



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

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



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Third Evaluation Round

Evaluation Report on the United States of America Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

Adopted by GRECO
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I. INTRODUCTION

1. The United States of America joined GRECO in 2000. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2003) 2E) in respect of the United States at its 17th Plenary Meeting (22-25 March 2004) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 10E) at its 30th Plenary Meeting (9-13 October 2006). The afore-mentioned evaluation reports, as well as their corresponding compliance reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to the United States (Washington DC) on 2 and 3 May 2011, was composed of Mr Alastair BROWN, judge (United Kingdom) and Mr Marin MRCELA, Vice-President of GRECO, Justice of the Supreme Court (Croatia). The GET was supported by Mr Wolfgang RAU, Executive Secretary of GRECO and Mr Björn JANSON, Deputy to the Executive Secretary. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2011) 3E, Theme I) as well as copies of relevant legislation.
4. The GET met with officials from the following Government Departments: the Criminal Division and the Office of the Inspector General of the Department of Justice, the Federal Bureau of Investigation (FBI) and the Office of Government Ethics (OGE). The GET also met with a Judge for the United States District Court for the District of New Jersey. Moreover, the GET met with members of the following non-governmental organisations: Transparency International, General Dynamics and Justice at Stake and in that context with representatives of various law firms (K&L Gates, Cadwalader, Wickersham & Taft and Covington & Burling).
5. The report on Theme II – "Transparency of party funding", is set out in Greco Eval III Rep (2011) 2E, Theme II.
6. The present report on Theme I of GRECO's Third Evaluation Round - Incriminations - was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate how the criminal legislation and practice and measures adopted by the United States' authorities comply with the requirements deriving from the relevant provisions indicated in paragraph 2. The report contains a description of the situation and a critical analysis. The conclusions include recommendations adopted by GRECO and addressed to the United States in order to improve its level of compliance with the provisions under consideration.

II. INCRIMINATIONS

7. Considering the size of the USA and its specific legal system where the competences are divided between the federal and state level, as well as taking into consideration the limits of the evaluation visit, the present report focuses principally on features of the federal level.

Description of the situation

8. The United States signed the Criminal Law Convention on Corruption (ETS 173) on 10 October 2000, but has not ratified this instrument. The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) has not been signed or ratified by the United States.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

9. The primary bribery provision¹ which criminalises active and passive bribery of domestic federal public officials, as well as the giving and receiving of illegal gratuities to and by federal officials is contained in 18 U.S.C. § 201.

18 U.S.C. § 201(b) provides:

“Whoever --

- 1. directly or indirectly corruptly gives, offers, or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent --*
 - (A) to influence any official act; or*
 - (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or*
 - (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;*
- 2. being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:*
 - (A) being influenced in the performance of any official act;*
 - (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or*
 - (C) being induced to do or omit to do any act in violation of the official duty of such official or person;*

shall be fined under this title of not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.”

¹ There are also other federal criminal provisions that can be applied in respect of domestic bribery of public officials, in particular 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud) and 1346 (honest services fraud) and 18 U.S.C. 666 dealing with bribery in programs receiving federal funds noted above. These provisions are described in relation to bribery in the private sector, below.

10. An additional statute, 18 U.S.C. § 666, theft or bribery concerning programs receiving Federal funds, makes it a ten-year felony for, *inter alia*, bribery of state and local public officials under certain circumstances. Specifically, section 666 prohibits bribery, fraud, and embezzlement by agents and employees of organisations and state, local and tribal governments and their agencies that receive more than \$10,000 in federal funds in a calendar year in connection with a transaction involving \$5,000 or more.² The US authorities have in this context also submitted a selected list of other statutes that they consider relevant as subsidiary statutes in respect of bribery offences of and by federal public officials. These provisions appear as Appendix I to this report and 18 U.S.C. § 666 under paragraph 73.

Elements/concepts of the offence

“Domestic public official”

11. The term “public official” as used in 18 U.S.C. § 201 is duty based and defined in 18 U.S.C. § 201(a) (1) as “Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror”. In the US context the term “Government” is not limited to the executive powers, but comprises the three separate branches of state power: the executive, the legislative and the judicial powers. (This definition applies to both active and passive bribery involving federal officials, but not state and local officials, the definition of which is provided for in state legislation.)

“Promising, offering or giving” (active bribery)

12. The elements “corruptly gives, offers or promises ...” are explicitly provided for under 18 U.S.C: § 201(b) 1.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

13. The elements “corruptly demands, seeks, receives, accepts or agrees to receive or accept ...” are explicitly provided for under the 18 U.S.C. § 201(b) 2.

“Any undue advantage”

14. According to 18 U.S.C. § 201(b) 1. and 2. the wording used is “anything of value” to refer to any advantage and there is no lower limit to the value. The phrase “anything of value” is defined broadly. See *United States v. Moore*, 525 F.3d 1033 (11th Cir. 2008) (thing of value includes intangibles and monetary worth is not the sole measure of value). Apart from the US Criminal Code, the legislative, executive and judicial branches have promulgated specific rules governing when an employee may accept a gift and, if so, in what amount. These rules are designed to eliminate the appearance of undue influence that might arise if a federal official were to receive a substantial gift from a person or entity with an interest in a matter under the official's responsibility. (The GET took note of these rules which, for example, indicate that in the executive branch public officials are as a main rule not allowed to accept any gifts but may, under certain indicated circumstances, accept a gift of not more than \$20).

² See, e.g., *United States v. Van Pelt*, No. 10-4567, WL 4925864 (3d Cir. Oct. 18, 2011); *United States v. Townsend*, 630 F.3d 1003 (11th Cir 2011); *United States v. Bryant*, 655 F3d 232 (3rd Cir. 2011); *United States v. Lupton*, 620 F. 3d 790 (7th Cir. 2011); *United States v. Spano*, 401 F. 3d 837 (7th Cir. 2005).

“Directly or indirectly”, “himself or herself or for anyone else”

15. The elements “directly or indirectly” are explicitly covered by both the active and the passive offences, 18 U.S.C. § 201(b) 1. and 2.; ie a bribe may be paid directly to the public official or to another person or entity.

“To act or refrain from acting in the exercise of his or her functions”

16. The active bribery offence covers the following actions, according to 18 U.S.C. § 201(b) 1.: “to influence any official act” (A), “to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud” (B) and “to do or omit to do any act of violation of the lawful duty” (C). The passive bribery offence covers the same actions and omissions which are reflected in 18 U.S.C. § 201(b) 2. (A), (B) and (C). In the statute, the phrase “official act” is used to link a public official’s decision to act or refrain from acting in the exercise of his/her official functions. The statute defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit” (18 U.S.C. § 201(a)(3)).

“Committed intentionally”

17. The provision 18 U.S.C. § 201 requires that both the active and the passive bribery offence be carried out “corruptly”, ie with a corrupt intent. It was explained to the GET that the wording “corruptly give” means that a bribe has been given with the specific aim to influence an official act rather than to promote a general cause (see also case law below). Active and passive bribery require intent in respect of all elements as most federal criminal statutes do. However, the offence of paying an illegal gratuity may be applicable with a lower level of criminal intent. The United States Supreme Court has explained the difference between a bribe and an illegal gratuity as follows: “The distinguishing feature of each crime is its intent element. Bribery requires intent ‘to influence’ an official act or ‘to be influenced’ in an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because of’ an official act. In other words, for bribery there must be a quid pro quo — a specific intent to give and receive something of value in exchange for an official act. An illegal gratuity is at stake if the link between the gift and the measure of the public official is missing, for example, merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.” (United States v. Sun-Diamond Growers of California, 526 US 398, 404-05 (1999)).

Sanctions in respect of bribery of domestic public officials

Criminal sanctions

18. Active and passive bribery of domestic public officials under 18 U.S.C. § 201(b) is sanctioned with a fine of up to \$250,000 or not more than three times the monetary equivalent value and/or with up to 15 years of imprisonment. The US authorities have added that when an official is convicted of engaging in domestic bribery of public officials, the typical sanction is a term of imprisonment, see “Court decisions/case law”, below.
19. While the maximum terms of imprisonment are set forth in the statutes, the most common ranges of potential penalties are set forth in the United States Sentencing Guidelines (USS.G.). The guidelines are intended to ensure that similar crimes by similarly situated defendants are

sentenced in a similar manner. Originally the guidelines were mandatory; however, the Supreme Court has held that the guidelines are not mandatory stating that the courts should consider them for guidance but should also look to a broader range of factors when imposing sentences (United States v. Booker, 543 US 220 (2005)).

Additional sanctions

20. In addition to criminal sanctions, there are administrative and civil sanctions available. If the conduct underlying the bribery violation also violates, for example, the conflict of interest statutes 18 U.S.C. 203, 250, 207-209, criminal and civil sanctions under 18 U.S.C. 216 may be available. If the bribe was not included on a required financial disclosure report, there are also additional criminal and civil penalties available. In addition, the administrative codes of conduct for all three branches have restrictions on the acceptance of gifts. A bribe would violate each of those codes so the public official recipient in each case would be subject to the administrative sanctions imposed under each code. These sanctions would, in addition to any sanctions imposed, be based on a finding of guilt under the criminal law. For the executive branch, a violation of the standards of conduct can result in a number of sanctions including dismissal from public service.
21. The US criminal law also requires the sentencing judge to order restitution when there is an identifiable victim, 18 U.S.C. § 3663 and USS.G. § 5E1.1. In corruption cases, the victim is often the United States and, in many cases, individuals convicted of corruption offences have been ordered to pay restitution to the United States. The following cases provide examples of restitution orders in connection with bribery-related convictions. In the case *United States v. Cockerham*, SA-07-CR-511-RF (W.D. Tex. 2010) a former Army major who pled guilty to conspiracy, bribery, and money-laundering offences related to contracting activities in Kuwait was sentenced to 270 months of imprisonment and ordered to pay \$9,600,000 in restitution. In *United States v. Murray*, 4:09-CR-1-001 (M.D. Ga. 2009), another former Army major working in Kuwait as a contracting officer took bribes from defence contractors in Iraq and Kuwait. He pled guilty to four counts of bribery, was sentenced to 57 months' prison and was ordered to pay \$245,000 in restitution. In a recent case, *United States v. Minor*, 11-131 (D.D.C. October 24, 2011), a senior employee of the United States General Services Administration serving as a customer services representative was convicted of receiving dozens of bribes for steering government contracts; he was sentenced to 30 months' imprisonment and was ordered to pay \$118,000 in restitution. Finally, in *United States v. Trimbol*, cr-00275 (D.D.C. 2008) a former official of the United States Tax Court was sentenced to 18 months' imprisonment and \$24,143 in restitution for engaging in a conspiracy to commit bribery involving contracts at the U.S. Tax Court.
22. Natural persons who are victims of corruption may also bring private actions for monetary damages against the violator in state or federal court. These lawsuits may be common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories.
23. The United States is furthermore empowered to annul or void fraudulently obtained contracts with the federal government and may sue for rescission in federal court to annul a fraudulently procured contract or contracts produced as a result of corruption. The authority to sue rests with the Attorney General. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract, 18 U.S.C. § 218 further permits the government to void contracts related to conviction under certain criminal conflicts of interest statutes set forth in Title 18 of the United States Code. Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations. Subpart 3.2 of those regulations specifically requires that government contracts permit termination in the

event of a bribery or gratuities violation. Finally, the federal government is empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons, including the contractor's corrupt acts in the acquisition or performance of a government contract.

Level of sanctions for other comparable offences

24. The US authorities have mentioned the following offences and their foreseen criminal sanctions for comparative reasons: Theft from the government may lead to up to 10 years' imprisonment (18 U.S.C. § 641); the sanctions for fraud and swindle may render up to 20 years' imprisonment (18 U.S.C. § 1341, 1343).

Court decisions/case law

25. In the case *United States v. Sun-Diamond Growers of California*, 526 US 398 (1999), the Supreme Court explained that bribery requires a corrupt intent and a quid pro quo. The Court further explained that an illegal gratuity is a payment made for or because of official act(s) but does not require a quid pro quo or an agreement that the official will be influenced. The case *Clark v. United States*, 102 US 322 (1880) held that voluntary payment of money to an official, with the corrupt motive of securing official action, constitutes bribery. In the case *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974): the higher degree of criminal [corrupt] intent was the additional element which makes bribery in return for being influenced in his performance of an official act the greater offence in relation to the lesser included offence of accepting an illegal gratuity. According to the case *United States v. Barash*, 412 F.2d 26 (2nd Cir. 1966), the intent to influence, accompanying the corrupt giving or receiving of something of value, was an essential element of the crime of bribery.
26. The United States Court of Appeals for the District of Columbia Circuit issued a decision interpreting the meaning of "official act" as used in section 201. See *United States v. Valdes*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). In *Valdes*, the court held that it was not an official action when a local law enforcement officer entered into a law enforcement database to search for information on fictitious subjects in exchange for money. In reaching this conclusion, the court interpreted the phrase "official act" to mean "a class of questions or matters whose answer or disposition is determined by the government", *Id.* at 1324.
27. In the case *United States v. Abramoff*, 2006-cr-00001 (D.D.C. 2006), a former lobbyist was charged and pled guilty to conspiracy to commit bribery and honest services wire and mail fraud; mail fraud; and tax evasion arising from a scheme to defraud four Native American Indian tribes by charging fees that incorporated huge profit margins and then splitting the net profits in a secret kickback arrangement. The offender admitted that over a 10-year period he and others had engaged in a pattern of corruptly providing items of value to public officials, with the intent to influence acts by the public officials that would benefit Abramoff and his clients. The offender also admitted evading payment of almost \$1.7 million in taxes by hiding income in certain non profit entities that he controlled. The offender was sentenced to forty-eight months of imprisonment, three years of supervised release, and ordered to pay \$23,134,695 in restitution to victims of the fraud offenses.
28. The US authorities have also referred to the case *United States v. Plaskett and Briggs*, 2007-cr-00060 (D.V.I. 2007) in which two former Commissioners of two territorial governments concerning planning and natural resources and of property and procurement were convicted for their role in a bribery and kickback scheme involving a fictitious company that received over \$1.4

million in government contracts. Once the contracts were awarded, the defendants and their associates, including at least two other territorial government officials, received over \$300,000 in return for steering at least seven contracts to the company. The former officials were sentenced to seven and nine years of imprisonment respectively, plus three years of supervised release.

