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Second Evaluation Round

Compliance Report on the United States of America

Adopted by GRECO
at its 40th Plenary Meeting
(Strasbourg, 1-5 December 2008)

I. INTRODUCTION

1. GRECO adopted the Second Round Evaluation Report on the United States of America (USA) at its 30th Plenary Meeting (9-13 October 2006). This report (Greco Eval II Rep (2005) 10E) was made public by GRECO, following authorisation by the US authorities, on 17 October 2006.
2. In accordance with Rule 30.2 of GRECO's Rules of Procedure, the US authorities submitted their Situation Report (RS-report) on the measures taken to implement the recommendations on 26 June 2008.
3. At its 26th Plenary Meeting (5-9 December 2005), GRECO selected, in accordance with Rule 31.1 of its Rules of Procedure, France and Poland to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Jean ALEGRE on behalf of France and Mr Cezary MICHALCZUK on behalf of Poland. The Rapporteurs were assisted by the GRECO Secretariat in drafting the Compliance Report (RC-Report).
4. The objective of the RC-Report is to assess the measures taken by the authorities of the USA, to comply with the recommendations contained in the Evaluation Report.

II. ANALYSIS

5. It was recalled that GRECO in its Evaluation Report addressed eight recommendations to the USA. Compliance with these recommendations is dealt with below.

Recommendation i.

6. *GRECO recommended to review the pertinent rules on confiscation/forfeiture and the use of interim measures, in order to ensure that all proceeds from acts of corruption and related instrumentalities are subject to confiscation, and to enable measures such as seizure and restraint orders, including in respect of substitute assets, to be taken as appropriate.*
7. The US authorities report that the legislation existing at the time of the adoption of the Evaluation report did, and continues to, provide for the use of restraint orders and forfeiture of property traceable to proceeds of corruption offences. Beyond that, the rules on confiscation/forfeiture and interim measures have been subject to review by the Department of Justice to ensure that they are comprehensive and effective. The Department of Justice presented draft legislation to Congress on 24 July 2007. Although existing US law provides broad authority to forfeit/confiscate both proceeds and instrumentalities of crime, this draft legislation (Proceeds of Crime Act of 2007), if enacted, is expected to ensure that confiscation will also be possible for the instrumentalities of those offences for which current law only permits forfeiture of proceeds under the general forfeiture statutes (18 U.S.C. §§ 981 and 982). In addition, the draft Proceeds of Crime Act, if adopted, will permit the pretrial restraint of substitute assets.
8. GRECO recalls that in the Evaluation report the US legal system was considered generally solid in respect of the possibilities to use forfeiture and interim measures in most situations relating to corruption offences (paragraph 47), and that forfeiture is much used in the USA (for example, in the Southern district of New York forfeiture measures to the value of more than \$ 1,1 billion (appr. EUR 800 million) were taken in 2007, according to the US authorities). However, a weakness discovered was that confiscation was not always available in respect of instrumentalities. Moreover, the lack of value based interim measures such as restraint orders, was also

highlighted as a shortcoming. It appears that the changes underway address both these issues; however, the relevant draft legislation has not been adopted yet.

9. GRECO concludes that recommendation i has been partly implemented.

Recommendation ii.

