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## **Second Evaluation Round**

### **Evaluation Report on the United States of America**

Adopted by GRECO  
at its 30<sup>th</sup> Plenary Meeting  
(Strasbourg, 9-13 October 2006)

## I. INTRODUCTION

1. The United States of America was the 36th GRECO member to be examined in the Second Evaluation Round. The GRECO evaluation team (hereafter referred to as the "GET") was composed of Mr Silvio CAMILLERI, Attorney General (Malta), Mr Jacek GARSTKA, Judge, Department of International Co-operation and European Law, Ministry of Justice (Poland), Dr Richard JARVIS, Secretary to the Committee on Standards in Public Life (United Kingdom) and Mr Pierre-Christian SOCCOJA, Secretary General of the Central Service for the Prevention of Corruption (France). This GET, accompanied by two members of the Council of Europe Secretariat, visited the USA (Washington DC and New York) from 10 to 17 December 2005. Prior to the visit the GET experts were provided with replies to the Evaluation questionnaire (document Greco Eval II (2005) 4E) as well as copies of relevant legislation.
2. The GET met with officials from the following US Government Executive Branch institutions: The US Department of Justice (the Attorney General's Office, the Executive Office for US Attorneys, the Civil Division Fraud Section, the Criminal Division Fraud Section, the Asset Forfeiture and Money Laundering Section, the Office for International Affairs of the Criminal Division, the US Marshals Service, the Federal Programs Branch, the Public Integrity Section of the Criminal Division, the Office of Information and Privacy), the Securities and Exchange Commission (the Office for International Affairs, Office of General Counsel, Division of Enforcement), the US Department of Treasury (Terrorist Financing and Financial Crime (TFI), and Internal Revenue Service), Financial Crimes Enforcement Network (FinCEN), the Department of Homeland Security (Bureau of Immigration and Customs Enforcement), the National Archives and Records Administration, General Services Administration, US Office of Government Ethics, the General Accountability Office, the Office of Inspector General at the US Postal Service, the Merit Systems Protection Board, the Office of Personnel Management and the Office of Special Counsel. Moreover, the GET met with representatives of the following state and local government institutions: The New York State Ethics Commission, Pennsylvania State Ethics Commission, New York State Department of Civil Service, the New York Department of State Division of Corporations, Records and the Uniform Commercial Code, the NY State Committee on Open Government (NY State and City), the New York State Office of the Attorney General, the New York City Law Department, the New York City Department of Investigation, the New York City Conflicts of Interest Board, the New York City Department of Citywide Administrative Services, Westchester County Clerk's Office (NYC), the Bronx County Office of District Attorney, the New York County Office of the District Attorney. The GET also met with representatives from the following non-governmental organisations: The American Bar Association, New York State Trial Lawyers Association, The National District Attorneys Association, the National Association of Attorneys General, the Council on Governmental Ethics Laws, Transparency International, the Ethics Resource Center, the Senior Executives Association, the National Treasury Employees Union, the American Federation of Government Employees, the National Journal, the Washington Post, Common Cause, the New York Public Interest Research Group and the New York Post.
3. The Second Evaluation Round, which runs from 1 January 2003, deals with the following themes:
  - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), as completed, for members having ratified the Criminal Law

Convention on Corruption<sup>1</sup> (ETS 173), by Articles 19 paragraph 3, 13 and 23 of the Convention;

- **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);
- **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.

4. The present report 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 the effectiveness of measures adopted by the US authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 3. The report contains a description of the situation, followed by critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to the USA in order to improve its level of compliance with the provisions under consideration.
5. 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 the features of the federal level, and, in so far as it has been possible, also makes references to the state and local administrations of New York, which was visited by the GET.

## II. THEME I – PROCEEDS OF CORRUPTION

### a. Description of the situation

6. The GET was informed that the use of asset forfeiture, including provisional measures to combat serious crime is given high priority in the USA. For example, the U.S. Attorneys' Offices ordinarily establish a specialised forfeiture unit or designate primary responsibility for forfeiture matters to particular attorneys. Similarly, other law enforcement agencies also assign responsibility for forfeiture matters to specialised units or personnel both at the headquarters level and in field offices.

### Confiscation/forfeiture of proceeds of crime and instrumentalities

7. The United States has a system at the federal level of conviction-based *in personam* forfeiture and non-conviction-based *in rem* forfeiture statutes which provide a basis for confiscating property derived from, used in, or otherwise involved in a broad range of criminal offences<sup>2</sup>. In addition, administrative forfeiture is available for specified categories of properties, such as vehicles or currency, in case the persons concerned do not object to agency adjudication (instead of by a court). In cases involving principal corruption offences, confiscation is authorised pursuant to 18 United States Code (U.S.C.) § 981(a) for *in rem* forfeiture, and pursuant to 18 U.S.C. § 982 and 28 U.S.C. § 2461 for conviction-based forfeiture. These statutes provide for forfeiture in connection with violations of 15 U.S.C. § 78dd-1 et seq. (Foreign Corrupt Practices Act), 18 U.S.C. §§ 201

<sup>1</sup> The USA has signed (10 October 2000) but not ratified the Criminal law Convention on Corruption.

<sup>2</sup> Sometimes the U.S. conviction-based confiscation procedures are referred to as « criminal forfeiture » and U.S. *in rem* confiscation procedures are referred to as « civil forfeiture. » Conviction-based and *in rem* confiscation procedures are closely analogous in purpose, procedure, application and legal effect. Both procedures are more appropriately considered within the context of a criminal investigation for penal offences and can only be prosecuted by the Government in exercise of its law enforcement authority. *In rem* confiscation proceedings do not involve more generally recognised notions of *in personam* civil liability, such as for civil damages, and cannot be brought by private litigants. As a result, *in rem* confiscation proceedings are more accurately described as quasi-criminal in nature. To avoid confusion, the more precise terms of « conviction-based » and « *in rem* » forfeiture (or confiscation) will be used to refer to these procedures.

(bribery), 215 (commissions or gifts for loans), 224 (sports bribery), 664 (embezzlement and theft of public property), 664 (embezzlement from pension and welfare funds), 666 (theft or bribery concerning programmes receiving federal funds), 1341 (frauds and swindles), 1343 (fraud by wire), 1952 (racketeering), among others. Because of the breadth of fraud provisions, including honest services fraud pursuant to 18 U.S.C. § 1346, forfeiture should be available for the proceeds of most corruption-related conduct, depending upon the manner in which the forfeiture complaint or criminal indictment is charged. Despite this, confiscation is not available for all domestic crimes and, in some cases, only exists for proceeds of the offence and not with regard to the property used to facilitate the offence (instrumentality).<sup>3</sup> In general, where confiscation authority exists, it is possible to confiscate the property either in a conviction-based *in personam* action against the criminal defendant or in an *in rem* action against the property.

i) Conviction-based *in personam* confiscation

8. The United States Supreme Court has ruled that criminal confiscation *in personam* is part of the defendant's sentence. As a result, procedurally, in order to confiscate property through conviction-based forfeiture, the defendant must first be convicted by a legal standard of "beyond reasonable doubt." Once convicted, it must be established by a preponderance (balance of probabilities) of the evidence that identified property is subject to forfeiture. However, generally the prosecutor may only seek forfeiture based upon the offence of conviction and only if s/he puts the defendant on notice of the potential for forfeiture by including a forfeiture allegation in the indictment (Federal Rule of Criminal Procedure 32.2.). Forfeiture may not be excessive, according to the Constitution ("excessive fines", i.e. the courts must make sure that the confiscation is not grossly disproportionate to the offence).
9. Conviction-based *in personam* actions cannot be perfected if the defendant is deceased or while s/he remains a fugitive. Conviction-based *in personam* actions are also limited to the property of the defendant and, therefore, cannot be used with regard to instrumentalities if the defendant commits the crime using a third person's property. However, as a conviction-based confiscation action would result in an *in personam* judgment against a defendant, the defendant has a personal obligation to satisfy the judgment, and it may be possible to confiscate legitimately acquired assets in lieu of tainted assets, such as in circumstances in which the assets involved in the offence have been dissipated or hidden. Similarly, in some conviction-based confiscation actions, such as those involving racketeering offences under the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, individual members of a criminal enterprise may be liable for confiscation of assets of the criminal business that are assets involved in the offence.
10. As in principle only the defendant's property (fully or partly owned) can be confiscated in a conviction-based case, property interest belonging to a third party cannot be subject to conviction-based forfeiture. However, property held by nominees, *alter egos* or persons who did not acquire their interest until after the crime was committed can be forfeited as property of the defendant. Thus, a third party who claims an interest in the proceeds of a crime, must satisfy the requirements of being a *bona fide* purchaser. The right to property forfeited vests in the authorities as of the date of the commission of the act giving rise to the forfeiture. As a result, transfers to third parties occurring after the commission of the offence but prior to the order of forfeiture, cannot be used to establish a prior title.

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<sup>3</sup> For example, for domestic drug trafficking and money laundering offences, the United States can confiscate both the proceeds of the offence and the instrumentalities, or property used to facilitate the offence. However, for bank fraud, the United States can confiscate only the proceeds of the offence.

ii) Forfeiture *in rem*

11. *In rem* forfeiture is generally considered an entirely remedial, non-punitive undertaking, which is civil in procedure, but like conviction-based *in personam* proceedings, requires the existence of a criminal offence. However, unlike conviction-based actions, *in rem* forfeiture does not require the conviction of any person for illegal acts and, instead, depends upon the prosecutor's ability to demonstrate the relationship between the criminal conduct and the particular property subject to confiscation. Thus, there is no civil *in personam* confiscation authority of any kind. *In rem* actions are particularly useful in cases in which a criminal conviction is not possible, such as when the property is held by a fugitive or a criminal who has died<sup>4</sup>. The GET was told that recent court decisions "have blurred the traditional distinction between civil *in rem* and conviction-based *in personam* forfeiture," and, as a result, even *in rem* forfeiture cases, in some circumstances, may be subject to the limitations of the Constitutional prohibition against "excessive fines" (not to be grossly disproportionate to the offence).
12. With regard to third parties in forfeiture proceedings *in rem*, a claimant generally either has to successfully refute evidence that the property is traceable to the pertinent crime or must establish that s/he is an innocent owner. For a person claiming an interest in existence at the time of the commission of the crime, the claimant must either have not known that the property was used to commit the offence, or must have taken all reasonable steps to stop it. If the third-party acquired an interest in the asset after the commission of the crime, the claimant must establish that s/he was a *bona fide* purchaser.
13. In either conviction-based or *in rem* forfeiture, confiscation is generally available for both property directly involved in the crime and property into which such offence-related property has been transformed or converted. Forfeiture is also generally available based upon the gross illegal activity, and expenses the criminal incurred in the commission of the offence are not ordinarily deductible.
14. Value confiscation is possible in conviction-based forfeiture and is adjudicated by the same legal standards as for other forfeiture: by a preponderance of the evidence. Thus, if a value judgment of confiscation is sought in lieu of an order of forfeiture directed at particular assets, it must be established that the defendant generated assets worth the equivalent of the amount ordered forfeited.
15. The confiscation legislation generally does not allow for the reversal of the burden of proof, neither in conviction-based nor *in rem* proceedings. In conviction-based forfeiture cases, the prosecution must first prove the defendant's guilt beyond reasonable doubt and then establish the forfeiture on a balance of probabilities. In *in rem* forfeiture, the prosecutor must establish by a preponderance of evidence that the property is subject to forfeiture. Only in very specific cases (cf. terrorism) is there an exception that allows reversal of the burden of proof (18 U.S.C. § 981(g)).
16. Combined forfeiture statistics, without regard to the predicate offence are, for the last three fiscal years, as follows: in the year 2002 there were 30,810 cases representing a total value of \$745,464,000; in 2003, 31,050 cases representing a total value of \$869,205,000 and in 2004, 46,294 cases representing \$864,765,000.