29. In another bribery case, *United States v. Fisher*, 2008-cr-00012 (D.D.C. 2008) the defendant, an employee of the General Services Administration responsible for negotiating contracts for repair and maintenance at US government facilities, pled guilty to bribery. The charge arose from his accepting approximately \$40,000 in cash and other things of value between 2003 and 2007 from a private maintenance company for steering numerous work orders to the company. The offender was sentenced, to eighteen months' imprisonment, two years' supervised release and a \$5,000 fine. As part of his plea agreement, the offender also consented to forfeiting \$40,000.
30. In the case, *United States v. Graham and Shipley*, 2005-cr-00962 (D.D.C. 2008), the last of over fifty defendants were sentenced as a result of an FBI undercover operation (Operation Lively Green) into a widespread bribery and extortion scheme. One of the offenders, a former army guard, pled guilty and the other offender, a civilian falsely purporting to be serving in the army national guard, pled guilty to conspiring to obtain cash bribes from persons they believed to be narcotics traffickers but were in fact FBI special agents in return for the defendants using their official positions to assist, protect and participate in the activities of an ostensible narcotics trafficking organisation. In order to protect the shipments of cocaine, the defendants wore official uniforms, carried official forms of identification, used official vehicles and used their colour of authority where necessary to prevent police stops and seizures of the narcotics as they drove through checkpoints guarded by the United States Border Patrol, the Arizona Department of Public Safety, and Nevada law enforcement officers. One of the offenders was sentenced to four years of probation and a \$3,000 fine. The other offender was sentenced to 24 months of imprisonment, three years of supervised release, and a \$3,000 fine.
31. In the case *United States v. Skilling*, 130 S. Ct. 2896 (2010), the Supreme Court limited the scope of the honest services fraud statute by holding that section 1346 must be limited to honest services fraud schemes that involve bribery/kickbacks in order to avoid concerns arising under the Fifth Amendment to the United States Constitution. *Id.* at 2931. The Court eliminated the use of section 1346 to prosecute undisclosed conflicts of interest or self-dealing. The essential distinction between bribery/kickbacks and concealed conflicts of interest is that for bribery/kickbacks, the payment or thing of value must be supplied by a third party who is not deceived, i.e. a third party who seeks favourable action in return for a thing of value. That is, the corrupting influence must come from a source other than the defendant's own financial interests. *Id.* at 2928.

Bribery of members of domestic public assemblies (Article 4 of ETS 4)

32. Active and passive bribery of members federal domestic public assemblies are primarily (see footnote 1, page 3) covered by 18 U.S.C. § 201(b), which includes members of Congress (Senate and House of Representatives), according to the definition provided for in 18 U.S.C. § 201(a)(1), see bribery of domestic public officials, above.
33. The elements/concepts, including the criminal sanctions, described under bribery of domestic public officials (above) are the same in respect of bribery of members of federal domestic public assemblies.

Additional sanctions

34. The authorities have in addition stated that neither the US Department of Justice nor the United States federal judiciary possesses the power to expel United States Senators or Members of the House of Representatives from Congress, or to unilaterally prevent individuals convicted of bribery from running for Congress. The minimum qualifications for serving in the House of Representatives and the Senate are set forth in the Constitution, and beyond that, only those bodies may determine the qualifications of their members. In this regard, the House of Representatives and the Senate each possess the power, under the US Constitution, to expel their own members (US Const. art. I, § 8). A decision of Congress to expel a member does not prevent the Department of Justice from criminally prosecuting that individual as well. However, the Department of Justice routinely requires defendants who plead guilty to corruption offences to agree not to accept or compete for public office or positions.
35. Moreover, although federal law does not, and cannot, bar felons from holding state or local elected office, states can enact laws prohibiting convicted persons from holding elected offices at the state or local levels. Several states have such laws in place.

Court decisions/case law

36. In the case *United States v. Jefferson* (2009), former Congressman William J. Jefferson was convicted of soliciting and accepting bribes in exchange for his performance of official acts, using his congressional office as a criminal enterprise to enrich himself and conspiring to violate numerous federal laws, including the Foreign Corrupt Practices Act. Jefferson was sentenced to 13 years imprisonment and ordered to forfeit approximately \$470,000. Appeal by the defendant was pending at the time of the adoption of this report.
37. In the case *United States v. Cunningham* (2008), former Congressman Randy “Duke” Cunningham was convicted of taking \$2.4 million in bribes from three defence contractors. He was sentenced to eight years and four months’ imprisonment.
38. In the case *United States v. Ney* (2007), former Congressman Robert W. Ney pled guilty to conspiracy to commit multiple offences, including honest services fraud, making false statements to federal investigators, and conflicts of interest. He admitted to corruptly soliciting and accepting thousands of dollars in gifts from lobbyists. He was sentenced to 30 months’ imprisonment and 200 hours of community service.

Bribery of foreign public officials (Article 5 of ETS 173)

39. The primary statute addressing active bribery of foreign public officials is a criminal offence under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq., and 78ff. The FCPA, which is a detailed law, appears as Appendix II to this report. The US has an additional network of statutes that have been used to prosecute both domestic and foreign bribery, whether it is active or passive or public or private. The most central parts of the FCPA in respect of the current evaluation reads:

§ 78dd-1 (Section 30A of the Securities & Exchange Act of 1934).

Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official or candidate to do or omit to do an act in violation of the lawful duty of such party official, or candidate or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

40. The active bribery offence under the FCPA can be committed by three categories of persons: i) “issuers” (see § 78dd-1 above), which comprises enterprises which have registered a class of securities with the Securities and Exchange Commission (SEC)³ and their officers, directors, employees, and agents; ii) US citizens and residents and US legal persons (“domestic concerns other than issuers”) (see § 78dd-2 in Appendix II) and; iii) any natural person not being a US citizen or resident (“any person other than an issuer or a domestic concern”) if he or she takes an action in furtherance of an offense in the territorial jurisdiction of the USA, or any such person working on behalf of a US entity (see § 78dd-3 in Appendix II). (Please note that FCPA § 78dd-1,2 and 3) contain the same elements except in respect of who can commit such an offence.)
41. Passive bribery of foreign public officials is not criminalised as such under the FCPA. The US authorities stress that this is due to reasons of policy and jurisdictional concerns and submit that such conduct can be and has been reached by other statutes when there is jurisdiction. For example, the United States can and has prosecuted foreign officials for money laundering based on corruption, as foreign corruption is a predicate crime for money laundering. In addition, officials of public international organisations have been prosecuted in the United States for corruption pursuant to the wire fraud or a domestic corruption statute, 18 U.S.C. § 666, where the United States had jurisdiction over such individuals. (See *United States v. Bahel*, 2d Cir., No. 08-3327.)

“Foreign official”

42. The term “foreign official” is defined in the FCPA as any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation (15 U.S.C. § 78dd-1(f). “Foreign government” covers all branches of state powers: the executive, the legislative and the judiciary.

“Promising, offering or giving” (active bribery)

43. The wording “offer payment, promise to pay, or authorization of the payment of any money or offer, gift, promise to give, or authorization of the giving of anything of value” is provided in the FCPA.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

44. Passive bribery is not covered under the FCPA. (The US authorities also refer to alternative statutes, see paragraphs 41 and 57-60.)

“Any undue advantage”

45. “any money or offer, gift” ... “anything of value” are the terms used in the FCPA. However, the FCPA provides for an exception for a routine governmental action (§ 78 dd-1 (b) et seq), ie. facilitating or expediting payments the purpose of which is to expedite or to secure the performance of a non-discretionary action by a foreign official.) Because the facilitating payments are to secure something to which the payer is otherwise entitled, however, the exception in fact provides additional clarification as to the reach of the FCPA, as the making of such a payment

³ The mission of the US Securities and Exchange Commission is to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.

would lack the requisite criminal intent (“intent to corrupt,” discussed below) to constitute an FCPA violation in any event. Such payments can and have been prosecuted under other US criminal statutes, however, also discussed below.

“Directly or indirectly”, “himself or herself or for anyone else”

46. The FCPA explicitly covers active bribery carried out directly or indirectly in respect of any foreign official. (The US authorities stress that other statutes that can be used cover these concepts as well.)

“To act or refrain from acting in the exercise of his or her functions”

47. The FCPA includes action or omission in respect of the foreign official. (The US authorities stress that other statutes include acts in furtherance of the offense or material omissions.

“Committed intentionally”

48. The FCPA requires that the bribe is made with corrupt intent.⁴ The US authorities stress that the mail and wire fraud statutes and 18 U.S.C. § 666 also require the intent to carry out the criminal conduct.

Additional elements in the FCPA

49. It is required that active bribery under the FCPA has been carried out within the framework of a business relation. The business relation is broadly interpreted, so even though there may not necessarily be a contractual situation in place, there must be a link to a commercial activity either on the side of the briber or the bribee. If there is no form of commercial relation, the FCPA is not applicable. The US authorities stress that other statutes could be applicable for such situations.

Sanctions in respect of bribery of foreign public officials

Criminal sanctions

50. Natural persons are subject to a fine of up to \$100,000 and/or imprisonment for up to five years for each offense under the FCPA and the Travel Act. Legal persons may be subject to a fine of up to \$2,000,000 for each offense. As noted elsewhere, bribery of foreign public officials can be prosecuted under other statutes, including the mail and wire fraud statutes, which subject the violator to a fine of up to \$250,000 and/or imprisonment for up to 20 years for each offense. Violations of 18 U.S.C. § 666 subject the violator to a fine of up to \$250,000 and/or imprisonment for up to 10 years for each offense.
51. The authorities also refer to the Alternative Fines Act (18 U.S.C. § 3571), according to which these fines may be substantially higher, as the actual statutory maximum fine for each offense may be up to twice the benefit that the defendant sought to obtain or received, or twice the pecuniary loss suffered by making the corrupt payment or engaging in the fraud.

⁴ See *Stichtinter Behartiging v. Schreiber*, 2003 WL 1904531 (2d Cir., April 21, 2003) at 6.

Civil sanctions

52. The Attorney General or the Securities and Exchange Commission (SEC), as appropriate, may bring a civil action for a fine of up to \$10,000 against any natural or legal person who violates the anti-bribery or accounting provisions under the FCPA. In addition, in an SEC enforcement action, the court may impose an additional penalty not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified amount, based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person. In addition, civil authorities can require that the company or individual disgorge any ill-gotten gains from the misconduct, including any and all profits derived from the transaction. The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti bribery provisions.

Other sanctions

53. Under guidelines issued by the Office of Management and Budget (Executive Office of the President) a natural or legal person found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The US President has directed that no executive agency shall allow any party to participate in any procurement or non-procurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non-procurement activity. A contractor may be debarred for a period of up to eighteen months based upon a reasonable suspicion that it has engaged in illicit conduct; if convicted or held liable in a civil action, the contractor may be debarred for three years or, if in the interests of the Government, even longer. In addition, a contractor may be debarred by the Department of Defence from obtaining overseas contracts if the foreign country in which the contract is to be executed determines that the contractor has engaged in anti-competitive behaviour or formally debars or suspends the contractor. The United States also cooperates with the international financial institutions, including the World Bank, in their investigations. The Department of Justice, at the request of other federal authorities, provides information regarding the criminal activity of prospective contractors to federal contracting agencies. In addition, the General Services Administration maintains a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by any federal agency or the Government Accountability Office (GAO). Non-federal authorities, such as states and municipalities, generally have similar provisions that permit the debarment of natural or legal persons convicted of federal crimes.
54. In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licences; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programmes for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

Court decisions/case law

55. *United States v. Juthamas Siriwan, et al*: On December 18, 2007, the owners of a film festival management company, were arrested on a criminal complaint which charged them in connection with a scheme to pay bribes to tourism authorities in Thailand. They were subsequently indicted by a federal grand jury in January 2008, on one count of conspiracy to bribe a foreign public official in violation of the FCPA and six substantive violations of the anti-bribery provisions of the FCPA. The charges against them were expanded pursuant to two superseding indictments on charges of conspiracy to commit money laundering, obstruction of justice and false subscription of a U.S. income tax return. According to court documents, they had paid bribes to the governor of the Tourism Authority of Thailand in exchange for receiving contracts to manage and operate a film festival as well as contracts related to a promotional book on Thailand and the provision of an elite tourism "privilege card" marketed to wealthy foreigners. Ultimately, between 2002 and 2007, the couple paid approximately \$1.8 million in bribes to the governor through numerous bank accounts in Singapore, the United Kingdom, and the Isle of Jersey in the name of a friend of the governor and his daughter. The contracts received in return resulted in more than \$13.5 million in revenue to their businesses. For their alleged roles in this bribery scheme, the governor and his daughter were indicted by a federal grand jury in Los Angeles on in January 2009, charging them with one count of conspiracy to commit international money laundering seven counts of transporting funds to promote unlawful activity, namely felony bribery in violation of the FCPA, and one count of aiding and abetting. There is no court ruling to date.
56. *United States v. Basu and Sengupta*: In 2002, the Department of Justice charged two World Bank officials, with conspiring to steer World Bank contracts to certain consultants in exchange for kickbacks. According to court documents, the two defendants conspired with a Swedish consultant and others to use their official positions with the World Bank to steer World Bank contracts in Ethiopia and Kenya to certain Swedish companies in exchange for approximately \$127,000 in kickbacks. In addition, the defendants admitted that in January 1999, they received a request for a \$50,000 bribe from a Kenyan government official working on a Project Implementation Unit involved in a World Bank-financed project, which was to be paid by the Swedish consultant. Collectively, the World Bank officials forwarded this request to the Swedish consultant and passed along related bank account information, despite knowing that the requested payment was mean to corruptly influence an act or decision of the foreign official in his official capacity, in violation of the anti-bribery provisions of the FCPA. One of the World bank officials pleaded guilty and was sentenced in 2006 to two months' imprisonment and one year of supervised release, which was to include four months of home confinement and was also sentenced to pay a criminal fine of \$3,000. The other pleaded guilty and was sentenced in 2008 to 15 months imprisonment, 2 years of supervised release and 50 hours of community service. He is currently appealing his sentence. Both were convicted of violating the FCPA (15 USC 78dd-3) and conspiracy (18 USC 371).
57. *United States v. Antoine and Duperval*: On December 4, 2009, two former executives of a Florida-based telecommunications company, the president of a Florida-based intermediary company, and two former Haitian government officials were charged in an indictment for their alleged roles in a foreign bribery, wire fraud, and money laundering scheme that lasted from at least November 2001 through March 2005. The former president of the telecommunications company, the former executive vice-president of the telecommunications company, the former president of Telecom Consulting Services Corp., a former director of international relations at the Republic of Haiti's state-owned national telecommunications company, and another former director of international relations at Haiti Teleco, were charged in connection with a scheme whereby the telecommunications company paid more than \$800,000 to shell companies to be

used for bribes to foreign officials of Haiti Teleco. The purpose of these bribes was to obtain various business advantages from the Haitian officials for the telecommunications company as well as to defraud the Republic of Haiti of revenue. In March 2010, one of the defendants pleaded guilty to conspiracy to commit money laundering. By pleading guilty, he became the first foreign official ever convicted of money laundering in the United States where the specified unlawful activity to which the laundered funds related was a felony violation of the FCPA. He was sentenced to 48 months' imprisonment and ordered to pay \$1,852,209 in restitution and to forfeit \$1,580,771. In October 2011, after trial, two other defendants were sentenced to 15 and 7 years incarceration respectively, in addition to forfeiture of \$3 million.