10. *GRECO recommended to consider enhancing the assistance to the public at the federal level with regard to access to public information.*
11. The US authorities refer to a Presidential Executive Order 13392 (2005) which focused on improving the service provided to the Freedom of Information Act (FOIA) by creating a more "citizen-centered and results-oriented approach". The Order includes measures to facilitate public access to federal records. As a consequence, each federal agency has supplemented its FOIA programme with new features, such as the employment of a "Chief FOIA Officer", who is ultimately responsible for the agency's entire FOIA programme; the creation of a "FOIA Requester Service Center", to provide requesters with information about FOIA and such requests; the designation of a "FOIA Public Liaison" to serve as a supervisory official to whom a requester may raise concerns about the service received; the creation of additional annual reporting requirements to allow assessment of the effectiveness of each agency's FOIA programme; and the development of an agency-specific plan to improve FOIA performance. The authorities have added that, in 2006, the Government received more than twenty-one million FOIA requests (an increase of about seven percent from the previous year), mostly from individuals, and that the number of requests appears to increase every year.
12. The authorities also report that the Office of Information and Privacy (OIP), which serves as the Federal Government's primary educator in FOIA law, also assists in the effort to provide assistance to the public, for example, through conferences several times per year for Government employees tasked with agency FOIA programmes. Furthermore, the OIP operates on a daily basis a telephone hotline staffed by OIP attorneys to provide anyone with FOIA-related guidance. The hotline received 3,212 calls during the fiscal year 2007.
13. GRECO, noting with satisfaction that several measures aimed at enhancing the assistance to the public in obtaining access to public information have been reported, concludes that recommendation ii has been implemented satisfactorily.

Recommendation iii.

14. *GRECO recommended that the federal government study the use of contractors and their employees in the federal workplace in order to provide a foundation for an appropriate approach for addressing, on a systematic basis, conduct standards expected of contractors working within public administration.*
15. The US authorities report that since the GRECO visit, in December 2005, discussions regarding the appropriate role and conduct of Federal Government contractors and their employees in Federal workplaces have continued and remained at the forefront of public policy discussions. In addition to frequent news articles and media reports on the issue, there have been numerous studies and reports, leading to proposed legislation and regulations on the role of such contractors and their employees. As these are not federal employees and thus not subject to the standard conduct requirements of such employees, these measures are often linked to

requirements of the procurement system. The authorities have referred to measures as detailed below.

16. A Congressionally mandated committee study was carried out in January 2007 by the Acquisition Advisory Panel, a federal committee established by law, which released its final report to the Office of Federal Procurement Policy (OFPP), a statutory office within the Executive Office of the President, and to Congress. The Report deals with necessary changes to acquisition laws, regulations and policies with a view to ensuring effective and appropriate use of commercial practices and performance-based contracting. Among other things, the Panel recommended that the Federal Acquisition Regulations (FAR) Council review existing rules and to the extent necessary, create a new uniform policy and clauses dealing with organisational and personal conflicts of interest in respect of contractors.
17. In February 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) proposed amendments to the Federal Acquisition Regulations (FAR). In summary, the proposed amendment applied to contractors receiving awards in excess of \$5 million and stated that they should have a code of ethics and business conduct, an employee ethics and compliance training programme and an internal controls system proportionate to the size of the company and extent of its business with the Federal Government. Following comments from the Department of Justice (November 2007), the Councils expanded the proposal to establish internal controls to detect and prevent improper conduct in connection with the performance of Government contracts.¹
18. In March 2008, the Councils published an Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register in order to determine if, when and how service contractor employees' personal conflicts of interest need to be addressed and whether more disclosure of contractor practices, specific prohibitions etc. are necessary to promote ethical behaviour. Also in March 2008, the Councils published an ANPR seeking information to determine whether the Federal Acquisition Regulation System's existing guidance on organisational conflicts of interest adequately addresses the current needs of the acquisition community or whether additional standards and provisions might be beneficial. Moreover, in March 2008, the General Accountability Office (GAO), the investigative arm of Congress, issued a comprehensive report on conflicts of interest and defence contracting to the Committee on Armed Services. In preparing the report, the GAO reviewed conflicts of interest laws and policies and interviewed ethics officials and senior leaders. The GAO recommended that the Department of Defence develop personal conflict of interest safeguards for contractor employees similar to those required of federal employees.
19. The authorities also refer to complementary efforts made by the Office of Government Ethics (OGE), such as policy discussions and awareness efforts regarding contractors in the workplace. The OGE has formally consulted with the organisations that have prepared the studies and reports noted above, such as the GAO and the Acquisition Advisory Panel, commented publicly on studies, reports, proposed regulations and legislation and serves as a guest member of a team working on one of the ANPRs (and subsequent FAR revisions), noted above. The OGE has also made efforts to create awareness of the contractors in the workplace through numerous

