entirely unrelated to Congressional service).

mandate of the OCE, which has jurisdiction only in the House, is to review information and, when appropriate, refer findings of fact to the House Ethics Committee. However, only the Committee, not the OCE, has the authority to recommend disciplinary measures in respect of House Members. The GET learned that the OCE came into being following scandals, including with links to corruption and as a reaction to criticism against the efficiency of the House Ethics Committee. The OCE is empowered to start investigations on its own initiative or on information provided by anyone. When the OCE finds that wrongdoings have occurred, it must report to the House Ethics Committee which may then continue the investigation. It is noteworthy that the OCE has no power to subpoena documents or hear witnesses, but is rather a pre-investigative body to the House Ethics Committee.

112. Each Ethics Committee is served by a nonpartisan, professional staff. The Senate Ethics Committee is comprised of 16 staff members. The staff includes seven attorneys, including the Chief Counsel and Staff Director; the Chiefs of Staff for the Chairman and Vice Chairman of the Committee; the Deputy Staff Director; one professional staff member; and five administrative support staff. The House Ethics Committee is comprised of 25 staff members. The Staff includes 15 attorneys, including the Chief Counsel and Staff Director, the Director of Investigations, the Director of Advice and Education, the Counsel to the Chairman and the Counsel to the Ranking Member; three professional staff members; and seven administrative support staff.

113. The Ethics Committees have full investigative authority, including the ability to issue subpoenas and take testimony. Committee investigations are generally conducted by the Committees' staff at the direction of their Members. The Ethics Committees follow procedural rules of their respective bodies. The Ethics Committees may choose to exercise their investigative authority in several different scenarios. The Senate Ethics Committee exercises its investigative authority when it receives: (1) a sworn or unsworn complaint submitted by an individual or organisation; (2) an anonymous or informal complaint; (3) information developed during a study or inquiry by the Ethics Committee or other committee or subcommittee of the Senate; (4) information reported by the news media; or (5) information obtained from any individual, agency, or department of the executive branch of the federal government. The House Ethics Committee may exercise its investigative authority when: (1) information offered as a complaint by a Member of the House is transmitted directly to the committee; (2) information offered as a complaint by an individual, not being a Member of the House, provided that a Member of the House certifies in writing that such Member believes the information is submitted in good faith and warrants the review and consideration of the committee; (3) the committee, on its own initiative, undertakes an investigation; (4) a Member, officer, or employee is convicted in a federal, state or local court of a felony; (5) the House of Representatives, by resolution, authorises or directs the Committee to undertake an inquiry or investigation; or (6) a referral from the OCE is transmitted to the Committee. The authorities submit that most investigations begin when the committee, on its own initiative, undertakes an investigation.

114. Most committee decisions require a simple majority of the total number of members of the Committee. Due to the evenly divided nature of the Ethics Committees, this requires a bipartisan vote. The authorities submit that while deadlocks on the committees are possible, they are rare. In the last few years, every vote of the House Ethics Committee has been unanimous. Further, there are procedural safeguards against deadlocks, including the ability of one side or the other to publicly disclose the existence of a deadlock.

115. In terms of sanctions, Members who knowingly and wilfully fail to file a timely, accurate, and complete financial disclosure reports may be subjected to (1) Committee action; (2) discipline by the Senate or House; (3) civil enforcement; or (4) criminal

prosecution. Depending on the enforcing mechanism, penalties for violations may include fines, punishment by the Senate or House, or, in a criminal prosecution, imprisonment.

116. If the Ethics Committees determine that there is substantial credible evidence of a violation of the financial disclosure requirements or of Senate or House rules, but that the alleged violation is inadvertent, technical, or otherwise of a *de minimis* nature, they may issue a public or private letter of admonition (in the Senate), or a letter of reproof (in the House), which shall not be considered discipline. If the Ethics Committees determine that a letter of admonition or reproof is a sufficient resolution to a matter, no further action may be taken. The Senate and House may impose several sanctions against its Members, including expulsion, a formal vote of disapproval such as a censure or reprimand, a fine, or a limitation of privileges. The House Ethics Committee rules state that "reprimand is appropriate for serious violations, censure is appropriate for more serious violations, and expulsion of a Member or dismissal of an officer or employee is appropriate for the most serious violations. A recommendation of a fine is appropriate in a case in which it is likely that the violation was committed to secure a personal financial benefit; and a recommendation of a denial or limitation of a right, power, privilege, or immunity of a Member is appropriate when the violation bears upon the exercise or holding of such right, power, privilege, or immunity." Expulsion is the most serious sanction available to the Senate and House, but is rare for either Chamber to expel someone. However, there are numerous instances of Members of Congress resigning from the Senate or House while under investigation by the respective Ethics Committee.

117. A total of 20 Senators/House Members have ever been expelled. The most recent expulsion occurred in 2002. A total of 41 Senators/House Members have ever been censured or reprimanded. The most recent reprimand occurred in 2012.

118. The Senate has expelled 15 Members; the last time was in 1862. 18 Senators have been subject to expulsion proceedings that did not result in expulsion, of those 18, six resigned from office while under investigation, the most recent was in 2011. Nine Senators have been censured.²⁶

119. Since 2012, five Members of the House of Representatives have resigned in the midst of public ethics investigations. Since 2012, an additional five Members of the House retired and left Congress before a public ethics investigation could be completed.²⁷

120. The GET was informed that the Senate and House Ethics Committees provide aggregated data regarding their investigative work, but it is not broken down by subject. In 2013 and 2014, the Senate and House Ethics Committees reviewed approximately 160 alleged violations. In 2015, the Senate and House Ethics Committees reviewed approximately 99 alleged violations. The Ethics Committees confidentially resolved most of those matters. The Ethics Committees publicly resolved 29 matters and of those 29 public resolutions, three involved conflict of interest issues and in two of these cases violations were found, which led to public letters of reproof to the Members and one of them was required to repay over \$50,000 for improper gifts.

121. The GET finds that Congress has a rather sophisticated system in place for the supervision and non-criminal enforcement applicable to its Members. Both Chambers have ethics committees: the Senate Committee of Ethics and the House Ethics Committee. A main objective of each is to ensure that Members follow the internal rules of Congress. Both Committees appear to be adequately staffed and with a good level of

²⁶ For additional information regarding discipline of Senators see the Congressional Research Service's publication *Expulsion and Censure Actions Taken by the Full Senate Against Members* at <https://www.fas.org/spp/crs/misc/93-875.pdf>.

²⁷ For additional information regarding discipline of House Members see the Congressional Research Service's publication *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* at <https://www.fas.org/spp/crs/misc/RL31382.pdf>.

professionalism. Having said that, the GET recognises some structural issues that could have an impact on the overall functioning of this system. First of all, each of the Committees consists only of Members of the respective chambers, the Senate committee of Senators and the House Committee of House Members. Consequently, they cannot be considered as independent, as such. Furthermore, both Committees consist of an even number of Members (three Democrats and three Republicans), which, while ensuring that any decision must garner the support of at least one Member from each party, may result in evenly divided votes, so called "deadlocks". The GET also noted that the House Ethics Committee may only accept complaints from the public with the support of a House Member as opposed to the Senate which may receive anonymous complaints without any such support.

122. As mentioned above, as a result of the criticism regarding the lack of independence and efficiency of the House Ethics Committee, the OCE was established as an independent pre-investigatory entity, which may start investigations *ex officio*. The independence of this body and the fact that it may deal with any case it believes merits an investigation were major steps forward towards meeting criticisms levelled at the House of Representatives at the time, and the House should be commended for it. Even if the Senate may not have suffered the same criticisms as did the House²⁸, an equivalent pre-investigative body might be appropriate also for the Senate, in the view of the GET.

123. That said, the GET shares the view with interlocutors met on-site that the powers of the OCE could well be further developed, for example, also to be in a position to take evidence, hear witnesses, etc. to the extent this is possible under the Constitution²⁹. The GET also notes that the current system only allows the OCE to channel its findings and proposals to the House Ethics Committee for a final decision by that Committee, which is due to constitutional limitations in respect of Congressional authority to discipline Members. Nevertheless, it would appear that the findings of the OCE (which often go public) have an impact on the Ethics Committee and the GET understood that the OCE had also been instrumental in preventing "deadlocks" in the Ethics Committee. To conclude, the GET is of the opinion that the establishment of the OCE was a major achievement towards more independent monitoring of House Members and that further efforts to increase its powers ought to be considered. **GRECO recommends that further measures to reinforce the efficiency of the supervision and enforcement of the internal rules of Congress be considered by the appropriate bodies of Congress.**

Advice, training and awareness

124. All Senate and House Rules, manuals, statutes and regulations and reports concerning the conduct expected from Members of Congress are publicly available documents published on the Internet through various congressional and government offices.

125. All new Members of Congress are obliged to complete mandatory introductory ethics training within 60 days of commencing congressional service. This mandatory training on the Codes of conduct lasts for 1.5 hours. In addition, the Ethics Committees conduct ongoing formal training (refresher training sessions), which typically run for 1 hour. The training sessions are conducted by non-partisan staff of the Ethics Committees. Members who do not complete the mandatory code of conduct training sessions are subject to discipline by the Ethics Committees.

²⁸ The authorities have pointed out that the Senate Committee has had fewer problems than the House Committee with regard to deadlocks and that it may take anonymous complaints.

²⁹ E.g. rights related to the Speech and Debate Clause needs to be considered in this respect.

126. Training materials are made available to those in attendance at each training session in hard copy format,³⁰ are available in the Ethics Committees' Offices, and are publicly available on the Ethics Committees' websites.³¹ In addition to the materials distributed in training sessions the Ethics Committees publish a variety of quick reference, frequently asked questions, and summary guidance documents, which are available to the public on the Committee's respective websites.

127. In 2015, the Senate Ethics Committee staff conducted seven new Member and staff ethics training sessions; 20 Member and committee office campaign briefings (including one remedial training session); 20 employee code of conduct training sessions; 13 public financial disclosure clinics, seminars, and webinars; 27 ethics seminars and customized briefings for Member offices and Senate committees; two private sector ethics briefings; and five international briefings.

128. In the 113th Congress, the House Ethics Committee staff conducted 102 training briefings, 1,845 personal advisory meeting with Members, officers and employees. During the year of 2013, 9,132 of the House's 9,313 employees had undergone training by the House Ethics Committee.

129. Further, the Ethics Committees provide advice to the entire Senate and House communities and the public through phone calls, email inquiries, and written requests for advice. The Senate and House Ethics Committees serve an ongoing advisory role through phone calls, e-mails, letters, in-person consultations, and training sessions to ensure Members of Congress are aware of, and in compliance with, the Senate and House Rules. All advice issued by the Ethics Committees is confidential.

130. In 2015, the Senate Ethics Committee handled over 13,000 telephone and email inquiries and issued over 900 ethics advisory letters. In the same year, the House Ethics Committee handled over 26,000 telephone and email inquiries, issued over 2,500 ethics advisory letters.

131. Moreover, the Ethics Committees have authority to issue guidance regarding the application of rules, laws and regulations within the scope of the Committees' jurisdictions. The Committees use this authority to publish public guidance in order to ensure Members of Congress are advised as to the application of Senate and House rules and the conduct expected from them.

³⁰ <http://www.ethics.senate.gov/public/index.cfm/training-handouts>.

³¹ http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=f2eb14e3-1123-48eb-9334-8c4717102a6e
http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

IV. CORRUPTION PREVENTION IN RESPECT OF JUDGES

Overview of the judicial system

132. The Constitution of the United States (Article III) establishes the judiciary as one of the three separate and distinct branches of the federal government. The principle of judicial independence as enshrined in the Constitution is further promoted in two major ways. First, federal judges (under Article III) are appointed for life and they can be removed from office only through impeachment and conviction by Congress of "Treason, Bribery, or other high Crimes and Misdemeanors." Second, the Constitution provides that the compensation of Article III judges "shall not be diminished during their Continuance in Office," which means that neither the President nor Congress can reduce the salary of a federal judge. Judicial independence is also affirmed in the Code of Conduct for United States Judges, which provides at Canon 1 that "A Judge Should Uphold the Integrity and Independence of the Judiciary".

133. No individual or institution may give directives in individual cases to judges. Judges and litigants must follow official rules of procedure in all cases. In accordance with the Rules Enabling Act of 1934, the federal judiciary itself is responsible for issuing the rules of procedure and evidence that govern all federal court proceedings. Under that authority, the judiciary has established federal rules of evidence and rules of civil, criminal, bankruptcy and appellate procedure. The rules are designed to promote simplicity, fairness, and the just determination of litigation and to eliminate unjustifiable expense and delay. In addition, the Code of Conduct for U.S. Judges includes detailed prohibitions on *ex parte* contacts with both parties and non-parties to cases.

134. The rules of procedure of federal courts (criminal, civil, bankruptcy, evidence and appellate procedure) are drafted by committees of judges, lawyers, and professors appointed by the Chief Justice. Draft rules of procedure are published widely for public comment, are approved by the Judicial Conference of the United States, and are promulgated by the Supreme Court. The rules become law unless Congress votes to reject or modify them. The federal rules of procedure are available on-line³².

135. Article III of the Constitution establishes the Supreme Court and has authorised Congress to pass laws establishing a system of lower federal courts. In the federal court system's present form, 94 district-level trial courts and 13 courts of appeals sit below the Supreme Court.

136. With certain exceptions, the federal courts have jurisdiction to hear a broad variety of cases. The federal courts address civil and criminal cases, public law and private law disputes, cases involving individuals and cases involving corporations and government entities, appeals from administrative agency decisions, and law and equity matters. There are no separate constitutional courts; all federal courts and judges may decide issues regarding the constitutionality of federal laws and other governmental actions that arise in the cases they hear.

137. In general, federal courts may decide cases that involve the United States government or its officials, the United States Constitution or federal laws or controversies between states or between the United States and foreign governments. A case also may be filed in federal court — even if no question arising under federal law is involved — if the litigants are citizens of different states or the dispute arises between citizens of the United States citizens and those of another country and a certain monetary threshold is met.

³² <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure>

Federal Trial Courts

138. The United States district courts are the principal trial courts in the federal court system and they have jurisdiction to hear nearly all categories of federal cases. There are 94 federal judicial districts, including one or more in each state, the District of Columbia, Puerto Rico and the overseas territories.³³ Each federal judicial district includes a bankruptcy court operating as a unit of the district court. The bankruptcy court has jurisdiction over almost all matters involving insolvency cases, except criminal law issues. Once a case is filed in a bankruptcy court, related matters pending in other federal and state courts can be removed to the bankruptcy court.

139. Two special trial courts within the federal judicial branch have nationwide jurisdiction over certain types of cases. The Court of International Trade addresses cases involving international trade and customs issues. The Court of Federal Claims has jurisdiction over disputes involving federal contracts, the taking of private property by the federal government and a variety of other monetary claims against the United States.

140. Trial court proceedings are conducted by a single judge, sitting alone or with a jury of citizens as finders of fact. The Constitution provides for a right to trial by a jury in many categories of cases, including: (1) all serious criminal prosecutions; (2) civil cases in which the right to a jury trial applied under English law at the time of American independence; and (3) cases in which the United States Congress has expressly provided for the right to trial by jury.