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<sup>4</sup> The GET noted that in some cases, such as health care fraud, racketeering, obscenity and economic espionage, federal law provides only for conviction-based *in personam* confiscation, but not *in rem* confiscation. As a result, it is necessary to examine the applicable statutes to determine whether *in rem* confiscation is available in a given case. However, under 28 U.S.C. § 2461 federal law makes conviction-based *in personam* confiscation available even in those cases in which specific statutes only enumerate an *in rem* confiscation remedy.

17. The GET was informed that in the State of New York, the legislation provides for conviction-based forfeiture as well as forfeiture *in rem*. In addition, New York also has broad-based civil *in personam* forfeiture. It appeared that *in rem* forfeiture was the most used scheme by a long way. Cooperation between the States was carried out in a practical manner, based on contacts and, if necessary, federal assistance may be invoked.

#### Interim measures

18. Both with regard to the conviction-based *in personam* and *in rem* forfeiture of the proceeds and instrumentalities of criminal offences, property subject to forfeiture can be seized, restrained, or otherwise preserved prior to the final forfeiture in order to ensure that it remains available, provided that there is probable cause to believe that the property is subject to confiscation. However, as noted above, although the law permits forfeiture of substitute assets in lieu of property directly involved in or traceable to the offence, federal courts typically cannot order the pre-trial restraint of substitute assets, i.e. with regard to property which cannot be traced to the crime.
19. In conviction-based forfeiture proceedings, the Court has authority, pursuant to 21 U.S.C. §853(e), to issue a protective order, such as a restraining order, or to “take any other action to preserve the availability of property” for forfeiture.<sup>5</sup> In addition, the Court has authority to order the seizure of property in accordance with procedures set forth in 21 U.S.C. § 853(f). Where forfeitable property is located outside the United States, the court has specific statutory authority to order the defendant to repatriate such property for adjudication in the conviction-based forfeiture proceedings. 21 U.S.C. § 853(e)(4).
20. Similarly, federal courts have authority in *in rem* forfeiture proceedings to “take any...action to seize, secure, maintain, or preserve the availability of property subject to...forfeiture,” pursuant to 18 U.S.C. § 983(j), as well as authority to issue a seizure warrant pursuant to 18 U.S.C. § 981(b). Moreover, because the defendant in an *in rem* forfeiture action is the property involved in the criminal offence itself, the Court must issue an arrest warrant *in rem* upon the filing of a complaint for forfeiture *in rem*, Supplemental Admiralty Rule C(3). United States law provides for the filing of a *lis pendens* or other measures to prevent the alienation of real property for purposes of *in rem* forfeiture, including through provisions set forth in 18 U.S.C. § 985.
21. There are also circumstances in which law enforcement authorities can lawfully seize offence-related property without prior judicial authorization in accordance with court-recognised exceptions to constitutional warrant requirements such as certain seizures made incident to a lawful search or arrest.
22. The use of interim measures with regard to bank or financial records is possible, despite the fact that the Right to Financial Privacy Act (RFPA) generally prohibits disclosure of information to government authorities at the federal level without notice to the customer and an opportunity for the customer to challenge the decision. The GET was informed, however, that there are numerous exceptions that work to assure the free flow of information to the prosecution authorities with respect to money laundering (for example, certain financial records required to be maintained and reports required to be filed by financial institutions pursuant to the Bank Secrecy Act (BSA), which information may be provided to law enforcement authorities – although in many cases this first requires the receipt of a subpoena or other legal process).

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<sup>5</sup> 21 U.S.C. § 853 establishes procedures for narcotics forfeiture cases, which are extended to other conviction-based forfeiture proceedings pursuant to 18 U.S.C. § 982(b).

23. As to the management of seized assets, there are two primary law enforcement funds into which the proceeds of forfeiture actions are deposited: The Department of Justice Assets Forfeiture Fund (DOJ/AFF), established pursuant to 28 U.S.C. § 524(c), and the Department of Treasury Forfeiture Fund (TFF), governed by 31 U.S.C. § 9703. Where assets are seized by an investigating agency participating in the DOJ/AFF (such as the Federal Bureau of Investigation or the Drug Enforcement Administration), the assets are ordinarily transferred to the custody of the U.S. Marshals Service, which has primary authority over the management and disposal of seized assets in its custody that are subject to forfeiture, including arrangements for property services or commitments pertaining to the management and disposition of such property. 28 C.F.R. § 0.111(i). Assets seized by agencies participating in the TFF (such as Internal Revenue Service, Criminal Investigation or the Department of Homeland Security) are ordinarily managed by provisions of a national contract with a private vendor. Seizing agencies are also directed by internal regulations of the particular seizing agency and policies established by the Department of Justice, Asset Forfeiture and Money Laundering Section and the Treasury Department, Executive Office of Asset Forfeiture.
24. There are no statistics regarding the number of corruption cases in which *interim measures* have been used. The overall seizure statistics, without regard to predicate offence, are as follows: in the year 2002 there were 45,342 cases representing a total value of \$1,247,285,000; in 2003, 42,199 cases representing a total value of \$1,549,114,000; and in 2004, 74,037 cases representing \$1,716,526,000.
25. The legal schemes for using interim measures, such as seizure, in New York State are similar in some respects to the system at federal level. However, unlike the federal system and the systems used by the vast majority of the States, the use of interim measures with regard to substitute assets or a monetary amount equal in value to tainted assets is possible and often applied in New York State.

#### International cooperation

26. The United States has signed and ratified a large number of Mutual Legal Assistance Treaties (MLATs) which are in force worldwide, and include MLATs in force with the following Council of Europe members: Austria, Belgium, Cyprus, the Czech Republic, Estonia, France, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Russia, Spain, Switzerland, Turkey, Ukraine, and the United Kingdom. Since the 1970's, the USA has concluded numerous case-specific agreements that provide for legal assistance with respect to corruption cases. Where assistance is available pursuant to a standing bilateral MLAT or a multilateral agreement, such a case-specific agreement is generally no longer necessary.
27. The United States is party to multi-lateral legal instruments, such as the Inter-American Convention on Mutual Assistance in Criminal Matters and the Inter-American Convention Against Corruption. The United States became a party to the United Nations Convention Against Transnational Organized Crime on November 3, 2005. However, the United States is not a party to the European Convention on Mutual Legal Assistance in Criminal Matters (ETS 30), nor to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141). It has signed (10 October 2000), but not ratified the Criminal Law Convention on Corruption (ETS 173). The USA is in the final process of ratifying the United Nations Convention Against Corruption.<sup>6</sup>

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<sup>6</sup> On 15 September 2006, the Senate approved the Convention and ratification is expected by December 2006.

28. The United States has statutory authority to confiscate property derived from or used to facilitate foreign crimes, including narcotics offences, crimes of violence, fraud, bribery of a public official, etc as well as offences for which the United States would have a multilateral treaty obligation to either extradite or submit the case for prosecution. (In particular, the ten United Nations counter-terrorism conventions contain such an obligation). Thus, provided that such an offence were punishable in both the United States and the other country by a term of imprisonment of at least one year, the United States can institute its own confiscation action to directly confiscate the proceeds and instrumentalities of the offence. Moreover, if someone commits a money laundering offence in violation of U.S. law involving the proceeds of one of these foreign crimes, the United States can also confiscate any property involved in the money laundering transaction, including money derived from legitimate sources but used to promote the criminal activity. In addition, there is statutory authority to forfeit property traceable to transnational offences committed, in part, in violation of U.S. law.

*i) When the US is the requesting State*

29. The United States courts have authority to issue forfeiture orders in conviction-based and in *in rem* proceedings even when property is located overseas. However, in most cases, the success of the forfeiture action will be dependent upon the assistance of foreign authorities in perfecting the court's jurisdiction or enforcing its orders.

30. In conviction-based forfeiture cases, the United States can seek forfeiture of a defendant's interest in property involved in criminal conduct, regardless of its location through issuing a protective order or seizure warrant pursuant to 21 U.S.C. § 853 and transmit that order to foreign authorities for execution. In practice, a protective order is usually deemed to be preferable because a seizure warrant must be executed within a period of ten days. The United States seeks assistance from foreign authorities in the execution of such orders through mutual legal assistance. In addition, the Court can direct a criminal defendant to repatriate assets for adjudication of forfeiture.

31. In *in rem* forfeiture actions, United States courts have legal jurisdiction over property located abroad as long as the same property would be subject to forfeiture if it were located in the USA, 28 U.S.C. § 1355(b)(2). In practice, a court must also obtain the assistance of foreign authorities to exercise jurisdiction in such cases. As United States courts have statutory jurisdiction to order confiscation, they may also issue arrest warrants *in rem*, protective orders, or *in rem* seizure warrants and seek their enforcement abroad. In limited circumstances, typically when mutual legal assistance from foreign authorities is not available, the United States can seize funds located in a United States correspondent account of a foreign bank in lieu of criminally tainted funds deposited in an account at that foreign bank located abroad. 18 U.S.C. § 981(k).

*ii) When the US is the requested State*

32. The United States has several mechanisms through which it can assist other governments in confiscation proceedings. First, it has authority to provide formal and informal assistance in tracing assets and obtaining evidence in support of a foreign confiscation action. Second, it can open its own investigation and seek confiscation of criminally tainted assets based upon foreign or transnational offences for which there is a statutory basis for confiscation under the laws of the United States. Third, the United States can register and enforce a final order of confiscation issued by a foreign court when there is an agreement with the particular State, the foreign judgment/court order is certified by the US Attorney General as following due process, and the crime would also give rise to confiscation if committed in the USA.

