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Groupe d'États contre la corruption

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FOURTH EVALUATION ROUND

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FOURTH EVALUATION ROUND

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

COMPLIANCE REPORT

UNITED STATES OF AMERICA

Adopted by GRECO at its 82nd Plenary Meeting
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GRECO Secretariat
Council of Europe
F-67075 Strasbourg Cedex
☎ +33 3 88 41 20 00

www.coe.int/greco

Directorate General I
Human Rights and Rule of Law
Information Society and Action against Crime Directorate

I. INTRODUCTION

1. The Compliance Report assesses the measures taken by the authorities of the United States of America to implement the recommendations issued in the Fourth Round Evaluation Report on the United States, which was adopted at GRECO's 74th Plenary Meeting (2 December 2016) and made public on 17 January 2017, following authorisation by the United States (GrecoEval4Rep(2016)10). GRECO's Fourth Evaluation Round deals with "Corruption prevention in respect of members of parliament, judges and prosecutors".

2. As required by GRECO's Rules of Procedure, the authorities of the United States submitted a Situation Report on measures taken to implement the recommendations. This report was received on 25 September 2018 and served, together with the information submitted subsequently, as a basis for the Compliance Report.

3. GRECO selected Cyprus and United Kingdom to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Ms Alexia KALISPERA, on behalf of Cyprus, and Mr David MEYER, on behalf of the United Kingdom. They were assisted by GRECO's Secretariat in drawing up the Compliance Report.

4. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

II. ANALYSIS

5. GRECO addressed 12 recommendations to the United States in its Evaluation Report. Compliance with these recommendations is dealt with below.

Corruption prevention in respect of members of parliament

Recommendation i.

6. GRECO *recommended to consider increasing the transparency of the legislative process leading up to the introduction of new bills in Congress.*

7. The authorities of the United States report that H.R. (House of Representatives) 1, the first bill introduced in the 116th Congress (commencing January 2019), would provide increased transparency by requiring the linking of Federal Election Commission reports on campaign donations and lobbying reports required by the Lobbying Disclosure Act. This would allow the public and the press to more easily see any connection between Members of Congress, the bill introduced by the Members, those lobbying done in relation to the legislation, and any campaign contributions to the Members. Moreover, H.R. 1 contains amendments to the Lobbying Disclosure Act to include all persons who provide legislative, political and strategic counseling services in support of lobbying contacts. This will broaden the coverage of the Act and, as a result, increase transparency. Finally, H.R. 1 would clearly and unequivocally prohibit any Member of Congress or her employee from introducing or aiding the progress of legislation that would affect their financial interests of those of their families.

8. H.R. 1 is co-sponsored by a majority of the House of Representatives. Three committees thus far have held hearings on the legislation, and one committee

reported it favorably with amendments. H.R. 1 passed the House of Representatives on 8 March 2019. Moreover, H.R. 1 has triggered debate in both Houses of Congress.

9. The authorities also report that, on 5 July 2016, the Library of Congress transitioned its old online legislative information system, "THOMAS.gov", into a new system, "Congress.gov", in order to ease the access and quality of legislative information available to the public. "Congress.gov" provides access to a wide array of information related to the legislative process, including bill status and summaries, bill texts, Congressional records and index, committee reports and executive actions such as nominations, treaties and communications. "Congress.gov" also has historic access to legislative information dating back to 1973.

10. "Congress.gov" provides contextual information such as member profiles, legislative-process videos, glossary, committee profile pages, video of committee hearings, and direct links from bills to cost estimates for the legislation compiled by the Congressional Budget Office. The site includes accessibility tools such as downloadable audio files and tracking tools, including customizable email alerts. In addition to the transition to "Congress.gov", Congress passed H.R. 2331, the Connected Government Act, and it became law on January 10, 2018 (115th Cong., 131 Stat. 2278 (2018)), requiring all federal government websites to be mobile-friendly, to increase public access and transparency.

11. The authorities also point out that over the course of 2017 and 2018, Members of Congress have introduced several additional bills which aim at increasing the transparency of the legislative process:

- H.R. (House of Representatives) 5143, the Searchable Legislation Act of 2018 - this bill would mandate that all legislation drafted and introduced be made searchable to the public by providing modernised platforms for accessing information. This bill has been introduced in the House.

- H.R. 346, the Congressional Integrity Act - this bill would expand the definition of lobbyists that are subject to lobbying disclosure rules. The bill was introduced in the House, referred to the House Committee on the Judiciary, and then to the Subcommittee on the Constitution and Civil Justice.

- S. (Senate) 1189, the Close the Revolving Door Act - this bill would require additional information in lobbying disclosure rules. The bill was read twice and referred to the Committee on Homeland Security and Governmental Affairs.

- H.R. 4504, the Transparency in Government Act, aims at increasing transparency of congressional committee work. It was referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Rules, House Administration, the Judiciary, Ethics, Ways and Means, and Financial Services.

- S. 3357, the Anti-Corruption and Public Integrity Act - this bill would increase electronic access to congressional committee and Member work product by requiring the posting of hearing and mark-up schedules, bill or amendment texts, testimonies, documents entered into the hearing record, hearing transcripts, written witness answers, hearing audio and video recordings, and searchable voting records on official websites. This bill would also require lobbyists to disclose when they lobby a specific congressional office; specific topics of the visits; the official action being requested; and all documents provided during the visit. It was introduced in the Senate and referred to the Committee on Finance.