Federal Appellate Courts

141. The 94 judicial districts are organised in 12 regional circuits, each of which has a court of appeals. These courts hear appeals from the district courts located within its circuit, as well as appeals from certain federal administrative agencies. In addition, the court of appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialised cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

142. There is a right of appeal in every federal case in which a district court enters a final judgment, and in certain interlocutory matters. The courts of appeals sit in panels of three judges. They are not courts of cassation and they may review a case only if one or more parties files a timely appeal from the decision of a lower court, or a petition for review of the decision of an administrative agency. When an appeal or petition for review is filed, the appeals court reviews the decision and record of proceedings in the lower court or administrative agency, but it does not hear additional evidence and it generally must accept the factual findings of the trial judge, unless there is clear error. If additional fact-finding is necessary, the court of appeals may remand the case to the trial court or administrative agency. Remand is unnecessary in most cases, however, and the court of appeals either affirms or reverses the lower court or agency decision in a written order or written opinion. In cases of unusual importance, a court of appeals may sit "*en banc*" - i.e. with all the appellate judges in the circuit present (or a lesser number permitted by statute) - to review the decisions of a three-judge panel. The full court may affirm, reverse, or remand the district court or administrative agency decision.

The United States Supreme Court

143. The United States Supreme Court is the highest court in the federal judiciary. It consists of the Chief Justice and eight associate justices. This Court always sits *en banc*, with all nine justices hearing and deciding all cases together. The jurisdiction of the

³³ Three territories of the United States — the Virgin Islands, Guam, and the Northern Mariana Islands — have U.S. district courts that hear federal cases, including bankruptcy cases.

Supreme Court is almost completely discretionary (implemented through the writ of certiorari), and, to be exercised, requires the agreement of at least four justices to hear a case. (In a small number of special cases, such as boundary disputes between the states, the Supreme Court acts either as the court of first instance or exercises mandatory appellate review.) As a general rule, the Court only agrees to hear cases where there is a split of opinion in the courts of appeals or where there is an important constitutional question or issue of federal law that needs to be clarified.

"Article I" Courts and Federal Administrative Tribunals

144. Within the executive branch there are military courts and a number of other specialised subject-matter tribunals and administrative agencies that adjudicate disputes in the first instance involving specific federal laws and public benefits programs. These courts and tribunals include the Tax Court, the Court of Appeals for the Armed Forces, and the Court of Appeals for Veterans Claims. While these courts, also known as "Article I-courts", are not part of the judicial branch, Congress created them to maintain a certain degree of independence and to operate impartially and without political influence. Appeals of their final decisions, except with respect to military courts, typically may be taken to the Article III courts.

Relationship between the State Courts and the Federal Courts

145. Although federal courts are located in every state, they are not the only forum available to litigants. The court systems in the 50 states, like the federal judiciary, have trial courts of general jurisdiction, intermediate appellate courts (in a majority of states), and a state supreme court. They may also have specialised lower-level courts, county courts, municipal courts, small claims courts, or justices of the peace to handle minor matters. The state courts have jurisdiction over a wider variety of disputes than the federal courts. State courts, for example, have jurisdiction over virtually all divorce and child custody matters, probate and inheritance issues, real estate questions, and juvenile matters, and they handle most criminal cases, contract disputes, traffic violations and personal injury cases.

146. In the initial stages of any lawsuit, the plaintiff must assert the legal basis for the court's jurisdiction over the case, and the court must make an independent determination that it has jurisdiction to address the case. If a case is filed initially in a federal court, but the court determines that it lacks jurisdiction to adjudicate, the case is to be dismissed. A case that was filed in a state court may, if certain conditions are met, be moved to a federal court. The federal and state courts are required to extend "full faith and credit" to each other's respective judgments (See Article IV, Section 1, U.S. Constitution and 28 U.S.C. § 1738.)

Federal Judicial administration and court governance

147. The Judicial Conference of the United States, established by statute in 1922, is the federal courts' national policy-making body, and it speaks for the judicial branch as a whole. The Chief Justice of the United States presides over the Judicial Conference, which consists of 26 other judges, including the chief judge of each court of appeals, one district court judge from each regional circuit, and the chief judge of the Court of International Trade. The Judicial Conference works through committees established along subject matter lines to recommend national policies and legislation on all aspects of federal judicial administration. The committees, all of which are appointed by the Chief Justice, consist mostly of judges. The main responsibilities of the Judicial Conference are approving the judiciary's annual budget request to Congress; proposing, reviewing, and commenting on legislation that may affect procedures of the courts; implementing legislation by promulgating national regulations, guidelines, and policies; supervising and directing the Administrative Office of the United States Courts in such matters as human

resources, accounting and finance, information technology, statistics and administrative support services; drafting and amending the general rules of practice and procedure for litigation in the federal courts, subject to the formal approval of the Supreme Court and Congress; promoting uniformity of court procedures and the expeditious conduct of court business; exercising oversight authority over codes of conduct, ethics, and judicial discipline; making recommendations to the Congress for additional judgeships etc.

148. The Administrative Office of the United States Courts is an agency within the judicial branch established by statute in 1939, supervised and directed by the Judicial Conference. It is responsible for carrying out policies adopted by the Judicial Conference. The Director of the Administrative Office, who is appointed by the Chief Justice in consultation with the Judicial Conference, serves as the chief administrative officer of the federal courts. Among its functions, the Administrative Office provides staff support and advice to the Judicial Conference; assists the Judicial Conference Committee on Financial Disclosure in the collection and review of judges' annual financial declarations; assists the Judicial Conference Committee on Codes of Conduct in providing ethics guidance and education to judges and judicial employees; provides management advice and assistance to the courts; develops and administers the judiciary's budget; audits court financial records; manages the judiciary's payroll, collects and analyses statistics, issues manuals, guides, and other publications etc. The Director of the Administrative Office delegates responsibility for many court administrative matters to the individual courts. This allows each court to operate with considerable autonomy in accordance with policies and guidelines.

149. The Federal Judicial Center, established in 1967, is the primary research and education agency of the federal judicial system. The Chief Justice of the United States chairs the Federal Judicial Center's Board, which also includes the Director of the Administrative Office and seven judges elected by the Judicial Conference. The Board appoints the Center's Director and Deputy Director. Among its functions, the Federal Judicial Center conducts and promotes education and training for federal judges, including formal ethics training for both new and experienced judges; develops education and training programs for court personnel, such as those in clerks' offices; conducts and promotes research on judicial processes, produces publications and manuals, maintains a library of materials on judicial administration etc.

150. The Circuit Judicial Councils oversee the administration of the federal courts located in the twelve circuits. Each judicial council consists of the chief circuit judge, who serves as the chair, and an equal number of other circuit (court of appeals) judges and district (trial court) judges. Each circuit uses its own procedures for selecting the members of the council. By statute the number of council members, and the length of members' terms, is determined by a majority vote of all judges in the circuit (28 U.S.C. § 332(a)). Each judicial council appoints a circuit executive, who works closely with the chief circuit judge on administrative matters. The judicial councils have broad authority to oversee numerous aspects of court of appeals and district courts operations. Under 28 U.S.C. § 332(d)(1), the circuit judicial council "shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." That said, the day-to-day responsibility for judicial administration rests largely with each individual court and its judges, for example to appoint its own support staff and manage its own affairs. Substantial budget and administrative responsibility has been delegated to each court. Each court in the federal judicial system has a chief judge who, in addition to hearing cases, has administrative responsibilities relating to the operation of the court. The chief judge is normally the judge who has served on the court the longest.

Federal Judges

151. Justices of the Supreme Court, judges of the courts of appeals, the district courts and judges of the Court of International Trade are appointed under Article III of the

Constitution. These, so called "Article III judges", are appointed for life. There are currently nine positions on the Supreme Court, 179 court of appeals judgeships, 667 district court judgeships (plus ten temporary district court judgeships for a total of 677) and nine Court of International Trade judgeships. It was explained that the holder of a temporary judgeship position enjoys life tenure, but the judgeship position itself will not necessarily be filled when the current holder dies or retires.

152. Other federal judges include 349 authorised bankruptcy judgeships, 534 authorised magistrate judgeships, 35 authorised part-time magistrate judgeships and 16 authorised Court of Federal Claims judgeships.

153. By statute (28 U.S.C. §§ 45, 136 and 258), judges of district courts, courts of appeal and the Court of International Trade must be under age 65 to become chief judge. They may serve as chief judge for a maximum of seven years and they may not serve as chief judge beyond the age of 70.

154. Judges of the courts of appeals, district courts and the Court of International Trade have life tenure under the Constitution. They are, therefore, not required to retire at any age. They may choose voluntarily to retire from "active" service on full salary if they are at least 65 years old and meet certain years of service requirements. Most Article III judges who retire continue to hear cases on a full or part-time basis as "senior judges" without additional compensation. Retired bankruptcy judges, magistrate judges, and judges of the Court of Federal Claims may also be "recalled" to active service.

155. As of May 2016, there were 405 male district court judges and 201 female district court judges, excluding senior judges, and 110 male court of appeals judges and 60 female court of appeals judges, excluding senior judges. As of September 2014, there were 335 male full-time magistrate judges and 179 female full-time magistrate judges, 259 male bankruptcy judges and 114 female bankruptcy judges. (There are approximately 12,000 state court judges in the general jurisdiction courts of the 50 states.)

Recruitment, career and conditions of service

156. All federal judges are appointed (not elected). Article III judges are nominated for positions by the President of the United States; they must be confirmed by a majority vote of the Senate and, following the confirmation, they are appointed by the U.S. President to their positions for a life term.

157. The primary criterion for appointment to a federal judgeship is a person's total career and academic achievements as well as integrity and a judicial temperament necessary for the performance of the duties of a federal judge. By statute, a district or circuit court judge generally must reside in the district or circuit to which s/he is to be appointed (28 U.S.C. § 134 and 28 U.S.C. § 44, respectively). There is no formal method for the selection of candidates for judicial appointments, but the process for such appointments has developed over the years to include a request by the President to the Senators or other senior official of the State of the district court vacancy for recommendations of individuals residing in the districts. Judicial vacancies are publicly announced on-line³⁴ and are often the focus of media attention in both the popular press and specialised legal publications. (With regard to circuit court judgeships, the President also collaborates with the Senators or other senior officials of the State where the circuit vacancy has or will arise, although the President does not necessarily rely on these officials for recommendations.) Senators follow various procedures in making recommendations of individuals to the President. Some establish merit selection committees or otherwise seek recommendations from the individuals who reside in the

³⁴ <http://www.uscourts.gov/judges-judgeships/judicial-vacancies>

district. Recommended individuals usually come from among the ranks of prominent practicing lawyers (both from private law firms and from public service), lower federal court judges, state court judges or law professors who reside within the district or circuit where the court sits. The names are then submitted to the President where the White House Counsel's Office does a preliminary check of those recommended, discusses the candidates more fully with the Senators as necessary and then narrows the field to one candidate. That individual is then required to complete an extensive questionnaire and go through a series of interviews; Department of Justice's Office of Legal Policy reads the candidate's past writings, speeches and interviews and conducts professional reputation calls; the Federal Bureau of Investigation (FBI) conducts a full field background investigation of the individual; the Department of the Treasury, the Internal Revenue Service, conducts a separate review for tax law compliance. Furthermore, the American Bar Association's Standing Committee on the Federal Judiciary conducts a separate evaluation of the candidate's legal qualifications. Following this process, should the President choose to nominate the individual, the Senate Judiciary Committee begins its own vetting, which also includes review of the nominee's FBI background investigation. The Committee holds a public confirmation hearing at which the candidate is required to be present. The Committee may also ask others to testify. The Committee then votes on whether to report the nomination out of the committee to the full Senate. Once the Senate votes to confirm a candidate, the President then appoints the individual.

158. The GET notes that the procedure for the appointment of Article III judges is in the hands of politicians: for the district courts, nominations are typically made by the home state Senators. The process is initiated by the President, recommendations provided by Senators, and the appointments are made by the President and subject to confirmation by the Senate. The GET recalls that the political dimension of this process was already highlighted in GRECO's First Round Evaluation Report on the United States.³⁵ The GET understands that this Constitutional model is anchored in deep traditions and deserves full respect. The GET was also made aware of a practical example where the political impact is very clear: The Senate may block an appointment by the President which, at the time of the on-site visit, was happening in respect of the appointment of a Supreme Court Justice since several months. That said, the GET also notes that the procedure of appointing Article III judges is far from being a purely political one. The integrity and suitability of nominees is scrutinised intensively and very thoroughly. There is every reason to think that those who are nominated/appointed are all candidates of the highest integrity, of outstanding legal ability and qualified in every respect for judicial office. The GET also heard repeatedly on-site that, once appointed, judges are to a large extent perceived to act with impartiality. It should also be mentioned that the framework provided in the Constitution (such as life tenure), legislation and other regulations are strong guarantees for judicial independence and judges' impartiality in the United States.

159. *Judges of the Court of Federal Claims* are appointed for terms of 15 years by the President, subject to confirmation by a majority of the Senate. The nomination and confirmation process is similar to that of Article III judges. A Court of Federal Claims judge who has completed his or her statutory 15-year term of office is authorised to continue to hear cases as a senior judge of the court.

160. *Bankruptcy judges* are appointed by the circuit judges of the courts of appeals for 14-year terms. The appointment process requires public notice of all vacancies. The judicial council of the circuit may appoint a merit selection panel to assist with the selection of candidates for bankruptcy judgeships. If such a panel is appointed, it must have at least three members, including a chair. If the judicial council decides not to appoint a panel, the judges on the judicial council, or a subcommittee of the members of the council, may perform the duties of the selection panel. Selection panel members must be residents of the circuit within which the appointment is to be made. The

³⁵ Greco Eval I Rep(2003) 2, paragraphs 151 and 152

selection process is conducted under rules and regulations established by the Judicial Conference.³⁶ The merit selection panel must prepare a report specifying five to ten persons the panel has determined as best qualified for the position, including written justifications. The council may accept a list containing less than five names in special situations. After reviewing the report of the merit selection panel, the judicial council reviews the qualifications of the recommended nominees, consistent with procedures it has established for this purpose. These procedures are public³⁷. At its discretion, the judicial council may accept the findings contained in the panel report or it may appoint its own review committee and may also conduct its own interviews or conduct an additional inquiry into the qualifications of the individuals recommended. Upon completion of its review, the judicial council must submit a list of at least three nominees to the court of appeals. The council must select the nominees from the list provided by the panel. But the judicial council, by majority vote, may reject the first list submitted by the panel. If that list is rejected, the panel must submit a second list from which the judicial council must then select its nominees. If the judicial council has chosen not to form a panel to assist it in the selection process, the council itself, or a subcommittee of the members of the council, may perform the duties of the merit selection panel and select nominees from among the applicants for the position. Upon receiving the list of nominees from the judicial council, the court of appeals may wish to conduct a final round of personal interviews and then must make a selection by majority vote of the judges of the court of appeals for that circuit.

161. The name of a person who is selected by the court of appeals for appointment as a bankruptcy judge must be submitted to the Director of the Administrative Office, who will request background reports by the FBI and the Internal Revenue Service (IRS). However, if the nominee has been the subject of such reports prior to appointment to the bankruptcy judge position, the requirement for further background reports may be waived on request by the court of appeals.

