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Third Evaluation Round

Addendum to the Second Compliance Report on the United States of America

"Incriminations (ETS 173 and 191, GPC 2)"

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"Transparency of Party Funding"

Adopted by GRECO
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GRECO Secretariat
Council of Europe
www.coe.int/greco

F-67075 Strasbourg Cedex
☎ +33 3 88 41 20 00
Fax +33 3 88 41 39 55

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

I. INTRODUCTION

1. The Addendum to the Second Compliance Report assesses the measures taken by the authorities of the United States of America since the adoption of the Compliance Report in respect of the recommendations issued in the Third Round Evaluation Report on the United States, covering two distinct themes, namely:

   - 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).

2. The Third Round Evaluation Report was adopted at GRECO's 53rd Plenary Meeting (9 December 2011) and made public on 26 January 2012, following authorisation by the United States (Greco Eval III Rep (2011) 2E, Theme I and Theme II). Following reporting on the situation by the U.S. authorities, GRECO adopted the Compliance Report at its 63rd Plenary meeting (28 March 2014) (Greco RC-III (2014) 6E) and the Second Compliance Report (Greco RC-III (2016) 6) at its 71st Plenary Meeting (18 March 2016).

3. As required by GRECO's Rules of Procedure, the authorities of the USA submitted a third situation report with additional information regarding the implementation of recommendations that were partly implemented or not implemented, according to the Second Compliance Report. This information (received on 10 February 2017) served as the basis for the Addendum to the Second Compliance Report.

4. GRECO had selected Ireland and Lithuania to appoint rapporteurs for the compliance procedure. The Rapporteur for the current report was Mr John GARRY (Ireland) assisted by GRECO's Secretariat in drawing up the current Report.

II. ANALYSIS

5. It is recalled that all 3 recommendations addressed to the United States in respect of Theme II had been dealt with in a satisfactory manner at the time of the adoption of the Compliance Report. The analysis of the current report is thus limited to Theme I.

Theme I: Incriminations

6. It is recalled that GRECO in its Evaluation Report addressed 6 recommendations to the United States in respect of Theme I. Recommendation vi was considered dealt with in a satisfactory manner in the Compliance Report. The conclusions remained the same in the Second Compliance Report, and the pending recommendations are dealt with below.

Recommendation i.

7. *GRECO recommended 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).*

8. It is recalled that this recommendation had not been implemented as concluded in the Compliance Report and the Second Compliance report, since no tangible steps had been taken towards ratification of the Criminal Law Convention on Corruption nor to signature or ratification of the Additional Protocol. The position of the U.S. authorities is detailed in the previous compliance reports.

9. The authorities now *repeat* that the United States has still not ratified these instruments. As noted in prior compliance reports, the U.S. maintains the concern that constitutional limitations on the federal government to implement legislation may impair the U.S. ability to comply with the precise text of the Convention and its Additional Protocol.

10. GRECO takes note of the explanations given by the U.S. authorities for not complying with the recommendation. It repeats the regret stated in previous compliance reports that no progress has been reported in order to ratify the Criminal Law Convention on Corruption (which was signed in 2000) and the Additional Protocol.

11. GRECO concludes that recommendation i remains not implemented.

Recommendation ii.

12. *GRECO recommended 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.*

13. It is recalled that this recommendation was partly implemented in the Compliance Report; more particularly, GRECO found that the United States had complied with part iii of this recommendation, but had only partially implemented parts i and ii. GRECO noted in detail the position of the U.S. authorities concerning the two pending parts of this recommendation in the Second Compliance Report and it also provided a detailed reasoning why this recommendation was not fully complied with; in essence GRECO accepted that the U.S. legal system provides a broad variety of possibilities for prosecuting offenders for alternative offences relating to those enumerated in the recommendation, but that there was not full compliance between the legislation/practice and the requirements of the Criminal Law Convention in a strict legal sense.

14. The authorities maintain their position as it was detailed in previous reports, underlining that the United States has not limited its enforcement actions to commercial activities and that both active and passive bribery offences are being prosecuted. As they did previously, the authorities cite the case of *United States v. Ashe*.

15. GRECO notes that the statutory situation as well as the case-law submitted by the U.S. authorities is the same now as it was at the adoption of the previous reports. GRECO made a detailed analysis in the Second Compliance Report, which in essence was that the business nexus in the Foreign Corrupt Practices Act (FCPA) - even when interpreted broadly - does not fully rule out the business requirement; this is not in full compliance with the Criminal Law

Convention. Furthermore, GRECO, although accepting that according to practice there is a broad range of alternative provisions in the Travel Act, found some elements of this federal Act (i.e. the requirement of use of inter-state travel, wire or mail in connection with the offence) are limiting its scope as compared with the Criminal Law Convention. GRECO also noted that the type of offence reached by this Act - according to the extensive practice referred to - were fraud and money laundering, which may be closely related to corruption, although they are not corruption offences as such.

16. GRECO concludes that recommendation ii remains partly implemented.

Recommendation iii.