12. GRECO recalls that the members of Congress have a gatekeeping role as the introduction of new bills in Congress can only be made by them. That said, draft

legislation is most often preceded by extensive prior consultations and preparations and then subject to potential significant amendments. While such prior consultations may be included in a committee report when a bill is reported out of committee, there is no requirement in place to refer to such information in the bill itself, as the bill contains only the text of the proposed law. This was highlighted in the Evaluation Report and GRECO notes that nothing has changed in this respect to date.

13. GRECO also notes that the US authorities have referred to draft legislation (H.R. 1) that would increase legislative transparency, especially as it relates to lobbyists. H.R. 1 passed the House of Representatives on 8 March 2019. GRECO acknowledges the attention being given to this issue and Congress's meaningful consideration of it. This legislative initiative which is supported by a majority of Congress Members and has been duly considered by some committees of Congress may possibly lead to more transparency of the legislative process in the context of the Lobbying Disclosure Act. It is also noted that a number of other bills introduced by individual members in Congress may also possibly lead to more transparency. However, these have not been subject to a debate (considerations) at present. While the draft legislation, H.R. 1, has been duly considered, this Bill does not cover more than parts of the issue at stake in the current recommendation.

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

Recommendation ii.

15. *GRECO recommended that guidance materials to the codes of ethics used by the Senate and by the House of Representatives be brought up-to-date and made available in a user friendly fashion.*

16. The authorities state that in July 2017, the *Senate Select Committee* on Ethics (the Senate Ethics Committee) updated its presentation materials for the mandatory Code of Conduct-training that all senators and staff must complete within 60 days after commencing their service or employment. Additionally, in August 2017, the Senate Ethics Committee recorded a new video to accompany the updated training materials. This training video is available to members, officers and employees of the Senate from the Senate Ethics Committee's website. The Senate Ethics Committee also updated (in 2018) both the content and user-functionality of its website, including but not limited to expanding the frequently asked question sections and revising existing training modules.

17. In June 2018, the *House Ethics Committee* updated its presentation materials for the mandatory Code of Conduct training that all Members and staff must complete within 60 days after commencing their service or employment. Additionally, in July 2018, the House Ethics Committee recorded a new video to accompany the updated training materials. This training video is available to all House Members, officers and employees on the House's internal training website. The House Ethics Committee is also in the process of updating the format of its website.

18. GRECO takes note of the information provided, that "presentation materials" and training tools, such as videos and PowerPoint slides for the mandatory ethics training carried out by the Senate Ethics Committee and the House Ethics Committee respectively, are addressed to senators, House Representatives, officers and employees of both Houses of Congress. Furthermore, it notes that the websites of both Ethics Committees have been updated accordingly.

19. GRECO concludes that recommendation ii has been implemented satisfactorily.

Recommendation iii.

20. GRECO *recommended that ad hoc disclosures be introduced for situations when an undisclosed conflict between specific private interests of individual Members of Congress may emerge in relation to a matter under consideration in congressional proceedings.*

21. The authorities state that ad hoc disclosures are effectively a part of the regular activities of Members and Senators. Nonetheless, additional measures have been taken to broaden awareness and use of these procedures, and to strengthen the ability to detect and address conflicts that are not disclosed. On 1 August 2017, the House Ethics Committee issued a public report regarding conflict of interest issues. That report addressed allegations that a Member of the House of Representatives took official action on a matter in which he had a personal financial interest. In its report, the House Ethics Committee favorably noted, among other things, that, when the Representative "introduced and spoke on his amendment on the House floor, he openly disclosed his status as a car dealer." The Committee also stated that it "has noted that while public disclosure of a potential conflict does not completely insulate a Member from possible violations of the conflict of interest rules, it is the preferred method of regulating possible conflicts of interest." Thus, the House Ethics Committee noted the benefits of ad hoc disclosures in addressing specific conflicts of interest. In the same report, the House Ethics Committee discussed a comprehensive framework to address potential conflicts of interest that directed Members to ask several questions regarding the nature of the Member's financial interest and the nature of the Member's official action. Thus, although a formal requirement to make ad hoc disclosures is not in force, this framework requires Members to be mindful of the potential for conflicts of interest. Additionally, the Senate Ethics Committee is preparing a "Dear Colleague" letter to all members of the Senate outlining existing mechanisms and procedures for formal disclosures through the financial disclosure process, and recommending that senators consider employing ad hoc disclosures when and where appropriate.

22. In addition, the House has taken steps to limit actual conflicts of interest. For example, as discussed below, the code of conduct for the 116th Congress bans Members from serving on the board of any public company. The revised code of conduct further directs the House Ethics Committee to "develop regulations addressing other types of prohibited service or positions that could lead to conflicts of interest." Finally, H.R. 1 (See US reply to recommendation i) includes a new conflict of interest prohibition that bars any Member or employee from, among other things, "knowingly us[ing] his or her official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his or her pecuniary interest[.]"

23. Congress also introduced and passed H.R. 72, the GAO Access and Oversight of 2017, which became law on 31 January 2017. The Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress and is generally considered the "congressional watchdog." It helps Congress fulfil its oversight role to improve performance and ensure the accountability of the federal government. The new law authorises the GAO to obtain any federal agency records needed in an audit, evaluation, or investigation. It also authorises the GAO to bring civil actions to require an agency to produce a record.

24. Moreover, in 2017 and 2018, members of Congress introduced several bills[1] that would further increase transparency regarding their financial interests, *inter alia*:

[1] GRECO was informed that these bills did not advance under the Congressional Session, which ended in January 2019.