162. A bankruptcy judge is appointed for an initial 14-year term. The court of appeals must decide whether or not to reappoint a bankruptcy judge before considering other potentially qualified candidates. In making this decision, the court of appeals shall take into consideration the professional and career status of the incumbent, and whether the incumbent has performed the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges. If a majority of the judges of the court of appeals votes to reappoint the incumbent, the incumbent must be reappointed. If a majority of the judges of the court of appeals votes not to reappoint the incumbent, the incumbent will not be reappointed.

163. *Magistrate judges* are judicial officers of the district court, appointed by majority vote of the active district judges of the court to exercise jurisdiction over matters assigned by statute as well as those delegated by the district judges. Full-time magistrate judges serve a term of eight years. The number of magistrate judge positions is determined by the Judicial Conference of the United States, based on recommendations of the respective district courts, the judicial councils of the circuits, and the Director of the Administrative Office of the U.S. Courts. Duties assigned to magistrate judges by district court judges may vary considerably from court to court. Magistrate judges exercise authority delegated by the district court judges in accordance with statutory authority. In criminal matters this authority is limited to certain pre-trial and misdemeanor matters; in civil cases magistrate judges conduct mediations, preside over pretrial matters and, with the consent of the parties, conduct trials.

³⁶ See Judicial Conference regulations for selecting and appointing bankruptcy judges at: <http://www.ca5.uscourts.gov/docs/default-source/default-document-library/qualif.pdf?sfvrsn=0>

³⁷ For example, see (2nd Circuit Court of Appeals Procedures for Appointment and Reappointment of Bankruptcy Judges) at: http://www.ca2.uscourts.gov/Docs/Appointment_Reappointment_bk_judges_dec29_2014.pdf

164. The appointment process for magistrate judges requires public notice of all vacancies and screening of candidates by a merit selection panel of lawyers. Before the appointment or reappointment of a magistrate judge, the district court in which the magistrate judge will serve must appoint a merit selection panel by majority vote of the district judges. The selection panel will recommend to the court for consideration individuals whose character, experience, ability, and commitment to equal justice under the law fully qualify them to serve as a U.S. magistrate judge. The panel must be established by an order of the court specifying the names of the members, whether each is a lawyer or a non-lawyer, and the effective date of the panel's appointment. A copy of the court's order appointing the merit selection panel must be submitted to the Director of the Administrative Office at the time the order is entered and prior to any action by the panel. In the case of the appointment of a new magistrate judge, the function of the merit selection panel is to identify five members of the bar who are the best qualified for appointment by the court as magistrate judge. In the case of a reappointment, the panel's role is to appraise the performance of the incumbent magistrate judge and to recommend to the court whether that individual should be reappointed to a new term of office. The merit selection panel is appointed by majority vote of the district judges of the court. It must include at least seven members, and consist of lawyers and other members of the community. The merit selection panel operates under rules and regulations established by the Judicial Conference. After receiving the report of the merit selection panel, the court reviews the qualifications of the individuals recommended by the panel. At its discretion, the court may accept the findings contained in the panel report, or it may conduct an additional inquiry into the qualifications of the recommended individuals. All the district judges must determine, by majority vote, a final selectee for appointment.³⁸ During the magistrate judge's term of office, the court should periodically assess his/her performance. Not less than one year before the expiration of a magistrate judge's term of office, the court should determine whether it wishes to consider the reappointment of the magistrate judge. If the court determines not to reappoint the magistrate judge, it must notify the judge. If the court desires to consider the reappointment of the magistrate judge, the court must again follow the merit selection procedures, see above. If the court determines not to reappoint a magistrate judge, the magistrate judge may not apply for the position.

165. The name of a selected candidate for a magistrate judge position must be submitted to the Director of the Administrative Office, who must request background reports by the FBI and background reports by the IRS.

166. The GET notes that bankruptcy judges and magistrate judges are appointed by procedures very different to the one that applies to Article III judges. These too are very rigorous in terms of the selection requirements, process and background checks of the selected candidates and these procedures are to be handled completely within the judiciary, i.e. by the structures decided by the courts and the judges and do not appear to be subject to any political influences. The GET therefore does not perceive any cause for concern arising out of the appointment process.

167. The GET is, however, concerned about the conditions of service which apply to magistrate judges and also (although to a lesser extent) those which apply to bankruptcy judges. While Article III judges are protected by the Constitution in terms of a life tenure, a prerogative granted in the interest of the independence of the judiciary and impartiality of judges and thus for the rule of law, a magistrate judge is appointed for an eight-year term and a bankruptcy judge for a 14-year term and yet, both magistrate judges and bankruptcy judges exercise aspects of district court jurisdiction in their own capacity (even if these powers are more limited than those of district court judges). The GET was told that, in practice, magistrate judges and bankruptcy judges whose terms are ending

³⁸ For further details see the Judicial Conference regulations for selecting and appointing magistrate judges at http://www.wvsc.uscourts.gov/pdfs/Procedures_Appointment_Reappointment%20MJ.pdf

most often seek re-appointment and are almost always reappointed; the GET was also informed that in the past ten years, there have been 454 magistrate judge reappointments, while only four judges who sought reappointment were not reappointed. That said, it was also confirmed to the GET that these figures do not show how many did not seek re-appointment, following bad appreciations or advice not to apply etc. In any event, if most are reappointed, it is even more difficult to see why these judges should not enjoy tenure until retirement, which is such a fundamental protection for the independence of all judges, according to international standards and GRECO practice, as well as in the U.S. Constitution in respect of Article III judges. In this context it is also recalled that GRECO has established a practice in respect of what is to be considered a reasonable probation period for judges before being permanently appointed. The GET considers that it would be of interest to assess the numbers of magistrate and bankruptcy judges who do not seek re-appointment, the reasons for not seeking re-appointment and the circumstances for denying such re-appointments. However, the core of this matter is rather of a principle nature, namely to protect judicial independence for judges at all levels. Consequently, **GRECO recommends that the judiciary consider how the system of re-appointments of magistrate judges and bankruptcy judges can ensure judicial independence.**

168. Judicial authorities do not have the power to promote a judge to a higher office or court. Each judge is to be appointed to a particular judicial office in accordance with the description above.

169. As far as the *mobility of judges* is concerned, federal judges are commissioned to a specific court and have no authority to hear matters in other courts unless they are "designated" to do so. Circuit chief judges must authorise "intra-circuit" assignments, that is, assignments of judges within their circuits to sit with other courts within that geographic circuit (28 U.S.C. §§ 291-296). The Judicial Conference Committee on Inter-circuit Assignments assists the Chief Justice with that statutory responsibility by processing requests for inter-circuit assignments and by maintaining rosters of judges who are willing to accept such assignments. Some typical examples of situations in which inter-circuit assignment of a judge might be requested include the temporary assignment of a judge to assist with a court's unusually heavy caseload, in a situation where judges of a court need replacement after recusal or where temporary assistance is needed because of vacancies. However, the GET was told that in practice judges are not designated to another district without their consent.

170. As mentioned above, *Article III judges* serve for life terms and are not subject to dismissal, except through the constitutional process of impeachment and conviction by Congress of "Treason, Bribery, or other high Crimes and Misdemeanors." The impeachment process is open to the public, with formal charges brought by the House of Representatives and a public trial and vote by the Senate. Under 28 U.S.C. § 355, if the Judicial Conference determines that impeachment of a judge may be warranted, "it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary". The Judicial Conference has certified six Article III judges for impeachment since 1986. The reasons for impeachment in these cases included income tax evasion, perjury, soliciting a bribe, sexual assault, spousal abuse, and obstruction of justice.

171. A *magistrate judge* may be removed from office by the judges of the district court for the judicial district in which the magistrate judge serves, but only for "incompetence", misconduct, neglect of duty, or physical or mental disability," or if the Judicial Conference determines that the services performed by the judge's office are no longer needed. Removal of a magistrate judge from office may not occur unless a majority of all of the judges of the court for the judicial district in which the magistrate judge serves concur in the order of removal. Before any order of removal may be entered, a full specification of

the charges must be provided to the magistrate judge, who must be given an opportunity to be heard (28 U.S.C. § 631(i)).

172. A *bankruptcy judge* may be removed from office by the judicial council of the circuit in which the judge serves, but only for "incompetence, misconduct, neglect of duty, or physical or mental disability." Removal of a bankruptcy judge from office may not occur unless a majority of all of the judges of the judicial council concur in the order of removal. Before any order of removal may be entered, a full specification of the charges must be provided to the bankruptcy judge, who must be given an opportunity to be heard. See 28 U.S.C. § 152(e).

173. Federal judges receive salaries and benefits that are set by Congress. Judicial salaries and employment benefits are comparable to those received by Members of Congress and other senior government officials. The Constitution provides that the compensation of an Article III federal judge may not be reduced during the judge's service. Federal judicial salaries do not vary based on the actual function occupied, seniority or any periodic evaluation. In 2016, the gross annual salary of the Chief Justice (Supreme Court) was \$ 260,700 (€246,000), Associate Justices (Supreme Court) \$249,300 (€235,000), Circuit (Court of Appeals) Judges 215,400 (€203,000), District Judges \$ 203,100 (€191,000) and the salary of bankruptcy and magistrate judges was \$ 186,852 (€176,000), i.e. a rate equal to 92% of the salary of a district court judge (28 U.S.C. § 153a and 28 U.S.C. § 634(a) and (b)). Magistrate judges' compensation cannot be reduced during their term of office.

174. Article III judges receive their salary for life. Federal judges are eligible for the employment benefits that are available to other senior government officials, such as the opportunity to participate in government health insurance and life insurance plans, and the option to participate in the federal government's Thrift Savings Plan (a government pension plan). All federal judges are also covered by retirement plans (pension). Judges are not provided any additional special benefits.

Case management and procedure

175. Every court with more than one judge must implement procedures for assigning responsibility for cases to its judges. See 28 U.S.C. § 137 (providing that the business of a court "shall be divided among the judges as provided by the rules and orders of the court.") Common methods of case assignment in the trial (district) courts include random assignments, rotational assignment, subject matter assignment and assignment by geographic division of the court.

176. Most federal district and bankruptcy courts randomly assign a case to a particular judge at the time it is filed and that judge has complete responsibility for the case until it is terminated. The authorities state that random assignment generally helps to ensure an equitable distribution of workloads and prevents "judge shopping." Under a rotational assignment system, a judge or judges are allotted a time period during which all incoming cases are assigned to them. Some courts implement case assignment systems in which the civil part of the docket is allocated randomly while the criminal docket is assigned rotationally. Such systems help to clear time for judges to handle civil matters without the frequent interruptions occasioned by criminal cases. Subject matter and divisional assignment systems are used less frequently, as they tend to create workload disparities and may also lead to improperly close relations between the bench and the bar. Courts, however, often use the subject matter of certain types of cases — such as Social Security appeals and prisoner petitions — to determine assignments to magistrate judges. The chief judge of the court is responsible for the allocation of cases under rules or orders developed by the court or the judicial council. See 28 U.S.C. § 137.

177. Each district court determines how magistrate judges will be utilised for case assignment. See 28 U.S.C. § 636 (regarding the assignment of cases to magistrate judges). Many district courts specify in local rules or orders that certain matters (for example, all pre-trial motions, all discovery motions, or all settlement conferences) will be referred automatically to a magistrate judge.

178. In the courts of appeals, cases are normally assigned by random selection to three-judge panels. Many courts have also implemented special procedures for reassigning cases in which a judge is recused (disqualified), for assuring that related cases are all assigned to the same judge or panel, and for special assignment of unusual and protracted cases. The local rules of the court will normally detail these special procedures. The assignment of judges to cases is also subject to the statutory and Code of Conduct provisions on recusal. Except for in situations where a judge self-recuses or a litigant requests a judge's removal from a case ("recusal", further dealt with below), it is not possible to remove a judge from a particular case.

179. All cases are to be handled as expeditiously as possible; the Speedy Trial Act of 1974 establishes special time requirements for the prosecution and disposition of criminal cases in district courts. See 18 U.S.C. §§ 3161-3174. As a result, courts must give the scheduling of criminal cases a higher priority than civil cases. On average the courts are able to resolve most civil trials in less than a year. Moreover, to avoid the expense and delay of having a trial, judges often encourage the litigants to reach an agreement resolving their dispute.

180. The Judicial Conduct and Disability Act complaint process is available to address undue delay in unusual circumstances, for example, in respect of allegations that a judge has an improper motive in delaying a particular decision or that the judge engages in habitual delay in a significant number of unrelated cases. With certain very limited exceptions, each step of the federal judicial process is open to the public. A citizen who wishes to observe a court in session may go to a federal courthouse, and watch any proceeding. Anyone may review the file and papers in a case by going to the clerk of the court's office and asking to review or copy the appropriate case file. Court schedules, dockets, judgments, opinions, and pleadings are being made available to the public in electronic format through the Internet. Orders and opinions of the courts are public record documents. The E-Government Act of 2002 (Pub. L. No. 107-347), in addition, requires that each court make a text-searchable version of its opinions available on its public website. Court records are also available through the judiciary's electronic public access system, Public Access to Court Electronic Records (PACER) at www.pacer.gov. Court decisions are also published in official bound volumes.

181. The main rule of the right of public access to court proceedings is partly derived from the First Amendment of the Constitution and partly from court and common-law tradition. Only in a few limited situations the public may not have full access to court records and court proceedings (security, confidentiality, or privacy reasons). Finally, certain documents may be placed under seal by the judge (e.g. confidential business records, certain law enforcement reports, juvenile records and national security issues). In recognition of the important First Amendment principles at stake, matters may be sealed only if certain well-established legal standards are met and only to the extent necessary to address the protected interest.

Ethical principles, rules of conduct and conflicts of interest

182. Ethical principles are guided by general norms in the Constitution, legal provisions in statutes, such as 28 U.S.C. § 455 on conflicts of interest and recusal and in the *Ethics in Government Act* (5 U.S.C.), which applies to government officials, including judges, for example concerning the acceptance of gifts. Moreover, federal judges are subject to a specific *Code of Conduct for United States Judges*, a set of ethical principles and

guidelines adopted by the Judicial Conference. The Code of Conduct (and the advisory opinions interpreting it) provides guidance for judges (and judicial staff) on issues such as judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities and the avoidance of impropriety or its appearance. This instrument, containing some 20 pages, consists of five "Canons", according to the following:

- Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
- Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
- Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
- Canon 4: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office
- Canon 5: A Judge Should Refrain From Political Activity

183. The Code, developed by the Judicial Conference, was adopted in 1973. The original Code of Conduct for judges was based on the American Bar Association's Code of Judicial Conduct. The Judicial Conference has continued to review and revise the Code, as noted in its introduction, and the Code was last revised in 2014. Each canon of the Code is complemented with a commentary. The complete text of the Code of Conduct is made available to the public on the federal judiciary public website.³⁹

184. The GET notes that the five canons of the Code of Conduct for United States Judges are supplemented by a commentary. The whole document bears comparison with other equivalent codes (notably the Bangalore principles). It is kept under review and updated as necessary (most recently, in 2014). and it is continuously complemented by advisory opinions from the Codes of Conduct Committee.