17. *GRECO recommended 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).*

18. It is recalled that this recommendation was partly implemented in the Compliance Report and in the Second Compliance Report. GRECO noted in detail the extensive case-law submitted by the U.S. authorities concerning the two pending parts of this recommendation in the Second Compliance Report and provided a detailed reasoning why this recommendation was not fully complied with.

19. The case-law referred to indicated that bribery in the private sector is subject to federal prosecutions through the use of a combination of provisions, such as the Travel Act, 18 U.S.C. § 1952, or mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346. GRECO acknowledged that the Travel Act - which can only be applied in this respect in combination with state legislation - had a broader coverage than at the time of adoption of the Evaluation Report, as bribery in the private sector had been criminalised in some more states (40 of the 50 states), since the adoption of the Evaluation Report. However, GRECO also noted that there may still be situations where the Travel Act cannot be applied, in which the United States instead may have to use other means, such as mail, wire or honest services fraud, 18 U.S.C. §§ 1341, 1343 and 1346, in order to prosecute instances relating to bribery, but as fraud cases and on the condition that U.S. mail or an inter-state wire has been used in furtherance of the offence , which - even if this notion is to be interpreted broadly - brings a certain limitation for the use of this offence as compared with the Criminal Law Convention.

20. The U.S. authorities now repeat the position already stated in the previous reports: that private sector bribery is constantly being prosecuted in the United States based upon money laundering, honest services fraud using the mails or wires, and the Travel Act, 18 U.S.C. § 1952. They refer to a case in which a company was alleged to have conspired to pay more than $300 000 in bribes to a bank to obtain over $12 million in electronic storage licensing contracts. The context was entirely within the private sector, and the charges, which were resolved in a non-prosecution agreement, focused on the Travel Act.

21. GRECO notes that the legislative situation remains unchanged and the extensive case-law submitted by the U.S. authorities goes in the same direction as the previous case law submitted by the authorities and dealt with in previous reports, namely that private sector bribery is constantly being prosecuted as a federal offence in the United States based upon money laundering, honest services fraud using mails or wires, and the Travel Act, 18 U.S.C. § 1952. GRECO has analysed the situation in detail in its previous reports and maintains its position that

there are certain requirements in this federal legislation that are more limiting than the elements of the Criminal Law Convention, referred to above as well as in previous reports. That said, case-law shows that this type of offence is regularly prosecuted in the United States.

22. GRECO concludes that recommendation iii remains partly implemented.

Recommendation iv.

23. *GRECO recommended 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).*

24. It is recalled that this recommendation was partly implemented in the Compliance Report as well as in the Second Compliance Report. GRECO accepted that U.S. federal law may be applied in various ways in order to cover a variety of situations which more or less resemble situations of trading in influence. GRECO had no doubt that several components of trading in influence might be covered by using alternative measures available under federal law, but it found that the applicable legislation in the United States in respect of the offence of trading in influence remained the same as it was at the time of the adoption of the Evaluation Report, namely that this offence was not criminalised *per se* under U.S. federal law. The authorities argued that, by using a mix of federal and state laws, it was possible to prosecute all offenders having participated in the particular scheme of trading in influence for bribery, fraud, false statement, conspiracy and conflict of interest and submitted extensive case-law to this end. GRECO said that it had no doubt about the U.S. determination and capabilities to deal with situations resembling trading in influence in the USA. However, it could not disregard that none of the provisions referred to standing alone - or even used in conjunction with other provisions - covers all the details required by Article 12 of the Criminal Law Convention; the provisions referred to were - to a large extent - geared towards other offences, such as fraud (when public officials are not involved) and indirect corruption, using intermediaries and to other circumstances involving the exertion of improper influence, conspiracy to corruption or the like but not to the particular offence of trading in influence as contained in the Criminal Law Convention. Moreover, GRECO found that some of the provisions referred to were subject to particular limitations, such as the use of mail or an inter-state wire in furtherance of the offence.

25. The authorities now reiterate their position as described in previous compliance reports. They add to the extensive practice already submitted that the U.S. prosecutes "trading in influence" following different theories, depending on the facts of the case. As noted previously, "trading in influence" cases break down into two categories: where a person who claims that he or she can trade in influence is telling the truth and where that person is lying. Where the claim of influence is true, the influence peddler can be prosecuted as a conspirator to the bribery or kickback scheme. (*United States v. O'Keefe*, 252 F.R.D. 26 (D.D.C. 2008); (*United States v. McNair*, 605 F.3d 1152, 1187 (11th Cir. 2010). Where the representations of the influence peddler are false, the peddler can be prosecuted for defrauding his or her client, because in such an instance, the lobbyist will have not provided actual services to the client (*United States v. Scanlon*, 753 F. Supp. 2d 23, 24, 28 (D.D.C. 2010) aff'd, 666 F.3d 796 (D.C. Cir. 2012); *United States v. D'Amiano,* as already put forward in earlier submissions to GRECO. In addition, they submit that the U.S. has recently initiated charges in the case *United States v. Bahn*, (January 2017, SDNY), where the complaint includes wire fraud charges against a person, who claimed to have a relationship with a government official capable of benefiting two co-defendants, and the employer one of them. The peddler's claim was untrue; he peddled influence that he did not actual have.