33. If foreign authorities provide evidence of a crime under United States jurisdiction that may give rise to domestic confiscation or of a foreign offence that falls within one of the eleven categories of foreign crimes (including, *inter alia*, bribery) for which confiscation is authorised under United States law, the United States can initiate confiscation proceedings in response to a foreign request.<sup>7</sup> Such requests for assistance may be made pursuant to existing treaties, agreements or letters rogatory.
34. To conclude a conviction-based *in personam* confiscation action, the United States would first have to obtain a criminal conviction against a defendant. Therefore, most often the United States would execute a request for confiscation assistance by initiating *in rem* proceedings. Because United States *in rem* confiscation authority generally permits only the confiscation of property involved in or derived from the offence, the property must be traced to the criminal offence. An exception applies in cases involving electronic funds in a bank account, which are considered fungible, making strict tracing to the offence unnecessary as long as the confiscation action is commenced within one year of the offence, 18 U.S.C. § 984.
35. In order for the United States to enforce a foreign confiscation judgment under 28 U.S.C. § 2467, the requesting State seeking enforcement of its judgment must be a party to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or to a treaty or other international agreement with the United States which provides for confiscation assistance. In addition, the United States Attorney General must certify that enforcement of the judgment would be in the interests of justice. Upon certification by the Attorney General, the United States is authorised to file an application to enforce a foreign confiscation judgment as if the order had been entered by a court in the United States, and the United States court would be bound by the foreign tribunal's findings of fact, to the extent that they are stated in the foreign confiscation judgment. The United States court would then be obligated to enforce the judgment in favour of the United States unless the court finds that the foreign confiscation system did not comport with due process, the foreign court lacked personal or subject matter jurisdiction, the claimant failed to receive timely notice of the foreign proceedings and an opportunity to be heard, or the judgment was obtained by fraud.
36. If the United States initiates a conviction-based or *in rem* confiscation action, whether on its own initiative or at the request of a foreign country, it may seize or restrain the assets subject to confiscation pending further judicial proceedings. The United States can also restrain property located in the United States at the request of a foreign country in order to preserve the property in anticipation of receiving an enforceable foreign judgment of confiscation. However, the procedures and standards for instituting such provisional measures differ depending upon whether the United States would seek to provide assistance through initiation of its own independent confiscation proceedings or through enforcement of a foreign confiscation judgment.
37. If the United States planned to open its own confiscation action, it could restrain assets as in any other United States *in rem* confiscation action upon a showing of probable cause that the property is subject to confiscation to the United States. Thus, the foreign government would have to provide evidence sufficient for the United States to establish probable cause of a predicate offence for confiscation under United States law. Generally, this could consist of hearsay evidence, but it would

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<sup>7</sup> As enumerated previously, the eleven categories of foreign offences for which direct confiscation authority is available include: narcotics offences, murder, kidnapping, robbery, extortion, destruction of property by explosive or fire, crimes of violence, fraud committed by or against a foreign bank, bribery of a public official (including misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official), smuggling of controlled exports and controlled munitions, and offences for which the United States would have a multilateral treaty obligation to either extradite or submit the case for prosecution. See 18 U.S.C. § 981(a)(1)(B), referencing foreign offences listed at 18 U.S.C. § 1956(c)(7)(B). Other offences include those in which part of the offence occurred in the United States or for which United States law provides for extraterritorial application.

have to be sufficiently reliable to allow a federal judge or magistrate to conclude that there are reasonable grounds to believe that the property was involved in an offence for which confiscation is authorised. Upon receipt of such evidence, the United States would seek a pre-trial seizure warrant, a restraining order immobilising the property, or an arrest warrant *in rem* for the property, and would simultaneously or subsequently initiate an *in rem* or conviction-based confiscation action.

38. Recognising that such probable cause evidence may be difficult to obtain before criminals move their assets, it is also possible to restrain property even without probable cause for 30 days, if the foreign country has arrested or charged someone in connection with criminal conduct that would serve as a basis for the United States seeking independent confiscation of the property. The purpose of this 30-day period is to preserve the property while the other country transmits evidence necessary for the United States to prove probable cause for the purposes of initiating an independent United States confiscation action. The 30-day period can be extended upon a demonstration of good cause at a hearing.
39. Alternatively, if the United States anticipates enforcing a final foreign judgment, it can restrain property either by registering and enforcing a foreign restraining order or by seeking a United States restraining order based upon an affidavit from the foreign authorities. To register and enforce a foreign restraining order, the Attorney General must first certify the foreign restraining order on the grounds that its enforcement is in the interests of justice. The affidavit approach, would require the foreign country to describe the foreign confiscation proceedings underway and set "forth a reasonable basis to believe that the property to be restrained will be named in a judgment of confiscation at the conclusion of such proceeding," 28 U.S.C. § 2467(d)(3)(B)(i). In order to restrain property based upon an affidavit, the United States would seek issuance of a Temporary Restraining Order (TRO) and would need to establish that there is probable cause that the foreign government will issue an enforceable final confiscation judgment, 18 U.S.C. § 983(j). The TRO will continue in effect for 10 days, unless extended by the court, however, claimants to the assets would have an opportunity for a contested hearing regarding the restraint before expiration of the TRO. In order to maintain the restraint, the United States would seek issuance of a 90-day protective order and have to present evidence at such a contested hearing to show that there is a substantial likelihood that the foreign government will issue a final confiscation order that would be enforceable under United States law. In some instances, upon demonstrating good cause, the 90-day limit can be extended by the court.

#### Asset sharing

40. The United States has a long-standing policy of transferring all or a portion of forfeited property to countries that have assisted in investigations and proceedings leading to the confiscation. This asset sharing procedure has been used to transfer corruption proceeds to countries victimised by high-level corruption. From 1989 through 2005, the Department of Justice transferred approximately USD 288 million in forfeited assets to 33 countries and territories in recognition of their confiscation assistance. In addition, between 1994 and 2005 the Department of Treasury has transferred more than USD \$27 million in forfeited assets to 20 foreign governments.

#### Money laundering

41. Money laundering was established as a separate criminal offence in 1986, through the enactment of the *Money Laundering Control Act of 1986*, codified as 18 U.S.C. §§ 1956 and 1957. Among other things, §§ 1956 and 1957 extended criminality to persons (including legal persons) who knowingly conduct or attempt to conduct financial transactions with proceeds generated by certain specified crimes, as well as to persons who are "wilfully blind to" such unlawful activity. These

provisions criminalise money laundering, with penalties of up to 20 years' imprisonment and fines of up to \$500,000 for each count. As amended and expanded since 1986, the Money Laundering Control Act currently prohibits the laundering of proceeds of over 130 domestic criminal offences and eleven categories of offences against foreign nations. The list of these predicate offences, defined as "Specified Unlawful Activities" (SUAs) includes, *inter alia*, active and passive bribery of domestic and foreign public officials and active and passive bribery in the private sector. In cases involving transactions over \$10,000 the Money Laundering Control Act also explicitly provides for extraterritorial jurisdiction over offences committed by US Nationals or, in the case of non-US citizens, conduct that occurred in part within the United States, 18 U.S.C. § 1956(f). The GET was told that due to the U.S. list approach to predicates for money laundering, some technical omissions may exist in respect of the coverage of corruption offences by the money laundering offence. However, the GET was informed that such possible technical omissions may be more theoretical than practical because in practice, the U.S. should be able to reach corruption-related money laundering conduct through such money laundering predicates as wire fraud, extortion, and interstate transportation of property stolen or taken by fraud, among others.

42. Under 18 U.S.C. § 1956, a person may be held criminally liable for money laundering if s/he (1) knows that the property involved in a financial transaction represents the proceeds of unlawful activity; (2) conducts or attempts to conduct a financial transaction; (3) does so with property which in fact involves the proceeds of specified unlawful activity; and (4) does so with the intent to promote the carrying on of specified unlawful activity, to evade taxes, to avoid transaction reporting requirements, or to conceal the nature, location, source, ownership, or control of the proceeds. A person may also be in violation of 18 U.S.C. § 1956 if s/he conducts or attempts to conduct a financial transaction with property that may not be criminally tainted but which law enforcement has represented to be SUA proceeds or facilitating property and the person intends to conceal or disguise its nature, promote an SUA, or avoid reporting requirements. Similarly, an international transaction or transportation of monetary instruments from, to, or through the United States may constitute a money laundering violation if conducted with SUA proceeds for the purpose of concealing its nature or avoiding reporting requirements or, even if not involving SUA proceeds, if the conduct is intended to promote an SUA.
43. In addition, a person may be in violation of 18 U.S.C. § 1957 if (1) the person knows that he or she is conducting or attempting to conduct a monetary transaction; (2) the person knows that the monetary transaction involves criminally derived property; (3) the criminally derived property has a value greater than \$10,000; (4) the criminally derived property was, in fact, derived from a specified unlawful activity; and, (5) the monetary transaction takes place in the territorial jurisdiction of the United States or, if outside of the United States, the defendant is a US citizen.
44. The system designed to prevent and detect money laundering, is built on obligations for certain financial institutions to report and/or keep records in accordance with the Bank Secrecy Act (BSA), including but not limited to: depository institutions, money services businesses, broker-dealers in securities, futures commission merchants and introducing brokers in securities, certain insurance companies, and casinos. Various financial institutions are required to report suspicious activity relevant to a possible violation of federal law or regulation, without notifying the persons involved in the transaction.
45. The U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) is the federal bureau which administers the Bank Secrecy Act's record-keeping and reporting requirements, including requiring that financial institutions report suspicious activity. FinCEN allows access to such reports to appropriate law enforcement and regulatory agencies. FinCEN has adopted tailored Suspicious Activity Report (SAR) forms for certain financial industries and has established

database for the same. Law enforcement access to SARs is further facilitated through the assignment of liaison officers from federal law enforcement agencies to FinCEN. As a result, affected law enforcement authorities have access to SAR information, including that which may involve known or possible corruption. FinCEN is not an investigatory agency but acts at the macro-level and makes analysis based on submitted information. FinCEN also works in cooperation with the financial community, *inter alia*, through publication of financial advisories which provide guidance on indications of criminal activity. The GET was informed that reporting of corruption in relation to SARs is very limited and has not been subject to any analyses. The GET was told that there are approximately 2,000 convictions for money laundering per year, but no figures about corruption as predicate offence were available to the GET.

**b. Analysis**

46. To deprive criminals of the proceeds of crime as far as possible is an important component of the US criminal policy and the use of asset forfeiture and interim measures in the fight against serious crime has been given high priority. To this end a comprehensive legal framework has been put in place. Moreover, there is far-reaching specialisation within the relevant law enforcement agencies as well as in the attorneys' offices; for example, through the establishment of units vested to deal only with forfeiture and interim measures. The GET was told that, normally, in serious cases of money laundering and corruption etc, a special file on the tracing of proceeds is opened. Moreover, substantial resources are being invested in the training of law enforcement and prosecutorial staff to develop their skills in identifying, tracing and freezing the proceeds from crime.
47. At the federal level, there is a generally solid legal system in place which provides for in personam forfeiture where the offender has been convicted and a more flexible system of *in rem* forfeiture in cases where there is no conviction. It appears that confiscation and interim measures are available for most - but not all - cases relating to corruption concerning the proceeds from crime but not always with regard to the instrumentalities. The prosecutor's decision on how to charge particular conduct may affect the extent to which property is subject to forfeiture in a given case. The prosecutor has discretionary powers to prosecute as well as to submit confiscation requests. If that has been done and all necessary requirements are fulfilled, it is mandatory for the court to order confiscation. Value confiscation or the confiscation of substitute assets is possible as is confiscation of property held by non *bona fide* third parties. The use of interim measures at the federal level is also available, except with regard to substitute assets, as these cannot be traced to the crime in the preliminary proceedings. Officials met by the GET were of the opinion that the lack of value based interim measures, such as restraint orders, was a weakness of the system at federal level. The GET shared this view, as the present situation is likely to diminish the possibilities for the criminal justice system to successfully enforce a final confiscation order. Consequently, **the GET recommends to review the pertinent rules on confiscation/forfeiture and the use of interim measures, in order to ensure that all proceeds from acts of corruption and related instrumentalities are subject to confiscation, and to enable measures such as seizure and restraint orders, including in respect of substitute assets, to be taken as appropriate.**
48. The legal possibilities to use confiscation and interim measures in the State of New York appear to be similar to that of the federal level. The GET understood, however, that New York State is one of the more advanced States in this respect and that the rules were not uniform in the various States. For example, it noted that forfeiture of substitute assets was, as a general rule, not possible in most of the States, New York being one of the exceptions.
49. In a country like the USA, with a federal legislation and law enforcement system as well as separate laws and law enforcement mechanisms in each State, with some 20,000 independent police forces

and several prosecutorial levels and court jurisdictions, the risks of double jeopardy are obvious. Coordination at all levels is therefore of the utmost importance for an efficient use of measures such as confiscation and interim measures. In this respect, the GET understood that there was a pragmatic cooperation between law enforcement bodies, such as the FBI, the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC). Rules issued by the Attorney General with a view to enhancing this cooperation were found to be important tools in this connection. Cooperation appeared to be particularly developed with regard to crimes such as terrorism and serious money laundering and could also help to deal with corruption cases of a serious nature. With regard to the individual States the situation is different. The legislation differs from one State to the other and cooperation among law enforcement agencies appeared to be based to a large extent on informal contacts and ad-hoc practical solutions. It is true that in particular situations of serious crime, the federal institutions have authority over inter-state matters, however, in ordinary corruption cases with an inter-state component, the independent features of the law enforcement may be obstacles to an efficient use of confiscation and interim measures. On a general level, *the GET observes that the appropriate inter-state organisations should promote, to the extent possible, more formal inter-state co-operation and the harmonisation of the rules concerning confiscation/forfeiture and interim measures.*