58. In the case *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007),⁵ cert. denied, US 129 S. Ct. 42 (2008), the 5th Circuit court ruled that any payments to foreign officials that might assist in obtaining or retaining business by lowering the costs of operations can fall within the FCPA, even where such a payment is not directly related to securing a contract. The judges rejected the defendants' argument that to interpret the business nexus requirement broadly rendered the statute unconstitutionally vague. The court also ruled that in proving the "knowing" element of an FCPA offence, the United States need only prove that the defendants understood that their actions were illegal. No specific knowledge about the FCPA or its prohibitions is required. (See Case 73A in Appendix C. to the reply to the questionnaire)
59. In the case *United States v. Kozeny, et al.*, No. 05-cr-518 (S.D.N.Y. 2005) (Case 50 in Appendix C to the reply to the questionnaire), the District Court⁶ judge issued a series of rulings on three key issues under the FCPA in the course of the trial and conviction of defendant. First, the judge ruled that the "knowing" standard under the FCPA can be met by evidence that the defendant "consciously avoided" or was "wilfully blind" to the substantial likelihood that there was bribery. Second, the Court held that for purposes of the affirmative defence of legality under local law, it is not enough that the local law merely relieve the payer of criminal liability; rather, it must affirmatively render the payment legal. Lastly, the trial court rejected the view that economic extortion can be a defence to an FCPA bribery charge, stating that the jury would receive an instruction on extortion only if the defendant laid a sufficient evidentiary foundation of "true extortion," which would involve threats of injury or death, rather than a threat to business interests or business demands. The defendant is currently appealing his conviction and the aforementioned legal rulings.
60. In *United States v. Esquinazi, et al.*, No. 09-21010 (S.D. Fla.) dkt. no. 309, November 19, 2010, the District Court held that the plain meaning of the FCPA includes employees of state-owned and state-controlled enterprises. Further rulings on the definition of "instrumentality" under the FCPA were issued in *United States v. Lindsey Manufacturing*, 10-cr-1031 (C.D. Ca.) and *United States v. Carson et al.*, 09-cr-077 (C.D. Ca.) subsequent to the on-site visit by the GET.

Bribery of members of foreign public assemblies (Article 6 of ETS 173)

61. Active bribery of members of foreign public assemblies is a criminal offence under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq., and 78ff. See also other statutes referred to by the US authorities, paragraph 39.

⁵ The opinions of circuit courts, which are the first court of appeal in the federal system, are binding only in courts in that circuit. For other courts, they are only persuasive authority.

⁶ The opinions of District Court judges, while persuasive authority, are not binding on any court.

62. Passive bribery of members of foreign public assemblies is not a criminal offence under the FCPA, for the same reasons as provided under passive bribery of foreign public officials, see paragraph 41.
63. "Foreign officials" as defined by the FCPA covers all three branches of government, including the legislature.
64. The elements/concepts, except sanctions, described under active bribery of domestic officials (above) are implemented in the same way for active bribery of members of foreign public assemblies, see above.
65. The criminal sanctions described under bribery of foreign public officials (above) also apply to bribery of members of foreign public assemblies (a fine and up to 5 years of imprisonment. See also paragraph 50.
66. The authorities refer to the same case law as under bribery of foreign public officials, above. In addition the US authorities have referred to two FCPA cases where sanctions were imposed for bribery of members of a foreign public assembly; *SEC v. Alcatel-Lucent SA* which involved payments made to Taiwanese legislators and *SEC v. Bellsouth Corporation* involves payments made to the spouse of a Nicaraguan parliamentarian.⁷

Bribery in the private sector (Articles 7 and 8 of ETS 173)

67. Bribery in the private sector is primarily provided for at the state level as commercial bribery. The GET was informed that, currently, there are specific commercial bribery statutes in 38 states, examples of such provisions are contained in Appendix IV to this report. The authorities also submitted that in states where commercial bribery is not criminalised *per se*, such conduct may instead be punishable under unfair trade practices laws which define bribery as an improper means of gaining a competitive advantage, or as fraud.
68. There is no specific offence of bribery in the private sector under federal law in the USA. However, where such bribery falls within federal jurisdiction, such bribery offences are nevertheless prosecuted under a number of federal provisions, namely under the Travel Act, 18 U.S.C. § 1952, which prohibits the use of the facilities of interstate commerce in furtherance of a commercial bribery scheme, as mail or wire fraud, 18 U.S.C. §§ 1341, 1343, and 1346 which prohibit the use of facilities of interstate commerce in furtherance of a scheme to defraud, which can include defrauding an employer of the right to the "honest services" of an employee in a commercial bribery context; or under the federal program fraud statute, 18 U.S.C. § 666, which prohibits bribery involving agents or employees of an organization, a state, local or tribal government or government agency that receives over \$10,000 in a calendar year under a federal program in connection with a transaction involving \$5,000 or more. The GET was also told that private sector bribery could be prosecuted as antitrust violations, conspiracy, and/or securities fraud, depending on the facts of a given case.

⁷ These matters were resolved with civil sanctions by the SEC as well as criminal sanctions imposed in agreement with the Department of Justice pursuant to deferred prosecution agreements ("DPAs"). Under a DPA, the Department of Justice files a charging document with the court, but requests that the prosecution of those charges be "deferred" for the duration of the agreement. DPAs require commitments from the defendant, including waivers of the statute of limitations, admission of the relevant facts, compliance and remediation commitments, and the payment of a fine. DPAs are subject to partial judicial review and approval. If the defendant completes the term of the agreement in full compliance with all the terms of the agreement, the Department will withdraw the charges.

69. The US authorities have explained that “facilities of interstate or foreign commerce” is a broad term that refers to a wide variety of mechanisms that may cross state or national borders. Such facilities would include the mail, any form of communication carried by wire (telephone, facsimile, email, internet, interstate bank transfer), or any physical movement across a state or national boundary, such as travel by plane, train, or car. A facility of interstate commerce can also be in use when there is federal engagement – for example, if a bank is federally insured or otherwise uses any interstate banking facility, a financial transaction involving that bank could constitute use of a facility in interstate commerce. Use of the facility does not need to be central to the crime, nor is it necessary for the prosecution to prove that the defendant knew of the use or intended such use of a facility of interstate commerce, according to the authorities.
70. The US authorities explained that in a situation of interstate private sector bribery where the action is criminalised as such bribery under the pertinent state law, it would also be possible to prosecute such an offence under federal legislation, namely by applying the “Travel Act” (18 U.S.C. § 1952, see below) as this law contains an explicit reference to unlawful activity at the state level in violation of state bribery laws (18 U.S.C. § 1952(b)(2)). However, if such bribery is not criminalised under any pertinent state law, there is no federal jurisdiction under the Travel Act.

The Travel Act

18 U.S.C.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) “unlawful activity” means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offences in violation of the laws of the State in which they are committed or of the United States,

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or

(3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and

(ii) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

71. If the Travel Act is not applicable, provided there is use of a facility of interstate commerce⁸, such actions can be prosecuted pursuant to the fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1346, or pursuant to antitrust, conspiracy, securities fraud, or other provisions of federal law as appropriate. U.S.C. §1341 and §1343 may be applied separately, depending on the circumstances of a case (ie whether something has been transmitted by mail or electronically etc) or in conjunction with §1346. The use of the latter provision in conjunction with one of the former provisions in cases of private sector bribery was confirmed in the case *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011). The case (also referred to below) shows that the federal government can and has reached bribery in the private sector through the “honest services” fraud statute.

18 U.S.C. § 1341. Fraud by mail

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

⁸ Absent the use of a facility of interstate commerce, the United States Congress lacks the explicit constitutional power to legislate criminalisation of commercial activity. Such authority is expressly reserved to the states. U.S. Constitution, Article 1, Section 8 (granting Congress the power to regulate commerce “with foreign nations and among the several states”), and Amendment X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

§ 1346. Definition of “scheme or artifice to defraud”

For the purposes of this chapter [of the United States Code that prohibits, inter alia, mail fraud, § 1341, and wire fraud, § 1343], the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 666

a) Whoever, [(organization, government, or agency) receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance]-

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof -

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that -

(i) is valued at \$5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

Elements/concepts of the offence

“Persons who direct or work for, in any capacity, private sector entities”

72. None of the provisions referred to above are limited to these elements. However, the *Skilling* case indicate that a private sector employee would be covered by §1346.

“In the course of business activity”; “...in breach of [their⁹] duties”

73. Although these elements are not explicitly referred to in the above provisions, the US authorities have stated that these statutes include but are not restricted to a business relationship.

“Promising, offering or giving” (active bribery)

74. These elements are not explicitly covered in the context of an undue advantage in a bribery context as foreseen in Articles 7 of ETS 173; however, according to the US authorities, the Travel Act and 18 U.S.C. § 666 have been applied to cover promises and offers, as well as the giving, of bribes. In addition, the authorities stress that because the fraud statutes criminalises the “scheme

⁹ By the persons who direct or work for, in any capacity, private sector entities.

or artifice to defraud” itself, regardless of whether the actual payment is made the fraud statutes also criminalise the promising, offering or giving of a bribe or kickback.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

75. These elements are not explicit, but appear in another context than foreseen in the provision of passive bribery of Article 8 of ETS 173.

“Any undue advantage”

76. § 1341 covers “any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing...”. § 1343 covers “money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice...”.

“Directly or indirectly”, “himself or herself or for anyone else”

77. These elements are not explicitly covered. However, the US authorities state that the Travel Act, 18 U.S.C. § 666, and the fraud statutes include payments made directly and indirectly, regardless of the beneficiary.

“To act or refrain from acting in the exercise of his or her functions”

78. These elements of a bribery offence are not explicitly covered in the Travel Act. The US authorities add that depending on the state bribery offence they may be explicitly included in the underlying state bribery law. In addition, material omissions or acts in furtherance are required for a violation of the fraud offenses.

“Committed intentionally”

79. The above offences require an intent to carry out the criminal conduct, ie if such an element is missing there is no criminal offence.

Other provisions applicable under federal law

Sanctions

80. Under the Travel Act § 1952, an individual can be fined \$250,000 or up to twice the pecuniary loss or gain whichever is higher and/or subject to imprisonment not more than 5 years, unless exceptional circumstances are at hand.

81. The sanctions in respect of the above fraud offences as proved in §§ 1341 and 1343 may lead to a fine and/or imprisonment of up to 20 years.