- *H.R.* (House of Representatives) *5458, the Member Financial Transparency Act* - this bill would expand existing requirements for members of Congress, such as requiring them to file reports on transactions in stocks, bonds, commodities futures, and other forms of securities, no later than seven days after the transactions are completed. The bill has been referred to the House Committee on House Administration.

- *H.R. 1293 is a bill to amend Title 5, United States Code, to require that the Office of Personnel Management submit an annual report to Congress relating to the use of official time by Federal employees.* This bill would increase transparency on the issues worked on by federal employees. It passed the House and was received in the Senate, referred to the Senate Committee on Homeland Security and Governmental Affairs, and placed on the Senate Legislative Calendar.

- *H.R. 71, the Taxpayers Right-to-Know Act* - this bill would require all federal programmes approved by Congress with an annual budget authority of more than $1 million to disclose expenses, performance of programmes, and areas of duplication. The bill passed the House and was received in the Senate, where it was referred to the Committee on Homeland Security and Governmental Affairs.

- *S. (Senate)* 3357*, Anti-Corruption and Public Integrity Act* - this bill would ban individual stock ownership by members of Congress while in office. It was introduced in the Senate and referred to the Committee on Finance.

25. GRECO takes into account the information provided by the authorities. In the Evaluation Report, it was noted that actual conflicts of interest in Congress require immediate action for their removal but there is no general requirement upon members of Congress to report conflicts as they appear (paragraph 63). The Report therefore concluded "that situations which are not foreseen in the current periodic and annual reporting requirements (even if rare) where the Member has a material or personal interest, for example, in a matter being discussed or voted and where the conflict remains, the member should disclose the situation on an ad hoc basis." It was against this background, that the current recommendation was adopted.

26. In addition, the authorities have referred to measures taken to demonstrate the use of existing possibilities to disclose conflicts of interest as they appear. In this context, the House Ethics Committee has issued a public report on 1 August 2017 regarding conflict of interest issues, in which the Committee notes the benefits of ad hoc disclosures. Moreover, the Senate Ethics Committee is preparing a letter to its members on the existing mechanisms and procedures for formal disclosures through the financial disclosure process, and, in addition, recommending that senators consider employing ad hoc disclosures when and where appropriate. Other measures referred to imply greater transparency through various forms of financial disclosures; however, these proposals for new legislation did not advance under the Congressional Session, which ended in January 2019. Moreover, the authorities have not identified any requirement to report a conflict of interest as it appears.

27. GRECO interprets the situation in the United States as follows. In addition to the structural and periodic disclosure obligations under statute, there is no statutory requirement on members of Congress to report conflicts of interest as they appear (ad hoc). That said, there are no rules prohibiting them from doing so either. The two Ethics Committees (Senate and House) have highlighted the possibility to use such disclosures and even advocate for them. This goes in the direction of the recommendation, which simply calls for the introduction of such disclosures and does not specify that they need to be based on statutes. However, it would appear that the measures taken are just of an encouraging and informative nature towards the

benefits of ad hoc disclosures rather than imposing an obligation to disclose, and are still in progress.

28. GRECO welcomes the progress made towards embedding a culture of ad hoc disclosures, but is of the view that – for the recommendation to be fully implemented – the disclosure should be based on a more formal requirement.

29. GRECO concludes that recommendation iii has been partly implemented.

Recommendation iv.

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

31. The authorities report that they considered the revolving door question in three ways. First, H.R. (House of Representatives) 1 (See US reply to recommendation i) strengthens ethics rules for all three branches of government. For example, the bill strengthens restrictions on certain executive branch employees who seek to enter the private sector. The bill also forbids Members of Congress from serving on the board of directors of any for-profit entity. Preventing Members of Congress from sitting on the boards of public companies will discourage Members from forming relationships with those companies. It also will make it more difficult for Members to become entangled with those companies.

32. Second, the new House of Representatives—which began service in January of 2019—strengthened the ethics rules contained in its Code of Official Conduct. Adopting this revised code required a vote of the entire House. The code (along with all of the Rules of the House of Representatives) governs the conduct and operations of the House. Under the revised code, House Members, employees, and others are prohibited from "serv[ing] as an officer or director of any public company."

33. Third, in 2017 and 2018, members of both the House and Senate introduced several bills aimed at increasing the efficacy of the current regime of Congress' rules relating to "revolving doors" such as those concerning House Members' possibilities to initiate employment negotiations to become lobbyists after leaving Congress and the quarantine periods applying to former Members of Congress when carrying out lobbying activities with representatives of the Congress. These include:

- H.R. (House of Representatives) 346, the Congressional Integrity Act - this bill would both impose a five year lobbying ban on Senators and House Members, and broaden the term 'lobbyist' to include an individual who spends less than 20% of the time working for a client on lobbying activities, if that individual is a former Member of Congress. The bill has been introduced in the House.

- H.R. 383, the Stop the Revolving Door in Washington Act - this bill would impose a five year lobbying ban on Senators and House Members and increase the post-employment lobbying restrictions on elected officers and certain senior legislative branch employees from one to two years. It was introduced in the House, referred to the House Committee on the Judiciary, and then to the Subcommittee on the Constitution and Civil Justice.

- H.R. 3504, the Public Service Integrity Act - this bill would impose a five year lobbying ban on Senators and House Members. It was introduced in the House and referred to the Subcommittee on the Constitution and Civil Justice.

- H.R. 5289, the Restoring Integrity in our Elected Officials Act - this bill would impose a lifetime lobbying ban on Senators and House Members. It was also introduced in the House and referred to the Subcommittee on the Constitution and Civil Justice.