¹ After publication of the proposed rule and public comment on the proposal, the Councils published the final rule on November 12, 2008. The final rule amends the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Federal government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments in connection with the award, performance, or closeout of Government contracts.

presentations to a variety of audiences and stakeholders, including academic groups, think-tank organisations, private sector associations and federal agencies, for example, the defence industry contractors, local governments through the Council on Governmental Ethics Laws (COGEL) etc. GRECO was provided with a detailed list of policy guidance, educational materials, seminars etc. organised by the OGE during 2006-2008.

20. GRECO welcomes the extensive measures reported, which indicate that the conduct standards of contractors performing in the public sector is of significant importance in the USA. GRECO recalls the statement made in the Evaluation report that the “USA is at the forefront of involving the private sector through the use of contractors” (paragraph 139) and GRECO has noted that the use of contractors in the public sector is an increasing phenomenon in many of its member States.
21. GRECO concludes that recommendation iii has been implemented satisfactorily.

Recommendation iv.

22. *GRECO recommended that the Office of Government Ethics (OGE) include in its training and educational materials, the obligation of executive branch officials at the federal level to report suspicions of corruption and related illegal activities, and, as a member of the Council on Governmental Ethics Laws (COGEL), to inform the other members of COGEL of the importance of an obligation to report suspicions of corruption.*
23. The US authorities report that the OGE has taken several measures to increase Government employees’ awareness of the numerous legal obligations to report misconduct as provided in administrative regulations and in law², including education of ethics officials and employees on the necessity of reporting misconduct and alternatives as to where to report. Information has also been provided to the Council on Governmental Ethics Laws (COGEL) on the importance of this issue.
24. More in detail, the authorities refer to the National Ethics Conferences, through which the OGE provides training to a large number of agency ethics officials, more particularly, the 15th Conference (March 2007) attended by over 650 ethics officials, *inter alia*, dealing with the obligation of Government employees to report wrongdoing and the importance of follow-up and accountability in this respect. Furthermore, the OGE has incorporated the message of employees’ responsibility to report misconduct into a training module on ethics. Also, the OGE regularly presents information on items of interest to the ethics community (“Hot Topics”), including the obligation to report misconduct, in other training courses routinely provided to agency ethics officials and is currently incorporating this obligation into two training courses designed for Government employees. Another new training tool referred to is “podcasting”, which aims at reaching a broader audience with topics of concern to the ethics community. As part of a series of “podcasts” in early 2008, the OGE recorded a segment dedicated to reporting misconduct in the workplace in the format of an interview/talk-show. The podcast was made available for download on OGE-provided flashdrives to all ethics officials attending OGE’s National Ethics Conference in September 2008. In addition, a link to the website of the “podcast” will be distributed via the OGE mailing list (6000 recipients) once OGE’s website enhancement is completed. Finally, the authorities report that COGEL members have received similar information and have been made aware of GRECO’s recommendation.

² The Evaluation report and the Situation report contain details on these regulations and legislation.

25. GRECO takes note of the measures reported, inter alia conferences and the provision of specific training, including the use of electronic devices, aiming at raising the awareness among federal public officials on their obligations to report misconduct as provided for in law. Furthermore, the state level has been informed of these matters via COGEL.
26. GRECO concludes that Recommendation iv has been implemented satisfactorily.

Recommendation v.