50. The GET took note of the limited data provided. It was pleased that the figures confirm that forfeiture as well as interim measures are applied to a large extent at the federal level. However, no light was shed on the extent to which perpetrators of corruption offences had been deprived of the proceeds generated. Aware of the practical difficulties in distinguishing corruption from other offences in this respect, the GET was nevertheless of the opinion that a systematic collection of data would significantly contribute to identifying possible flaws or blind spots in the US anti-corruption policy. *The GET observes that the federal authorities should seek ways to analyse data specifically related to seizure, investigations, prosecutions, convictions and confiscations (including non-conviction based in rem forfeiture) in corruption cases.*
51. The United States has the legal possibility to issue confiscation orders as well as interim measures abroad. However, the success of such requests is very much dependent upon the assistance of foreign authorities. The United States is also in a position to respond to foreign requests for confiscation and the use of interim measures. Such requests can be handled through the opening of a US investigation to seek confiscation or, the United States may enforce the order of a foreign authority to confiscate or to apply interim measures in case there is an agreement with the other country, the US Attorney General has certified the order and the dual criminality conditions are met. Using the possibility to opening its own proceedings for confiscation risks delaying the process, in particular with regard to the enforcement of an interim measure. The possibility of direct enforcement of foreign orders of confiscation and interim measures depends on assistance agreements with the foreign country. Cooperation in this area is likely to be expanded through the implementation of the United Nations Convention Against Corruption (UNCAC).
52. The GET took note of the extensive list of predicate offences to money laundering and the wide ranging obligations of the financial sector to record and report suspicious transactions. Almost any offence, including most corruption offences, is covered. Nevertheless there are some doubts as to whether the whole spectrum of offences, in particular "trading in influence", as defined by Article 12 of the Criminal Law Convention on Corruption, is covered by the offence of money laundering. *The GET observes that it should be ensured that all acts of corruption are predicate offences to money laundering.*

### III. THEME II – PUBLIC ADMINISTRATION AND CORRUPTION

#### a. Description of the situation

##### Concept of Public Administration

53. The concept of “public administration” is very broad in the USA and includes all means used to implement policy in the executive branch of government. There is no definition of public administration contained in the Constitution or in legislation.
54. The governmental system in the United States consists of a National (federal) government and various state and local governments. The legal system is developed in the common law tradition. The law of the land derives from the Constitution, legislation and judicial decisions which interpret custom and precedent. The US Constitution creates the federal government and assigns the powers to each of the three branches: executive, judicial, and legislative and anticipates checks and balances among the various branches of government through shared responsibilities and oversight. The principal types of federal law include, first, the *Constitution*; second, *statutes*, which are enacted by Congress and usually signed into law by the President, issued as numbered Public Laws and compiled by topic in the U.S. Code (U.S.C.); and, third, *regulations*, which are promulgated by agencies to implement or interpret statutes and are published first in the daily Federal Register and compiled in the Code of Federal Regulations (C.F.R.).
55. Each one of the States has its own constitution and government, including subordinate local and municipal governments. All States have created their own branches of government, complete with their own judicial systems and legislatures. The state governments hold powers not granted to the various federal branches via the Constitution, which allow them control over areas such as land use, corporate entities, and local crimes. However, laws enacted by the federal legislative branch are considered the “supreme law of the land” and, thus, binding on the States and their citizens.

##### Anti-corruption policy and its assessment

56. The GET was informed that the prevention of corruption, which to a large extent focuses on the public administration, is given high priority in the USA. However, there is no overarching instrument containing a National anti-corruption strategy in place at the federal level. Nevertheless, the legal framework of the public administration, i.e. the Constitution, which provides a series of checks and balances between branches of the government, as well as various enforceable written standards, such as criminal statutes on conflicts of interest, civil ethics statutes, administrative standards and codes of conduct for public officials, taken together provide a written basis for the public administration at large. In addition, significant powers have been given to the individual States to develop their own strategies and accompanying laws and regulations. The strategy to combat corruption consists of a combination of prevention, detection and suppression measures.
57. According to the US authorities, substantial resources are allocated to the prevention of corruption. As a general matter, prevention programmes include procedural systems promoting consistency and transparency, such as general requirements for standardised and public administrative processes and licences; public legislative processes following standardised rules; public budgeting processes and financial controls; a large merit-based civil service and rights for public access to information regarding most government activities. Extensive internal controls and auditing procedures are also considered important for the prevention of corruption at federal as well as state and local level. The federal and many state and local governments have standards of conduct,

ethics training, education and counselling programmes and personal financial disclosure requirements. At the federal level each executive branch agency is required to have a programme to ensure compliance with ethics laws and requirements.

58. The Office of Government Ethics (OGE), which aims at fostering ethical standards for federal executive branch Government employees and resolving conflicts of interest when they occur, also has a responsibility for prevention of corruption. The OGE is a separate but not a fully independent body consistent with the constitutional scheme that all government is accountable to some authority. OGE's head is appointed by the President for a five year term. More particularly, the OGE is responsible for developing the executive branch Standards of Ethical Conduct and approving individual agency supplements to those Standards. These supplements can and are updated by agencies as needed. The OGE has overall ethics policy responsibilities, establishes the requirements for each agency's ethics programme, provides advice, education and counselling services, and reviews the implementation and effectiveness of agency ethics programmes.
59. In 2003, as part of the programme reviews, the OGE began conducting a survey of employees of the agency prior to the on-site visit in order to assess employees' awareness of the ethics programme, perception of the agency's programme effectiveness and perception of the ethical climate of the agency. Surveys have been administered amongst all employees in a limited number of executive branch agencies (16 by the end of 2005). Overall, the OGE has found that employees are favourable in their assessment of their agency's ethics programme and ethical climate, with employees who file financial disclosure reports (and therefore receive annual training on the Standards of Conduct) generally providing the most favourable responses. There are 126 agencies in the executive branch subject to OGE ethics programme oversight and in addition to OGE's review, OGE is planning to develop self assessment programmes for the agencies. In addition, OGE annually surveys every agency with regard to general programme data including information on the number of administrative actions taken. Moreover, the OGE annually requests information from the 94 Offices of U.S. Attorneys and the Department of Justice with regard to the number of prosecutions or actions taken pursuant to the criminal conflict of interest laws and the civil ethics statutes and makes that information available on its website.
60. The States and the local administrations are free to formulate their own anti-corruption strategies. In Pennsylvania and New York State there are Ethics laws in place. These apply to a vast number of elected as well as employed officials and deal with, *inter alia*, conflicts of interest. In both these States an Ethics Commission has been established, with the purpose of monitoring officials' compliance with the ethical standards provided in law. The Ethics Commissions have an advisory function, receive financial disclosure reports, investigate allegations about violations of the Ethics laws and may hold public hearings for receiving input. The Pennsylvania State Ethics Commission is an independent agency which has the authority to investigate Executive Branch and Legislative Branch public officials and employees.
61. At the local level, the GET was informed about the New York City Conflicts of Interest Board which is an independent, non-mayoral agency charged with interpreting and enforcing the Conflicts of Interest Law (New York City Charter Chapter 68) and the New York City Financial Disclosure Law. This Board is considered one of the most developed bodies of its kind in the USA and serves as a model.
62. The Council on Governmental Ethics Laws (COGEL) is a voluntary professional organisation for government agencies, organisations and individuals with responsibilities and interests in governmental ethics, elections, campaign finance, lobby laws and freedom of information. The OGE and a large number of state ethics commissions participate in COGEL's annual conferences and

take part in discussions of good practice and emerging trends relating to ethics, corruption etc. On a more ongoing basis however, agencies such as the OGE respond to requests for information on good practice and policies and make their own requests to fellow COGEL members for the same purpose. In such a way government agencies that provide similar "preventive" services such as education, training, codes of conduct, financial disclosure reviews, and counselling have a common platform for an exchange of views. The GET was informed that the OGE hopes to work cooperatively with other COGEL members on a project to develop a curriculum on government ethics and corruption for use by civics teachers for students. (Education in the USA is administered at the local government level, so this plan is intended to be a model for each State to adapt to its structure but with a consistent federal component.)

63. In so far as the repressive side of the anti corruption strategy is concerned, the Department of Justice (DOJ) is the principal federal government entity fulfilling that role. The DOJ conducts this function through 93 U.S. Attorneys (serving 94 offices) and other specialised components within the main Department offices. Each State has its own prosecutorial system.

### Transparency

64. The primary mechanism for accessing documentary administrative information at the federal level is the *Freedom of Information Act* (5 U.S.C. § 552 (FOIA) which provides that any person has a right, enforceable in court, to obtain access to federal agency records. Each federal agency is responsible for maintaining and producing its own records under FOIA. Requests for records can be submitted by sending a letter to the relevant agency. There are several exemptions from disclosure which agencies may apply to specific documents, including means to protect the personal privacy of individuals to whom the requested records may pertain, matters such as proprietary business information and information that is classified to protect national security. A requestor may seek court review against an agency withholding documents and the agency bears the burden of proof to show that its action was justified. Depending on the circumstances of the requestor, the agency may charge fees for search time, document review and duplication. However, only those who are requesting information for commercial use are charged fully for these services. Others, including representatives of the mass media, and educational or scientific institutions, receive some or all of the materials requested for free.
65. The *Privacy Act* of 1974, (5 U.S.C. § 552a), has been designed to ensure a fair information practice that attempts to regulate the collection, maintenance, use and dissemination of personal information by federal executive branch agencies.
66. There are some additional federal statutes that permit public access to specific kinds of documents. For example, the *Ethics in Government Act* (5 U.S.C. App. § 105) specifies the manner in which the financial disclosure reports of all senior federal officials are made available to the public.
67. The United States also has document retention and disposal requirements aimed at ensuring that records are properly managed, including that available records may be requested for access. The Federal Records Act, at 31 U.S.C. § 3101, requires the head of each federal agency to "make and preserve records containing adequate and proper documentation of the organisation, functions, policies, decisions, procedures and essential transactions of the agency..." The law treats as "records" a broad array of materials, regardless of type or format, that are made or received in connection with the transaction of public business, and also provides criminal penalties for any unlawful concealment, mutilation or destruction of federal records. Appropriate records should be made of official dealings, including those undertaken by email, telephone, or other electronic communications.