- S. (Senate) 1189, the Close the Revolving Door Act - this bill would also impose a lifetime lobbying ban on Senators and House Members; a six year ban for officers and employees of the leadership branch; and a six year ban on registered lobbyists or agents of a foreign principal being hired by a Member of Congress or a congressional committee with whom they have had a substantial lobbying contact. It was introduced in the Senate and referred to the Committee on Homeland Security and Governmental Affairs.

- S. 3357, Anti-Corruption and Public Integrity Act - this bill would impose a lifetime ban on Presidents, Vice Presidents, Senate and House Members, federal judges and Cabinet Secretaries, and multiyear bans on all other federal employees, from lobbying their former office, department, House of Congress, or agency after they leave government service until the end of the Presidential Administration, but for at least two years, and at least six years for corporate lobbyists. It was introduced in the Senate and referred to the Committee on Finance.

34. GRECO takes note of the initiatives referred to by the authorities, in particular the Bill H.R. 1, which has passed the House of Representatives, the revised Code of Official Conduct of House Members and the list of legislative initiatives by individual Members. As far as the Bill H.R. 1 is concerned, GRECO notes that it, inter alia, aims at preventing Members from having certain side activities while in Office. The revised Code of Official Ethics prohibits Members, while in Office, from serving in other functions. The other listed legislative initiatives did not advance during the previous Congressional Session. To sum up, the US authorities have referred to multiple legislative initiatives by individual Members with links to "revolving doors" after leaving Congress, but these initiatives have not been subject to proper considerations and, moreover, they did not advance during the Congressional Session, which ended in January 2019. That said, the Bill H.R. 1 has been subject to proper considerations in various committees, and passed the House of Representatives on 8 March 2019, but the referred texts do not appear to be addressing the specific issue of employment after Members have terminated their office and the same applies to the revised Code of Official Ethics.

35. GRECO concludes that recommendation iv has not been implemented.

Recommendation v.

36. GRECO *recommended that additional guidance and training materials for Members of Congress on how the current restrictions applicable to their interactions with lobbyists and other third parties seeking to influence the congressional process, be included in the training of Members of Congress.*

37. The authorities of the United States report that the House and Senate Ethics Committees provide regular ethics training to Members, Senators, and employees. In the Senate, that ethics training (for new Senators) addresses, among other things, Gifts, Bribery/Gratuity, Anti-Solicitation, Attendance at Events, Travel, Conflicts of Interest, and Interactions with Outside Entities. Rules regarding interactions with lobbyists and third parties are discussed throughout the training. The Senate training was updated in November 2018 and February 2019. Similarly, House Members are required to receive annual ethics training. That training was updated in June 2018

and January 2019 and includes information about the rules related to interacting with lobbyists and third parties.

38. GRECO is pleased that both Ethics Committees offer substantive and updated training regarding a broad range of issues, including those implicating lobbyists and third parties.

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

Recommendation vi.

40. GRECO *recommended that updated information on pertinent case-law concerning the "Speech or Debate Clause" be provided on a periodic basis.*

41. The authorities report that on 1 December 2017, the Congressional Research Service (CRS), a legislative branch agency within the Library of Congress which provides policy and legal analysis to committees and Members of both the House and Senate, issued a report entitled "Understanding the Speech or Debate Clause." The report lays out the historical origins and intentions of the Speech or Debate Clause of the United States Constitution and provides an update on how courts have interpreted the clause. The report is available to the public online[2]. The CRS plans to update this report for each Congress in order to ensure any pertinent case law is effectively captured in the report.

42. GRECO recalls that the "Speech and Debate Clause" provides members of Congress with freedom of speech protection, which is crucial in any democracy. That said, there have been allegations that the Clause has been misused as a protection against criminal investigations not related to freedom of speech. There is a rich but complex case law that explains the limits of the Clause and it is to be welcomed that the Congressional Research Service has updated its document (December 2017) which is aimed at informing Members of Congress of the objectives, reach, limits and repercussions of the Speech or Debate Clause, based on the current case law. GRECO acknowledges the update carried out and notes that the CRS also plans to continue updating this document on a regular basis (i.e. for each Congress), in accordance with the recommendation.

43. GRECO concludes that recommendation vi has been implemented satisfactorily.

Recommendation vii.

44. *GRECO recommended that further measures to reinforce the efficiency of the* supervision *and enforcement of the internal rules of Congress be considered by the appropriate bodies of Congress.*

45. The authorities of the United States submit that both Houses of Congress unanimously passed the Congressional Accountability Act of 1995 Reform Act. The President signed the Act into law on December 21, 2018. The Act revises judicial and administrative procedures for employees who allege that their Congressional employers violated their rights under the Congressional Accountability Act of 1995. The Act also gives greater protections to employees who allege sexual harassment. The Senator who sponsored the Act stated that it would "protect victims of harassment" and that "getting rid of a lot of the Byzantine way these cases were being handled [would] be better for victims."

[2] https://fas.org/sgp/crs/misc/R45043.pdf

46. The authorities also report that the recently-adopted Code of Official Conduct for the 116th Congress added new protections for Congressional employees. Specifically, the new code bars discrimination on the basis of sexual orientation or gender identity; bars sexual relationships between Members of Congress and employees of the committees on which the legislators serve; and creates an Office of the Whistleblower Ombudsman to provide whistleblower training and promulgate best practices for the intake of whistleblowers.