185. The GET also notes that the Code of Conduct does not as such apply to Supreme Court Justices. However, 28 USC 455 does apply to them and is very similar in its terms to the key elements of the Code of Conduct. (Supreme Court Justices also comply with detailed disclosure requirements, gift regulations and outside earned income restrictions.) Justices use the Code as a guide and they can and do ask for opinions from the Judicial Conference Codes of Conduct Committee. The authorities also point to the Chief Justice's 2011 Year-End Report on the Federal Judiciary," which provides further explanation on how the Justices address ethical issues⁴⁰, explaining that all members of the Court are to consult the Code of Conduct in assessing their ethical obligations and that the Code is the starting point and a key source of ethics guidance for the Justices as well as their lower court colleagues, in addition to legal ethics opinions, treatises, and other sources. That said, the Code was adopted for the benefit of lower federal court judges. It appears to the GET that it would be helpful if the adherence of Supreme Court Justices to the Code of Conduct, which has been adopted by the Judicial Conference (which is chaired by the Chief Justice who is also the President of the Supreme Court), was more formalised, in particular so that they are seen to be giving a lead and underlining the importance of the Code of Conduct for other judges. For that reason, **GRECO recommends that the Supreme Court justices be invited to adopt - or declare that they regard themselves as being bound by - the Code of Conduct for United States Judges.**

Incompatibilities and accessory activities, post-employment restrictions

186. Judges are permitted to hold financial interests, but are required to disqualify in any matter in which they hold a financial interest. In addition, the Code of Conduct at

³⁹ <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

⁴⁰ <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>

Canon 4D(1) further restricts judges' financial and business activities, which broadly provides that: "A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves".

187. The Ethics in Government Act, at 5 U.S.C. App. §§ 501 to 505, prohibits judges from accepting outside earned income and from engaging in outside employment, with limited exceptions. The Judicial Conference has developed regulations in this respect. The Judicial Conference Regulations on Outside Earned Income, Honoraria, and Employment are available on-line⁴¹. In addition, Canon 4 of the Code of Conduct limits judges' possibilities of accepting certain types of governmental appointments (Canon 4G), non-profit board memberships (Canon 4B), and limits judges from engaging in other financial and business activities (Canon 4D). Furthermore, judges are prohibited from practicing law under Canon 4A(5) of the Code of Conduct and by statute (see 28 U.S.C. § 454). The Code of Conduct also prohibits service as an arbitrator or mediator outside the court.

188. The rules of lawyer professional ethics, as well as the Code of Conduct for Judges, both function to limit the scope of a former judge engaging in the practice of law after retirement or resignation from judicial office. These limitations are discussed in detail in several published advisory opinions. For example, see No. 84 ("Pursuit of Post-Judicial Employment"), No. 70 ("Disqualification When Former Judge Appears as Counsel"), No. 72 ("Use of Title 'Judge' by Former Judges"), and No. 113 ("Ethical Obligations for Recall-Eligible Magistrate and Bankruptcy Judges"). These Advisory Opinions, published by the Judicial Conference Committee on Codes of Conduct, are available to the public⁴².

Recusal and routine withdrawal

189. Judicial recusal (often also referred to as "disqualification") is formally governed by two statutes: 28 U.S.C. § 144 and 28 U.S.C. § 455(a). Section 144 permits a party to file an affidavit to attempt to establish personal bias or prejudice of a district court judge. Section 455(a), which applies to all federal judges and justices, including the Supreme Court, is broader, addressing both the appearance of impartiality and other categories for disqualification, and it functions as the primary statute governing judicial conflicts of interest and disqualification in cases. The language of Section 455 is mirrored in Canon 3C of the Code of Conduct. Section 455 and Canon 3C specify five specific situations in which a judge's recusal is mandatory and the parties may not waive recusal in any of those situations. The five mandatory recusal situations are 1) when the judge has a personal bias about a party or has personal knowledge of disputed facts in the case; 2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter; 3) the judge, judge's spouse or minor child has any financial interest in the subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding; 4) the judge, judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or; 5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.

190. In addition to the five specific mandatory recusal situations, Section 455 and Canon 3C also include a mandatory general disqualification requirement whenever the judge's impartiality might reasonably be questioned. The standard for determining

⁴¹ <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/outside-earned-income-honoraria-and-employment>

⁴² <http://www.uscourts.gov/file/1903/download>

disqualification under this principle is based on an objective determination. The question is not whether the judge believes there is an issue of impartiality, but rather whether an objective observer, or "reasonable person," might reasonably question the judge's impartiality.

191. A judge who is disqualified under this impartiality standard has the option to use the "remittal" procedure and obtain waivers from the parties to remain on the case. The remittal process is transparent and is designed to avoid placing any pressure on parties to waive a judge's decision to disqualify. The judge is required to disclose on the record the basis for disqualification; then the parties and their lawyers must be given the opportunity to confer outside the presence of the judge, and if all parties and counsel agree in writing or on the record that disqualification is not necessary, then the judge may proceed with the case. However, this procedure is not available for recusal based on the five specific mandatory grounds for disqualification.

192. The authorities stress that the recusal statutes and the Code of Conduct lie at the heart of a broader framework that the judiciary has developed to identify and resolve judicial conflicts of interest before they arise. The judiciary has implemented efforts to promote transparency and provide multiple checkpoints in the recusal process itself, and has adopted a number of mechanisms that supplement the recusal requirements of the Code and the statutes.

193. As to how the preventive system is applied in practice, the U.S. authorities pointed at several institutional safeguards that operate together to ensure that judges have the tools they need to comply with the recusal statutes and the Code of Conduct and that judges who have real conflicts or where the judge's impartiality in a particular case might reasonably be questioned do not hear those cases. These safeguards include randomly assigned cases, and that at the beginning of a case, the judge has an obligation to assess whether disqualification is required. The Judicial Conference requires all judges to use an electronic conflicts screening system listing all financial interests that would require recusal. The conflicts screening software compares a judge's recusal list with information filed in each case. The judicial authorities should be commended for these arrangements.

Gifts

194. The Ethics in Government Act (5 U.S.C. §§ 7351 and 7353), prohibits government officials, including judges, from soliciting or accepting gifts, with limited exceptions (such as reimbursed travel for participating in activities relating to improving the legal system or administration of justice). Furthermore, the Judicial Conference has developed gifts regulations for judges. Those regulations state that: "A judicial officer or employee shall not solicit a gift from any person who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or non-performance of the judicial officer's or employee's official duties." The regulations define gifts to include "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value." The Judicial Conference Regulations on Gifts are available on-line⁴³.

Third party contacts, confidential information

195. Judges are prohibited from engaging in "ex parte" communications concerning cases. This matter is addressed in detail in the Code of Conduct for Judges at Canon 3A(4), which provides as follows: "A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider *ex parte*

⁴³ <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/judicial-conference-regulations-gifts>

communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may: (a) initiate, permit, or consider ex parte communications as authorized by law; (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters”.

196. As far as the use of confidential information is concerned, Canon 2 of the Code of Conduct prohibits a judge from using the judicial office to advance the judge’s (or anyone’s) private interests. Canon 3A(6) of the Code of Conduct broadly prohibits a judge from making public comment on the merits of a matter pending or impending in any court. Canon 4D(5) provides that judges should not disclose or use non-public information acquired in a judicial capacity for any purpose unrelated to the judge’s official duties. In addition, the STOCK Act states that judges and other government officials are prohibited from using non-public information derived from their position or gained from the performance of their official responsibilities as a means for making a private profit.

Declaration of assets, income, liabilities and interests

197. The Ethics in Government Act (EGA) regulates that financial information (asset declarations) is to be reported annually by federal judges (as well as by Members of Congress and senior officials of the executive branch, including senior officials of the Department of Justice). The relevant requirements are contained in title 1 of that Act, which was explained under the chapter dealing with Members of Congress.

198. The declarations are to be filed annually, with the annual report covering the prior calendar year. The statute requires that initial reports and final reports be filed within 30 days of assuming the duties of the position. Newly identified filers and filers who are leaving positions that require disclosures are to file reports with designated time frames depending on their start dates and end dates, respectively. In addition, declarations are required for Article III judges already during the nomination process, because their appointments require the advice and consent of the Senate. These nomination reports are filed within five days of the transmittal by the President to the Senate of the nomination. Bankruptcy and magistrate judges file initial reports within thirty days of their appointment or within thirty days of receiving notice of the obligation to file a financial disclosure report, whichever is later. Final reports for all categories of filers are due within thirty days of their last date of service, or within thirty days of receiving notice of the obligation to file a final financial disclosure report, whichever is later. A judge’s annual declaration is to be sent to the Judicial Conference, which in turn has delegated its authority to the Judicial Conference Committee on Financial Disclosure.

199. The Committee on Financial Disclosure provides copies of financial disclosure reports when the request procedures based on the Ethics in Government Act are followed properly. A request for a copy of a financial disclosure requires the requestor to provide the name of the person whose financial disclosure is being sought as well as the name of the requester, the mailing address, and whether the requester is seeking the reports for himself or another person. Most reports are mailed to requesters, but they also may be

viewed or retrieved in the Committee's office. (See the Ethics in Government Act, as amended, 5 U.S.C. app. 4 § 105(b) and the Judicial Conference regulations promulgated under that authority).

200. In addition to the above declarations, the Judicial Conference requires all judges to use an electronic conflicts screening system to ensure that judges do not inadvertently fail to recuse based on financial interests in a party. Under this mandatory policy, each judge must develop a list of financial interests that would trigger recusal. The conflicts screening software is used to compare a judge's recusal list with information filed in each case. The system identifies potential financial conflicts, which enables the judge to decline an assignment or, if the case has been assigned, to recuse if necessary. Once a case is assigned, a judge has a continuing obligation, under the recusal statute and the Code of Conduct, to evaluate and monitor the case for potential recusal. The judges' lists are not subject to public disclosure.

Supervision and enforcement

201. The primary non-criminal enforcement mechanism in respect of judges' performance is the Judicial Conduct and Disability Act. Under this law (28 U.S.C. §§ 351-364) any person who believes that a judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts," or that a judge cannot discharge all the duties of the office because of physical or mental disability, may file a complaint with the clerk of the court of appeals for the circuit where the judge sits. Moreover, violations of the Judicial Conference Regulations on Gifts, and of the Regulations on Outside Earned Income, Honoraria, and Employment, may be addressed through the Judicial Conduct and Disability Act complaint process.

202. The Judicial Conference has published Rules for Judicial-Conduct and Judicial-Disability Proceedings that address in detail the procedures for accepting, investigating, and adjudicating complaints against judges under the Judicial Conduct and Disability Act. In addition to the Rules, a brief guide entitled "Filing a Complaint of Judicial Misconduct or Judicial Disability Against a Federal Judge," is available on the judiciary's public website⁴⁴ and on the public websites of individual courts.

203. The chief judges of the courts of appeals are authorized to dismiss complaints if these do not allege conduct that meets the statutory definition of misconduct or disability, if the complaint relates to the merits of a judicial decision or if the complaint is frivolous. The chief judge may also dismiss the complaint if corrective action has been taken or if intervening events have made further action unnecessary. If the chief judge does not dismiss the complaint, s/he is required to appoint a special investigatory committee of judges to examine the allegations and prepare a written report and recommendations to the judicial council of the circuit. After consideration of the special committee's report, the council is empowered to investigate the allegations further or to take appropriate actions, including: 1) requesting that a judge retire voluntarily; 2) certifying the disability of the judge (thereby creating a vacancy on the court); 3) ordering that no further cases be assigned to the judge for a temporary period; 4) issuing a public or private reprimand of the judge; or 5) taking any other action as appropriate.

204. The GET was informed that the judicial branch collects and publishes statistical information concerning complaints filed under the Judicial Conduct and Disability Act, including information regarding the number of complaints filed, investigations conducted, and outcome. In the five-year period from 2010 to 2014, 13 complaints against federal judges were referred to special investigating committees under the statutory procedure

⁴⁴ <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability>

set forth in the Judicial Conduct and Disability Act⁴⁵. The annual "Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. §§ 351-64" is available online⁴⁶.

205. In addition, under the Ethics in Government Act, 5 U.S.C. App. § 504(a), the Attorney General of the United States may bring a civil action against a judge who violates the statutory provisions concerning outside earned income and outside employment and the court in which the action is filed may assess civil penalties against the judge. (This has never been done).

206. As far as criminal proceedings are concerned, judges are not subject to any immunity from criminal prosecution. The Public Integrity Section of the Criminal Division of the Department of Justice has primary jurisdiction for the investigation and prosecution of federal judges due to the potential appearance issues that might arise if a local United States Attorney's Office were to investigate an allegation of wrongdoing by a judge before whom that United States Attorney's Office appears on a regular basis. In any matter filed under the Judicial Conduct and Disability complaint process in which it appears that a potential criminal violation may have been committed by a judge, the matter is to be referred to the Department of Justice for possible criminal prosecution.

207. If the Judicial Council determines that an Article III judge may have engaged in criminal conduct, or that a non-criminal complaint is not amenable to resolution by the Council, the Judicial Council must forward the matter to the Judicial Conference, which may vote to refer the matter to the Congress for possible impeachment and removal proceedings. Under 28 U.S.C. § 355, if the Judicial Conference determines that impeachment of a judge may be warranted, "it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary." The Judicial Conference has certified six Article III federal judges for impeachment since 1986 (see above).

208. The GET takes the view that the regime for making complaints against judges under the Judicial Conduct and Disability Act 1980, which is supported by the Rules for Judicial Conduct and Judicial Disability Proceedings and the Commentary on those Rules provide a good basis for a complaint mechanism in respect of judges. Anyone is entitled to file a complaint and the circuit chief judge can initiate a disciplinary process *ex proprio motu*. In the first instance, a complaint is dealt with by the circuit chief judge who may appoint a special committee to investigate. The report is made for the judicial council, which takes the final decision. There is a right to review by the Committee on Judicial Conduct and Disability. Where criminal conduct is identified, the judge may be prosecuted as any other citizen and in respect of Article III judges, the Judicial Conference may refer the case to the House of Representatives. This is an adequate system and the general perception of a high degree of ethical/moral conduct among federal judges in the United States stressed by various civil society representatives, appears to be supported by the figures indicating that very few judges are subject to complaints proceedings.

209. That said, the GET could not disregard the fact that out of more than 1100 complaints filed annually against federal judges, almost 99 % were dismissed as manifestly ill-founded. The authorities acknowledge that the complaint process is confidential, with limited exceptions, but further note that each complaint, unless

⁴⁵ The authorities submit that these 13 complaints involved allegations related to sexual assault, bias against a lawyer or litigant, misuse of office to advance another person's private interest, improper ex parte communications, misuse of government funds, membership in a discriminatory private club, and a disability that would prevent a judge from fulfilling judicial duties. Of the 13 matters, eight were ultimately dismissed, while five resulted in some form of sanction against the subject judge.

⁴⁶ <http://www.uscourts.gov/statistics/table/s-22/judicial-business/2014/09/30>

withdrawn, results in a public written order detailing the basis for dismissal or other action. The authorities furthermore indicated that the high number of dismissals is because most complaints are either related to the merits of a case - ground not encompassed by the disciplinary rules - or because the complaints are frivolous. For this reason, public orders usually will not disclose the name of the complainant or the subject judge. Nevertheless, the final orders are made publicly available in the clerk's office of the relevant regional circuit and on that court's website. Any decision by the Committee on Judicial Conduct and Disability is made available on www.uscourts.gov and in the clerk's office of the relevant regional circuit, according to the U.S. authorities.