68. Federal agencies make extensive use of the Internet and the *Electronic Government Act* of 2002 (44 U.S.C. chapter 36) requires federal agencies to provide public access to agency information available through their portal web sites. The FOIA requires this for some information as well. The aforementioned websites are also linked to a centralised federal Internet portal, FirstGov.gov, which serves as a reference point for citizen access to government information and services. "FirstGov" allows users to access federal government information by subject matter rather than by agency. It also provides links to state, local and tribal government web sites.
69. The Office of Information and Privacy of the Department of Justice (DOJ) is responsible for policy development and compliance of all government agencies in respect of the FOIA<sup>8</sup>. This Office decides all appeals from denials by the Justice Department under those acts (more than 3,200 per year, more than is received by any other agency). Ultimately, a denial of access to information may be challenged in federal district court and then taken up higher to the appellate court level. All administrative appeals are free of charge; court challenges involve a relatively nominal fee. There are typically more than 4.000.000 requests for access to federal information every year and the authority concerned in many (but not all) instances has discretionary powers to disclose the information or not.
70. Federal law provides a number of mechanisms through which public consultation is part of federal decision-making. For example, federal agencies must conduct their rule-making proceedings pursuant to the *Administrative Procedure Act*, 5 U.S.C. § 551 et seq. ("APA"). These rules often involve the establishment of agency policy under the enabling legislation which grants authority to the agency to perform specified government functions. The APA requires agencies to keep the public informed of their rule-making activity and to permit public participation. Agencies publish most rules in proposed form in the Federal Register (which is available in print and on-line) and provide the public with an opportunity to comment on those rules. In addition to accepting written and electronically transmitted comments<sup>9</sup>, agencies may conduct public hearings at which interested persons may testify on the proposals. The APA also grants the public the right to petition agencies to issue, amend or repeal a rule. A person who is adversely affected or aggrieved by a rule may challenge the agency's rule-making in court and seek to have it overturned.
71. Agencies may also seek outside policy advice or recommendations by establishing an advisory committee composed of outside experts or others with an interest in the outcome. Advisory committees must follow the requirements of the *Federal Advisory Committee Act* ("FACA"), 5 U.S.C. App., which include publishing advance public announcements of committee meetings, and holding open meetings that the public can attend. The FACA also provides that the membership of federal advisory committees be fairly balanced in terms of the points of view represented.
72. *The Government in the Sunshine Act* (5 U.S.C. 552b) requires federal agencies that are run by a collegial body to hold agency meetings in public, unless the meeting, or portion of a meeting, would be likely to disclose information protected under one of several exemptions in the Act. Under the Sunshine Act, agencies must publish a notice in advance of the meeting, noting the time, date and

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<sup>8</sup> By statute the Office of Management and Budget is responsible for Privacy Act policies and gives advice to agencies on how to handle requests, guidance that is said to carry heavy weight in that it is backed by the fact that the Department of Justice can refuse to defend an agency's position in court if it is not followed.

<sup>9</sup> Agencies are accepting electronic comments on proposed rules, directly or through Regulations.gov, the government-wide e-rulemaking portal. The Electronic Government Act of 2002 requires agencies to provide an opportunity for electronic comment and access to an electronic docket of comments received, to the extent feasible.

subject matter to be discussed. The right to observe agency decision-making at open meetings does not include the right to participate in discussions.

73. In addition to the federal Freedom of Information Act, which applies only to federal agencies, each of the fifty States has enacted an access to information law applicable to its state and local government agencies. Unless there is a specific direction in a federal law indicating that its application extends to state or local governments, the state access laws govern rights of access and the authority to deny access to government information maintained by state and local government agencies. For instance, under the Homeland Security Act, certain records that come into the possession of the federal Department of Homeland Security must be kept confidential if they come into the possession of a state or local government agency. However, in most cases, when records are maintained by a unit of state and or local government, even records prepared or transmitted by federal agencies, a state law will govern access.
74. The freedom of information legislation differs from one State to another, but nearly every State contains an exception authorising government agencies to withhold records insofar as disclosure would result in an unjustified or unwarranted invasion of personal privacy. In New York and approximately ten other States, laws reflecting data protection and fair information practices have been enacted. For example, under New York's Personal Privacy Protection Law, the subjects of records maintained by state agencies generally have the right to gain access to the records and to seek to correct errors or inaccuracies. Moreover, the law limits the authority of state agencies to collect personal information to those items that are necessary to comply with law and restricts disclosures without the consent of the subject of a record.
75. The Committee on Open Government (New York State) is responsible for overseeing the implementation and development of the above-mentioned laws. The Committee gives advice to any person or authority (written or oral). The staff of the Committee on Open Government, which consists of two attorneys and two secretarial/administrative assistants, now prepares approximately 800 written advisory opinions annually. More than 20,000 advisory opinions have been prepared since its creation in 1974. Those drafted since 1992 are accessible online, and the Committee's website receives approximately a million "hits" annually. The staff also engages in a significant number of educational presentations each year before state and local government groups, news media, professional and civic organisations, and for students in law, journalism and public administration.
76. Complementing their laws concerning public access to records, each State has enacted a law generally requiring that meetings of public bodies, i.e., state legislatures, city councils, boards of education, etc., be conducted in public. While the levels of transparency or openness differ from one State to another, the laws concerning access to government meetings and records focus on a central principle, namely the presumption of access; i.e. records and meetings must be open to the public unless an exception prescribed by law authorises a denial of access to records or closing meetings.

#### Control of Public Administration

77. The Department of Justice (DOJ) is the principal federal government entity responsible for detecting and prosecuting public corruption offences. The DOJ directs the federal prosecution function through US Attorneys in ninety-four districts and through specialised components in Washington, D.C. The DOJ also directs the primary federal investigative function through the Federal Bureau of Investigation (FBI).

78. Other federal agencies also have specialised components responsible for addressing pertinent aspects of public corruption. These agencies include the Internal Revenue Service (IRS), the Securities and Exchange Commission (SEC), and the Office for Government Ethics (OGE).
79. Most federal agencies have Offices of Inspectors General (IG), who function as internal “watchdogs” for the agency and are responsible, *inter alia*, for conducting investigations into wrongdoing at the respective agency. According to the Inspector General Act of 1978, as amended, the IG’s mission is to conduct independent and objective audits, investigations and inspections; prevent and detect waste, fraud and abuse (including corruption). An important part of the detection function is the reporting by employees of misconduct of fellow employees or others whose improper conduct may affect the agency. Almost all Offices of the Inspector General have “hotlines” that invite employees to report misconduct and abuse over the telephone. The investigations may result in administrative, civil, or criminal proceedings/sanctions. All prosecutions are ultimately conducted by the DOJ, which is the only body that is entitled to bring federal criminal charges. Reports may be made anonymously.
80. IGs should be appointed without regard to political affiliation and based only on integrity and ability in accounting, auditing, investigations, management analyses, etc. The President appoints IGs in major agencies with Senate confirmation. Both Houses of Congress must be informed if an IG is removed. The IG is under the general supervision of the head of the agency, but independent in performing his/her duties and the head of an agency cannot, according to law, prevent or prohibit the IG from conducting an investigation or audit. The IG reports biannually to the Congress.
81. There are currently 64 Inspectors General within the executive branch who co-ordinate their activities through the President’s Council on Integrity and Efficiency (PCIE). The PCIE also oversees a committee that examines allegations against the Inspectors General and high-level members of their staff.
82. The Government Accountability Office (GAO) is an independent, non-partisan agency accountable to the Congress. The GAO basically investigates how the federal government spends its funds and the effectiveness of federal programmes. It monitors virtually the whole Government and issues more than 1000 reports every year. The GAO is also an appeals instance for unsuccessful bidders in a competition.
83. The concept of the ombudsman is rare in the United States, and there is no ombudsman function or office that deals with maladministration or complaints by the public at the federal level. However, some federal and state agencies have designated ombudspersons to serve as a bridge between an agency, the public, and an industry, as in the case of the Federal Deposit Insurance Corporation. The GET was informed that the citizens of the City of New York elect a “Public Advocate” who carries out ombudsman functions concerning the relationship between the public and City government. The Public Advocate serves as a mediator and intermediary and performs an advisory role in seeking to resolve disputes and protecting the public.
84. Administrative decisions can be challenged through a whole range of procedures. Appeal rights exist against an administrative decision or action at the agency or at a higher authority within the agency. Ultimately, there are always judicial review provisions. The Administrative Procedure Act, 5 U.S.C. 701 et seq., permits those adversely affected by an administrative decision to challenge it in a federal court. The system of challenging administrative decisions at the federal level is mirrored at state and local levels.

85. A particular tool in the fight against corruption at the local level is the New York City Department of Investigation (DOI), founded in 1873 and described as one of the oldest corruption fighting organisations in the USA. The DOI's mission is basically to investigate city employees and others doing business with the City (including contractors), which involves notably background checks before employment or contracts; and to investigate those who are suspected of *inter alia* corruption. DOI is also the investigative arm of the New York City's Conflicts of Interest Board, and as such, investigates allegations of violations of the city's conflicts of interest law that are brought to the Board. In its investigations the DOI works with the federal as well as local law enforcement.

#### Recruitment, career and preventive measures

86. There are two main categories of public officials in the federal executive branch: those hired under a competitive, merit system typically leading to career appointments and those appointed to non-career positions, such as Presidential appointees and their immediate staff. There are approximately 20 million public employees in the USA, three million of these are employed at the federal level. There are approximately 3,000 non-career (political) positions. However, the vast majority of full-time public officials in the executive branch are still selected through a merit system. Individuals applying for these merit positions are recruited through public announcements of openings (internet and/or publication in the press) and through the Government's participation in recruitment visits to educational institutions and job fairs. Selection by the Government must be based on applicants' ability, knowledge and skills (5 U.S.C. 3301-3304). There is a general prohibition on career public employees to run for partisan political office or take part in political activity while on duty or in a government building (the "Hatch Act"). Political appointees are subject to the prohibition on running for partisan political office, but may take part in political activity while on duty or in a government building as long as the appointee does not use funds from his employing agency to pay for that political activity. The GET was informed that most agencies have been delegated authority to recruit their own staff.
87. Under existing statutes and rules, all persons employed within government circles must be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. The appointment of each individual is subject to investigation. The scope of the investigation varies, depending on the nature of the position and can range from a simple criminal record and financial credit check to a full field background investigation conducted by the FBI or any other investigative service. The requirement to be investigated applies whether or not the position requires a "security clearance" (in order to have access to classified national security information) or whether the position is career or non-career. Each potential official for any position requiring some degree of public trust is required to complete a questionnaire which asks for personal information going back several years (seven or more) such as addresses, all schools attended, past employment (including information on the reasons for leaving the prior employment), references, marital status, relatives, military service, investigations record, foreign travel, police record, and financial records. The potential official who has consulted with a mental health professional or another health care provider about a mental health related condition may also be required to waive his or her privacy interest and permit the background investigators to question his/medical practitioner about his/her mental status and prognosis. Medical history questions are limited in terms of whether the status or prognosis would impact the individual's ability to carry out the duties of the position or present conflicts with security requirements. The investigation is a job requirement. Providing the information is voluntary on the part of applicants, but if an applicant chooses not to provide the required information, s/he will not meet the requirements of the job and will therefore not be considered further. If the individual is already employed by the federal government on a conditional appointment pending this investigation, his/her appointment will be terminated unless the information is provided. For those being considered for Presidential

appointments requiring Senate confirmation, the FBI typically conducts a full field investigation. Such applicants are also required to fill out separate questionnaires from the White House and from the Senate Committee scheduled to conduct their confirmation hearing. These individuals are required to file personal financial disclosure reports.