47. The authorities also report that Congress took steps to ensure that Members of Congress are aware of their ethical responsibilities. As mentioned previously, the new code of conduct requires all House Members to receive ethics training on an annual basis. Additionally, both the Senate and the House added new anti-harassment training requirements for all Members, officers, and employees.

48. The authorities also report that in 2017 and 2018, Members of Congress introduced bills that would increase and reinforce the efficiency of supervision of the House ethics rules, such as:

- H.R. (House of Representatives) 1388, the Clean Legislating and Ethical Accountability Now Act - this bill would establish the Office of Congressional Ethics into permanent law. It has been introduced and referred to the Committee on House Administration, and the Committee on Rules.

- H.R. 2678, Ensuring Trust and Honorability In Congressional Standards Act of 2018 - this bill would require all Members, officers and employees of the House of Representatives to participate in ongoing ethics training and awareness programmes. It has been introduced and referred to the Committee on House Administration.

- S. (Senate) 3357, Anti-Corruption and Public Integrity Act - this bill would expand and empower the Office of Congressional Ethics. It was introduced in the Senate and referred to the Committee on Finance.

49. GRECO takes note of the information provided. It recalls that this recommendation is largely about reinforcing corruption prevention in respect of members of Congress through the existing mechanisms for supervision, investigation and enforcement of the ethical rules of Congress, i.e. the Ethics Committee of the Senate, the Ethics Committee of the House of Representatives and the Office of Congressional Ethics. As detailed in the Evaluation Report (paragraphs 111-123), these bodies/mechanisms were described and their respective strengths and weaknesses outlined and the recommendation is to be seen as a means for improving the system in this respect. The Congressional Accountability Act of 1995 Reform Act, as referred to by the US authorities, signed into law on 21 December 2018, revises judicial and administrative procedures for employees who allege that their Congressional employers violated their rights under the Congressional Accountability Act of 1995. Furthermore, the new code bars discrimination on the basis of sexual orientation or gender identity; bars sexual relationships between Members of Congress and employees of the committees on which the legislators serve; and creates an Office of the Whistleblower Ombudsman to provide whistleblower training and promulgate best practices for the intake of whistleblowers. These measures are clearly to be welcome; however, GRECO notes that they appear in the first place to increase the protection of Congress staff rights vis-à-vis Members, which was not the core of the current recommendation, which primarily is about increasing the functions (e.g. independence and powers) of the existing monitoring mechanisms, the Ethics Committees in the light of the Office of Congressional Ethics (OCE).

50. GRECO concludes that recommendation vii has not been implemented.

Corruption prevention in respect of judges

Recommendation viii.

51. GRECO *recommended that the judiciary consider how the system of re-appointments of magistrate judges and bankruptcy judges can ensure judicial independence.*

52. The authorities of the United States submit that in response to this recommendation, the Administrative Office of the Courts undertook an informal survey of both current and retired bankruptcy judges and magistrate judges. Specifically, during spring and summer 2017, the leadership of the Federal Magistrate Judges Association and the National Conference of Bankruptcy Judges asked its members for their opinions on whether independence or fairness concerns may be discouraging some judges from seeking re-appointment. The opinions of magistrate judges in particular were solicited both in person at judicial education conferences and in writing through the newsletter of the Magistrate Judges Association, which reaches over 800 active and retired magistrate judges. Based on these inquiries, no evidence was found, other than a few anecdotal cases that are unaccompanied by any specifics, of judges deciding against applying for reappointment because of discouraging or negative reviews. Moreover, based on comments from the judges, it appears that they perceive their position as the functional equivalent of tenure, due to the length of the appointment itself, the timing of the appointment in terms of their careers, and because of the fairness of the reappointment process.

53. The authorities also refer to data that, in 2016, there had been 454 magistrate judge reappointments in the previous 10 years and during that same period, only four judges who sought reappointment were not reappointed (already contained in the Evaluation Report). For the period 2016-17, 63 additional magistrate judges were reappointed. During that period, there were no magistrate judges who expressed a willingness to be reappointed who were not in fact reappointed. As a result of the data gathered in response to the recommendation, the Judiciary has decided not to seek changes to the system of reappointment for the time being.

54. GRECO recalls the reasons for this recommendation, which were stated in the Evaluation Report: While district court judges (and other so called Article III judges) are protected by the Constitution in terms of a life tenure, magistrate judges are appointed for an eight-year term and bankruptcy judges for a 14-year term after which period they have to be reappointed to maintain their position. Even if it is the case that most often the judges who seek re-appointment are almost always reappointed (in the past ten years, only four judges who sought reappointment were not reappointed), there is no information showing how many did not seek re-appointment, e.g. following bad appraisals or advice not to apply etc.

55. GRECO notes that the measures taken by the judicial authorities so far consist of an "informal survey" involving current and retired bankruptcy judges carried out by the Federal Magistrate Judges Association and the National Conference of Bankruptcy Judges. The surveys referred to appear to have no formal recognition and the methods used, number of judges involved, type of questions and the results presented are vaguely described.

56. Above all, GRECO notes that the surveys have not focused on those judges that did not seek re-appointment following the end of their term, which would be of particular interest in this context, as already pointed out in the Evaluation Report. It would also remain unclear, which official judicial institution has considered this matter, when and to what extent. GRECO therefore accepts that a preliminary assessment has taken place, but on the basis of the information provided, and in the absence of

further documentation, is of the view that the "informal surveys" do not appear to be sufficiently broad in scope (e.g. no information on those judges that did not seek re-appointment) and do not constitute a full consideration of how the system of re-appointments can ensure judicial independence. It follows that the recommendation has been considered to some extent, but more is required for full compliance.