Court decisions/case law

82. In *Perrin v. United States*, 444 U.S. 37 (1979), the Supreme Court held that the legislative history of the Travel Act makes clear that Congress was concerned about criminal activity that crosses both state and international borders, and stated that the Travel Act “impose[s] criminal sanctions upon the person whose work takes him across State or national boundaries in aid of certain ‘unlawful activities.’” H.R. Rep. No. 966, at 4 (1961) (emphasis supplied), reprinted in 1961 U.S.C.C.A.N. 2664, 2666 (letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives). The Court stated that Travel Act is, “in short, an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce.” The Court expressly held that “Congress intended ‘bribery... in violation of the laws of the state in which committed’ to encompass conduct in violation of state commercial bribery statutes.”
83. In *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003), relying on *Perrin*, the Court held that the Travel Act’s legislative history indicated that the Act was designed to “impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain ‘unlawful activities.’” 327 F.3d at 1090, and that a state commercial bribery statute can serve as a predicate for a Travel Act violation based on foreign commercial bribery. In addition, in a decision after the visit of the GET, *United States v. Carson et al.*, the court held that the Travel Act applies to overseas private bribery, noting that the Supreme Court has previously ruled that wire fraud can be applied to otherwise wholly overseas transactions when an act in furtherance of the crime is taken inside the United States.
84. In the case *United States v. Bryza*, 522 F.2d 414 (7th Cir.1975), cert. denied, 426 US 912 (1976), a purchasing agent secretly accepted kickbacks from the suppliers from whom he bought products for his employer. The Seventh Circuit explained that “[t]he fraud consisted in [the defendant’s] holding himself out to be a loyal employee, acting in [the employer’s] best interests, but actually not giving his honest and faithful services, to [the employer’s] real detriment.”
85. In the case *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), cert. denied, 447 US 928 (1980), an officer and director of a corporation’s subsidiaries was charged with mail fraud for extorting insurance brokers doing business with the corporation by threatening to cancel contracts between the corporation and the insurance brokers unless the brokers agreed secretly to kick back a portion of their commissions to him. The indictment was dismissed in the lower court and the government appealed the dismissal. In reversing the dismissal, the Court discussed the types of schemes violative of mail fraud: These schemes can be divided into two general categories. Most mail fraud cases fall into the first category, which is comprised of those schemes which deprive others of tangible property interests. There is no question that these types of schemes fall within the purview of the mail fraud statute. The second category includes schemes which deprive others of intangible rights. Most often these cases have involved bribery of public officials. The requisite “scheme or artifice to defraud” is found in the deprivation of the public’s right to honest and faithful government. When a public official is bribed, he is paid for making a decision while purporting to be exercising his independent discretion. The fraud element is therefore satisfied. The rationale applied to public officials has been carried over into the area of commercial deprivations.
86. A case that explored the differences between 18 U.S.C. §§ 1341 and 1343 and 18 U.S.C. § 1346 is *United States v. Siddiqui*, 2010 WL 3835604 (2010). In that case, Siddiqui was the Vice President of Merchandising and Operations for Fry’s Electronics, Inc. (“Fry’s”). In 2003, when he was promoted to that position, Siddiqui convinced Fry’s that it could save money by eliminating sales representatives who brokered deals between Fry’s and vendors and charged a

commission. Fry's agreed that Siddiqui could broker the deals directly. Beginning at some point before June 2005 and continuing through to November 2008, Siddiqui made deals with certain vendors who provided kickbacks in exchange for business. The kickbacks were based on the amount of merchandise purchased by Fry's. The vendors made the kickback payments to PC International, LLC ("PCI"), a company founded and controlled by Siddiqui. Siddiqui failed to disclose information to Fry's about the deals he struck with vendors, the payments that vendors made to PCI, and his relationship with PCI. On January 6, 2009, the grand jury returned an indictment charging Siddiqui with eleven counts, including five counts of wire fraud. The wire fraud counts were charged under 18 U.S.C. § 1343. Siddiqui moved to dismiss those counts on the ground that a different statute, 18 U.S.C. § 1346, is unconstitutionally vague on its face and as applied. The Court concluded that §§ 1343 and 1346 are not inextricably tied and that the two sections give rise to alternative theories: (1) money-or-property fraud under § 1343; and (2) honest-services fraud under § 1346. The Court noted that before § 1346 was enacted, the Government could prosecute under § 1343 alone and the enactment of § 1346 did not change this fact. The Court further noted that since § 1346 was enacted, courts have held that in cases involving only money or property fraud, it is unnecessary to determine whether acts pursuant to the alleged scheme took place before or after the enactment of § 1346. The Court concluded that the word "includes" in § 1346 indicate that the statute merely codifies an additional theory or an additional definition of "scheme or artifice to defraud." For those reasons, the Court concluded that §§ 1343 and 1346 are not inextricably tied and reliance in the Siddiqui's indictment on § 1343 did not automatically incorporate § 1346. - Siddiqui also challenged his indictment on the ground that § 1346 is unconstitutionally vague as applied to his context because the indictment did not allege that he "contemplated any economic harm to his employer." He claimed that, without such a limitation, § 1346 "potentially criminalizes 'any breach of duty of loyalty in the private employment context.' He asserted that § 1346 creates a "standardless sweep" that gives too much discretion to police, prosecutors and juries. In addressing this issue, the Court said (emphasis in original): *The petitioner in Skilling also challenged § 1346 on this ground. The Supreme Court perceived 'no significant risk that the honest-services statute ...will be stretched out of shape.'* *Skilling*, 130 S. Ct. at 2933. *In particular, the Court did not limit the applicability of the honest-services statute to public-sector relationships. See id. at 2926-27 (noting that 'courts also recognize [] private-sector honest services fraud' even though most cases involve public officials). In fact, the Court suggested that Skilling, a private sector employee, could have been prosecuted under the honest-services fraud provision if the Government had alleged bribery or kickbacks. See id. at 2934. The Court's construction of § 1346 'define[d] honest services with clarity.'* *Id.* at 2933. *The Court noted that the terms 'bribery' and 'kickback' derive their meanings from other federal statutes, and it held that a criminal defendant who participated in such crimes 'cannot tenably complain about prosecution under § 1346 on vagueness grounds.'* *Id.* at 2934. *(denying Skilling's argument that § 1346 would permit policemen, prosecutors, and juries to prosecute in an arbitrary manner).*

Bribery of officials of international organisations (Article 9 of ETS 173)

87. Active bribery of officials of international organisations is a criminal offence under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq., and 78ff, see bribery of foreign public officials, above. See also other statutes referred to by the US authorities, paragraph 39.
88. Passive bribery of officials of international organisations is not a criminal offence under the FCPA, for the same reasons as those provided under passive bribery of foreign public officials; however, the US authorities stress that officials of international organisations have been prosecuted for receiving bribes pursuant to other federal statutes, see paragraph 41.

89. The term “foreign official” in the FCPA means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation.
90. The term “public international organization” means (1) an organisation that is designated by an executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or (2) any other international organisation that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register. All international organisations of which the United States is a member and other designated organisations are covered by this offence.
91. The elements/concepts described under bribery of foreign public officials (above) also apply to bribery of officials of international organisations.
92. The sanctions described under bribery of foreign public officials (above) also apply to bribery of officials of international organisations.
93. The authorities referred to the following bribery of international organisations cases: *United States v. Basu and Sengupta* (see paragraph 56, above). In the case *US v. Bistrong* a United Nations official was bribed to induce the official to provide non-public, inside information regarding contracts to assist Bistrong and his company in securing those contracts. Bistrong has not yet been sentenced. In the case *US v. Yakovlev*, the defendant, was charged with honest services wire fraud and money laundering for receipt of bribes in connection with his duties as a UN procurement official. Yakovlev paid forfeiture of \$900,000. In the case *United States v. Welch*, the defendants were charged with violations of the Travel Act pursuant to bribes paid to members of the International Olympic Committee. On October 26, 2011, the Second Circuit held in *United States v. Bahel*, 2d Cir., No. 08-3327, that United Nations officials can be prosecuted pursuant to domestic corruption statutes (18 U.S.C. § 666, described above) because the United Nations receives federal funding.

Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)

94. Active bribery of officials of international parliamentary assemblies is a criminal offence under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq., and 78ff, see bribery of foreign public officials. See also other statutes referred to by the US authorities, paragraph 39.
95. Passive bribery of members of international parliamentary assemblies is not a criminal offence under the FCPA, for the same reasons as those provided under passive bribery of foreign public officials, above. However, the US authorities stress that other federal criminal statutes could be used to reach the conduct, see paragraph 41.
96. The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation.
97. The term “public international organization” means (1) an organisation that is designated by an executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or (2) any other international organisation that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such

order in the Federal Register. All international organisations (assemblies) of which the United States is a member and other designated organisations are covered by this offence.

98. The elements/concepts described under bribery of foreign public officials (above) also apply to bribery of members of international parliamentary assemblies.
99. The sanctions described under bribery of domestic officials (above) also apply to bribery of members of international parliamentary assemblies.
100. The authorities informed the GET that there was no case law in respect of this offence.

Bribery of judges and officials of international courts (Article 11 of ETS 173)

101. Active bribery of judges and officials of international courts is a criminal offence under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq., and 78ff, see bribery of foreign public officials, above. See also other statutes referred to by the US authorities, paragraph 39.
102. Passive bribery of judges and officials of international courts is not a criminal offence under the FCPA, for the same reasons as those provided under passive bribery of foreign public officials, above; however, the US authorities stress that other federal criminal statutes could be used to reach the conduct, see paragraph 41.
103. The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation. According to the US authorities, judges of international courts would be covered by the notion “foreign official”.
104. The term “public international organization” means (1) an organisation that is designated by an executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or (2) any other international organisation that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register. All international organisations (assemblies) of which the United States is a member and other designated organisations are covered by this offence.
105. The elements/concepts described under bribery of foreign public officials (above) also apply to bribery of judges and officials of international courts.
106. The sanctions described under bribery of domestic officials (above) also apply to bribery of judges and officials of international courts.
107. The authorities did not provide the GET with any case law in respect of this offence.

Trading in influence (Article 12 of the ETS 173)

108. Trading in influence is not a criminal offence as such under federal legislation, but US authorities submit that the conduct, depending on the circumstances of the crime, is covered by different statutes, such as 18 U.S.C. § 201 (bribery of domestic public officials) or 18 U.S.C. §§ 1341, 1343, 1346 (mail, wire and honest services fraud), 18 U.S.C. §§ 203-209 (conflict of interest statutes), and 18 U.S.C. § 666 (bribery concerning federally funded programs), all referred to above.
109. The authorities furthermore state that none of the above mentioned provisions explicitly require the element that the defendant “asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]”. However, the fact that a defendant made such a representation is relevant evidence that the prosecution could introduce at trial, such as to prove the defendant’s intent in a bribery prosecution. Moreover, it is not relevant whether the influence is exerted or not or whether it leads to the intended result or not. The statutes referred to above all criminalise attempt so *a defendant may be guilty regardless of whether s/he did actually exert the influence or not or whether the result was achieved or not.*
110. The remaining elements of Article 12 of the Convention are not applicable as trading in influence *per se* is not a separate offence in the USA.
111. The authorities refer to the sanctions described under domestic bribery (public or private sector) as far as these provisions apply.

Bribery of domestic arbitrators (Article 1, sections 1 and 2 and Articles 2 and 3 of ETS 191)

112. There is no federal provision criminalising bribery of domestic arbitrators. However, the US authorities submit that bribing a domestic arbitrator could be an offence under 18 U.S.C. § 666 (See paragraph 71) in case *the arbitrator is an agent of a state or local government body receiving over \$10,000 in federal funds.* The authorities furthermore state that the federal fraud provisions, 18 U.S.C. § 1341, 1343 and 1346 (see above under bribery in the private sector), may also be applicable depending on the circumstances of the case. This offence could also be covered under 18 U.S.C. § 201(b) in so far as arbitrators are considered public officials. The US authorities also point out that several states have laws prohibiting commercial bribery, and those statutes could also apply to bribery of domestic arbitrators (although they would be enforced by state or local law enforcement agencies and not by the United States Department of Justice).
113. Arbitration at the federal level is regulated in the Federal Arbitration Act.
114. The elements/concepts and sanctions described under bribery in the public/private sector (above) would apply to bribery of domestic arbitrators as appropriate.
115. The authorities add that 18 U.S.C. §666 may lead up to ten years of imprisonment. In addition, pursuant to 9 U.S.C. § 10(a)(1), an arbitration judgment awarded under the Federal Arbitration Act may be annulled if it was procured by corruption or fraud.
116. The authorities did not provide the GET with any case law in respect of this offence.

Bribery of foreign arbitrators (Article 4 of ETS 191)

117. Bribery of foreign arbitrators is not criminalised as such. However, the US authorities submit that in so far as foreign arbitrators are considered to be “foreign public officials”, active bribery would be covered under the FCPA. The authorities also state that such misconduct would likely be reached under other statutes including fraud, money laundering, and the Travel Act.
118. Passive bribery is not covered under the FCPA; however, the US authorities stress that other federal criminal statutes could be used to reach the conduct, see paragraph 41.
119. The elements/concepts and sanctions described under other bribery offences covered by the FCPA would also apply to bribery of foreign arbitrators. (Some elements would possibly also be covered by other statutes, according to the US authorities, see above).
120. The authorities did not provide the GET with any case law in respect of this offence.

Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191)

121. Active and passive bribery of domestic jurors are criminalised under 18 U.S.C. § 201(b)(1) and (2) as the term “public official” would specifically include jurors according to 18 U.S.C. §201(a)1, see paragraph 11, above.
122. All other elements/concepts of this offence, including the penal sanctions, described under bribery of domestic officials (above) are equally applicable in respect of bribery of domestic jurors.
123. Furthermore, the authorities refer to 18 U.S.C. § 1503, titled “Obstruction of Justice,” which contains a section that deals with jurors, which is also applicable in order to charge bribery of domestic jurors. The authorities describe Obstruction of Justice as not being a single offence, but a category of crimes that interfere with the due administration of justice.

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Court decisions/case law

124. The US authorities have referred to the following cases:
125. In the case *United States v. Panczko*, Panczko and one Margaret Gorman were jointly indicted in one count for giving money to a juror to influence her action as a petit juror in a case then pending in the district court, in violation of 18 U.S.C. § 201(b); and in another count for “corruptly * * * endeavouring” to impede the “due administration of justice” by that conduct in violation of 18 U.S.C. § 1503. The defendants were tried separately and convicted. Panczko was sentenced to fifteen years’ imprisonment, consecutive to a fifteen year sentence he was then serving. In Panczko's appeal, he claimed he was denied a fair trial. The principal government witnesses who testified to the arrangements for and delivery of the bribe were two convicted felons and the juror, Sue Taylor. Taylor testified that Margaret Gorman told her she would be “well taken care of” if she could “find it in her heart” to vote not guilty in Panczko's trial, and left with her an envelope containing \$500.00. The jury was presented evidence which went uncontroverted that Panczko, through Margaret Gorman and one of the felons, gave \$500.00 to juror Taylor with intent to influence her decision in Panczko's earlier trial. The court denied Panczko's appeal, finding that he was not denied a fair trial by the jury's additional knowledge that Panczko had a prior conviction. 429 F.2d 683 (1970).
126. In the case *Osborn v. United States*, Osborn, an attorney, was contesting his conviction on one count of violating 18 U.S.C. § 1503 for endeavouring to bribe a member of the jury panel in a prospective federal criminal trial. Osborn paid a third party, Vick (who was cooperating with federal authorities), to pay a juror, one Elliott, \$10,000 to vote for an acquittal. Osborn argued that his conviction should be set aside because his conduct did not constitute a violation of 18 U.S.C. § 1503 because Vick never in fact approached Elliott and never intended to do so. The US Supreme Court concluded that the statute under which Osborn was convicted is not directed at success in corrupting a juror, but at the “endeavor” to do so. 385 US 323 (1966).