88. There are three central institutions of particular relevance for providing a common recruitment and personnel oversight at the federal level; the Office of Personnel Management (OPM), which has the overall policy function and objective to ensure the federal government has an effective civilian workforce and to arrange for security or background investigations on hired employees; the US Merit System Protection Board (MSPB), which is an independent quasi-judicial agency that serves as the guardian of the merit system; and the Office of Special Counsel (OSC), which is an independent investigative and prosecutorial agency with the main objective to safeguard the merit system by protecting federal employees from prohibited personnel practices, such as reprisal for whistleblowing (see also below). Employees are entitled to submit complaints (appeals) about their employment and about specific personnel actions taken against them including wrongful termination to these bodies; several thousand complaints are submitted every year. Presidential appointees are not covered by the prohibited personnel practice rules, nor are any of their confidential employees (employees hired by the appointee to work during the appointee's term of office on confidential or policy-making matters). However as the GET was told, it is not possible for a public employee to challenge a decision to remove his/her "security clearance" outside of the administrative review process within the employing agency. Procedural steps must be followed if an employment is subsequently terminated because of failure to maintain their security clearance. The employee may challenge those procedures outside the employing agency. The OPM and MSPB perform regular audits on how the agencies follow the recruitment and employment rules. These institutions also perform some training although much training is accomplished within individual agencies and by vendors. Presidential appointees and their staff do not have appeal rights to these institutions as they serve at the pleasure of the President.
89. The recruitment policy at state and local level is similar to that of the federal level. There are two types of public employees; competitive class and the non-competitive employees (political appointees). The rules on employment in the State of New York are based on a merit system, contained in the Constitution.
90. The New York State Department of Civil Service is the central personnel agency for the State of New York, which employs some 164,000 people. The Department performs the selection of public employees and acts as the watchdog over the civil service through regular audits, etc. This Department has also a Municipal Service Division to provide technical assistance to 101 municipal civil service agencies within the State, representing some 388,000 employees.
91. New York City has its own administrative organ: the New York City Department of Citywide Administrative Services to support all city agencies. The system of recruitment is similar for New York City, with a merit system and background checks equivalent to those in place at the federal level.

### Training

92. All federal executive branch employees are required by regulation to receive an initial ethics orientation within 90 days of entering the federal Government. High and mid-level executive branch employees are, in addition, required to receive subsequent annual ethics training. The purpose of the training is to educate employees about the executive branch standards of conduct and the

ethics laws in order to help them avoid real or apparent conflicts of interest and the appearance of impropriety. Executive branch agencies generally provide the initial ethics orientation through written materials which must include a copy or summary of the Standards of Ethical Conduct for Employees of the Executive Branch to keep or review, and the names, titles and office addresses and phone numbers of the Designated Agency Ethics Official and other ethics officials available to advise the employee on ethics issues. The agencies are required to provide each employee one hour of official duty time to review the materials. Some agencies exceed the minimum requirement for initial ethics orientations by providing new employees with a verbal briefing, ethics education videotapes or computer-based ethics courses.

93. Annual ethics training for high and mid-level officials can be conducted using a variety of methods. Executive branch agencies must provide a one-hour verbal briefing to these officials once every three years and may use other training media in the other years to meet the annual training requirement. Annual Ethics training, regardless of the format used, must include a review of the Principles of Ethical Conduct, the Standards of Ethical Conduct for Employees of the Executive Branch, the criminal conflict of interest statutes, any agency supplemental ethics regulations and the names, titles and office addresses and phone numbers of the Agency Ethics Official and other ethics officials available to advise on ethics issues. Additionally, the training must be presented or prepared by a qualified instructor, who is typically an ethics official of the agency or an employee of the Office of Government Ethics (OGE). Many executive branch agencies also require other employees to attend ethics training annually or periodically at their discretion and have ethics education materials on their intranets or web sites that are accessible to all employees.
94. High-level executive branch employees who file financial disclosure reports must receive verbal ethics training annually, though an agency may substitute written training in some years under certain circumstances. Many other high- and mid-level employees must also receive annual ethics training of some type, and many agencies require additional employees to attend annual ethics training. In addition to each agency's ethics programme, the OGE oversees many training programmes throughout the executive branch. The focus of the training is on conflicts of interest laws. Each agency is also required to appoint an agency ethics official, and one of the duties of such officials is to ensure that an ethics counselling programme exists for the agency's employees.
95. Executive branch employees are also provided with a number of training opportunities in order to advance in their careers. Many of those training opportunities, particularly those designed for managers and for those individuals seeking to enter the Senior Executive Service, have special components that deal with the broader topic of the ethics of public service.
96. The GET was told that according to data collected by the Council on Governmental Ethics Laws (COGEL), most of the state and many of the municipal level ethics offices conduct employee training.
97. Training of staff employed by the New York City rests upon the City itself, primarily the New York City Conflicts of Interest Board and the Department of Investigation. By law, a public employee must, within 10 days of employment, file a written statement with the Board stating that s/he has read and will conform with the NYC Conflicts of Interest Law. The Board also carries out training through various media of new recruits to this end and provides public servants with plain language versions of the Law. The Department of Investigation (DOI) conducts corruption prevention lectures in every City agency in which the City's conflicts of interest rules are emphasised as is each employee's legal obligation to report violations to the DOI.

## Codes of conduct/ethics

98. All federal officers and employees of the executive branch are governed by the administrative Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) and a series of criminal conflict of interest statutes and civil ethics statutes. The Standards of Conduct are based upon 14 Principles of Ethical Conduct and are contained in 5 C.F.R. part 2635. The criminal conflict of interest statutes are found in chapter 11 of Title 18, U.S.C. The civil "ethics" statutes are found in title 5 U.S.C. app. Briefly, provisions within the executive branch standards of conduct cover the following topics: gifts from outside sources; gifts between employees; conflicting financial interests; impartiality in performing official duties; seeking other employment; misuse of position (using public office for private gain, non-public information, Government property, and/or official time); and outside activities. These Standards of Conduct are regulatory in nature and can be enforced through the administrative imposition of disciplinary sanctions including reprimand, suspension, demotion, transfer and termination of Government position.
99. The Standards of Conduct cover behaviour which is deemed inappropriate but not so serious as to subject an employee to criminal or civil sanctions. All public officials (political appointees as well as career employees) in managerial positions are provided with training on the standards of conduct and ethics laws and regulations upon entering their positions and, for those in managerial positions, annually thereafter. Additionally, managers of programmes that can have a substantial financial effect on the public are required to file either a public or a confidential financial disclosure form upon entering the position and annually thereafter. These forms are reviewed by agency ethics officials and serve as a counselling tool with regard to conflicts of interest. As mentioned, the OGE has an overall responsibility for federal agencies' compliance with these ethics programme requirements. More generally, the performance of all employees of the executive branch, and most importantly managers, is reviewed annually by supervisors based upon written performance criteria. In part, those criteria will include performance standards to help inculcate the conduct expected of the managers with regard to the application of laws and regulations applicable to their conduct.
100. New York State has an Ethics Law (Public Officers Law) administered by the New York State Commission. The Commission has jurisdiction over state executive branch employees and provides advice and counsel, trains state employees in the law, and prosecutes violators when the law is broken. New York City has a Law on Conflicts of Interest administered by the NYC Conflicts of Interest Board. The New York City Department of Investigation conducts all investigations of possible violations of the laws on behalf of the Conflicts of Interest Board. Moreover, the Council on Governmental Ethics Laws provides means for voluntary co-ordination between federal, state and local levels regarding issues of public ethics.

## Conflicts of interest

101. Addressing conflicts of interest is an important responsibility of the various ethics committees which exist at federal level as well as at state and local levels. The Office of Government Ethics (OGE) deals, to a large extent, with prevention of conflicts of interest at federal level and similar tasks are given to the New York State Ethics Commission and the New York City Conflicts of Interest Board together with the New York City Department of Investigation.
102. At federal level there is a series of conflict of interest statutes, criminal, civil and administrative. These extend to public employees and sometimes even to the private sector in dealings with public authorities. There are criminal statutes in chapter 11 of title 18 of the U.S. Code which specifically describe situations where an employee may not engage in a particular conduct which

is in conflict with an official duty or loyalty to the Government. The most generally applicable restrictions are found in sections 201-209. None of these criminal statutes prohibit the holding of a particular financial asset or a position outside the Government, but some do prohibit the receipt of anything of value or compensation for certain activities. The civil statutes (5 U.S.C. app. section 501 et. seq.) do, however, prohibit the most senior political officials from engaging in certain types of activities or holding certain positions in their private capacities and from receiving more than a specified value of outside earned income, regardless of the activity performed. The Standards of Conduct for the executive branch (5 C.F.R. Part 2635) complement these restrictions with general branch-wide restrictions as well as by allowing agencies to restrict further the outside activities and financial interests of their employees, when appropriate.<sup>10</sup> There is also at state and local levels similar legislation to curb conflicts of interest.

103. Individuals in the most senior positions at federal level are required to file a personal financial disclosure report upon entry into the senior position, annually and when leaving the service. These reports are available to the public upon request. In the executive branch, individuals in positions which require the employee to make decisions or exercise significant judgment in activities in which the final decision or action will have a direct and substantial economic effect on a non-federal entity (i.e. contracting, procurement, etc) are also required to file financial disclosure reports with their agency. These individuals are often, but not always in mid-level positions. The reports filed by these individuals are not available to the public. In the executive branch there are approximately 20,000 public financial disclosure filers and 250,000 confidential financial disclosure filers. The financial disclosure requirements apply to career as well as to political employees.
104. Both the public and confidential financial disclosure reports are reviewed by the federal executive branch agency in which the individual serves, primarily for purposes of identifying potential or actual conflicts of interest. When information on a financial disclosure report indicates that an actual conflict of interest may have occurred, that matter is referred for further investigation and possible prosecution and/or administrative sanction. When information on a report indicates a potential conflict of interest, the employing entity works with the individual to determine appropriate steps s/he must take in order to avoid engaging in an activity that will change the potential for a conflict into an actual conflict. Such steps may include: divestiture of an asset, resignation from an outside position, etc.
105. For the highest officials of the executive branch this programme is more formalised. As a practice, each individual whom the President is considering appointing to a position which requires Senate confirmation, files, initially on a confidential basis, a draft copy of the financial disclosure report that would become public if the individual is ultimately nominated. That report is reviewed by the White House, the agency in which the individual would serve and the Office of Government Ethics (OGE) in order to determine what steps that individual must take to avoid conflicts. When the President formally nominates an individual, the OGE sends to the Senate a copy of the individual's financial disclosure report, as well as an opinion letter outlining the steps which have been determined necessary for the individual to follow in order to avoid conflicts (an

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<sup>10</sup> Agency supplemental regulations are found at 5 C.F.R. Parts 3101-8701.) Laws governing individual agencies may provide for additional specific activity restrictions or prohibit certain specific types of interests for officers and employees of that agency. As an example, the law establishing the Securities Exchange Commission (the Securities Exchange Act of 1934 as amended), states that the five Presidentially appointed and Senate confirmed Commissioners may not "engage in any other business, vocation, or employment than that of serving as commissioner, nor . . . participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission. . . ." (See 15 U.S.C. 78d(a)).