57. GRECO concludes that recommendation viii has been partly implemented.

Recommendation ix.

58. *GRECO recommended that the Supreme Court justices be invited to adopt - or declare that they regard themselves as being bound by - the Code of Conduct for United States Judges.*

59. The authorities indicate that the Evaluation Report (including this recommendation) was provided to the Supreme Court in January 2017 when it was circulated within the judicial branch. The Report was also submitted to the Counsellor to the Chief Justice of the United States (President of the Supreme Court), who at the time affirmed that the Court has an on-going programme on judicial ethics.

60. The authorities add that in the 2017 Year-End Report on the Federal Judiciary, the Chief Justice announced that the judiciary will in 2018 undertake an evaluation of "whether its standards of conduct and its procedures for investigating and correcting inappropriate behaviour are adequate." In June 2018, the Federal Judiciary Workplace Conduct Working Group issued its Report, making recommendations in three areas to achieve the goal of an exemplary workplace throughout the judicial branch. First, the Report calls for revision of the judiciary's codes of conduct and other published ethics guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behaviour. Second, it recommends improved procedures for identifying and correcting misconduct, strengthening existing processes, and adding less formal mechanisms for employees to seek advice and register complaints. Third, it recommends the judiciary supplement its educational and training programmes to raise awareness of conduct issues, prevent discrimination and harassment, and promote civility throughout the judicial branch.

61. GRECO notes that the Supreme Court, through the Counsellor to the Chief Justice, has been informed of the Evaluation Report. Moreover, the US authorities have submitted that Supreme Court Justice Elena Kagan has testified before Congress that Chief Justice John Roberts is considering adopting a code of conduct. GRECO welcomes this development and is satisfied that this recommendation and the reasons for it, as explained in the Evaluation Report, are available to the members of the Supreme Court. GRECO furthermore notes that the submission of the Evaluation Report was timely as a reflection process on judicial codes of conduct was initiated by the Chief Justice at this time.

62. GRECO maintains its view that a judicial code of ethics should in principle apply in respect of all judges of a given judiciary at all court levels, including the highest courts, in respect of their judicial functions. GRECO is satisfied that this message has been submitted to the Supreme Court of the United States and that this Court has been invited to adopt such an approach, as required by the recommendation. GRECO's clear hope is that Supreme Court justices will be bound by a code of ethics, as has been signalled to Congress. The adoption of such an approach is, however, up to the Court itself to do.

63. GRECO concludes that recommendation ix has been dealt with in a satisfactory manner.

Recommendation x.

64. GRECO *recommended that the opportunities for ethics training for court of appeals judges be increased.*

65. The authorities report that the judiciary offers numerous ethics education programmes that are designed to provide both initial and continuing judicial ethics education for all federal judges, including court of appeals judges. These offers have been increased in recent years, and the Federal Judicial Center (FJC) continuously reviews and updates its education programmes to meet judges' needs. Court of appeals judges come from varying backgrounds, and many have already attended both basic and continuing ethics education sessions when they are appointed to a court of appeals. Those who have not served as federal district judges are invited to the FJC initial orientation programmes for Article III judges, known as the "Phase I" programme for new district judges, which include extensive ethics education presented by ethics counsel and members of the Judicial Conference Committee on Codes of Conduct.

66. In addition, there is an Orientation Seminar for new court of appeal judges that overlaps with the week-long "Phase II" programme for new district court judges, typically held in Washington, DC, at the FJC. Appellate judges do not attend the entire Phase II programme, but they do attend the block of judicial ethics instruction that is offered as part of the Phase II programme. The Phase II session is designed to provide all Article III judges with advanced ethics education that includes a focus on the most recent ethics opinions from the Committee on Codes of Conduct, as well as "hot topics" in judicial ethics.

67. Following up on the recommendation, the authorities report several programmes of special interest. On 2 and 3 November 2017, the FJC held its triennial national symposium for appellate judges, which included ethics-related programmes (113 appellate judges in attendance). On 16-18 April 2018, the FJC offered a new program for mid-career and experienced appellate judges. This seminar, conducted at the University of Pennsylvania Law School, augmented the array of ethics-related education opportunities already provided for appellate judges (four mentor appellate judges and twelve mid-career and experienced appellate judges). Also, the FJC offers a wide range of "special focus" programmes that offer ethics-related instruction. In 2016 and 2017, a total of ten appellate judges attended Appellate Judges Education Institute (AJEI) Summits, including sessions on judicial ethics. In 2018, the FJC partnered with the Institute of Judicial Administration at New York University School of Law to provide a seminar for new federal and state appellate judges including a session on "Issues in Judicial Ethics and Judicial Independence." Continuing ethics education for court of appeals judges is also offered in programmes that are jointly sponsored by the courts and the FJC. These include annual circuit judicial conferences, which are well attended by court of appeal judges, and periodic circuit-wide workshops in which both district and circuit judges participate.

68. Finally, the FJC offers monthly Court Web broadcasts, available to appellate judges, on topics that include ethics, to include "What Every Law Clerk Needs to Know About Ethics When Starting a Clerkship" (2017), "What You Do Not Know About Harassment Could Hurt You!" (2017), "Ethics After 5 PM: Understanding How the Judicial Codes of Conduct Apply to Your Personal Life" (2017), and "The Ethics of Social Media and Politics" (2016). In 2018/2019, the FJC's ethics education programmes place special emphasis on workplace conduct issues, including ethics programmes for all judges to raise awareness of judicial conduct issues and prevent workplace discrimination and harassment.