Enforcement of asset declarations

210. Filers are to use automated software to complete their disclosure reports and the software includes instructional resources as well as an audit function that may inform the filer if an entry is incomplete. The Committee on Financial Disclosure reviews financial disclosure reports filed by judges and other judicial officers and employees, consistent with the Ethics in Government Act. Nine permanent and five temporary staff perform a year versus year comparison of the annual reports, as well as noting any item that raises a question, such as a position without corresponding asset information. If a potential error is identified, correspondence is sent to the filer asking that the report be reviewed and updated as needed. Through delegated authority from the Judicial Conference, the Committee administers the late filing fees and contacts filers if it has questions about the disclosures. If the Committee on Financial Disclosure does not receive a satisfactory response from a filer, the matter may be referred to the Judicial Conference for it to take action. The GET was told that such a referral is extremely rare; instead, interaction with the Committee members or Committee staff nearly always remedies the matter. Finally, the Judicial Conference may refer a matter to the Attorney General (the Department of Justice) for review and action, including bringing civil and criminal actions against filers who fail to file, or do not file completely.

211. As far as sanctions are concerned, there are administrative monetary penalties in place for late filing of financial disclosure forms (\$200, €178), civil penalties (up to \$50,000, €45,000) and criminal penalties for failure to file (monetary only) and criminal penalties for false filing including up to one year of imprisonment. The primary authority for the late filing fee and the civil and criminal penalties is the Ethics in Government Act.

212. The authorities submit that the Committee on Financial Disclosure has successfully resolved nearly all disclosure filing matters itself, and in the past three years has referred only one filer (a judiciary employee, not a judge) to the Department of Justice (DOJ) to seek action for the failure to file a complete annual report.

Advice, training and awareness

213. Ethics advice is available to all federal judges through the Judicial Conference Committee on Codes of Conduct. The Committee's jurisdiction broadly encompasses ethics policy for the judiciary. The Committee serves as an advisory body for judges on a broad array of judicial ethics issues including disqualification and conflicts of interest. The statutes and the related case law, the Code of Conduct for United States Judges, the associated Commentary and the ethics regulations adopted by the Judicial Conference are the basic resource documents. Beyond the Codes and regulations, the Committee has issued about eighty Advisory Opinions addressing judicial ethics topics that frequently arise. The Committee also oversees the mandatory conflicts screening system and the approval process for "certificates of divestiture" which authorises judges to divest and reinvest certain financial assets for tax purposes in order to avoid a conflict of interest. The Committee's goal is to ensure that the ethics guidelines for judges effectively protect the fairness and impartiality of the judiciary, while also preserving judicial independence.

214. The Judicial Conference Committee on Codes of Conduct has 15 members, including a representative from each judicial circuit, a bankruptcy judge and a magistrate judge. All committee members participate in providing ethics advice for judges and judicial employees. The Committee does not have the authority to act in judicial disciplinary policy or activities, which is aimed at encouraging judges to request confidential ethics advice from the Committee.

215. A judge may request ethics advice directly from the Codes of Conduct Committee, and may approach any committee member for an informal ethics opinion. Judges may also obtain informal ethics advice from experienced attorneys at the Administrative Office which serve as counsel to the Committee. In cases where an informal opinion is not sufficient or the judge raises a novel issue, the judge may seek "formal" ethics guidance. In that situation, the Committee issues a confidential letter of advice to the judge, usually within three weeks.

216. Another key function of the Codes of Conduct Committee is developing and delivering ethics education for judges. Committee members and staff participate in ethics education and training at judicial meetings, particularly through programs sponsored by the Federal Judicial Center. In training the Committee typically covers ethics scenarios drawn from the confidential inquiries the Committee receives, as well as hypothetical ethics problems to encourage discussion of ethics issues among the judges. At national and regional meetings of different judges, members and staff of the Committee routinely offer interactive ethics presentations. The Committee also provides Internet-based training, such as ethics quizzes, on a variety of topics including recusal and sends periodic written ethics updates to all judges by email. Education and training concerning financial disclosure filing requirements is provided by the Judicial Conference Committee on Financial Disclosure. In addition, the Committee on Judicial Conduct and Disability provides advice and prepares resources to assist chief circuit judges and the judicial councils in implementing 28 U.S.C. §§ 351-364.

217. Through programs sponsored by the Federal Judicial Center, the Committee provides ethics training for new judges, law clerks, staff attorneys, clerks and judicial assistants. The Committee offers an introductory video on ethics, coupled with explanatory booklets. New judges are required to attend initial and follow-on training that includes ethics training. Although continuing training is not compulsory, the frequency, scope, methods of delivery and broad range of ethics training and updates ensure coverage and dissemination on a broad scale to judges. Web-based training, including periodic updates on key ethics issues, webinars, archiving of ethics programs and videos on cutting-edge ethics issues, such as the ethics implications of social media, is a complement to the numerous in-person trainings. All key ethics guides are provided to each judge in a booklet form and available on the judiciary internal website.

218. The GET takes the view that the confidential counselling system available to all federal judges, provided by the Codes of Conduct Committee, is an exemplary model for providing informal as well as formal advice to judges. The GET was also pleased to note that federal district court and court of appeals judges are subject to mandatory training on judicial ethics during the appointment process and that numerous training opportunities are offered to all federal judges in different training schemes as described above. In respect of the training actually provided to judges, the GET was made aware of a detailed list of the different ethics training sessions provided in 2014-2016, indicating that several hundred first instance judges had participated in national workshops and other orientations on judicial ethics. That said, it would appear that courts of appeal judges did not participate in these events, except for a national symposium. **GRECO recommends that the opportunities for ethics training for court of appeals judges be increased.**

V. CORRUPTION PREVENTION IN RESPECT OF PROSECUTORS

Overview of the prosecution service

219. The U.S. Constitution separates the government into three distinct branches—the legislative, the judicial and the executive. The executive branch is charged under the Constitution with ensuring that the laws of the United States are faithfully executed (U.S. Constitution Article II, Section 3). The U.S. Department of Justice (DOJ), established in the executive branch in 1870, is exclusively responsible for federal criminal prosecutions and primarily responsible for civil prosecutions.

220. The DOJ is one of twelve Cabinet level Departments within the executive branch. The Department is led by the Attorney General, who is appointed by the President after confirmation by the United States Senate; the Attorney General serves in the President's Cabinet. The Attorney General is supported by a Deputy Attorney General, an Associate Attorney General, twelve Assistant Attorneys General and 93 U.S. Attorneys for the 94 districts throughout the United States. These officials are also appointed by the President after Senate confirmation and serve as the Department's policy and management leadership team.

221. The GET notes at the outset that the prosecution system in the United States, as described above, has a clear political dimension. It also means that the U.S. Constitution places the prosecution system as a part of the executive branch of Government and that it cannot, as such be regarded as an independent agency from this power. That said, the prosecution service is guided by numerous checks and balances within the system, as well as externally, ultimately through the powers of an independent judiciary.

222. The prosecutorial work of the DOJ is carried out primarily by career civil servants who enjoy protections afforded by civil service rules and regulations throughout the Executive Branch. Career prosecutors within the DOJ take appropriate law enforcement actions based on the available evidence and applicable law.

223. The DOJ has its own appropriation in the executive branch budget, its own congressional oversight and appropriations committees, does not take direction outside of the Department in the conduct of federal prosecutions and has established internal systems to protect its independence in making prosecutorial decisions.

224. Under the federal criminal justice system, career prosecutors possess wide latitude in determining when, whom, how and even whether to prosecute for apparent violations of federal criminal law. Because of this latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice, that all prosecutors be guided by a general statement of principles that summarises appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities. Therefore, each DOJ attorney (prosecutor) is guided by the precepts enshrined in the Principles of Federal Prosecution, contained in the United States Attorney's Manual. See USAM 9-27.000 et seq⁴⁷.

225. The DOJ, headed by the Attorney General, comprises approximately 40 separate component organisations and employs more than 114,000 persons. Within the Department, there are several Divisions based in Washington DC that have the authority to prosecute criminal cases, including the Criminal Division, the Antitrust Division, the Environmental and Natural Resources Division, the National Security Division etc. Each of those divisions is led by an Assistant Attorney General, who may be assisted by a small number of non-career prosecutors appointed by the Attorney General and who may be

⁴⁷ <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>

removed by the Attorney General. Each Division litigating unit is staffed by career prosecutors. The career prosecutors are selected through a competitive process and are appointed by the Attorney General typically as "trial attorneys" in the Division. Moreover, the Department enforces federal law throughout the United States and its territories in 94 federal districts.

226. The bulk of federal prosecutions are carried out by the prosecutors of the 93 U.S. Attorney's offices. The United States Attorney is the chief federal law enforcement officer in each federal district, and like the Attorney General and the Assistant Attorneys General, is appointed by the President after confirmation by the Senate (28 USC §§ 541 and 547 and 28 CFR 0, "Organization of the Department of Justice"). There are currently 93 U.S. Attorneys (of whom 21 are women).

227. Within each federal district, career prosecutors are selected through a competitive application process, at the conclusion of which they are appointed by the Attorney General to serve as Assistant United States Attorneys (28 USC § 542). These career Assistant United States Attorneys (AUSAs) carry out the day-to-day functions of prosecuting criminal cases. There are currently 5,817 Assistant U.S. Attorneys (AUSAs) (of whom 2,234 are women). Routine decision-making on any given case is handled by career AUSAs. These prosecutors report to supervisory AUSAs, who are senior career prosecutors within the Department of Justice and the career supervisors ultimately report to the United States Attorney for the federal district in which they are assigned. (At the State level, there are more than 30,000 state prosecutors in more than 2,000 state prosecution offices.)

228. In Fiscal Year 2013, the 93 US Attorney's offices dealt with a total of 172,024 new criminal matters, 25,629 of which were "declined" (i.e. dismissed at the investigation stage). During Fiscal Year 2013, the 93 US Attorney's offices filed 61,529 cases against 83,825 defendants in United States District Courts, and at the end of Fiscal Year 2013, a total of 79,735 criminal matters were pending.

Recruitment, career and conditions of service

229. The Attorney General, the Deputy Attorney General, the Associate Attorney General, the United States Attorneys and the Assistant Attorneys General are appointed by the President of the United States subject to confirmation by the Senate. Each one of these officials is subject to removal by the President. United States Attorneys are appointed for a term of four years, and on expiration of that term, a United States attorney shall continue to perform the duties of the office until a successor is appointed (28 U.S.C. §§ 541, 542).

230. Attorney candidates for positions requiring presidential appointment with Senate confirmation have first gone through a vetting process that includes a discussion of ethics statutes and rules particularly in relationship to information they have provided on the financial disclosure report each has submitted for the purpose of nomination. In addition to the financial disclosure report, these individuals have also gone through a full FBI background check, a tax check, filed a very comprehensive a questionnaire for the White House, a questionnaire for the Senate Judiciary Committee and a public confirmation hearing.

231. It follows from the above, that the top leadership of the prosecution service in the United States, is made up of political appointees. That said, their appointments by the President are subject to thorough scrutiny and are finally dependent on confirmation by the Senate. In particular, the selection of these top officials is also guided by a very thorough vetting process to test their integrity carried out by various authorities, such as the FBI and the tax authorities and a senate committee will also scrutinise the candidates

from this point of view in hearings etc. Furthermore, the candidates have to publicly disclose assets, income and liabilities prior to appointment for the same purpose.

232. The GET is fully aware, that in this system decisions to appoint U.S. Attorneys are not without political motivations, which is an inevitable result of the prosecution service being part of the executive branch. Yet, the GET notes that there are checks and balances (involving different authorities and the Senate) in the appointment process, aiming at providing a good basis for selecting candidates for these top positions who are professionally suitable and of a high moral standard. Apart from one particular case in 2007, where the President's decision to dismiss U.S Attorneys and replace them with new ones had been considered "inappropriately political" by the Inspector General of DOJ, the GET heard of no misconduct in this respect, and the particular situation which at the time allowed the President to replace dismissed U.S attorneys with temporary attorneys for an indefinite period of time, no longer exists since that legislation has been changed⁴⁸.

233. The Department of Justice employs career prosecutors whose tenures are not for fixed terms. That said, they are initially appointed to fixed terms while they are serving in DOJ pending the completion of their full background investigation. Career prosecutors who are supervisory may be appointed to the Senior Executive Service while the rest are generally "excepted service appointments," which is a branch-wide civil service category generally used for those serving in legal positions. Although the official appointments are made by the Attorney General, the GET notes that the appointments follow only after a competitive selection process conducted by others in the Department. While career prosecutors are subject to removal by the Attorney General, they enjoy the same rights and benefits as other "excepted service appointments" in the executive branch, including the right to challenge personnel actions. As all career services of the executive branch, decisions on performance reviews, promotions, reassignments, bonuses, discipline and other administrative actions are initially made by supervisors, following standard personnel procedures.

234. The hiring of career federal prosecutors is overseen by the Office of Attorney Recruitment and Management (OARM), in accordance with applicable federal hiring regulations. OARM, which is led by a Director, selected by the Deputy Attorney General, is comprised of 16 employees, nine of whom are attorneys. The OARM director determines the composition of the OARM. While the OARM has the final authority to *appoint* attorneys and AUSAs, the candidate review and selection process is decentralised and hiring decisions are made separately by each office. The OARM has been delegated authority to take final action in matters pertaining to employment, separation and general administration of DOJ attorneys including recruitment, appointment and determination of suitability for employment. Hiring is done after an advertisement, selection and interviewing process by the office to which the prosecutor will be assigned.

235. OARM strictly adheres to hiring criteria requiring that all DOJ attorneys are active members in good standing of a bar of a United States jurisdiction. Hiring by United States Attorneys' Offices frequently requires specific residency and bar admission requirements⁴⁹.

236. Once a candidate is identified, the OARM reviews the suitability and integrity of the candidate based on his/her application and completed security forms, fingerprint and financial background checks, as well as full field FBI background investigation and tax and attorney bar check. In making a determination regarding suitability for employment, OARM considers a number of factors, including a candidate's tax filing and payment history, credit history candor and any history of usage of controlled substances.

⁴⁸ "Lawyergate"

⁴⁹ <http://www.justice.gov/oarm/about-office>

237. Promotions and mobility are typically within the purview of the career and appointed supervisors within the DOJ. Because offices such as U.S. Attorney's Offices vary in size from dozens of prosecutors to hundreds of prosecutors, promotions within the offices are decided by the office's management team, depending on the structure of the office. Promotions and titles within such offices are determined locally, within the parameters established by civil service protections and non-discrimination laws. As in the rest of the career service of the executive branch, decisions on performance reviews, promotions, reassignments, bonuses, discipline and other administrative actions are initially made by supervisors, following standard personnel procedures. Promotion to a small number of career supervisory positions within the Senior Executive Service is more formal, and must involve advertisement, a qualification process and interviews.

238. The staff attorneys in OARM, as well as the senior human resources official in OARM, are subject to the same hiring criteria, including integrity tests as prosecutors and are subject to a renewal of their own background investigation every five years. The selection of OARM attorneys is conducted through an application and interview process in accordance with applicable federal hiring regulations.