Bribery of foreign jurors (Article 6 of ETS 191)

127. Active Bribery of foreign jurors is a criminal offence under the FCPA as such officials are covered by the definition “foreign officials”. See also other statutes referred to by the US authorities, paragraph 39.
128. Passive bribery is not criminalised under the FCPA; however, the US authorities stress that other federal criminal statutes could be used to reach the conduct, see paragraph 41.
129. The elements/concepts and sanctions described under other bribery offences covered by the FCPA (above) would also apply to active bribery of foreign jurors.
130. The authorities did not provide the GET with any case law in respect of this offence.

Participatory acts (Article 15 of ETS 173)

131. The US authorities have submitted the below provisions on aiding and abetting the commission of the above offences as appropriate. It was explained by the US authorities that “an offence against the United States” (below) means an act constituting an offence defined in any US federal law”.

18 U.S.C. § 2

“(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

18 U.S.C. § 3

“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”

“Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.”

18 U.S.C. § 4

“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”

18 U.S.C. § 371

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

“If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”

Jurisdiction (Article 17 of ETS 173)

132. Territorial jurisdiction: the trial of all crimes (except impeachment) in the USA, are to be judged by the courts in the state where the crime was committed; however, when a crime is not connected to a particular state, the trial shall be held according to the law (US Constitution, Article III, Section 2).
133. The GET was informed that US law does not provide for a general rule that would always establish jurisdiction in respect of nationals committing offences abroad. Instead, the jurisdiction is to be interpreted in the light of the pertinent legislation providing for the criminalisation. The authorities stated that the determination of whether a criminal statute applies extraterritorially is

guided by the Supreme Court's decision in the case *United States v. Bowman*. 260 US 94 (1922). That case concerned the prosecution of four individuals involved in a scheme to defraud a shipping company in which the United States government was a shareholder. There was no provision in the statute prohibiting such conduct which granted extraterritorial jurisdiction. Therefore jurisdiction "depend[ed] upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime". Purely private crimes against individuals or their property *do not* give jurisdiction outside the United States. Conversely, criminal statutes which are enacted because of the right of government to defend itself against obstruction or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents can create extraterritorial jurisdiction, according to the *Bowman* case, because otherwise these statutes would not be effective and leave many crimes by citizens immune from prosecution because of their transnational nature. In the case of the scheme to defraud, the court determined that the statute applied extraterritorially because the statute must have included fraud against public companies abroad in order to be effective. Therefore, when the nature of a criminal statute indicates that it was meant to apply to conduct outside of the United States in order to be an effective prosecutorial tool, it applies extraterritorially. The GET was told that since the *Bowman* case, US courts have routinely inferred jurisdiction over offenses occurring outside the United States when they cause harm domestically. Conversely, crimes that have their primary effects in foreign countries can still be prosecuted by the United States if there is the use of interstate commerce. For example, in *United States v. Pasquantino*, 544 U.S. 349 (2005), the Supreme Court affirmed the wire fraud convictions of those who attempted to evade Canadian tax duties because even though the primary impact was in a foreign country, a portion of the scheme or artifice to defraud took place in the United States and used the means and instrumentalities of interstate commerce.

134. The GET was also informed that if an individual meets the definition of a "public official" whether or not s/he is a citizen, the domestic bribery statute, section 201, will apply. The same would be true of a statute that applies to "officers and employees" of the United States (as do many of the conflict of interest statutes). Individuals who are not citizens of the US can be hired as employees of the United States Government or act on behalf of the United States under certain specific authorities. Moreover, whoever offers or promises a bribe to a US public official is covered by the prohibition in section 201(b) even if the public official rejects the offer. An offer of a bribe to a US citizen who happens to be an employee of an international organisation (like the UN) could trigger the FCPA as a bribe to an employee of an international organisation; it would have nothing to do with the fact the person to whom the offer was made was a US citizen.

Statute of limitations

135. In respect of all domestic bribery offences which would fall under the provision of bribery of domestic public officials, 18 U.S.C. § 201, as well as concerning bribery offences in the foreign/international context where the FCPA is applicable, the statute of limitations for criminal prosecutions is five years, according to 18 U.S.C. § 3282, which reads:

18 U.S.C. § 3282: Offenses not capital

(a) *In general – Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.*

136. The statute of limitations defence is only applicable to the SEC when obtaining a civil penalty. It does not impact the SEC's ability to bring charges or to seek disgorgement, pre-judgment interest or other equitable relief. The statute of limitations may be tolled for up to three years where a mutual legal assistance request has been made but not been completed, according to 18 U.S.C. § 3292. Nevertheless, statutes of limitations can pose challenges when the schemes are complicated, well concealed and involve multiple foreign jurisdictions. In many instances, as part of their cooperation, companies under investigation will voluntarily toll the statute of limitations. In much rarer instances, individuals may also agree to do so.

18 U.S.C. §3292: Suspension of limitations to permit United States to obtain foreign evidence

(a) (1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

137. In relation to offences of bribery in the private sector (which under US federal law are prosecuted as mail or wire fraud, bribery concerning federally funded programs, or pursuant to the Travel Act), the statute of limitations generally is statute dependent, ie the limitation period for federal offences is five years unless a different period is specified in the relevant provision at state level. For example, for private sector bribery charged under the Travel Act, the statute used frequently in federal prosecutions, the period is five years. Since private sector bribery is not established as a separate federal offence, the relevant statute of limitations could also be the state statute under which the charge is brought.
138. The US authorities have submitted that the statute of limitations as applied in foreign bribery cases was assessed by the Court in the case *United States v. Kozeny et al.*, 493 F. Supp. 2d 693 (S.D.N.Y. 2007). This judgement clarifies when a suspension period starts and ends, according to 18 U.S.C. §3292.

Defences

139. There are no special defences of “effective regret” under US federal criminal law in respect of corruption offences.
140. However, there are two so called “affirmative defences” under the FCPA which were added to the FCPA in 1988, to clarify that payments that are legal under local law or for reasonable and bona fide business purposes would not fall within the FCPA. If a payment is legal under local law or a reasonable and bona fide business expenditure, the payment would not be illegal and no charges would be laid (or any charges based on such a payment would be withdrawn). These affirmative defences have never successfully been asserted before a court, although they have been reasons for a determination not to bring charges *ab initio*.

FCPA § 78dd-1 (c) and §78dd-2 (c)

It shall be an affirmative defense to actions under subsection (a) and (i) of this section that --

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

141. The US authorities submit that the US Department of Justice has issued numerous opinions regarding the reasonable and bona fide expenditure defence described above. For example, in *Opinion Procedure Release No. 08-03 (2008)* the Department issued an opinion in response to an inquiry from TRACE International (TRACE), a US non-profit business membership organisation, declining to take enforcement action if TRACE paid a limited stipend to cover certain travel expenses for Chinese journalists (who are employees of the state, and therefore foreign officials under the FCPA) to attend a press conference to be held by TRACE. TRACE represented that the journalists are not typically reimbursed by their employers for such costs; that stipends will be equally available to all journalists regardless of whether they later provide coverage of the conference and regardless of the nature of such coverage; that TRACE has no business pending with any government agency in China; and that it had obtained written assurances from an established international law firm that the payment of the stipends is not contrary to Chinese law. Furthermore, in the *Opinion Procedure Release No. 07-01(2007)*, the Department issued an opinion in response to a private company in the United States, declining to take enforcement action if the company proceeded with sponsoring domestic expenses for a trip by a six-person delegation from an Asian government. The company represented that the purpose of the visit would be to familiarise the delegates with the nature and extent of the company's business operations; that it would not select the delegates; it would pay all costs directly to providers; and it did not currently conduct operations in the foreign country at issue. Finally, in *Opinion Procedure Release No. 07-02: (2007)*, the Department issued an opinion in response to a private insurance company in the United States, declining to take enforcement action if the company proceeded with sponsoring domestic expenses for a trip by six officials from an Asian government for an educational programme at the company's US headquarters. The company represented that the purpose of the visit would be to familiarise the officials with the operation of a US insurance company; that it would not select the officials who would

participate; that it would pay costs directly to providers; and that it has no non-routine business pending before the agency that employs the officials.

Data

142. The statistics below relating to the fiscal years 2007-2010 are extracted from the United States Attorney's Case Management System.

18 U.S.C. 201 Bribery of federal domestic public officials:

	Defendants filed	Defendants terminated ¹⁰	Defendants guilty**
FY2007	145	148	102
FY2008	135	165	106
FY2009	133	143	82
FY2010	119	149	101

18 U.S.C. 1341 ("mail fraud")

	Defendants filed	Defendants terminated	Defendants guilty**
FY2007	1,587	1,735	1,055
FY2008	1,632	1,530	898
FY2009	1,540	1,538	878
FY2010	1,650	1,386	865

18 U.S.C. 1343 ("wire fraud")

	Defendants filed	Defendants terminated	Defendants guilty**
FY2007	1,518	1,504	925
FY2008	1,550	1,410	815
FY2009	1,806	1,459	898
FY2010	1,943	1,668	984

18 U.S.C. 1346 ("honest service fraud")

	Defendants filed	Defendants terminated	Defendants guilty**
FY2007	29	22	8
FY2008	73	34	9
FY2009	24	79	18
FY2010	27	27	9

Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m, 78dd-1 et seq

Criminal prosecution of the Foreign Corrupt Practices Act is centralised in the Fraud Section of the Criminal Division of the U.S. Department of Justice. The criminal statistics attached as Appendix III are extracted from the Fraud Section's case management system.

¹⁰ The term "terminated" as used in this and the following tables includes investigations that were closed without prosecution, convictions and acquittals.

III. ANALYSIS

143. The United States signed the Criminal Law Convention on Corruption (ETS 173) in 2000, but this instrument has not been ratified by the United States to date; the Additional Protocol to the Convention (ETS 191) has not been signed nor ratified by the USA. Nevertheless, like any other member of GRECO, the USA is subject to peer review according to the standards of the Convention and its Additional Protocol which are under examination in the Third Evaluation Round (for details see paragraph 2). The GET notes that, in 2006, the USA ratified the United Nations Convention against Corruption (UNCAC), which – regarding the corruption offences – covers to a large extent the same ground and is inspired by the same underlying philosophy as the Council of Europe Convention. Moreover, the United States has also ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1998) and the Inter-American Convention against Corruption (2000). The GET explored the outstanding issue of ratification of the Criminal Law Convention, as well as the signature and subsequent ratification of the Additional Protocol thereto; the authorities indicated that the Convention has been subject to analysis for potential ratification but a clear time frame for a final determination and potential action was not given. In the light of GRECO's standing practice for these situations, the GET recommends **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191)**. The GET recalls that Article 37 of the Convention makes it possible for ratifying states to introduce reservations in respect of a limited number of provisions in the Convention. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion the Committee of Ministers appealed to States "which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible." The recommendations contained in this report are without prejudice to the right of the USA to enter declarations and reservations pursuant to Article 37 of the Convention.
144. The basis for criminalising corruption in the USA, being a federal state, is different from most other GRECO member States – whether these have a unitary or a federal type of government structure – as the US Constitution reserves significant governmental authorities solely to the states, and only vests particular enumerated powers in the federal Government. As a consequence, the federal Government as well as the individual states have their own criminal statutes, court systems, prosecutors and investigative agencies. In addition, the law in the United States is a blend of statutory rules and common law (judicial law based on precedent) and there is extensive court practice to be taken into account at various levels. It may therefore be difficult to pre-judge what is covered by a law in certain situations by reference to the text of the law alone; analysis of judicial interpretation and implementation of the law in practice is therefore often required.
145. While almost any crime can be subject to state prosecution provided it was committed within the boundaries of the state, the power of the federal government extends throughout the United States and its insular areas and territories. Indeed most of the criminal offences, including crimes of corruption, are prosecuted at the state level; however, in situations involving inter-state, foreign, transnational, or international crime, the federal authorities have jurisdiction. The crimes most often prosecuted at the federal level are those in which there is federal interest, such as when federal officials, federal funds or means of interstate commerce are involved. Indeed, it is the federal interest that supplies federal jurisdiction over these offences. There are also certain

crimes that may only be subject to federal prosecution, for example, offences committed within the area of customs or federal taxation.