69. GRECO is pleased to take note of the comprehensive information provided on a large number of educational and training possibilities in respect of judicial ethics that focus particularly on court of appeals judges. This information complements the limited information available in the Evaluation Report in this respect. It also demonstrates that the United States, through various training institutes, has in place a broad range of ethics training available for court of appeals judges, and has even increased/expanded such training, in conformity with this recommendation.

70. GRECO concludes that recommendation x has been implemented satisfactorily.

Corruption prevention in respect of prosecutors

Recommendation xi.

71. *GRECO recommended that existing checks and balances within the decision making process of federal prosecutors' offices be complemented with further appropriate measures, including that hierarchical instructions and decisions (e.g. not to prosecute in a case or moving a prosecutor from a case) are justified in writing in appropriate cases.*

72. The authorities refer to the United States Attorneys' Manual (USAM) and Principles of Federal Prosecution (Principles), which are to promote consistent and reasoned exercise of prosecutorial discretion across the country. Since the adoption of the Evaluation Report, the USAM and Principles have been amended. They now include a number of provisions that are to ensure that important prosecutorial decisions are justified in writing in appropriate cases, as recommended by GRECO. The following are examples of updated guidance:

- 9-2.020 - Declining Prosecution (updated in June 2018): The United States Attorney is authorised to decline prosecution in any case referred directly to him/her by an "agency" unless a statute provides otherwise. See USAM 9-2.111. Whenever a case is closed without prosecution, the United States Attorney's files should reflect the action taken and the reason for it.

- 9-2.050 - Dismissal of Indictments and Information: The United States Attorney may move for leave of court to dismiss an indictment or information, in whole or part. In every case of a dismissal, the file should reflect the reasons for the dismissal. See also Principles of Federal Prosecution, USAM 9-27.000.

- 9-27.130 – Implementation (updated in February 2018): Each United States Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure: 1) that prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and 2) that serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions or other measures, when warranted, as are deemed appropriate.

- 9-27.270 - Records of Prosecutions Declined (updated in February 2018): Whenever an attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are also reflected in the office files to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the

understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives the authorities' attention.

- 9-27.300 - Selecting Charges - Charging Most Serious Offenses (updated in February 2018): Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offences. By definition, the most serious offences are those that carry the most substantial sentence, including mandatory minimum sentences.

- 9-27.410 - Plea Agreements – Cooperation (updated in February 2018): The Sentencing Guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. - A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for a prosecutor to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the existence of the departure and thereby afford the court an opportunity to reject it. - Every United States Attorney or Department of Justice Section Chief (or Assistant Chief) or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading in the official file.

- 9-27.450 - Records of Plea Agreements (updated in February 2018): All negotiated plea agreements to felonies or to misdemeanours negotiated from felonies shall be in writing and filed with the court.

- 9-27.640 - Agreements Requiring Assistant Attorney General Approval (updated in February 2018): The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the appropriate Assistant Attorney General in certain situations.

- 9-27.650 - Records of Non-Prosecution Agreements (updated in February 2018): In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialled by the person with whom the agreement is made or his/her attorney.

73. GRECO is pleased that the current recommendation has been followed up thoroughly by the US prosecution authorities. It takes note of a long list of amendments and explanations added to the United States Attorneys' Manual (USAM) and Principles of Federal Prosecution, some of which are reflected above. It takes the view that the amendments made clarify that procedural decisions and instructions given within the hierarchical structure of the Attorney General's Office or by individual prosecutors on issues such as declining a case or deciding not to prosecute etc. are to be accompanied by reasoned decisions and written justifications in the file. This is a clear achievement.

74. GRECO concludes that recommendation xi has been implemented satisfactorily.

Recommendation xii.

75. *GRECO recommended i) that further appropriate measures be taken to ensure that intentional or reckless professional misconduct by federal prosecutors be investigated and sanctioned within a framework of transparent proceedings, including in appropriate cases by bodies with adequate autonomy and independence; and ii) that the public transparency of these proceedings involving federal prosecutors be*

enhanced, with due regard to the right of privacy and effective defence of the federal prosecutors concerned.

76. The authorities state that, on 15 January 2019, the House of Representatives passed by voice vote the Inspector General Access Act of 2019. This legislation would provide the Inspector General with the authority to investigate certain claims of prosecutorial misconduct. The same bill passed the House last November by voice vote. It currently is awaiting action in the Senate Judiciary Committee.

77. The authorities also emphasise that, although the Evaluation Report suggests that the Office of the Inspector General (OIG) has greater autonomy and transparency in its "disciplinary proceedings" than the Office of Professional Responsibility (OPR) does, the OIG and OPR are similar in that they only carry out misconduct investigations within their jurisdiction and refer disciplinary proceedings to others. If the OIG finds misconduct, it refers those findings to the appropriate office within the Department of Justice to impose discipline. Similarly, the OPR's findings of professional misconduct are referred to the Professional Misconduct Review Unit, which determines whether and what discipline is warranted.

78. The authorities state that the OPR endeavours to be as transparent in publicising its findings as federal law allows. To that end, it summarises its investigations and inquiries in its Annual Report, which is published on-line and there are links to all OPR Annual Reports from 2005 – 2017. Except for privacy details, the OPR's summaries provide information and statistics about its investigations, inquiries, and operations. In addition, OPR publishes reports of investigation in matters in which the public interest is strong. Additionally, to improve the transparency of its operations, OPR recently created a new policy to make summaries of reports of investigation or redacted copies of reports of investigation publicly available on OPR's website upon conclusion of the appellate process and with the approval of the affected stakeholders.