239. As far as the financial conditions of the service are concerned, the U.S. authorities state that by law, the Attorney General position is an Executive Level 1, the Deputy Attorney General position is a Level II, the Associate Attorney General position is a Level III, the Assistant Attorneys General positions are Level IV (or Level V for the AAG for Administration) and the U.S. Attorneys can be paid no more than a Level IV. With regard to the latter, they are paid at Level IV or Level V. The rates below were established by law effective January 2016:

- Level I \$205,700 (€183,000)
- Level II \$185,100 (€165,000)
- Level III \$170,400 (€152,000)
- Level IV \$160,300 (€143,000)
- Level V \$150,200 (€134,000)

240. In addition to the salary, federal prosecutors receive paid personal leave and sick leave based on years of tenure, subsidized health care insurance, basic life insurance with an option to purchase more, matched basic retirement savings, with an option to contribute to an additional savings plan and fringe benefits such as transportation subsidies primarily for public transport services - all benefits available to executive branch employees.

241. The GET notes that the prosecution system in the United States, as defined in the U.S. Constitution is particular as it forms part of the Department of Justice, which in turn is headed by the Attorney General, the Deputy Attorney General, the Associate Attorney General and twelve Assistant Attorneys General. These high-ranking officials, together with the 93 U.S. Attorney Generals in the districts, are appointed by the President, subject to confirmation by the Senate. This apparent political dimension of the top hierarchy of the system does not exclude, however, that these political appointees may serve under different presidential administrations, although it means clearly that the U.S. Constitution places the prosecution system as a part of the executive branch of Government.

Case management and procedure

242. Most offices are given substantial autonomy in organising the approval process for prosecutions. Some offices have an indictment review panel as to most cases. Some reserve the panel for major or difficult cases and have a less formal system for routine matters. For complex cases, such as certain corruption matters, an indictment review panel is usually employed. Such panels involve the most senior of the career prosecutors and, exceptionally, the United State Attorney or Section Chief. The GET was told that in

most cases, the indictment panel reviews a written prosecution memorandum prior to making its decision, but there is no formal process to provide written justifications for its decisions.

243. In order to promote a harmonised exercise of the prosecutorial discretion, DOJ prosecutors are governed by the United States Attorneys' Manual and the Principles of Federal Prosecution (contained in USAM 9-27.000 et seq.) which are designed to promote a reasoned exercise of prosecutorial discretion by attorneys respect to decisions on charging, plea agreements and decisions on non-prosecution in return for cooperation.

244. The U.S. Attorney's Manual stipulates that, as to certain kinds of crime, approval must be obtained (or in some cases, consultation must be undertaken) with offices within the Department of Justice in Washington DC (USAM 9-2.000 et seq.; USAM 9-2.400). For example, on corruption cases of particular note, attorneys from the Public Integrity Section of the Criminal Division in Washington DC will be made part of the panel. Similarly, tax prosecutions brought by the U.S. Attorney's Offices must be approved by the Tax Division. A chart describing the approval process is publicly available in the USAM, 9-2.400 with cross-references to the sections where the approval process for each investigative step or prosecution is explained.

245. A subordinate prosecutor who disagrees with the result of the approval process – to charge or not to charge – the prosecutor may register his/her disagreement or complaint with senior management in the office (including the applicable section chief, U.S. Attorney and/or Assistant Attorney General, as appropriate). If the prosecutor believes a decision has been made for an improper purpose, the prosecutor may make a complaint with DOJ's Office of the Inspector General (OIG), or OIG's Whistleblower Ombudsperson, which may entitle the person to protections, including confidentiality, protection from retaliation, etc.

246. The career attorneys (AUSAs) are typically assigned to either criminal or civil practice areas. Cases are assigned to individual prosecutors based on the attorney's experience, particular skills, areas of expertise and work load. These decisions, along with all other aspects of a supervisory prosecutor's performance, are reviewed by two higher levels of prosecutors on an annual basis. At the distribution of cases, attorneys may also be restricted from certain assignments, or are recused from working on certain cases, in conformity with applicable statutes and rules concerning conflicts of interest, which is further described, below.

247. Because the management is responsible to ensure that cases are prosecuted diligently, it is also within the management's power to remove a prosecutor from a case and to assign another prosecutor. The grounds for reassignment may occur for many reasons. For example, a lengthy trial on one case may require that other cases assigned to a prosecutor be reassigned to allow for speedier procedures. Such reassignments happen from time to time, according to the authorities. These decisions are not normally justified in writing.

248. There is also a practical check to ensure that cases are not reassigned for improper purposes. In the Department of Justice, prosecutors work closely with criminal investigators who do not report to the same managers as the prosecutor. In the event of a prosecutor being removed from a case by management for suspicious reasons, the investigators could appeal to their own management to ensure that reassignments or removals are appropriately motivated.

249. The GET wishes to reiterate that the federal prosecution system in the United States is, according to the U.S. Constitution, part of the executive power. Furthermore, the "principle of mandatory prosecution" does not apply in the United States; instead, the prosecutors have wide latitude of discretion when determining law enforcement actions

and whether to prosecute a case. In a “nutshell”, such decisions are governed by the “probable cause requirement” (there must be sufficient evidence allowing the assumption that a conviction is reasonably likely to happen) and the “substantial federal interest” test (e.g. seriousness of the offence, law enforcement priorities, deterrent effects, level of culpa, criminal record, plea bargain possibilities etc.). Nevertheless, these rules still leave an important amount of autonomous responsibility with the line-prosecutor concerned. In order to further structure the approval process for prosecutions, many U.S. Attorney Offices have organised specific indictment review panels (which involve as a rule the most senior prosecutors and, in exceptional cases, even top representatives of the DOJ). The GET learned that even in this respect, the offices are granted substantial autonomy as to the operations of such panels. Some reserve the panels (only) for major and/or difficult cases, whereas the scrutiny by superiors is less formal in routine matters. In particularly complex matters, e.g. certain corruption matters, an indictment review panel is practically always used, according to the authorities. In addition, certain high-gearred economic crime cases can only be prosecuted with the formal approval of specific divisions of the DOJ, such as in corruption cases of a particular importance where the Public Integrity Section of the Criminal Division of DOJ is necessarily part of the indictment review panel.

250. The GET acknowledges that discretionary powers within this system makes, on the one hand, the prosecution service a rather dynamic and flexible institution to adjust measures to the particular needs in a given case; on the other hand, it raises concerns from the perspective of potential undue influence over the decision making, for example, for political reasons. This is all the more valid where discretionary powers are combined with a hierarchical structure which is part of the executive branch and led by political appointees. There are numerous checks and balances in place to prevent undue influence over this process; not least the existence of the U.S. Attorney’s Manual (USAM), the collective approach of the panels and the hierarchical checking and permission requirements. As described above, there are also channels (internal as well as external) for a prosecutor to challenge decisions taken by superiors, within and without the system.

251. The GET does not question the fact that the hierarchical structure of the prosecution system implies that superior prosecutors, and ultimately the Attorney General, have powers to give instructions to subordinate staff, including in individual cases. It is therefore important that there are checks and balances built into this system. That said, the GET takes the view that the existing checks and balances could well be complemented with further measures aiming at bringing more transparency to the decision making procedure, in order to ensure that the process is impartial, and seen to be impartial, i.e. free of undue influence. This becomes particularly crucial in respect of instructions and decisions such as not to prosecute a case or to move a case from one prosecutor to another etc. The GET strongly believes that such decisions should, as a rule, be accompanied by a reasoned justification in writing. In view of the foregoing, **GRECO recommends that existing checks and balances within the decision making process of federal prosecutors’ offices be complemented with further appropriate measures, including that hierarchical instructions and decisions (e.g. not to prosecute in a case or moving a prosecutor from a case) are justified in writing in appropriate cases.**

252. As far as safeguards in place ensuring that prosecutors deal with cases without undue delay are concerned, the Constitution provides that defendants in criminal cases are entitled to a speedy trial. The Speedy Trial Act has further codified this right at 18 U.S.C. §§ 3161-3174. The Act establishes time limits for completing the various stages of a federal criminal prosecution. The information or indictment must be filed within 30 days from the date of arrest or service of the summons. 18 U.S.C. § 3161(b). Moreover, in order to ensure that defendants are not rushed to trial without an adequate opportunity to prepare, Congress amended the Act in 1979 to provide a minimum time period during

which trial may not commence. Most criminal statutes are also subject to limitations that bar prosecution if a case is not brought within the applicable time frame. In addition, the Federal Rules of Criminal Procedure govern discovery and trial scheduling to ensure that cases proceed without undue delay.

Ethical principles, rules of conduct and conflicts of interest

253. All employees of the executive branch, including DOJ employees, are bound by Standards of Ethical Conduct for Employees of the Executive Branch, promulgated by the Office of Government Ethics (OGE) at 5 C.F.R. Chapter XVI, Part 2635, as well as the Principals of Ethical Conduct set forth in Executive Order 12674, as modified⁵⁰. DOJ employees are also bound by Department of Justice supplemental Standards of Conduct at 5 C.F.R. 3801, and Department of Justice Order 1200.1.

254. Also, all employees are subject to the provisions of 18 U.S.C. § 201 et seq., making criminal certain bribery, graft, and conflict of interest activities by employees or former employees. Senior politically appointed officials are subject to outside activity and employment restrictions found in civil statutes at 5 U.S.C. app §§ 501-505 and implemented, in part, in 5 C.F.R. part 2636.

255. All full-time non-career appointees (including United States Attorneys) are also subject to the Ethics Pledge as set forth in Executive Order 13490, which includes additional recusal obligations than those imposed by statute or regulation, additional post-employment restrictions than those imposed by statute, and a ban on accepting gifts from lobbyists or lobbying organisations.

256. In addition, all DOJ employees are subject to the Hatch Act, 5 U.S.C. §§ 7323(a) and 7324(a), which generally prohibits Department employees from engaging in partisan political activity while on duty, in a federal facility or using federal property. The statute bars employees from using official authority or influence for the purpose of interfering with or affecting the result of an election, from using official authority to coerce any person to participate in political activity, and from soliciting, accepting or receiving political contributions. Political activity is activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group. The statute carries serious penalties including removal from federal employment. Moreover, under the Hatch Act, members of the Career Senior Executive Service, employees of the Criminal Division, and all Department political appointees are subject to stricter rules whereby they are prohibited from participating actively in political management or political campaigns even when off-duty.

257. The *Standards of conduct for prosecutors*⁵¹ are compiled in the United States Attorney Manual (USAM) 1-4.000 et seq. This instrument is a compilation of all relevant legislation, regulations, orders etc., which contains sections with references to pertinent rules concerning prosecutors conduct, e.g. reporting of misconduct; financial disclosure reporting, outside activities, restrictions on employees; permissible activities; gifts, cooling-off periods; sanctions etc.

258. The DOJ has designated an Agency Ethics Official, who is the Assistant Attorney General for Administration ("Designated Agency Ethics Official", or "DAEO"). The Departmental Ethics Office is responsible for the overall direction of the ethics program in the Department and each bureau, office, board, and division has a deputy designated

⁵⁰ The branch-wide Standards of Ethical Conduct issued by OGE became effective in 1993 after an extensive notice and comment rulemaking process that sought input from any interested employee, agency, group or member of the public. Subsequent amendments have also been subject to a notice and comment process. The 1993 Standards of Ethical Conduct superseded previous agency regulations and Executive Orders regarding ethical conduct. Many of those agency regulations were based on Executive Order 11222 issued in 1965.

⁵¹ www.justice.gov/usam/usam-1-4000-standards-conduct

Ethics official (Deputy DAEO) and each district has one or more *Ethics advisors* among the career prosecutors; all these officials are to advise on ethics. This, as well as ethics training is further dealt with below.

259. As indicated above, the GET welcomes that prosecutors in the United States are subject to a wide range of ethical standards, contained in legislation, regulations, and orders forming a rich base for ethical standards to be applied. These are all compiled in the United States Attorney Manual (USAM), which could be categorised as a “handbook for ethical conduct of prosecutors”. The GET notes that the ethical standards are subject to continual revisions and that massive training, which takes many forms, as well as institutionalised advice services, are provided, as dealt with more in detail below. The U.S. authorities should be commended for this.

Prohibition or restriction of certain activities

Incompatibilities and accessory activities, post-employment restrictions

260. The U.S. Attorney’s Manual (USAM) sets forth policies governing outside activities by prosecutors. They may not generally engage in outside activities, including employment, that conflict with their official duties. An activity conflicts with an employee’s official duties if it is prohibited by statute or an agency supplemental regulations or it would require disqualification from matters so central and critical to the employee’s official duties that the employee’s ability to perform the duties of his or her position would be materially impaired. (5 C.F.R. § 2635.802(b)). Senior Department of Justice officials who are appointed by the President are subject to more stringent outside earned income and employment restrictions (5 U.S.C. app. §§ 501-505).

261. Two overlapping federal statutes, 18 U.S.C. §§ 203 and 205, prohibit all employees from representing others before departments, agencies, and courts if the United States has a substantial interest in the matters involved. Representation is prohibited whether the employee receives compensation or not, and the prohibition applies regardless of whether those matters relate to the work the employee performs for the Government. These statutes also prohibit employees from receiving compensation for certain representational services when those services are provided by others and receiving compensation for assisting in the prosecution of a claim against the United States.

262. All DOJ employees are prohibited from providing any outside professional services in criminal or *habeas corpus* matters in any court, whether with or without compensation. (5 C.F.R. § 3801.106(b)). Furthermore, all DOJ employees are subject to the Hatch Act, which generally prohibits them from engaging in partisan political activity, even when off-duty (5 U.S.C. § 7321 et seq).

263. DOJ employees may not engage in fundraising in their official capacity, unless authorised by statute, executive order, regulation or agency determination. (5 C.F.R. § 2635.808(b)). Moreover, the DOJ periodically circulates memoranda, reminding employees of the restrictions applicable to off-duty activities, ensuring that those activities do not detract from the mission of the Department of Justice.

264. Government post-employment restrictions also apply to prosecutors. They are found at 18 U.S.C. § 207, and are explained in greater detail in OGE’s interpretive regulations in 5 C.F.R. part 2641 and in USAM 1-4.600 through 1-4.660. In general, under 18 U.S.C. § 207(a)(1), employees are permanently prohibited from knowingly making, with the intent to influence, any communication to or appearance before the United States on behalf of someone other than him/herself or the United States, in connection with a particular matter having specific parties in which the United States is a party or has a direct and substantial interest, and in which the employee participated personally and substantially while being a government employee.

265. With respect to supervisors, under 18 U.S.C. § 207(a)(2), all employees⁵² are restricted for two years after leaving the government from knowingly making, with the intent to influence, any communication to or appearance before the United States on behalf of someone other than himself or herself or the United States, in connection with a particular matter having specific parties in which the United States is a party or has a direct and substantial interest, and which the former employee knows or reasonably should know was pending under his or her official responsibility within a period of one year before the termination of his or her employment. This provision applies to supervisors and managers who did not personally handle a matter, but in relation to which they were responsible.

266. Under 18 U.S.C. § 207(c), a senior employee, as defined by statute, may not knowingly make, with the intent to influence, any communication to or appearance before his or her former agency on any matter in which the former employee seeks official action on behalf of any other person, except the United States, within one year after termination of his or her service or employment as such officer or employee. According to 5 C.F.R. § 2641.204(d), the one year period runs from the time the individual ceases to be a senior employee, rather than from termination of government employment. It was designed to prevent the use of personal influence based upon past government affiliations. The prohibition applies even when the United States is not a party and even when it does not have a direct and substantial interest. For full-time, non-career employees who signed the Ethics Pledge under Executive Order 13490, this prohibition is extended for 2 years from the date the employee leaves a covered position. Unlike the other prohibitions, this one is limited to communications to or appearances before the employee's former agency.