"ethics agreement"). The OGE then monitors this agreement to ensure that the steps agreed upon have been taken by the individual once in office. The OGE reviews the ethics agreements of some 1000 top executive officials.

106. Systems of financial disclosure are also in place at state and local levels. The objective of them is mainly preventive, i.e. to identify where conflicts of interest may exist. The GET was informed that in the State of New York, 25,000 employees (out of 250,000) have to file financial disclosure statements. The obligation applies to "policy makers" or those who earn more than \$75,000 per year. In addition, New York City has rules on annual disclosure by public employees most at risk of conflicts of interest. Disclosure applies to elected officials/candidates, agency managerial staff, policy and decision-makers, and employees involved in contracting or purchasing. Some 8,000 publicly available financial disclosure reports are filed every year with the NYC Conflicts of Interest Board. In addition, approximately 5000 supplemental financial disclosure reports are filed with the New York City Department of Investigation, which provide additional detailed information about City employees who are in positions in which they have the potential to significantly influence procurement and other critical government decisions.
107. The enforcement of conflicts of interest laws and the civil ethics laws at federal level is carried out by the Department of Justice (DOJ) through its Public Integrity Section in the Criminal Division, the Civil Division and the US Attorneys' Offices. The OGE surveys the DOJ and the U.S. Attorneys' Offices for all prosecutions conducted each year and posts on its website a summary of each case. These summaries are used in training and education. The New York State Ethics Commission can conduct administrative proceedings for violations of the Public Officers Law and impose civil penalties; disciplinary sanctions for violations are imposed by the employing agency. Certain violations of the Public Officers Law may be referred by the Commission to an appropriate prosecutor. The New York City Conflicts of Ethics Board enforces conflicts of interest legislation at NYC level.

#### Post employment restrictions ("revolving doors")

108. In the executive branch, measures are in place for addressing actual or apparent conflicts or partiality when first entering government service, while in service and when officials are considering moving to employment outside of the government. With regard to the latter, the Criminal Conflict of Interest Code in section 208 prohibits a federal executive branch employee from taking any action in a Government matter in which any person with whom s/he is negotiating for employment has a financial interest. This is supplemented by the Executive Branch Standards of Ethical Conduct which set forth the restrictions for employees when they begin "seeking" employment, which begins earlier than "negotiating" for employment. Following public service, the Criminal Conflict of Interest Code (section 207) restricts the activities of former public officials of the executive and legislative branches. It does not contain an outright prohibition on employment with any entity. Instead, the restrictions apply to communications or appearances on behalf of another, made with the intent to influence the public service. In general terms, these restrictions are focused on protecting governmental processes from misuse of former government positions in matters or venues in which the former official was involved or held a senior position. The restrictions apply in principle to all executive branch officers regardless of rank. An executive branch officer who serves in a position at any level is restricted from representing others on particular matters involving specific parties in which s/he had personally and substantially participated as a public official. This restriction lasts for life of the matter (18 U.S.C. 207(a)(1)). Senior officials are restricted for one year from representing others before the officers and employees of the departments and agencies in which they served in their last year of public service. For these senior officials, the subject of the representation need not be related in any way to matters in which they had participated while in

Government service (207(c)). Very senior officials (Cabinet level) are restricted for one year from representing others before, in essence, the senior political officials of all departments and agencies of the executive branch (207(d)). In addition to the post employment restrictions found in section 207, there are specialised safeguards for those in specific fields, in particular in procurement (41 U.S.C. 423).

109. The GET was told that according to information compiled by COGEL, the ethics laws of at least 35 of the state governments contain post employment/revolving door restrictions for their public officials.
110. The Ethics Law of the State of New York also provides rules on post-employment for public officials. The state post-employment restrictions are a part of the Public Officers Law and consist of a two year and a lifetime bar. They apply to virtually all state officers and employees including employees of state agencies, state public benefit corporations and authorities, the State University of New York ("SUNY") and the City University of New York ("CUNY"). A former employee is barred for two years from appearing, practicing, or rendering compensated services on any matter before his or her former agency. A former employee is prohibited forever from appearing, practicing, or rendering compensated services on any case, proceeding, application, or transaction in which the former employee worked while in state service.
111. New York City's Conflicts of Interest Law contains a prohibition on soliciting, negotiating for, or accepting a position from anyone with whom the employee is already involved in his/her present NYC position. Moreover, former officials are prohibited from communicating with their former City agency for one year after leaving the service, former employees are banned for life from working on matters they worked on in the former public function, and former employees are prohibited from ever disclosing confidential information. The New York City Conflicts of Interest Board is the sole City agency to interpret and enforce the Conflicts of Interest Law.

### Gifts

112. Gifts are, in addition to provisions in the Constitution and in criminal law (criminal conflict of interest statutes), addressed through administrative Standards of Conduct. The (federal) executive branch Standards of Ethical Conduct contain two sub-parts dealing with the subject of gifts, gifts from outside sources, and gifts from other employees. The gifts restrictions have been drafted in such a way that employees who follow the rules need not concern themselves with inadvertently violating a civil or criminal statute.
113. The basic restriction for gifts from outside sources provides that an employee must not, directly or indirectly, solicit or accept a gift from a prohibited source (or a gift given because of the employee's official position). There are specific written exceptions. A "gift," includes in principle "any gratuity, favour, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value". A "prohibited source" means any person or organisation who is seeking official action by the employee's agency; does business with or seeks to do business with the employee's agency; conducts activities regulated by the employee's agency; or has interests that may be substantially affected by performance or non-performance of the employee's official duties. One basic exception allows for an unsolicited gift that has a market value of \$20 or less. This would, for example, allow for the occasional lunch or inexpensive dinner. Another exception, narrowly drawn, applies to gifts based on a personal relationship, such as a gift from a family member or close friend.

114. Moreover, officers of the federal executive branch who file financial disclosure reports are required to report gifts from each source having an aggregate value exceeding \$305. There are narrowly drawn exceptions for reporting, including that applicable for gifts from family members.
115. The legislation and ethical provisions prohibiting gifts are in principle mirrored at the state and local levels. At the State of New York the main prohibition to accept gifts (bribes) is contained in the Penal Law. There is an additional provision in the Public Officers Law that prohibits the acceptance of gifts (as opposed to bribes) which have a cumulative value from one source in a given year of \$75 or more when the gift is given under circumstance in which it could be reasonably inferred that the gift was intended to influence the official. The Conflicts of Interest Law of New York City as complemented by rules of the NYC Conflicts of Interest Board provide detailed rules about gifts, based on the main principle that no public employee is allowed to accept any valuable gift as defined by the Board. The GET was told that the limit of a "valuable gift" is set at \$50 during a twelve month period, i.e. two gifts from the same person exceeding in total \$50 would violate the rule (there are some exceptions to the rule). The public employee bears the burden of determining whether the donor does business with the City.

#### Reporting corruption

116. With regard to the federal executive branch, the Standards of Conduct provide that employees are to disclose waste, fraud, abuse and corruption to appropriate authorities" (5 C.F.R. 2635.101(b)(11)). The authorities may have supervisors or investigative authorities such as an agency's Inspector General. Employees normally report to these bodies but may also report directly to the law enforcement. Additionally, all executive branch agency heads are required, pursuant to 28 U.S.C. 535, to report to the Attorney General's office any information, allegation, or complaint received in their respective agency regarding a violation of the Criminal Code by an executive branch officer or employee. An executive branch employee who is fully aware of, for example, corruption and fails to report the misconduct is subject to administrative discipline. Offices of Inspector General have created telephone hotlines that allow employees to report either anonymously or otherwise.
117. In respect of the legislative branch, Senators, Members of the House of Representatives, and officers, and employees of both houses of Congress are expected to adhere to the 1958 Code of Ethics for Government Service, which requires them to "*Expose corruption wherever discovered*". In addition, the Code of Official Conduct for the House (House Rule 23) states that (a Member,) an officer, or employee of the House of Representatives "shall conduct himself/herself at all times in a manner that shall reflect creditably on the House." Senate Resolution 338 of the 2<sup>nd</sup> Session of the 88<sup>th</sup> Congress, as amended, stresses that the Senate Select Committee on Ethics "shall receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate."
118. It is normally mandatory for public employees at the state and local level to report suspected corruption. New York State employees of the executive branch are required by Executive Order #39 to report wrongdoing to the Office of the Inspector General. Pursuant to Mayoral Executive Order 16, all New York City employees are required to report any information concerning corruption, fraud, conflicts of interest, abuse of authority or gross mismanagement to the New York City Department of Investigation. Failure to make such a report could lead to loss of the employees' government jobs, among other things.

## Whistleblower protection

119. The federal Whistleblower Protection Act of 1989 was enacted to remove any chilling effect on whistleblowing that might result from reprisals. The Act prohibits the punishment of public officials for reporting of violations of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a serious danger to public health or safety. Under the Whistleblower Protection Act (5 U.S.C. section 2302(b)), a public official who believes that s/he has suffered retaliation for making a protected disclosure may file a complaint with the United States Office of Special Counsel, an independent investigative and prosecutorial agency. That Office will investigate the complaint and, where it finds that an improper reprisal has occurred, will seek voluntary corrective action from the employing agency. It may also ask the employing agency to take disciplinary action against the agency official who engaged in retaliation. If the employing agency declines to provide voluntary relief, the Office of Special Counsel may prosecute a case on behalf of the injured employee and/or may file a case for disciplinary action against the retaliating official with the Merit Systems Protection Board. The Board has the authority to order the employing agency to provide corrective action to employees and/or to discipline agency officials who engage in retaliation. Local governments also provide additional protections to Whistleblowers. In New York State, two laws, New York State Labor Law § 740 and New York State Civil Service Law § 75-b primarily protect government and private sector employees who blow the whistle on corruption. In New York City, there is a special Whistleblower law, New York City Administrative Code § 12-113, which protects City employee Whistleblowers and is investigated and enforced by the New York City Department of Investigation.