79. The authorities also state that the OIG's investigative summaries and the OPR's Annual Report summaries, both of which are posted online and available to the public, are similar in nature. As the Evaluation Report notes, the OIG generally redacts from the public summaries the names of the subjects of its investigations and other Privacy Act-protected information. Similarly, the OPR's Annual Report summaries redact identifying information about subjects and witnesses, as well as other Privacy Act-protected information. Where the public interest outweighs individual privacy interests, both the OPR and the OIG publicise full and unredacted reports of investigation. Thus, the OPR conducts and reports on misconduct investigations with the same degree of transparency as does the OIG. Although the Privacy Act precludes the OPR's professional misconduct investigations and any ensuing disciplinary process from being conducted with any greater transparency than is currently afforded, that is also true of the OIG, which, like the OPR, conducts and reports on its misconduct investigations in compliance with the Privacy Act. In sum, it is not a lack of autonomy or independence that precludes the OPR from making more of its findings public, but the necessary constraints of the Privacy Act, which apply to both the OPR and the OIG.

80. The authorities also wish to stress that the OPR's Annual Report publicly explains why a large number of complaints received by the OPR do not warrant investigation. For example, in 2017, the OPR received 636 complaints, of which 33%, were from incarcerated individuals. Many of those 636 complaints related to matters that do not fall within the OPR's jurisdiction. Others were referred to the other agencies: 72 of the complaints alleged professional misconduct and warranted further review. The remaining matters did not warrant further inquiry or investigation for various reasons, such as they were under consideration by a court or had been rejected by

a court or were frivolous etc. In sum, the OPR currently provides an annual accounting of the number of complaints it receives, how many are opened as inquiries or investigations, and why the remaining complaints do not warrant an OPR inquiry or investigation. In addition, the OPR is currently developing improvements to its website and an online complaint submission form, which will be designed to better inform the public of what matters are appropriate for the OPR's review and eliminate some of the complaints that do not fall within the OPR's jurisdiction.

81. GRECO takes note of the clarifications submitted. It does not question the information provided, but its objective in respect of the current recommendation is not to compare the OIG with the OPR, but to assess to what extent the system as it was described in the Evaluation Report, has improved in a direction required by the recommendation.

82. The first part of this recommendation calls for measures to ensure that professional misconduct by federal prosecutors be subject to transparent proceedings, and carried out by bodies with adequate autonomy and independence. GRECO is pleased to note the Inspector General Access Act of 2019, which has passed the House of Representatives. Although the Act has not passed both Houses of Congress, its progress to date is encouraging. It was noted in the Evaluation Report that the alleged lack of sufficient transparency of the OPR must be taken seriously. The OPR needed to increase its transparency (paragraph 303) and that OPR is an internal body of the Department of Justice (DOJ) and is thus not independent from the Attorney General, while OIG is a statutory independent entity (paragraph 299). Nothing new has been reported in this respect concerning the OPR.

83. In the second part of the recommendation more (general) transparency is called for and, in this context, GRECO notes that the OPR is reportedly improving its on-line information to better inform about its mandate. OPR's recently-adopted policy of making summaries of reports of investigation or redacted copies of reports of investigation publicly available on OPR's website (subject to approval of the relevant stakeholders) is also a step in the right direction. More needs to be done, however, to implement this recommendation fully.

84. GRECO concludes that recommendation xii has been partly implemented.

III. CONCLUSIONS

85. **In view of the foregoing, GRECO concludes that the United States have implemented satisfactorily or dealt with in a satisfactory manner six of the twelve recommendations contained in the Fourth Round Evaluation Report.** Of the remaining recommendations, four have been partly implemented and two have not been implemented.

86. More specifically, recommendations ii, v, vi, x and xi have been implemented satisfactorily and recommendation ix has been dealt with in a satisfactory manner, recommendations i, iii, viii and xii have been partly implemented and recommendations iv and vii have not been implemented.

87. As regards members of Congress, some consideration has been given to increase the transparency of the legislative process. Guidance material and training tools relating to the Codes of Ethics of the Senate and the House of Representatives have been updated and so called ad hoc disclosures in situations of conflicts of interest are being promoted by the respective Ethics Committees. Apart from that, further measures are expected relating to "revolving doors", interaction with lobbyists and the supervision of Congress' internal rules. The introduction of a few bills in Congress is

not sufficient to properly consider measures of importance for the legislative process in Congress.

88. Concerning judges, it is noted that more efforts are required in order to properly consider the system of re-appointments of magistrate and bankruptcy judges in relation to judicial independence. It is to be welcome that the Supreme Court has been invited to adopt the Code of Conduct for US Judges and that this Court is engaged in a reflection process relating to judicial codes of ethics. Ethics training of court of appeals judges has been considerably enhanced.

89. A very positive development in respect of prosecutors is that the United States Attorneys' Manual (USAM) has been amended with a number of provisions ensuring that prosecutors decisions (such as to decline prosecution, dismissal of indictments etc.) are to be justified in writing, as recommended. Legislation is underway to alter the way certain claims of prosecutorial misconduct are investigated. OPR also has taken some actions to improve the transparency of procedures against prosecutors alleged of various forms of misconduct.

90. In view of the above, GRECO notes that further material progress is necessary to demonstrate an acceptable level of compliance with the recommendations within the next 18 months. GRECO invites the Head of delegation of the United States to submit additional information regarding the implementation of recommendations i, iii, iv, vii, viii and xii by 30 September 2020.

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