27. *GRECO recommended that the appropriate federal authorities explore the possibilities to promote greater uniformity of registration requirements [in respect of legal persons] in the various States.*
28. The US authorities recall that there is no general federal mechanism for the establishment of legal persons in the United States as this responsibility has been retained by each of the 50 states and the District of Columbia. The authorities recognise, however, that while greater uniformity would be a positive step in assisting law enforcement efforts, the difficulty is to ensure that the registration process itself does not become too unwieldy or adversely affected.
29. The General Accountability Office (GAO), released a report in April 2006 on company formations and ownership information (GAO 06-376). The report describes (1) the kinds of information each of the 50 states and the District of Columbia and third party agents collect on companies, (2) law enforcement concerns about the use of companies to hide illicit activity and how company information from states and agents helps or hinders investigations, and (3) the implications of requiring states or agents to collect company ownership information. The GAO observes that it would be useful for policymakers to consider options that balance the conflicting concerns among states, agents and law enforcement agencies and uniformly apply such requirements in all states. In October 2006, the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury, issued a report on the role of domestic shell companies in financial crimes. In November 2006, the US Senate held a hearing on the problem for the law enforcement of identifying company owners. Statements were given by representatives of the Department of Justice; the Internal Revenue Service, GAO, FinCEN and representatives of a few States. Following the Congressional hearing noted above, the Business Services Committee of the National Association of Secretaries of State (NASS) initiated a process that resulted in a Task Force Report containing five recommendations addressing the disparate processes among the states (April 2006). Currently, the American Bar Association and the National Conference of Commissioners on Uniform State Laws are involved in the drafting of amendments to Model or Uniform Business entity laws.
30. The authorities also report, *inter alia*, that on 1 May 2008, a bill (S. 2956) entitled the "Incorporation Transparency and Law Enforcement Assistance Act" was introduced in the Senate which, if enacted, would establish minimum standards for company registration throughout the country. The bill has been referred to the Committee on Homeland Security and Government Affairs for consideration. The purpose of the Act is to prevent corporations from being used to commit terrorism, money laundering, tax evasion, or other misconduct by requiring the various States, *inter alia*, to obtain a list of the beneficial owners of each legal person formed under their laws.
31. GRECO takes note of the measures reported, in particular, the Report by the GAO which clearly promotes uniform policies concerning registration requirements in respect of legal persons at the state level. The recent Bill on "Incorporation Transparency and Law Enforcement Assistance Act"

may well lead to federal legislation concerning respect of registration of legal persons in order to prevent certain criminal offences, which would represent a desirable development.

32. GRECO concludes that recommendation v has been implemented satisfactorily.

Recommendation vi.

33. *GRECO recommended that the information gathered/to be gathered by the Corporate Fraud Task Force be used, to the extent possible, by the Task Force or other appropriate body to analyse investigations and prosecutions, as well as alternatives to prosecutions including the deferred prosecution agreements (DPAs) in the context of corruption cases involving business entities.*
34. The US authorities report that the Corporate Fraud Task Force, established in 2002, coordinates and oversees all corporate fraud matters under the Department of Justice. The Task Force is chaired by the Deputy Attorney General who, in March 2008, issued a policy memorandum on Deferred Prosecution Agreements (DFA) which reiterated the reasons for DFAs and non-prosecution agreements as alternatives to prosecution in order to mitigate undesirable consequences while promoting corporate reform and reducing corporate recidivism etc. The memorandum provides guidance in the form of nine principles that should be used in the selection and use of monitors in deferred prosecution and non-prosecution agreements with corporations. Furthermore, the memorandum imposes new record keeping requirements by which all prosecutors are required to notify the appropriate US Attorney or similar prior to the execution of an agreement. The attorney must, in turn, provide a copy of the agreement to the Assistant Attorney General, who must maintain a record of all such agreements.
35. The authorities also report that statistical information between 2003 and 2008 shows that there were approximately 85 DPAs in place, including crimes such as fraud, money laundering, foreign corruption. Although the terms of an agreement are determined by the particular facts and circumstances in a given case, there were certain common features to the agreements including restitution to the victims, payment of fines and penalties, cooperation with ongoing investigations, and the implementation of compliance programmes and internal controls designed to reduce recidivism.
36. GRECO recalls that in the Evaluation report concerns were raised in relation to the use of DPAs, *inter alia*, that it appeared that prosecutors would favour the prosecution of physical persons rather than corporations, which might lead to corporate liability legislation losing its deterrent effect. However, the situation could not be wholly assessed due to a lack of statistics on the use of DPAs. The authorities have now presented additional information in the form of some statistics and have also indicated that the Corporate Fraud Task Force is provided continuously with information about the use of DPAs and that some form of analysis of the individual cases is carried out on a regular basis.
37. GRECO concludes that recommendation vi has been dealt with in a satisfactory manner.