267. The Attorney General, as a very senior executive branch official under the statute, has additional post employment restrictions that are lengthier with regard to representations to the Department of Justice and extend to representations made to certain specified high-level positions throughout the executive branch. 18 U.S.C. § 207(d).

Recusal and routine withdrawal

268. Attorneys may not participate personally and substantially in any particular matter that will have a direct and predictable effect on their financial interest or those of their spouse, minor child, or general partner (or other individuals or organisations that are specified by the law or rule).⁵³ This prohibition also applies if an organisation in which the prosecutor serves as an officer, director, trustee, or employee has a financial interest; or if a person or organisation with which the prosecutor is negotiating or has any arrangement for future employment has a financial interest (18 U.S.C. § 208 and 5 C.F.R. § 2635.402).

269. Furthermore, an attorney may not participate in a particular matter affecting the financial interests of an organisation with which s/he is employed, or with which s/he is negotiating for or has an arrangement for future employment. (18 U.S.C. § 208). A non-

⁵² It applies to all employees but its practical effect is on those who have specific matters under their official responsibility but who are not personally and substantially participating in those matters—typically supervisors of those who are handling cases rather than the prosecutors actually handling the cases. The latter is covered by the longer restriction discussed in the previous paragraph. “Official responsibility” expands the higher one goes in the Department. Ultimately the Attorney General has “official responsibility” for every matter pending in the Department.

⁵³ It should be noted that there is not statutory “de minimis” to his prohibition. The Office of Government Ethics has, however, established certain regulatory exemptions permitting employees to act in certain matters where they would have otherwise disqualifying financial interests, on the bases that the financial conflict of interests posed were “too remote or too inconsequential” to affect the integrity of the employee. See 5 C.F.R. § 2640.201, et. seq.

criminal regulation passed by the Office of Government Ethics also requires employees to recuse themselves from particular matters that could have a direct and predictable effect on the financial interest of an organisation with which the attorney is seeking employment (5 C.F.R. § 2635.604).

270. Additionally, if a reasonable person would question prosecutors' impartiality, prosecutors may not participate without authorisation in a particular matter having specific parties that could affect the financial interests of members of their household or where one of the following is a party or represents a party: someone with whom the prosecutor has a business, contractual or other financial relationship; a member of the prosecutor's household or a relative with whom they have a close relationship; a present or prospective employer of a spouse, parent or child; a former client or employer of the prosecutor within the last year or, for most full-time non-career appointees, a longer period of time; or an organisation which the prosecutor serves as an active participant (5 C.F.R. § 2635.502 and EO 13490).

271. If a prosecutor has a financial conflict of interest or believes a reasonable person would question his/her impartiality, s/he is required to first disqualify him/herself from taking action that could affect that interest and then may consult with the ethics officer (Deputy DAEO) about the following alternatives: In the case of a financial interest, a prosecutor might qualify for a regulatory exemption issued by OGE (5 C.F.R. part 2640, Subpart B), an individual waiver of the prohibition under 18 U.S.C. § 208(b), or may be required to divest the interest. Similarly resignation from the position that creates the conflict or appearance of a conflict may be sufficient action. If the prosecutor has no financial interest in the matter but a reasonable person may question the prosecutor's impartiality, the prosecutor cannot participate unless the prosecutor first receives authorisation to do so (18 U.S.C. § 208(b)(1), 5 C.F.R. § 2635.402, and 5 C.F.R. § 2635.502).

Gifts

272. The acceptance of gifts is addressed in both criminal statutes, in the compilation of the executive-branch wide regulations and in the DOJ specific standards of conduct and related conduct restrictions found in the USAM. Generally, the Executive Branch standards of conduct prohibit an employee from accepting a gift from a prohibited source, or given because of the employee's official position. A prohibited source is a person, company or organisation that seeks official action by the Department, does business or seeks to do business with the Department, is regulated by the Department, or has interests that may be substantially affected by performance of a prosecutor's duties. There are some exceptions under which an employee may accept an otherwise prohibited gift including those based on a personal relationship and unsolicited gifts valued at less than \$20 (€18). Employees may also exchange gifts among themselves as long as there is not a supervisor-subordinate relationship. Subordinates are prohibited from giving gifts to their supervisors and individuals who make more pay are prohibited from accepting gifts from those who make less pay, except for individual gifts worth no more than \$10 (€ 9). The gift restrictions and exceptions of the Executive branch standards of conduct are found in subparts B and C of 5 C.F.R part 2635. All politically appointed employees additionally are barred from accepting gifts from registered lobbyists (EO 13490).

Third party contacts, confidential information

273. The USAM 1-7.500 states: "At no time shall any component or personnel of the Department of Justice furnish any statement or information that s/he knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Contacts with the press must balance the public's right to know, the defendant's right to a fair and public trial, the fair administration of justice,

and the obligations of secrecy during certain stages of an investigation or prosecution (USAM 1-7.000 et seq).

274. Similarly, contacts from Congress must weigh the interests of democratic control with the fair administration of justice (USAM 1-8.000). Prosecutors are instructed to contact the Office of Legislative Affairs if any request for information is received, and should follow these standards in both open and closed cases and never provide information on (1) pending investigations; (2) closed investigations that did not become public; (3) matters that involve grand jury, tax, or other restricted information; (4) matters that would reveal the identity of confidential informants, sensitive investigative techniques, deliberative processes, the reasoning behind the exercise of prosecutorial discretion, or the identity of individuals who may have been investigated but not indicted.

275. In all cases, the Department of Justice is to follow policy and protocols in place regarding the control and safeguarding of information, (5 C.F.R. § 2635.703), including grand jury information, informant and witness information, investigative material, federal tax and tax return information, Privacy Act information and information which can cause risk to individuals or could be sold for profit. For example, Rule 6(e) of the Federal Rules of Criminal Procedure provides that access to grand jury materials shall be restricted to prosecutors assigned to the particular case and those personnel deemed necessary by the prosecutor to carry out the official duties related to grand jury activities. Access to tax information is also restricted to persons whose duties require access or to whom disclosures may be made under provisions of the law. The Internal Revenue Code Section 6103 permits disclosure of tax returns and return information to officers and employees of federal agencies for the administration of federal non-tax criminal laws.

276. Prosecutors with access to federal tax information must be advised, at a minimum, annually of the provisions of Section 7213(a) of the Internal Revenue Code which makes unauthorised disclosure of Federal returns or return information a crime which may be punishable by a \$5000 (€4,500) fine, five years imprisonment, or both, as well as the costs of prosecution. Access to records of financial institutions is regulated by the Right to Financial Privacy Act 12 U.S.C. §§ 3401 et seq., and the handling of such information is addressed in USAM 9-13.800 and in the Criminal Resource Manual at 400 et seq.

277. Finally, every DOJ prosecutor is required to be a member in good standing with their home state bar association which places requirements on attorneys to safeguard attorney-client privileges and fiduciary duties to clients (Model Rule of Professional Conduct 1.6 "Confidentiality of Information").

Declaration of assets, income, liabilities and interests

278. Officials of the Prosecution Service (DOJ) are subject to three different regimes of disclosures, depending on their status.

279. Firstly, like in respect of Members of Congress and federal judges, the Ethics in Government Act (EGA) requires that senior executive branch officials, including senior Department of Justice officials file public financial disclosure report (OGE Form 278e). The positions covered by this public reporting requirement are the senior career leadership of each agency, including senior prosecutors in the Department of Justice, and political appointees, including those appointed by the President and confirmed by the United States Senate (Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorneys General, United States Attorneys), and less senior non-career attorneys. The required content of these public disclosures is the same as for those who apply in respect of Members of Congress and federal judges, described above.

280. Public financial disclosure reports for presidential appointees who are to be confirmed by the Senate are filed at the time of nomination. For other employees, a public financial disclosure report must be filed within 30 days of entering a covered

position and annually by May 15th. A final report is also to be filed within 30 days of leaving a covered position for all public filers.

281. Secondly, less senior career attorneys/prosecutors, who are not subject to submit public financial reports, file annual confidential financial disclosure reports (OGE-450). Confidential financial disclosure reports require similar information as required for the public financial disclosure reports but do not require the listing of values for reported assets, income, liabilities and gifts or the reporting of certain other interests such as cash bank accounts and diversified mutual funds that are unlikely to give rise to a conflict of interest.

282. Thirdly, all prosecutors, dealing with cases on a daily basis (typically the AUSAs) who can affect the outcome of a case must complete the "GCO Form 1", Certification of No Conflict of Interest, for every case to which they are assigned, at the opening and closing of each case. At least twice a year, the same individuals are to complete a "GCO Form 3", Confidential Conflict of Interest Certification Semi-Annual/Periodic Review. This procedure is an alternate method of financial disclosure selected by the DOJ and approved by OGE under its procedures at 5 C.F.R. § 2634.905(a).

283. The public as well as the confidential reports are required to be filed within the Department of Justice. All reports are reviewed within the DOJ but, in addition, the public financial disclosure reports of Senate-confirmed appointees are also sent by the Department to the U.S. Office of Government Ethics (OGE) for a second review by that office.

284. Every disclosure report is reviewed by a supervisory attorney in the employees chain of command who is familiar with the employee's assignments. Additional reviews take place depending on the level of the attorney's filing, within the hierarchy of the DOJ. DOJ officials review the reports against prior reports, but they do not perform verification of the information reported (checking accounts etc.). Any questions that arise are to be addressed directly with the employee until the reviewer is satisfied. If the person charged with reviewing an employee's report finds a conflict, s/he should impose a remedy immediately. The employee's supervisor, with his ethics official, should decide on the remedy. Possible remedies include disqualification, divestiture or a waiver of the disqualification under 18 U.S.C. § 208 or 5 C.F.R. § 2635.502. A waiver of 18 U.S.C. § 208 may be granted only by a senior official in the employee's component or division, after consultation with OGE, and must be in writing. Where an actual conflict of interest is found to violate 18 U.S.C. §§ 201-209, the matter will be referred for potential prosecution.

285. In addition to the above disclosure regimes, there is an anonymised list of assets held by the DOJ management, which is circulated annually to all prosecutors asking if any of the listed entities are involved in any on-going investigation. This procedure allows the management to recognise the need for recusal whenever a conflict that was not apparent at the beginning of an investigation has since developed during the course of the investigation without the knowledge of the affected manager. Where conflicts are identified, the manager is to be recused and replaced. Through these reporting requirements, prosecutors and their supervisors monitor both the individual prosecutor's and the supervisors' interests and current assignments in order to avoid conflicts of interest.

286. The GET welcomes that the U.S. authorities have in place a system of mandatory declarations concerning assets, incomes etc., which is designed on the basis of the various functions of the officials in the prosecutorial hierarchy. This implies that the political appointees (the top management levels) together with some other categories of prosecutors, as detailed above, are obliged to file public financial disclosure reports, in the same way as Members of Congress, while less senior career prosecutors are to file

annual confidential financial disclosure reports. As far as the big bulk of “line-prosecutors” are concerned, i.e. those who deal with prosecution cases on a daily basis, these are obliged to sign a “no conflict of interest” form in respect of every case they deal with. The three systems are also designed to be checked to the form as well as in respect of substance. The GET was of the opinion that this differentiated system is exemplarily adapted to the various hierarchical levels within the prosecution system and that it takes into account the accountability of the officials concerned.

Supervision and enforcement

287. Attorneys and prosecutors are liable to a range of measures for various forms of violations of legislation, regulations, orders, ethical codes etc. relating to their expected conduct. These include disciplinary measures, civil measures and criminal prosecution. Furthermore, prosecutors are in addition to disciplinary measures within the DOJ also subject to disciplinary measures by their respective bar associations.

288. In respect of non-criminal enforcement mechanisms, while minor disciplinary measures for routine matters may be imposed by supervisors, within the limitations of the civil service protection offered to all career executive branch employees, the Office of Attorney Recruitment and Management (OARM) has authority to impose disciplinary measures or take adverse actions against attorneys. That said, serious misconduct is to be referred to be dealt with by the Office of Professional Responsibility (OPR) or the Office of the Inspector General (OIG), being the two principle entities to review allegations of misconduct by attorney’s/prosecutors and to investigate such matters whenever necessary. All DOJ officials, whether career employees or presidentially appointed, are subject to OPR’s jurisdiction if an allegation of misconduct involves the Department attorney’s exercise of his/her authority to investigate, litigate or provide legal advice. Thus OPR has jurisdiction to investigate the Attorney General, Deputy Attorney General, or any other Department official.

289. The Office of Professional Responsibility (OPR)⁵⁴ was created in 1975 by order of the Attorney General in response to the ethical abuses and misconduct committed by Justice Department officials during the Watergate scandal. OPR’s mission is to hold accountable Justice Department attorneys who abuse their power as prosecutors or otherwise violate the high ethical standards required of the nation’s chief law enforcement agency. Pursuant to 28 C.F.R. § 0.39a, the Counsel for OPR reports directly to the Attorney General and Deputy Attorney General. OPR is staffed by a Deputy Counsel, Associate Counsel, and Assistant Counsel. The Counsel is appointed by the Attorney General, following a competition between career employees, who maintain their position regardless of changes in the presidential administration, in order to deter potential political bias. Remaining staff are also career employees.

290. The Counsel for Professional Responsibility leads the OPR in reviewing allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct or DOJ policy that relate to the exercise of their authority to investigate, litigate or provide legal advice. Whenever warranted, OPR conducts full investigations of such allegations and reports its findings and conclusions to the Attorney General and other appropriate DOJ officials. The OPR also serves as the Department’s contact with state bar disciplinary organisations.

291. The OPR does not need permission from anyone to open an investigation and can open an investigation *ex officio*. To this end it routinely monitors pertinent published court decisions, major media publications, which may lead to an investigation. The OPR’s website includes instructions to the public on how to file a complaint.

⁵⁴ <http://www.justice.gov/opr/about-office-and-opr-policies-and-procedures>

292. Pursuant to Chapter 1-4.100 of the USAM, all DOJ employees have a duty to report allegations of professional misconduct against an attorney that relate to the exercise of the attorney's authority and must report any evidence of non-frivolous allegation of misconduct to their supervisor. An employee may also refer the allegation directly to OPR. Supervisors are required, in turn, to report any evidence or non-frivolous allegation of serious misconduct to OPR. However, if the supervisor participated in the alleged misconduct, s/he must refer the matter to a higher-ranking official for review.

293. In fiscal year 2015, the OPR received 846 complaints. It opened 66 investigations and inquiries and closed 49 investigations and inquiries. OPR made findings of professional misconduct in 8 of the 20 investigations that it closed. In those eight investigations OPR sustained a total of 22 allegations of misconduct.

294. Disciplinary action was imposed by the Professional Misconduct Review Unit (PMRU) against attorneys in 7 of the 8 matters in which OPR found professional misconduct. Disciplinary action was not initiated against an attorney in one matter because the attorney was no longer employed by the Department. With respect to the 7 matters in which disciplinary proceedings were initiated and discipline was imposed, 6 attorneys received suspensions and 1 received a written reprimand.