146. A general principle in the USA is that the federal authorities only possess competence in matters assigned to them in the Constitution by the individual States of the Union. This has very important consequences: straightforward bribery, which takes place entirely within one of the individual states, without any use of the facilities of interstate commerce, is not within the competence of the federal authorities. Therefore, the USA cannot simply enact federal legislation which directly criminalises all the conduct struck at by the incriminations contained in the Convention and its Additional Protocol. There have to be further elements which engage federal competence, otherwise the jurisdiction remains exclusively at the level of the individual states and these are responsible for their own legislation. The most obvious such element is that the bribery offence concerns a public official who performs functions in relation to the federal authorities as is the case covered by the main domestic federal anti-bribery statute - 18 U.S.C. 201(b). However, that statute cannot extend to officials who serve the public at the level of an individual state; although there are certain situations where bribery of state and local officials would fall within federal competence, for example, where the institution the official represents receives federal funding, pursuant to other statutes, such as 18 U.S.C. § 666. Likewise, the federal criminal legislation cannot be extended to private sector bribery without the element of interstate or international commerce in the commission of the crime.
147. Despite the constraints described above, the federal authorities are far from complacent about the fight against corruption. The USA has, for many years, attacked corruption in a most determined way and the information gathered by the GET clearly indicates that the United States continues to do so. The approach which has been taken at federal level has been to make aggressive and creative use of a variety of legislative provisions which permit prosecution of the offenders for their criminal conduct; however, not necessarily by using “pure” bribery or corruption provisions. The particular understanding which US federal law has of the concept of fraud has been of great importance in this context. Fraud, for US law, connotes an affirmative false statement or material omission with an obligation to disclose combined with deceit carried out for a personal purpose. In large measure, this approach is possible because US federal law is fundamentally a common law system in which the law interpreted by the courts and the federal courts have, in general, been willing to interpret the language of legislation quite broadly, in keeping with legislative intent. For example, in the essential case *United States v Skilling*, the Supreme Court observed that the direction of the “current” in the case law is “to construe, not condemn”. It is clear that US federal law has proved to be a very flexible and effective tool in the hands of prosecutors. The GET found many times that conduct which did not appear to be addressed explicitly by legislation was in practice established as a criminal offence as a result of the breadth of the concept of fraud and the willingness of the federal courts, based on the arguments of prosecutors, to interpret legislation broadly, with an eye to the harm which it was intended to attack. In situations where there is no explicit bribery provision at federal level, for example, in a situation of inter-state private sector bribery, the Travel Act (18 U.S.C. § 1952) may be applicable as it makes reference to bribery provisions at the state level. In situations where there is no pertinent bribery provision at the state level the Travel Act cannot be applied, but then the federal fraud provisions (18 U.S.C. §§ 1341, 1343 and 1346), or bribery involving federally funded programmes (18 U.S.C. § 666) or money laundering which do not require the connection to state law, may be applied.
148. Concerning active and passive bribery of domestic public officials at federal level, 18 U.S.C. 201(b) is the paramount provision under US law. It seems clear to the GET that all the specific elements required by Articles 2 and 3 of the Convention are addressed in that law in an adequate

manner. It must be underlined in this connection that in the US context the term “government” is not limited to the executive power, but comprises the three separate branches of state power: the executive, legislative and judicial powers. Therefore, the GET is satisfied that, for example, judges who are not mentioned explicitly in that provision, are covered as public officials on the basis that they are officers acting on behalf of the US government. This legislation also covers active and passive bribery of jurors (Article 1, section 3 and Article 5 of ETS 191). The GET furthermore notes that 18 U.S.C. 201(b) also captures bribery of members of domestic public assemblies (Article 4 of ETC 173) since the term “public official” in 18 U.S.C. 201(b) includes members of Congress. The US authorities should be commended for having adopted such comprehensive legislation which could also serve as a model for such offences at the state level to the extent necessary.

149. The United States was early to criminalise bribery of foreign public officials: the Foreign Corrupt Practices Act (FCPA) was adopted in 1977. This legislation has been extended through several amendments, lastly in 1998. There are two major objectives of the FCPA: i) to ensure transparency of the books and accounts of publicly traded stock companies to provide investors with sufficient information about the business of such companies (under the supervision of the Securities and Exchange Commission, SEC) and ii) to criminalise bribery of foreign public officials (under the supervision of the Department of Justice and, in the case of civil penalties against publicly-traded companies, the Securities and Exchange Commission). It would appear that the Department of Justice works very closely with the SEC in monitoring compliance with the FCPA; the two institutions operate in tandem and their cooperation has increased over the years. In this respect the GET recalls that the OECD Working Group on Bribery in International Business Transactions in its Phase 3 report on the USA commends the United States for its visible and high level support for the fight against bribery of foreign public officials. In the same report the Working Group concludes that the United States has investigated and prosecuted more foreign bribery cases (companies and individuals) than any other party to the OECD Convention and that the number of cases is increasing. Also the GET took note of a large number of cases strongly suggesting that the FCPA is an efficient tool for the fight against active foreign bribery and the USA should be praised for the determined implementation of this legislation. Having said that, the GET turns to assess compliance of the FCPA (providing references also to some other statutes invoked by the US authorities) with the specific requirements of bribery of foreign public officials under Article 5 of the Council of Europe Convention.
150. The FCPA (15 U.S.C. §§ 78dd-1, et seq.) criminalises active bribery of foreign public officials committed by anyone. Furthermore, as noted above in relation to domestic bribery of federal public officials, the particular understanding which US law has of the term “government” would also apply in respect of “foreign government” which ensures that all officials from the executive, legislative and judicial branches are covered by the FCPA. While the FCPA in many aspects complies with the requirements of the Criminal Law Convention, the GET notices three important areas where this does not appear to be the case in respect of the FCPA, standing alone.
151. First, concerning the requirement of a *business relation* under the FCPA, it was explained to the GET that this receives a wide interpretation, for example, it does not require a contractual relation. Reference was made to *United States v Kay* 200 F 3d 738 (5th Cir 2004), in which it was argued for the defendant that payment of bribes to reduce duties and taxes was not within the scope of the business nexus required by the FCPA. In holding that the conduct was within that scope, the US Court of Appeals for the Fifth Circuit applied a range of techniques of statutory interpretation to conclude that what was intended was a broad reading of the business nexus element which would include even indirect assistance in obtaining business or maintaining

existing business operations in a foreign country. Partly in reliance on the *Kay* case, it was explained to the GET that, for example, a bribe paid by a US citizen to a public official in a foreign country to obtain a permit to install replacement windows in a house which s/he owned would be within the scope of the FCPA because the supply of replacement windows (by a third party) is a business activity. The GET is not entirely convinced by this explanation. The proposition depends upon a broad reading not only of the legislation but also of the *ratio decidendi* of *Kay* which, on its facts, appears to be distinguishable. Furthermore, the GET notes that the Court in *Kay* itself characterised the business nexus as “ambiguous” (whilst rejecting the proposition that it is vague). The GET does not question that the business nexus is very wide; however, no case was cited to the GET in which the FCPA was applied other than in a context which was commercial. Moreover, the GET cannot disregard the fact that the purpose of the FCPA clearly is to deal with foreign bribery in the commercial context. The GET therefore takes the view that the FCPA is not targeted at dealing with foreign bribery where the true purpose is purely private, i.e. unrelated to any form of business and concludes that in this respect, the FCPA does not comply with Article 5 of the Criminal Law Convention, which does not in any sense limit bribery of foreign public officials to any form of business relation. The GET also notes that even if other statutes would be applicable as an alternative to the FCPA, for example fraud statutes or the “Travel Act”, which do not require a business nexus, these statutes do not appear to cover all the elements of Article 5 of the Convention.

152. Second, the FCPA does not criminalise *passive bribery* of foreign public officials. This is the result of deliberate policy decision in the USA, namely, that as a main rule passive bribery of foreign public officials ought to be prosecuted by the country of the public official; i.e. that state sovereignty has been an important constraint to a more comprehensive federal legislation in the USA. The GET notes that this policy determination is not compatible with Article 5 of the Criminal Law Convention and recalls what is stated in the Explanatory Report to the Criminal Law Convention (paragraph 49): Article 5 “provides for the criminalisation of bribery of foreign public officials of any foreign country” [...] “the inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official’s own State”. The GET wishes to stress that the Convention makes the distinction between the offences (in this case Article 5) and questions relating to jurisdiction (Article 17) and concludes that the FCPA, which does not criminalise passive bribery of foreign public officials, does not incorporate these provisions of Article 5. Interlocutors met by the GET submitted that passive bribery of foreign public officials, in the absence of this offence under the FCPA, could well be prosecuted under the 18 U.S.C. § 1952 (the Travel Act, see under paragraph 75, above), money laundering (18 U.S.C. § 1957), 18 U.S.C. § 666 (bribery involving federally funded programs) or possibly 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud) or § 1346 (honest services fraud). The GET notes that even if these provisions are applicable in certain situations, which the US authorities have submitted, they do not appear to cover all elements of the offence of bribery of foreign public officials foreseen in the Convention.
153. Third, the GET is concerned that – contrary to what is the case in respect of bribery of domestic public officials under federal law (18 U.S.C. § 201(b)) – the FCPA excludes from the criminal offences in the foreign/international context any *facilitating or expediting payment* the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official (FCPA, § 78 dd-1 (b) et seq). The Convention does not contain any explicit exceptions for facilitation payments which aim at making foreign public officials do what they are duty-bound to do. Nor does the concept of “undue advantages” under the Convention open up for such exceptions (cf. paragraph 38 of the Explanatory report to the Convention). Furthermore, in this

context, the GET has also taken note of the so called “affirmative defence”, contained in FCPA § 78dd-1 (c) et seq which clarifies that facilitation payments made in the foreign context which are legal under the foreign law or were a reasonable and bona fide expenditure, do not amount to a criminal offence under the FCPA (even if such payments would be illegal under US law). The GET takes the view that the exception of facilitating or expediting payment as well as the related “affirmative defences” (although the latter have never been successfully asserted before a court, according to the US authorities) are not in line with the Criminal Law Convention, which makes no distinction concerning the undue/due advantage between domestic and foreign bribery offences. In this context, the GET has been informed that the Department of Justice actively discourages facilitation payments and has prosecuted such payments pursuant to the accounting provisions of the FCPA. In addition, the Departments of Justice and Commerce, along with the SEC have published guidelines to the FCPA, aimed at the private sector, following a recommendation adopted by the OECD in 2009¹¹. That said, the exception under the FCPA regarding facilitation payments brings uncertainty as to what can be prosecuted as bribery in the foreign/international context, in particular, concerning offences committed in those parts of the world where anti-bribery legislation is less developed.

154. To summarise, while the FCPA has proven an effective tool in combating foreign and transnational bribery, in and of itself, it does not fully cover all of the elements of Article 5 of the Convention; it limits the offence of foreign bribery of public officials to commercial activities and the passive side of this offence is not covered. Furthermore, the exception in respect of facilitation payments is problematic in relation to the Convention. The US authorities have provided information in support of its argument that other federal statutes can in fact be used in situations where the FCPA is not applicable. The GET is sympathetic to that position, however, each additional statute indicated by the US authorities assessed on its own merits does not appear to fully cover all the requirements of Article 5 of the Convention. As the US federal legislation is applicable in respect of all bribery offences in the foreign or international context, the same shortcomings do not only affect compliance with the offence of bribery of foreign public officials (Article 5), but also – and in the same manner – the other offences of bribery with a foreign/international nexus as established under the Convention and its Additional Protocol. Consequently, the GET recommends **to ensure that federal legislation and/or practice in respect of bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts (Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173)) as well as bribery of foreign arbitrators and foreign jurors (Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) i) is not limited to commercial activities; ii) also criminalises the passive side of the aforementioned offences; and iii) to ensure that all forms of “undue advantages” in relation to these offences are covered by the relevant bribery offences.**
155. Federal legislation does not provide for the offence of bribery in the private sector as such. As a result, bribery in the private sector is primarily addressed at the state level¹². The GET was informed that private sector bribery was specifically criminalised in 38 states but that 12 states did not have free-standing commercial bribery statutes. Some examples of *state legislation* are appended to this report (Appendix III). It was explained to the GET that states which do not provide for private sector bribery as a specific offence, would nevertheless be in a position to prosecute such behaviour, but under other types of offences, such as fraud.

¹¹ OECD Working Group on Bribery in International Business Transactions (Phase 3, 15 October 2010)

¹² If federal funds are involved, the conduct is reachable under the federal programmes statute, 18 U.S.C. § 666, according to the US authorities.

156. The lack of an explicit offence of private sector bribery at the federal level does not, however, prevent the federal authorities from prosecuting such offences. Once federal jurisdiction is triggered by an interstate or international element, there are two main “avenues” to follow: the first option would be to apply 18 U.S.C. § 1952 (the Travel Act). This law covers “whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce” with the intent to otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity”. “Unlawful activity” according to this law includes “extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States”. Consequently, the application of the Travel Act in respect of private sector bribery requires that such an offence is provided in the legislation at the state level.
157. However, in case private sector bribery is not criminalised at state level, the Travel Act cannot be applied. In such a situation, the federal authorities may choose to prosecute under other federal provisions, most notably the fraud provisions contained in 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud) in conjunction with § 1346 (the right to honest services) or § 666 (bribery in federally funded programs). The provisions concerning mail fraud and wire fraud interpreted in the light of the “honest services” provision, represent an important component in the US anti-corruption effort, not only for private sector bribery, as it may also be applied to public sector corruption. The expression “honest services” was explained to the GET to connote the duties of an employee to perform his/her duties with reasonable care and competence, with diligence, with honesty and with fidelity. Thus any act of bribery seduces the employee from his/her duty, deceives the employer about the quality of the services provided by the employee and – technically – constitutes a fraud offence. To the extent that the particular elements of these provisions are present (these offences presuppose the use of postal services, wire, radio, television or internet in the action taken), there is federal competence. Since one of those elements is likely to be present in numerous cases, these fraud offences would most likely cover many situations of private sector bribery. Nevertheless, in the GET’s view, it is not difficult to figure a case of bribery in which those provisions would not be engaged and in such a situation these provisions would not be applicable, for example, when a bribe is handed over directly from hand to hand or when the bribe consists of a service. Moreover, the GET cannot refrain from noting that 18 U.S.C. § 1341, § 1343, § 1346, and § 666, taken alone, do not expressly cover the particular elements contained in Articles 7 and 8 of the Convention. It appears that the US authorities have not substantiated that federal legislation and practice are fully compliant with Articles 7 and 8 of the Convention, despite the various possibilities to prosecute bribery in the private sector under the above-mentioned provisions. Consequently, the GET recommends **to ensure that federal legislation and/or practice complies with the requirements of bribery in the private sector, as established in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173)**.
158. The GET notes that the offence of trading in influence is not criminalised as such under US federal law. However, representatives of the authorities submitted that various federal laws reach the conduct addressed by Article 12 of the Convention, including 18 U.S.C. § 201 (bribery of domestic public officials) as well as 18 U.S.C. §§ 1341, 1343 and 1346 (fraud) and 18 U.S.C. § 666. The authorities also referred to statutes aiming at preventing conflicts of interest (18 U.S.C. §§ 203-209). The GET notes that it has been determined in the United States that one of the greatest areas of potential improper influence arises when former government employees trade on their access to former colleagues and their knowledge of confidential government information. The criminal conflict of interest statute governing post-employment activity, 18 U.S.C. § 207, contains an extensive set of restrictions on former government employees, and these restrictions

expressly cover activities performed "with the intent to influence" the government. That law also covers staff and members of Congress. The GET has no doubt that all these conflicts of interest laws make a significant contribution to the comprehensive US approach to preventing and punishing undue influences which come close to trading in influence. The authorities also emphasised that right to lobbying is a fundamental freedom of speech issue in the USA which is well protected and not subject to any criminalisation. The GET readily accepts that perspective and recognises the importance of distinguishing illegitimate influencing from the legitimate one (i.e. lobbying). The GET recalls that Article 12 of the Convention rests on the distinction between legitimate lobbying and the exercise of "improper influence", which means that a corrupt intent by the influence peddler is required in order to establish the offence. In other words, acknowledged forms of lobbying do not fall under this notion (Explanatory Report to the Convention, paragraph 65). The GET furthermore notes that this offence may be broken down into two different parts – active and passive trading in influence. While the active side of the offence appears to be quite similar to active bribery, it differs in one important aspect, namely that the advantage is not given to the public official (and cannot be considered as an indirect advantage) but to the influence peddler and the possible action or inaction of the public official is not linked to the advantage offered to the influence peddler. In respect of the passive side of this offence, trading in influence may resemble passive bribery, but again the influence peddler is the receiver of the undue advantage, not the public official (the public official is not even aware of the advantage). The US authorities have described various prosecutions that arose from the activities of a lobbyist in which authorities applied various bribery, fraud, false statement, conspiracy, conflict of interest and post-employment restriction statutes. While these cases provide examples of the US authorities' determination to reach corrupt influence peddling, the GET is of the opinion that it has not been substantiated that the particular situation aimed at by the Convention (where the influencing is "improper" and where the person who offers the advantage to the influence peddler may not even be aware of the existence of the public official) is fully criminalised under US federal law in accordance with the elements provided for in Article 12 of the Convention. Consequently, the GET recommends **to ensure that federal legislation and/or practice complies with the requirements of trading in influence as established in Article 12 of the Criminal Law Convention on Corruption (ETS 173).**