That activity has been charged as wire fraud, citing the bribe payers as the victims of the intermediary's fraud. For their part, the bribe-payers were charged with violations of the Foreign Corrupt Practices Act, Conspiracy, and Money Laundering, which shows that the U.S. pursues prosecutions for influence peddling where the claim of the peddler is either true or false.

26. GRECO, well aware of its reasoning in previous reports, takes note of the additional information provided by the authorities. Again, GRECO acknowledges that situations of trading in influence and similar offences might be covered by the use of alternative federal provisions. However, the legislative basis is the same as before and the offence of trading in influence is not criminalised as such under U.S. federal law. Instead, the various components may be criminalised under a combination of a variety of provisions under various offences, such as fraud, indirect corruption using intermediaries etc. GRECO does not contest the possibilities to prosecute influence peddling, whether the claim of the peddler is either true or false as put forward by the authorities and that trading in influence situations are being prosecuted in the United States. That said, it maintains its position that the provisions referred to also contain limitations, such as the use of mail or an inter-state wire in furtherance of the offence, which is not in line with the requirements of Article 12 of the Criminal Law Convention.

27. GRECO concludes that recommendation iv remains partly implemented.

Recommendation v.

28. *GRECO recommended 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).*

29. It is recalled that this recommendation was partly implemented in the Compliance Report and in the Second Compliance Report. GRECO noted that the factual situation in respect of this recommendation remained largely the same as it was at the time of adoption of the Evaluation Report, i.e. domestic bribery of arbitrators was criminalised in the same way as bribery in the private sector. The scope for using the Travel Act in combination with state legislation was slightly expanded as some more states had criminalised private sector bribery than at the time of adoption of the Evaluation Report. As far as the application of honest services mail or wire fraud statutes is concerned, the reasoning under recommendation iii (private sector bribery) was equally relevant in respect of arbitrators. Bribery of foreign arbitrators could be prosecuted under the FCPA if the foreign arbitrator was to be considered a public official, but this Act did not criminalise passive bribery. Finally, the use of the Travel Act or the fraud statutes as alternatives to the FCPA, was not considered sufficient as these provisions are not in full compliance with the requirements of private sector bribery, nor with those foreseen in Articles 2-4 of the Additional Protocol to the Criminal Law Convention, because of the additional requirements to prove the use of inter-state travel or wire or mail.

30. The U.S. authorities have not submitted new information in respect of this recommendation.

31. GRECO concludes that recommendation v remains partly implemented.

III. CONCLUSIONS

32. In view of the above, GRECO concludes that the United States of America has dealt with in a satisfactory manner four of the nine recommendations contained in the Third Round Evaluation Report. Of the remaining recommendations, four have been partly implemented and one has not been implemented.

33. With respect to Theme I – Incriminations – recommendation vi has been dealt with in a satisfactory manner, recommendations ii, iii, iv and v remain partly implemented and recommendation i remains not implemented. With respect to Theme II – Transparency of Party Funding, all recommendations were dealt with in a satisfactory manner, as concluded in the Compliance Report.

34. GRECO notes that the substantial issues dealt with in the current report only concern Theme I, more precisely to what extent U.S. federal legislation, practice and measures taken comply with certain aspects of the Criminal Law Convention on Corruption and its Additional Protocol. Closely linked thereto is the recommendation to ratify these Instruments.

35. As far as ratifications are concerned, no progress has been achieved, which has been explained by the authorities as being the result of constitutional limitations.

36. No new federal legislation of relevance for the pending recommendations has been enacted since the adoption of the Evaluation Report. It is noted in this respect that the U.S. Constitution reserves significant powers to criminalise offences, including corruption, to the individual states (which are not covered by the current evaluation). It is also noted that the United States has referred to extensive federal case-law which complements the federal statutory legislation indicating that the compliance with the Convention and its Additional Protocol goes beyond the situation described in the Evaluation Report. Indeed, the case-law indicates that federal legislation - as applied - provides for a considerable degree of compliance in practice with the provisions at stake, even if it does not provide full compliance to the letter; this justifies the conclusion that a number of recommendations have been complied with partly. Moreover, the extensive practice put forward by the authorities also shows the high priority given in the United States to prosecuting corruption and corruption related offences in an effective way.

37. Nevertheless, the United States is further encouraged to ensure that its federal legislation and/or practice comply fully with the pertinent requirements of the Criminal Law Convention on Corruption and the Additional Protocol, as well as to strive for the ratification of these Instruments. That said, considering the extensive and exhaustive explanations and information provided on these matters by the authorities concerning the previous Compliance Reports and the current Report, GRECO does not consider it useful to ask for further information, pursuant to Rule 31, paragraph 9 of its Rules of Procedure. The adoption of the Addendum to the Second Compliance Report terminates the Third Round compliance procedure in respect of the United States.

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