Recommendation vii.

38. *GRECO recommended to consider means for tracking information about legal persons convicted of corruption offences at federal, state and local levels.*

39. The US authorities reiterate that, in the USA, records of convictions of legal persons are publicly accessible through the jurisdiction where the conviction took place. Furthermore, legal persons who are also public companies are required to include any convictions in their reports to the Securities Exchange Commission. These reports are available on-line through the EDGAR system for free. In addition, there are commercial databases containing information on federal, state and local convictions as well as pre-conviction records. One such business model is designed to provide access to the database as part of a subscription which is generally used for multiple research projects. Another business model is designed to provide reports to individual requestors for a fee. In addition, the law enforcement community in the USA has a non-public data source which includes conviction information.
40. GRECO takes note of the information provided, in particular, the reference made to a non-public data source available to law enforcement agencies, including conviction information in respect of legal persons. With this additional information and also taking into account the position of the authorities that there are no further needs in this respect, GRECO does not find it necessary to pursue the issue raised in this recommendation any further.
41. GRECO concludes that recommendation vii has been dealt with in a satisfactory manner.

Recommendation viii.

42. *GRECO recommended that the use of the existing prohibitions of natural persons convicted of felony corruption offences from acting in leading positions in legal persons should be promoted.*
43. The US authorities report that instructions about the potential use of the remedy prohibiting a natural person from serving as a leading person in legal persons is included in the US Attorney's Manual. The manual is to be followed by every federal prosecutor in the Department of Justice. In addition, the Sentencing Guidelines Manual, which must be reviewed and analysed by prosecutors when seeking a particular sentence as a result of a conviction contains information about the use of this prohibition. Moreover, the use of this potential penalty is periodically highlighted in specific training provided to US Attorneys. Two seminars on fraud held in 2007 and 2008 respectively dealt with occupational restrictions. The US authorities also report that in addition to court imposed requirements, agencies within the federal government can suspend and bar individuals from acting as leading persons or even from performing any contractual business for the United States government. For example, the Securities and Exchange Commission (SEC) can bar individuals from serving in leading positions of publicly traded corporations subject to the SEC's jurisdiction (over 13,000 corporations). In the fiscal year 2006, the SEC sought such orders for 97 individuals and in fiscal year 2007, that number increased to 125.
44. GRECO takes note of the information provided. The measures reported, in particular, the information that US attorneys through the various manuals, which they are to consult when seeking a particular sentence are aimed at keeping attorneys aware of the possibility to demand sanctions such as occupational restrictions. Even if the manuals have not been developed as a result of this particular recommendation, they serve the same purpose as expressed by GRECO and so does the training reported.
45. GRECO concludes that recommendation viii has been dealt with in a satisfactory manner.

III. CONCLUSIONS

46. **In view of the above, GRECO concludes that the United States of America has implemented satisfactorily or dealt with in a satisfactory manner the large majority of the recommendations contained in the Second Round Evaluation Report.** Recommendations ii-v have been implemented satisfactorily, recommendations vi-viii have been dealt with in a satisfactory manner and recommendation i has been partly implemented.
47. GRECO invites the Head of the US delegation to submit additional information regarding the implementation of recommendation i by 30 June 2010.
48. GRECO invites the US authorities to authorise the publication of this report.