159. Bribery of domestic arbitrators is not a separate criminal offence under US federal law. Much therefore depends on whether the nature of the arbitration is such that the arbitrator qualifies as a federal domestic official, in the case of which 18 U.S.C. § 201 (b) would apply, or whether the offence is to be considered as private sector bribery. If the latter is the case, the GET does not need to repeat the same reasoning and conclusion as provided in relation to private sector bribery, above. The authorities have also submitted that 18 U.S.C. § 666, is applicable, however, the GET notes that this provision is much more limited in scope (employees receiving limited federal funds) and cannot be applied beyond the particular context regulated in that law. Bribery of foreign arbitrators would only be covered in so far as such persons are to be considered as public officials, in which case the Foreign Corrupt Practices Act (FCPA), or alternatively the Travel Act or the fraud statutes would apply. Consequently, the GET also refers to its previous reasoning in respect of bribery of foreign public officials, above. It follows that current US legislation and practice appear not to fully comply with the requirements of Articles 2-4 of the Additional Protocol to the Criminal Law Convention. Consequently, the GET recommends **to ensure that federal legislation and/or practice complies with the requirements of bribery of domestic and foreign arbitrators as established in Articles 2–4 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).**
160. Concerning sanctions applicable to corruption offences (and leaving aside the possibility to sanction legal persons, which was addressed in GRECO's Second Evaluation Round), the GET

notes that the federal statutes relating to domestic public officials provide for a battery of diverse penalties; the corruption related offences contemplated in this respect may result in fines and/or imprisonment of up to 15 years. Other sanctions may also be applied, such as administrative and civil penalties, including restitution. Turning to sanctions in respect of bribery of foreign public officials, it is noteworthy that in comparison with the previous offences, the FCPA is considerably more lenient; fines may go up to \$100,000 or twice the pecuniary loss or gain (in respect of natural persons) and imprisonment may not be longer than 5 years for such an offence. In practice, significant sanctions have been imposed pursuant to the FCPA. It should also be noted that sanctions, as imposed in practice, are determined in reference to the United States Sentencing Guidelines, and offenses of both domestic and foreign bribery are assessed pursuant to the same guideline (U.S.S.G. § 2C1.1). In respect of private sector bribery as prosecutable under the Travel Act fines and/or imprisonment up to 5 years' can be imposed. Should instead the "mail", "wire" or "honest services" fraud provisions (18 U.S.C. §§ 1341, 1343, 1346) be applied, the law foresees fines and imprisonment of up to 20 years. Although the GET notes that the possible sanctions vary to a large extent, depending on the type of offence as well as the applicable legislation, the GET is of the opinion that all the sanctions available under US federal law comply with the requirements of the Convention and often involve a level of severity higher than that foreseen by most European bribery laws. Moreover, the GET was provided with extensive case law strongly suggesting that the criminal sanctions as applied are effective, proportionate and dissuasive.

161. Participatory acts, notably aiding and abetting, in respect of an offence against the United States (ie any statutory federal offence) are punishable in the same way as the principal offence (18 U.S.C. § 2 and 3). The statute of limitations for prosecuting corruption offences is 5 years. Bearing in mind the special features of corruption offences, in particular their secretive nature, this period is not very long for investigation and prosecution, but is not much different from many other GRECO members. There are no federal rules concerning defences of effective regret, providing that an offender is to be exonerated from a criminal charge in return for reporting the offence; however, such situations may result in mitigation of sanctions in certain situations. In conclusion, the aforementioned areas do not appear to pose any discernible problems in the context of the current evaluation.
162. As far as jurisdiction is concerned it is to be noted that in addition to the territorial jurisdiction, which follows from the US Constitution, US courts have wide discretionary powers to try cases committed abroad whenever the nature of a criminal offence indicates that it applies outside the US territory. The pertinent statutes do not require citizenship to be applied and public officials, whether citizens or not, are covered. Case law shows convincingly that courts routinely have inferred jurisdiction over offences occurring abroad as soon as these may cause harm domestically. In the view of the GET, this broad interpretation of the law appears to go further than what is required by the Convention.
163. Finally, it was explained to the GET that "functional equivalence" is often the most realistic ambition for the relationship between US law and some international treaty provisions relating to corruption. The GET does not presume to challenge that professional assessment. However, the GET's perception is that the "plain language of the statute" principle of statutory interpretation may be regarded as giving a certain primacy to an explicitly expressed legislative provision in which Congress speaks clearly. It seems to the GET, to be preferable, if possible to reach a more definite position about direct compatibility between US law and the Convention and its Additional Protocol than a conclusion that there is functional consistency. Accordingly, the GET recommends, in conjunction with the previous recommendations, **that the authorities of the United States consider the feasibility and the effectiveness to the extent that is consistent**

with the fundamental principles of the federal legal system, to promote legislation which would, on the face of the statute, establish as criminal offences the various matters dealt with in the current report without additional elements dealing with such things as the mode by which a corrupt transaction is effected.

IV. CONCLUSIONS

164. 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 appear to be effective in detecting, prosecuting and deterring corruption. That said, there appear to be some lacunae in the criminal legislation as to the full compliance with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191).
165. The approach for criminalising corruption offences in the United States is not as straightforward as in most other GRECO member States for two particular reasons. First, the USA is a federation where the Constitution reserves significant governmental authorities solely to the states, and only vests particular enumerated powers in the federal government in terms of adopting legislation, enforcing the law and the adjudication of criminal cases. As a main principle, state legislation is the primary source for incriminations unless there are specific elements that would provide for federal jurisdiction. Second, as the United States is a common law jurisdiction there is extensive court practice to be taken into account at various levels. The described features make the evaluation of US legislation and practice demanding. On the face of the legislation, full consistency with the Convention is not always apparent; but the legislation cannot be read in isolation from the applicable principles of statutory interpretation and the relevant – often extensive - case law. In addition, the approach to incriminations in the United States is highly pragmatic and many criminal cases, including corruption, will end through a plea bargain conviction and therefore never come to the trial stage.
166. There are distinct statutory provisions in place concerning bribery offences at the federal level, such as active and passive bribery of domestic public officials and active bribery of foreign public officials, which are the results of a clear commitment by Congress; however, these central provisions do not, by themselves, cover all the various offences under the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Therefore, other statutes that are not “pure” bribery provisions, must be applied complementarily in certain situations of bribery, but these do not appear to contain all the specific elements of corruption offences as provided in the Convention and the Additional Protocol. As a result, it appears that to a large degree there are possibilities to prosecute offenders engaged in various forms of corruption and it may therefore be concluded that the US federal legislation and practice provide for a high degree of “functional” consistency with the Convention and the Additional Protocol in the meaning that most corruption offences can be prosecuted in one way or another, often as fraud; however, not necessarily always as bribery. Nevertheless, there is a provisional quality about such a conclusion. In the absence of competence to legislate directly and exclusively about corruption in general, it is, no doubt, necessary for prosecutors to pursue creative uses of existing law and they are to be commended for doing so; but what they are doing may often be regarded as “gap-filling”. To be sure, US law is highly flexible; but there is always a risk that the courts will say that Congress needs to speak more clearly.
167. Having said that, the current evaluation shows that the US authorities have not substantiated that federal legislation and practice fully respond to all of the requirements of the Criminal Law Convention and the Additional Protocol concerning various forms of bribery in the foreign or international context, although in practice the use of the Foreign Corrupt and Practices Act

(FCPA) has been very successful. Furthermore, while bribery in the private sector will be covered federally through the “Travel Act” when there is corresponding legislation at the state level and that, alternatively, federal fraud provisions (18 U.S.C. §§ 1341, 1343, 1346) and 18 U.S.C. § 666 appear to provide for a degree of “functional” compliance, this possibility is not always convincing as these provisions do not appear to comprise all elements as foreseen in the Criminal Law Convention. Trading in influence and bribery of arbitrators are also offences where the current legislation and practice do not appear to meet all requirements of the Convention and the Additional Protocol. It would therefore be preferable if the law were as clear in respect of these offences as it is in the paramount provision on bribery of domestic public officials (18 U.S.C. 201(b)).

168. The United States has not ratified the Criminal Law Convention on Corruption (ETS 173), nor has it signed or ratified the Additional Protocol thereto (ETS 191). Considerable time has passed since the Criminal Law Convention was signed and since then the United States has ratified the United Nations Convention against Corruption (UNCAC). These Conventions are based on the same underlying philosophy, however, in terms of detail and obligations in respect of criminal offences, the ETS 173 and ETS 191 go beyond the requirements of the UNCAC in respect of certain elements, but at the same time, the former instruments provide for the possibility to introduce reservations.

169. In view of the above, GRECO addresses the following recommendations to the United States of America:

- i. **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191) (paragraph 143);**
- ii. **to ensure that federal legislation and/or practice in respect of bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts (Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173)) as well as bribery of foreign arbitrators and foreign jurors (Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) i) is not limited to commercial activities; ii) also criminalises the passive side of the aforementioned offences; and iii) to ensure that all forms of “undue advantages” in relation to these offences are covered by the relevant bribery offences (paragraph 154);**
- iii. **to ensure that federal legislation and/or practice complies with the requirements of bribery in the private sector, as established in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 157);**
- iv. **to ensure that federal legislation and/or practice complies with the requirements of trading in influence as established in Article 12 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 158);**
- v. **to ensure that federal legislation and/or practice complies with the requirements of bribery of domestic and foreign arbitrators as established in Articles 2–4 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) (paragraph 159);**

vi. **that the authorities of the United States consider the feasibility and the effectiveness to the extent that is consistent with the fundamental principles of the federal legal system, to promote legislation which would, on the face of the statute, establish as criminal offences the various matters dealt with in the current report without additional elements dealing with such things as the mode by which a corrupt transaction is effected** (paragraph 163).

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

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

APPENDIX I

Selected list of other statutes that can apply to domestic bribery/corruption offences of and by federal officials (see paragraph 10 DDP):

- 18 U.S.C. § 203, prohibiting the payment or receipt of outside compensation by and to members of Congress, federal officers and employees, or federal judges to act in a representational capacity in any proceeding in which the United States is a party or has a direct and substantial interest;
- 18 U.S.C. § 205, prohibiting any officer or employee of the executive, legislative, or judicial branch of the Federal Government from acting as agent or attorney for prosecuting any claim against the United States; 18 U.S.C. § 208, prohibiting any officer or employee of the executive branch or of an independent agency of the United States from participating in any matter in which he or a member of his family or business or organisation with which he or she is associated has a financial interest;
- 18 U.S.C. § 209, prohibiting any officer or employee of the executive branch or of an independent agency of the United States from receiving, and any person from paying such officer or employee, any supplementation of his official salary in respect of his official duties;
- 18 U.S.C. § 210, prohibiting any person from paying another to use his or her influence to procure any appointive office or official position;
- 18 U.S.C. § 599, prohibiting any candidate for federal public office from promising to use his influence or to appoint any person to a public or private office in exchange for their support in the election;
- 18 U.S.C. § 600, prohibiting any person from promising any federal public post or government contract in exchange for political activity in connection with any election to any political office;
- 18 U.S.C. § 1951, prohibiting, inter alia, any person from interfering with or affecting interstate commerce by extortion, that is, the obtaining of property of another under color of official right (the Hobbs Act); and
- 18 U.S.C. §§ 1961-1963, prohibiting any person who receives any income derived from a pattern of racketeering activity, including bribery in violation of § 201, from investing in, acquiring, or establishing any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce (the Racketeer Influenced and Corrupt Organizations Act or RICO).
- 18 U.S.C. § 666 prohibits bribery, fraud, and embezzlement by agents and employees of organisations and government entities that receive more than \$10,000 in federal funds in a given year in connection with a transaction involving \$5,000 or more. This statute criminalizes bribery committed by state and local public officials.