295. Ten, or 50% of the investigations OPR closed in Fiscal Year 2015, had at least one finding that an attorney exercised poor judgment. Five of those 10 matters also involved a finding of professional misconduct. OPR refers poor judgment findings to the Department attorney's component for consideration in a management context, which may include recommendations for additional training. Three closed investigations, or 15%, involved at least 1 finding that an attorney made an excusable mistake. One of those 3 matters also included a finding of professional misconduct or poor judgment. Thus, of the 20 investigations closed, OPR found professional misconduct or poor judgement in 13 or 65%, of the investigations it closed in FY 2015.

296. The Office of the Inspector General (OIG)⁵⁵ was established pursuant to the Inspector General Act, 5 U.S.C. App.3. It is a statutorily created independent entity within the Department of Justice whose mission is to detect and deter fraud, waste, abuse and misconduct within the Department as well as to promote the integrity and efficiency of DOJ operations. The Inspector General of the OIG is nominated by the President and confirmed to the position by the U.S. Senate. By statute, the Inspector General can only be removed from office by the President, and only after the President provides advance notice to Congress of the reason for removal; the Attorney General has no authority to remove or take any personnel action against the Inspector General. Additionally, the Inspector General has no term and therefore remains in the position even following a change in Administration. The Inspector General reports on the activities of the OIG to both the Attorney General and to Congress. OIG investigates allegations of criminal and/or administrative misconduct by all DOJ employees, including attorneys/prosecutors that do not fall within the jurisdiction of OPR.

297. Since 2014, until the adoption of this Report, OIG had conducted 48 investigations of prosecutors or other Department attorneys. None of these resulted in criminal charges. 21 of them resulted in substantiated findings of misconduct that were referred to the relevant component of the Department of Justice for appropriate follow-up action. Including two cases involving substantiated findings of misconduct by Presidentially-appointed United States Attorneys. Six investigations remain open or pending. OIG does not impose sanctions on attorneys for whom findings of misconduct were made; that decision is made by the individual DOJ components.

⁵⁵ <https://oig.justice.gov/about/>

298. The OIG reports on its operations semi-annually to Congress and those reports are publicly available on its website. It also posts on its website summaries of investigations in which it found misconduct that did not result in criminal prosecution involving high-level officials, including all such matters involving prosecutors and the two cases of substantiated findings of misconduct by Presidentially-appointed United States Attorneys referenced above. While names and other Privacy Act-protected information are not included in these public filings, they provide information regarding the OIG's findings of misconduct as applied to prosecutors in a variety of situations. In appropriate cases, the OIG may even issue a public report naming the United States Attorney or other prosecutors, as it did in its report on the conduct of Operation Fast and Furious in 2012 (in which the OIG made findings regarding the conduct of a Presidentially-appointed United States Attorney and other supervisors and line prosecutors from the same district, as well as the Attorney General and others going to the very highest levels of the Department of Justice) and, in 2016, regarding misconduct involving political and fundraising activities by another Presidentially-appointed United States Attorney.

299. The GET understood that while the OPR has jurisdiction typically in matters relating to misconduct concerning the prosecutorial functions (violations of the U.S. Attorney Manual), the OIG has a broader mandate to investigate any form of statutory misconduct concerning any the DOJ employee (including prosecutors). It would appear that it is not always straight-forward to determine which body is most competent for a particular complaint. Therefore, DOJ employees, prosecutors and supervisors are encouraged to contact the OPR and the OIG for assistance in determining whether a matter should be referred to the OPR or the OIG, and both the OPR and the OIG are required to notify the other of allegations that may fall within the jurisdiction of the other. The OIG is required to notify the OPR of the existence and results of any OIG investigation that reflects upon the professional ethics, competence or integrity of an attorney. The GET notes that while the OPR is an internal body of the DOJ, the OIG is a statutorily created independent entity.

300. Taking a closer look at the OPR, the GET notes that it carries out preliminary inquiries as well as full investigations (takes evidence etc.). Based on the evidence it obtains, OPR makes all determinations whether a federal prosecutor has engaged in professional misconduct by acting intentionally or in a reckless disregard of his or her ethical obligations. If OPR concludes that the attorney has engaged in misconduct, that attorney can request a review of OPR's findings by the Professional Misconduct Review Unit (PMRU), a separate office within the Office of the Deputy Attorney General. The PMRU reviews OPR's findings and either affirms or modifies its determinations. The PMRU also determines whether the attorney should be disciplined. Discipline recommendations are referred to the EOUSA or to OARM for further proceedings. This procedure is within the DOJ and it is not public. If PMRU determines that the attorney should be referred to his or her state bar disciplinary organisation, OPR makes that referral.⁵⁶

301. The OPR produces an annual report, providing relevant statistical data on complaints received, preliminary inquiries and full investigations carried out and their outcome. In addition, these reports contain generic descriptions of a number of chosen cases of alleged or proven professional misconduct of federal prosecutors, which serves as guidance on the issues dealt with and the reasoning of the OPR. The GET finds this information very useful as it provides guidance, in particular for the prosecutors. These annual reports are published on OPR's website⁵⁷, (listing all OPR Annual Reports which contain investigative summaries from 2005 to 2015).

⁵⁶ Both OPR and OIG may make findings that an attorney committed misconduct. In appropriate cases those findings are referred to the attorney's state bar disciplinary authorities. The PMRU reviews those findings and makes a final determination on the bar referral after giving the attorney an opportunity to make a submission

⁵⁷ <https://www.justice.gov/opr/resources>

302. Having said that, the GET was made aware on-site by representatives of civil society and the media that the OPR procedure is much criticised for lacking sufficient public transparency. Representatives of civil society told the GET that the OPR's Annual Reports from 15 years ago were much more comprehensive and informative on individual cases than the current editions. Also, the GET heard accusations that the OPR "*has a lack of teeth*" and that its proceedings are governed by "*minimal transparency*" and that the OPR has a tendency to hold its protective hands over "its" prosecutors. The U.S. authorities took issue with these allegations and stated that the annual reports of the OPR contain information about important findings, arguing that the main reason for the rather generic case descriptions in the OPR's Annual Reports was the concerned federal prosecutors' right to privacy.

303. The GET takes the view that internal disciplinary proceedings, such as the OPR process, cannot be fully open to public scrutiny in all situations. A sanctioning system for professional misconduct of prosecutors has to be regarded in its specific domestic setting. It is very striking, however, that disciplinary proceedings run by the aforementioned OIG, seem to benefit from a considerably higher internal autonomy and transparency than the OPR (PMRU and OARM), as it reports directly not only to the Attorney General, but also to Congress. In the view of the GET, the alleged lack of sufficient transparency in respect of the OPR process needs to be taken seriously. Furthermore, having studied the most recent OPR annual reports, the GET notes that there is a considerable difference between complaints filed and the number of cases actually being investigated, which would require public explanations. It is of the opinion that more needs to be done to shed further light on this process, while balancing the right to privacy with the general public's legitimate interest in being thoroughly informed about gross misconduct inside the executive branch of government, of which the prosecution system in the United States is a part. The GET is of the opinion that in particularly serious cases, the right to privacy may weigh less than the public's right to be informed. In view of the foregoing, **GRECO recommends i) that further appropriate measures be taken to ensure that intentional or reckless professional misconduct by federal prosecutors be investigated and sanctioned within a framework of transparent proceedings, including in appropriate cases by bodies with adequate autonomy and independence; and ii) that the public transparency of these proceedings involving federal prosecutors be enhanced, with due regard to the right of privacy and effective defence of the federal prosecutors concerned.**

304. With regard to alleged violations of criminal law by a prosecutor, the OIG works with other Department prosecutors, typically from offices other than that in which the subject prosecutor is employed, in the investigation and prosecution of the case. In non-criminal cases, the OIG conducts the investigation and refers its findings regarding any administrative misconduct to the DOJ for consideration and imposition of disciplinary action.

305. Prosecutors who violate statutes where criminal penalties may be imposed are subject to the same treatment as any other citizen would be (There are no immunities). Such investigations would be carried out with the participation of the OIG, the Public Integrity Section of the Criminal Division (DOJ) and prosecutors from other offices not employing the prosecutor (to avoid conflicting interests and recusals). Where a prosecutor within the OIG or the Public Integrity Section is the subject of criminal prosecution, the Attorney General would appoint a prosecutor from an unaffected office or section to handle the investigation and prosecution.

306. Consequences for violating conflict of interest provisions under criminal law include imprisonment up to five years, fines up to \$250,000 (€223,000), community service and restitution to the government. Consequences for violating regulations governing ethical

conduct include loss of job or suspension, demotion, administrative reprimand and required further training.

307. The Department of Justice may also bring a civil action for prosecutors' conduct constituting an offense under 18 U.S.C. §§ 201, 203, 205, 207, 208 or 209, for which a civil fine of up to \$55,000 may be imposed.⁵⁸

Advice, training and awareness

308. All new Department of Justice employees receive initial ethics training within 90 days of entering on duty. Senior officials receive ethics counselling usually within some days of beginning their service. They also receive counselling with regard to the application of the federal conflict of interest laws prior to appointment and in conjunction with their preparation and submission of their first public financial disclosure report for purposes of their nomination and appointment.

309. DOJ attorneys are required to complete certain training requirements on an annual basis, determined by the type of position they hold. Examples of the training include professionalism, ethics and sexual harassment prevention training. The ethics training includes training on conflicts of interest, gifts, outside activities, and post-employment restrictions.

310. Training is conducted both on a live in-person basis and through online video presentations. DOJ attorneys must certify annually that they have completed the training required. A record of online training is maintained on the Department's training website LearnDOJ.

311. Each district and Division provides new employee orientation which includes mandatory initial government ethics training. Thereafter, every public financial disclosure filer receives mandatory annual government ethics training and other financial disclosure filers receive mandatory annual government ethics training (live every third year). Each office has an ethics advisor who conducts the training. Each ethics advisor receives detailed training every 18 months at the National Advocacy Center. Annual ethics training for prosecutors is typically one hour and covers the substantive areas covered in 5 C.F.R. § 2635. In addition, the Department of Justice makes available to its prosecutors training opportunities on a variety of topics, including federal practice and procedure, the ethical responsibilities of a prosecutor, and best practices in the many subject matter areas in which DOJ attorneys operate.

312. In addition, DOJ prosecutors must maintain an active membership in at least one State bar association, many of which impose continuing legal education requirements.

313. As far as ethics advice is concerned, the GET was informed that the Assistant Attorney General for Administration is the DAEO for the Department of Justice. The Ethics Office is responsible for the overall direction of the ethics program in the DOJ. Each bureau, office, board and division has a deputy DAEO who advises employees in the component. In addition, each district has one or more Ethics Advisors among the career prosecutors who advise on ethics matters, and one or more Professional Responsibility Officers (PRO) who advise on the requirements under the applicable Rules of Professional Responsibility. The PROs work closely with the headquarters' Professional Responsibility Advisory Office (PRAO).

314. Prosecutors can seek advice from an Ethics Advisor, Deputy DAEO, or the Departmental Ethics Office and from a PRO or PRAO. Accordingly, prosecutors have the option to obtain ethics and professionalism advice from officials associated with their own

⁵⁸ As of August 1, 2016, a fine of up to \$94,681 may be imposed for acts committed after November 2, 2015.

offices and convenient to them, or to reach out to the entities in the DOJ to obtain ethics and professionalism advice. In addition, substantial ethics materials are available on the Departmental Ethics Office's website and at LearnDOJ. Finally, materials are frequently and routinely circulated through the Department-wide email system for all prosecutors or for all employees, depending on the issue.

315. Moreover, the Office for Governmental Ethics (OGE) provides education and training opportunities for executive branch ethics officials, including those at the Department of Justice, so that ethics officials have the knowledge and skills necessary to apply the ethics laws and regulations.

VI. RECOMMENDATIONS AND FOLLOW-UP

316. In view of the findings of the present report, GRECO addresses the following recommendations to the United States of America:

Regarding Members of parliament

- i. to consider increasing the transparency of the legislative process leading up to the introduction of new bills in Congress** (paragraph 33);
- ii. that guidance materials to the codes of ethics used by the Senate and by the House of Representatives be brought up-to-date and made available in a user friendly fashion** (paragraph 54);
- iii. that *ad hoc* disclosures be introduced for situations when an undisclosed conflict between specific private interests of individual Members of Congress may emerge in relation to a matter under consideration in Congressional proceedings** (paragraph 63);
- iv. that consideration be given to the efficacy of the current regime of Congress' rules relating to "revolving doors" - such as those concerning House Members possibilities to initiate employment negotiations to become lobbyists after leaving Congress and the quarantine periods applying to former Members of Congress to carry out lobbying activities with representatives of the Congress** (paragraph 83);
- v. that additional guidance and training materials for Members of Congress on how the current restrictions applicable to their interactions with lobbyists and other third parties seeking to influence the congressional process, be included in the training of Members of Congress** (paragraph 95);
- vi. that updated information on pertinent case-law concerning the "*Speech or Debate Clause*" be provided on a periodic basis** (paragraph 107);
- vii. that further measures to reinforce the efficiency of the supervision and enforcement of the internal rules of Congress be considered by the appropriate bodies of Congress** (paragraph 123);

Regarding judges

- viii. that the judiciary consider how the system of re-appointments of magistrate judges and bankruptcy judges can ensure judicial independence** (paragraph 167);
- ix. that the Supreme Court justices be invited to adopt - or declare that they regard themselves as being bound by - the Code of Conduct for United States Judges** (paragraph 185);
- x. that the opportunities for ethics training for court of appeals judges be increased** (paragraph 218);

Regarding prosecutors

- xi. that existing checks and balances within the decision making process of federal prosecutors' offices be complemented with further appropriate measures, including that hierarchical instructions and decisions (e.g. not to prosecute in a case or moving a prosecutor from a case) are justified in writing in appropriate cases (paragraph 251);**
 - xii. i) that further appropriate measures be taken to ensure that intentional or reckless professional misconduct by federal prosecutors be investigated and sanctioned within a framework of transparent proceedings, including in appropriate cases by bodies with adequate autonomy and independence; and ii) that the public transparency of these proceedings involving federal prosecutors be enhanced, with due regard to the right of privacy and effective defence of the federal prosecutors concerned (paragraph 303).**
317. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of the United States of America to submit a report on the measures taken to implement the above-mentioned recommendations by 30 June 2018. These measures will be assessed by GRECO through its specific compliance procedure.
318. GRECO invites the authorities of the United States of America to authorise, at its earliest convenience, the publication of this report.

About GRECO

The Group of States against Corruption (GRECO) monitors the compliance of its 49 member states with the Council of Europe’s anti-corruption instruments. GRECO’s monitoring comprises an “evaluation procedure” which is based on country specific responses to a questionnaire and on-site visits, and which is followed up by an impact assessment (“compliance procedure”) which examines the measures taken to implement the recommendations emanating from the country evaluations. A dynamic process of mutual evaluation and peer pressure is applied, combining the expertise of practitioners acting as evaluators and state representatives sitting in plenary.

The work carried out by GRECO has led to the adoption of a considerable number of reports that contain a wealth of factual information on European anti-corruption policies and practices. The reports identify achievements and shortcomings in national legislation, regulations, policies and institutional set-ups, and include recommendations intended to improve the capacity of states to fight corruption and to promote integrity.

Membership in GRECO is open, on an equal footing, to Council of Europe member states and non-member states. The evaluation and compliance reports adopted by GRECO, as well as other information on GRECO, are available at: www.coe.int/greco.