APPENDIX II

(As of July 22, 2004)

**Anti-Bribery and Books & Records Provisions of
The Foreign Corrupt Practices Act
Current through Pub. L 105-366 (November 10, 1998)**

UNITED STATES CODE

TITLE 15. COMMERCE AND TRADE

CHAPTER 2B--SECURITIES EXCHANGES

§ 78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 781 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

- (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 781 of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
- (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) Form of report; books, records, and internal accounting; directives

* * *

- (2) Every issuer which has a class of securities registered pursuant to section 781 of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--
 - (A) make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
 - (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--
 - (i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

- (3) (A) With respect to matters concerning the national security of the United States no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing expire one year after the date of issuance.
- (B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.
- (4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.
- (5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account described in paragraph (2).
- (6) Where an issuer which has a class of securities registered pursuant to section 781 of this title or an issuer which is required to file reports pursuant to section 780(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).
- (7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

* * *

§ 78dd-1 (Section 30A of the Securities & Exchange Act of 1934).

Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this title, or for any officer, director, employee, or agent of

such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity,

(ii) inducing such party, official or candidate to do or omit to do an act in violation of the lawful duty of such party official, or candidate or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defences

It shall be an affirmative defence to actions under subsection (a) or (g) of this section that--

- (1) the payment, gift, offer or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party/s, party official's, or candidate/s country; or
- (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses incurred by or on behalf of a foreign official party official, or candidate and was directly related to--
 - (A) the promotion, demonstration, or explanation of products or services; or
 - (B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

- (1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and
- (2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

- (1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance

with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

- (2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (i), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.
- (3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- (4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

- (1)
 - A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.
 - (B) For purposes of subparagraph (A), the term "public international organization" means--
 - (i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or
 - (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
- (2)
 - (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--
 - (i) such person is aware that such person is engaging in such conduct, that such circumstance exists or that such result is substantially certain to occur; or
 - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
 - (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
- (3)
 - (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--
 - (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

- (1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (n (2)1 and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.
- (2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (S U.S.C.. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

- (1) any foreign official for purposes of--
 - (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
 - (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with or directing business to, any person;

- (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--
- (A) (i) influencing any act or decision of such party official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or
 - (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

- (3) any person while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--
- (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or
 - (B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defences

It shall be an affirmative defence to actions under subsection (a) or (i) of this section that--

- (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--
 - (A) the promotion, demonstration, or explanation of products or services; or
 - (B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

- (1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or

practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

- (2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.
- (3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

- (1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and
- (2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

- (1) The Attorney General after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with

the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

- (2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern by made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.
- (3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- (4) The Attorney General shall to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

- (1)
 - A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than \$2,000,000.
 - (B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (2)
 - (A) Any natural person that is an officer, director, employee or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years or both.
 - (B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section effective as of the date of publication of such order in the Federal Register.

(3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

- (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defence to actions under subsection (a) of this section that--

- (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

- (1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage in any act or practice constituting a violation of subsection (a) of this section the Attorney General may in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing i a permanent injunction or a temporary restraining order shall be granted without bond.
- (2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in

the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

- (3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.
- (4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

- (1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than \$2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- (2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than \$101000 imposed in an action brought by the Attorney General.
- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

- (1) The term "person/, when referring to an offender, means any natural person other than a. national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof
- (2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A) the term "public international organization" means --

- (i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C.. § 288); or
- (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

- (3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance or a result if --
- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
- (4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
 - (v) actions of a similar nature.
- (B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.
- (5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of -
- (A) a telephone or other interstate means of communication, or
 - (B) any other interstate instrumentality.

§ 78ff. Penalties

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation there under the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation there under or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents or reports required to be filed under subsection (d) of section 780 of this title or any rule or regulation there under shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for

such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

- (1)
 - (A) Any issuer that violates subsection (a) or (g) of section 30A of this title (15 U.S.C. § 78dd-1J) shall be fined not more than \$2,000,000.
 - (B) Any issuer that violates subsection (a) or (g) of section 30A of this title (15 U.S.C. § 78dd-1J) shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- (2)
 - (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title (15 U.S.C. § 78dd-1J) shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.
 - (B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title (15 U.S.C. § 78dd-1J) shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

APPENDIX III

CHART 1A

**FCPA Criminal Enforcement Statistics (1998-2010)
Natural Persons**

Prosecutions of Natural Persons																						
Year	Total No. Charged ¹	No. Charged with: ²			Pending as of end of calendar year ³			Discontinued without Sanctions ⁴			Guilty Pleas			Trial Convictions			Acquittals			No. Sentenced		
		FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML
1998	4	4	0	0	7	1	2	0	0	0	2	0	0	1	0	0	0	0	0	0	0	0
1999	1	1	0	0	4	1	2	0	0	0	1	0	0	0	0	0	0	0	0	4	0	0
2000	0	0	0	0	4	1	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2001	7	6	2	0	10	2	2	0	0	0	3	2	0	0	0	0	0	0	0	0	1	0
2002	4	4	0	0	11	2	2	0	0	0	3	0	0	1	0	0	0	0	0	4	0	0
2003	4	4	0	3	15	2	5	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
2004	2	0	2	0	14	4	5	0	0	0	2	0	2	2	0	0	0	0	0	0	0	0
2005	5	5	0	3	19	2	8	0	0	0	0	0	0	0	0	0	0	2	0	2	0	0
2006	4	3	1	1	21	3	9	0	0	0	4	1	0	0	0	0	0	0	0	1	0	0
2007	9	9	0	6	28	2	15	0	0	0	5	0	2	0	0	0	0	0	0	2	1	0
2008	12	12	1	5	30	3	18	1	0	1	4	0	0	0	0	0	0	0	0	7	0	1
2009	44	40	0	33	70	3	51	0	0	0	9	0	5	4	0	4	0	0	0	3	0	2
2010 ⁵	5	3	1	3	62	4	45	0	0	0	8	2	6	0	0	0	0	0	0	11	0	9
Total	101	91	7	54	--	--	--	1	0	1	42	5	15	8	0	4	0	2	0	34	2	12

¹ In this column, each natural person was only counted once, so the numbers represent the actual number of natural persons charged with FCPA violations in each year.

² For the purposes of this chart, the Department counted a natural person in each applicable column according to the conduct with which the defendant was charged. For instance, if a defendant was charged with both foreign bribery (FB) and foreign bribery related accounting misconduct (AM), the person was counted in both the applicable FB and AM columns.

³ For the purposes of this column, cases were deemed to still be pending if any of the following was true: (1) the defendant was charged, but not yet convicted; (2) the defendant was convicted, but not yet sentenced; (3) the defendant was sentenced, but had filed an appeal, which was still open; or, (4) the defendant was a fugitive, as of the end of the calendar year.

⁴ Since 1998, there has not been a case in which the Department discontinued the prosecution of a natural person for foreign bribery or a related offense while imposing sanctions. Therefore, this category was excluded from this table.

⁵ For 2010, the numbers in this chart are current through September 30, 2010.

CHART 1B

FCPA Criminal Enforcement Statistics (1998-2010)
Legal Persons

Prosecutions of Legal Persons																									
Year	Total No. Charged ⁶	No. Charged with: ⁷			Pending as of end of calendar year ⁸			Discontinued with Sanctions			Discontinued without Sanctions			Guilty Pleas			Trial Convictions			Acquittals			No. Sentenced		
		FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML	FB	AM	ML
1998	3	3	0	0	3	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0
1999	1	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	4	0	0
2000	1	0	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0
2001	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2002	1	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	0
2003	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2004	3	3	1	0	0	0	0	1	1	0	0	0	2	0	0	0	0	0	0	0	0	0	2	0	0
2005	4	4	2	0	0	0	0	2	1	0	0	0	2	1	0	0	0	0	0	0	0	0	2	1	0
2006	2	2	2	0	0	0	0	2	2	0	0	0	1	1	0	0	0	0	0	0	0	0	1	1	0
2007	15	13	8	0	0	0	0	9	7	0	0	0	4	1	0	0	0	0	0	0	0	0	4	1	0
2008	16	9	13	1	1	0	1	5	7	0	0	0	3	4	0	0	0	0	0	0	0	0	3	4	0
2009	7	5	4	0	1	0	1	2	4	0	0	0	3	0	0	0	0	0	0	0	0	0	3	0	0
2010 ⁹	15	13	8	0	3	2	0	5	4	0	0	0	9	4	1	0	0	0	0	0	0	0	6	2	1
Total	68	54	39	1	--	--	--	26	26	0	0	0	29	12	1	0	0	0	0	0	0	0	26	10	1

⁶ In this column, each legal person was only counted once, so the numbers represent the actual number of legal persons charged with FCPA violations in each year.

⁷ For the purposes of this chart, the Department counted a legal person in each applicable column according to the conduct with which the defendant was charged. For instance, if a defendant was charged with both foreign bribery (FB) and foreign bribery related accounting misconduct (AM), the person was counted in both the applicable FB and AM columns.

⁸ For the purposes of this column, cases were deemed to still be pending if any of the following was true: (1) the defendant was charged, but not yet convicted; (2) the defendant was convicted, but not yet sentenced; or, (3) the defendant was sentenced, but had filed an appeal, which was still open, as of the end of the calendar year.

⁹ For 2010, the numbers in this chart are current through September 30, 2010.

APPENDIX IV

Samples gathered by the US authorities of state commercial bribery statutes

Colorado (basically the same as the American Legal Institute Model Penal Code):

(a) Any employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.

(b) This section does not apply where the amount of money or monetary worth of the thing of value is two hundred fifty dollars (\$250) or less.

(c) Commercial bribery is punishable by imprisonment in the county jail for not more than one year if the amount of the bribe is one thousand dollars (\$1,000) or less, or by imprisonment in the county jail, or in the state prison for 16 months, or two or three years if the amount of the bribe exceeds one thousand dollars (\$1,000).

(d) For purposes of this section:

(1) "Employee" means an officer, director, agent, trustee, partner, or employee.

(2) "Employer" means a corporation, association, organization, trust, partnership, or sole proprietorship.

(3) "Corruptly" means that the person specifically intends to injure or defraud (A) his or her employer, (B) the employer of the person to whom he or she offers, gives, or agrees to give the money or a thing of value, (C) the employer of the person from whom he or she requests, receives, or agrees to receive the money or a thing of value, or (D) a competitor of any such employer.

Pennsylvania:

Commercial bribery and breach of duty to act disinterestedly

(a) Corrupt employee, agent or fiduciary.--An employee, agent or fiduciary commits a misdemeanor of the second degree when, without the consent of his employer or principal, he solicits, accepts, or agrees to accept any benefit from another person upon agreement or understanding that such benefit will influence his conduct in relation to the affairs of his employer or principal.

(b) Corrupt disinterested person.--A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor of the second degree if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.

(c) Solicitation.--A person commits a misdemeanor of the second degree if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under subsections (a) or (b) of this section.

Washington State:

Commercial bribery

(1) For purposes of this section:

- (a) "Claimant" means a person who has or is believed by an actor to have an insurance claim.
- (b) "Service provider" means a person who directly or indirectly provides, advertises, or otherwise claims to provide services.
- (c) "Services" means health care services, motor vehicle body or other motor vehicle repair, and preparing, processing, presenting, or negotiating an insurance claim.
- (d) "Trusted person" means:
 - (i) An agent, employee, or partner of another;
 - (ii) An administrator, executor, conservator, guardian, receiver, or trustee of a person or an estate, or any other person acting in a fiduciary capacity;
 - (iii) An accountant, appraiser, attorney, physician, or other professional adviser;
 - (iv) An officer or director of a corporation, or any other person who participates in the affairs of a corporation, partnership, or unincorporated association; or
 - (v) An arbitrator, mediator, or other purportedly disinterested adjudicator or referee.

(2) A person is guilty of commercial bribery if:

- (a) He or she offers, confers, or agrees to confer a pecuniary benefit directly or indirectly upon a trusted person under a request, agreement, or understanding that the trusted person will violate a duty of fidelity or trust arising from his or her position as a trusted person;
- (b) Being a trusted person, he or she requests, accepts, or agrees to accept a pecuniary benefit for himself, herself, or another under a request, agreement, or understanding that he or she will violate a duty of fidelity or trust arising from his or her position as a trusted person; or
- (c) Being an employee or agent of an insurer, he or she requests, accepts, or agrees to accept a pecuniary benefit for himself or herself, or a person other than the insurer, under a request, agreement, or understanding that he or she will or a threat that he or she will not refer or induce claimants to have services performed by a service provider.

(3) It is not a defence to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because the person had not yet assumed his or her position, lacked authority, or for any other reason.

(4) Commercial bribery is a class B felony.

New York:

S 180.00 Commercial bribing in the second degree.

A person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs. Commercial bribing in the second degree is a class A misdemeanor.

S 180.03 Commercial bribing in the first degree.

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when

the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars. Commercial bribing in the first degree is a class E felony.

S 180.05 Commercial bribe receiving in the second degree.

An employee, agent or fiduciary is guilty of commercial bribe receiving in the second degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs. Commercial bribe receiving in the second degree is a class A misdemeanor.

S 180.08 Commercial bribe receiving in the first degree.

An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars. Commercial bribe receiving in the first degree is a class E felony.

California:

(a) Any employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.

(b) This section does not apply where the amount of money or monetary worth of the thing of value is two hundred fifty dollars (\$250) or less.

(c) Commercial bribery is punishable by imprisonment in the county jail for not more than one year if the amount of the bribe is one thousand dollars (\$1,000) or less, or by imprisonment in the county jail, or in the state prison for 16 months, or two or three years if the amount of the bribe exceeds one thousand dollars (\$1,000).

(d) For purposes of this section:

(1) "Employee" means an officer, director, agent, trustee, partner, or employee.

(2) "Employer" means a corporation, association, organization, trust, partnership, or sole proprietorship.

(3) "Corruptly" means that the person specifically intends to injure or defraud (A) his or her employer, (B) the employer of the person to whom he or she offers, gives, or agrees to give the money or a thing of value, (C) the employer of the person from whom he or she requests, receives, or agrees to receive the money or a thing of value, or (D) a competitor of any such employer.