## Sanctions (criminal, civil and disciplinary)

120. The criminal conflict of interest statutes and all other statutes in Title 18 of the U.S.C. are enforced by the Department of Justice (DOJ) through the courts. Cases involving conflicts of interest statutes in sections 203-209 can be brought either as criminal or civil matters. For criminal matters, there are two potential levels of sanction depending on whether or not the conduct was wilful. The first is a fine and/or imprisonment for one year. The second is for wilful violations and the potential penalty is generally a fine and/or imprisonment up to five years. The bribery statute (18 U.S.C. 201(b)) is punishable by up to a fifteen year prison term and offering or providing gratuities (18 U.S.C. 201(c)) is punishable by up to a two year prison term. Appeals may be made to the next level court following standard appellate procedures.<sup>11</sup>

121. Using a less onerous level of proof, the DOJ may also bring a civil action against any person who violates these sections. The civil penalty is not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The DOJ may also enjoin ongoing conduct. (See 18 U.S.C. 216)

122. The civil ethics statutes are enforced by the DOJ through the courts and have as sanctions a monetary fine of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is more severe (5 U.S.C. app. 504). Appeals can be made to the next level court.

123. Disciplinary and corrective sanctions for violations of the Standards of Conduct can include a warning, counselling, reprimand, suspension, transfer, or firing. These actions are imposed by the agency in which the employee serves following standardised procedures. These actions

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<sup>11</sup> Other sanctions based on other statutes often used in public corruption cases include: 20 years imprisonment and/or \$250,000 fine for extortion under colour of official right (18 U.S.C. 1951) or for honest services mail and wire fraud (18 U.S.C. 1341, 1343 and 1346); and 5 years imprisonment and/or \$250,000 fine.

include rights of appeal first within the agency, then in the case of more major disciplinary actions (14 days of suspension through removal) there are statutory appeal rights to the Merit Systems Protection Board (a separate agency within the executive branch) and then to the federal court system.

124. The situation is similar at state and local levels. In New York City, alleged violations of the City's Conflicts of Interest laws are investigated by the Department of Investigation and the results of these investigations are referred to the Conflicts of Interest Board for appropriate disposition.

#### Disciplinary proceedings

125. Primary investigative responsibility for the discipline of public officials depends on the nature of the misconduct. When the misconduct is administrative in nature, and does not rise to the level of criminal activity, the Offices of Inspector General play the lead role in the investigation of their employees. Disciplinary procedures are administrative in nature, and usually result in some form of adverse personnel action, ranging from letters of reprimand to termination of employment. If the misconduct involves the substantial likelihood of a violation of federal criminal laws by a public official, the Federal Bureau of Investigation (FBI) is usually the principal investigative agency. Additionally, the Offices of Inspector General for the individual Departments or Agencies may either conduct the investigation or assist the FBI where allegations involve misconduct by officials within the particular Department or Agency. The Public Integrity Section of the DOJ and the United States Attorneys' Offices co-ordinate the investigations.
126. Disciplinary and criminal procedures are in principle very much independent from each other. However, in the public corruption arena, it is not uncommon for both disciplinary and criminal procedures to be potential outcomes of an investigation. With appropriate co-ordination between administrators and prosecutors, both criminal and administrative procedures can take place at the same time. Typically, however, administrative procedures do not occur until a decision is made regarding criminal charges. Once the criminal matter is resolved, administratively imposed sanctions are considered.
127. The situation is similar at state and local level. In New York City, an Inspector General is assigned to monitor the conduct of each City agency. These Inspectors General report to the Department of Investigation, rather than the head of the agency being monitored to ensure the Inspector General's independence. The Inspectors General do report investigative findings to the affected agencies.

#### Statistics

128. In the executive branch, agencies are required to maintain evidence of administrative disciplinary actions in individual employee personnel files but compilations by agencies of actions taken do not necessarily separate discipline based upon a violation of the Standards of Conduct from that based upon a violation of other types of rules. However, each year the OGE surveys executive branch agencies with regard to disciplinary actions (including removals, demotions, suspensions, and written reprimands) based wholly or in part upon violations of the Standards of Conduct. The agencies make good-faith efforts at supplying this information, but the OGE considers the data to be approximate<sup>12</sup>:

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<sup>12</sup> The category of Misuse of Position, Government Resources or Information, includes such matters as using a telephone or a computer for unauthorised personal purposes. The workforce covered by the relevant standards exceeds 3 million employees.

**Number of Disciplinary actions taken based wholly or in part upon violations of the Standards of Conduct**

	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Gifts from outside sources	42	27	63	117
Gifts between employees	2	7	6	11
Conflicting financial interests	21	39	71	44
Impartiality in performance of official duties	83	72	89	52
Seeking other employment	47	22	11	26
Misuse of position, Government resources, information	1,880	1,785	2,513	2,050
Conflicting outside activities	31	101	49	99
Compensation for teaching, speaking, and writing	0	4	3	5
Compensation from non-federal sources	21	101	30	4
Indebtedness	441	304	1,168	724
General principles	653	1,208	417	253
Provision(s) in agency supplemental regulation	46	149	30	79
Other	677	692	606	842
Total disciplinary actions taken	3,944	4,511	5,056	4,306

In 2004 and 2005, data was collected in a different manner but the total disciplinary actions were 3,225 for 2004 and 3,454 for 2005.

**b. Analysis**

129. Although it is widely recognised in the United States that corruption poses a constant threat to the proper functioning of public administration at federal, state and local levels, there is no one document outlining an anti-corruption strategy for the whole public administration. This is not due to an assumption that corruption is not a major problem, but rather a result of the constitutional framework and common law tradition of the USA, in particular the strict independence of the various states and local governments.
130. The federal Government has stated that considerable resources are devoted to the prevention of corruption and that “by focusing attention and resources on areas like government hiring and promotion, employee compensation, codes of ethical conduct, internal controls and auditing procedures we can prevent much more corruption than we would ever be able to prosecute”<sup>13</sup>. Such resources, and those devoted to the detection, investigation and prosecution of corruption, are spread across a significant number of public bodies at the federal, state and local governmental levels, reflecting the different judicial systems and legislatures which are integral to the US system of federal government.
131. An inevitable result of this federal system of government, and the strict separation of powers at each level, is that corruption offences are capable of investigation and prosecution by a number of different public authorities both within one and between different levels of government. These overlaps in jurisdiction require close and significant co-operation and collaboration between the various investigating and prosecuting authorities to ensure that measures taken to combat corruption in the public administration are effective. The GET received information that suggests that, although sometimes imperfect, the mechanisms used to ensure the necessary co-operation

<sup>13</sup> Former Attorney General John Ashcroft, Global Forum II.

between different authorities for such co-operation work well in practice and are broadly effective in combating corruption in public administration.

132. One key benefit of this system, even though it may entail more administration costs, is that it can produce richness in differences of approaches to the prevention, detection and prosecution of corruption in public administration, all within broadly similar governance frameworks. This in turn provides considerable opportunity for the sharing of effective practice and learning about measures to prevent corruption in the public administration. Although in the time available the GET was only able to study arrangements in one State (New York) and one local government (New York City), in addition to the federal level, it discovered elements of good practice that might be usefully applied elsewhere in the system. In the lack of a mandatory and comprehensive sharing of good practice between various branches of public administration at federal, state and local levels, the GET considers that the Council on Governmental Ethics Laws (COGEL)<sup>14</sup>, a voluntary membership organisation, plays a critical role in ensuring that these benefits are realised by the collation and sharing of the variety of good practice in the USA.
133. Transparency of public administration is an important component for the prevention of corruption and a longstanding principle of US democracy. The effectiveness of prevention as well as the detection of corruption in public administration is clearly assisted by its relative transparency, established through a number of laws, the most significant of these being the Freedom of Information Act (FOIA). The federal Government introduced such legislation in 1966. Moreover, the promotion of transparency was further developed with the establishment of the Office of Information and Privacy in 1981. The GET was pleased to note that information received indicates that all the States also have their own freedom of information legislation in place to complement the federal law. The GET also noted with satisfaction that public consultation is a generally developed feature of US administration at all levels.
134. The GET did hear concerns that following the terrorist attacks of 2001, the scope of transparency had been curtailed for reasons of new "homeland security" sensitivities. Although the GET understands the reasons and also received information that an appropriate balance between transparency and security was currently being reached, *it observes that the US authorities should be cautious to maintain a high degree of transparency to the extent possible.*
135. The GET was interested to learn about the operation of the New York State Committee on Open Government for New York State and City. This "ombudsman-type" institution, which assists both public authorities, and - more importantly in the view of the GET - also the wider public through the issuing of opinions, apparently carries significant weight and represents an important complement to the established case-law of the courts, which is not always easy to interpret, at least not for the wider public. The Committee on Open Government is aimed at bringing clarity to issues relating to freedom of information without recourse to the courts, thereby saving both time and money of public authorities and the public at large. The GET considers that it is a good example of a proactive approach and service spirit *vis-à-vis* the citizens. Such a model does not exist at the federal level; the Office of Information and Privacy of the Department of Justice provides advice and guidance only to agencies and not to the wider public. **The GET therefore recommends to consider enhancing the assistance to the public at the federal level with regard to access to public information.**

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<sup>14</sup> COGEL has members from outside the US, although membership is predominantly US and Canadian government agencies, offices, and committees with responsibility for ethics, campaign finance, lobbying registration and freedom of information.

136. The Office of Government Ethics (OGE) plays a central role at the federal level in the prevention of corruption in public administration through its ethics programme delivered by ethics officials within each federal executive branch agency. The information collected by the GET indicates that the OGE's programmes have played a significant role in the high levels of awareness of anti-corruption principles and preventive measures of federal officials in different agencies. Moreover, the OGE oversees a substantial training programme in each federal executive branch agency centred around applicable ethics laws and, in particular, the administrative "Standards of Ethical Conduct for the Executive Branch", an enforceable civil code of conduct for all federal employees in the executive branch. The Code is comprehensive, covering gifts, misuse of position, conflicting financial interests among other issues and, in order to be enforceable, is necessarily detailed in its provisions. The GET shares the observations of OGE that, although important because employees are subject to discipline based on those standards, such a detailed Code is not necessarily always the best instrument for raising awareness and understanding of the key principles of conduct that underpin effective prevention of corruption. In this connection, the GET was pleased to note that OGE had developed and was continuing to develop additional educational products based on the 14 Principles of Ethical Conduct from which the Standards of Ethical Conduct to the Executive Branch derive.
137. The annual financial disclosure obligation applies to around 270,000 federal employees (over 10% of the total federal employees). This tool is split into 20,000 *public* disclosures from the most senior positions (of all three branches of the federal Government) and 250,000 *confidential* disclosures for those in the executive branch holding less than senior positions but required to file using a risk-based criteria. This is a comprehensive programme which includes review and analysis of the financial disclosures for conflicts of interest that, in the view of the GET, may have an important preventive impact on real and potential conflicts of interest that might lead to corrupt activities in the public administration.
138. The GET did not receive any indication that the internal scrutiny carried out in respect of public financial disclosures within the public administration was not sufficient; it was, *inter alia*, informed that more than 6000 individuals throughout the executive branch were involved in the ethics programme function - under the supervision of the OGE - where the review of the disclosure reports is an important element. In this context, the GET did hear critical concerns about the accessibility and availability of the individual disclosures to the public and the media.. However, the GET noted with interest that according to OGE's statistics, 90 per cent of all requests for access to public disclosures were fulfilled within three days and, as a matter of practice, most requests satisfied within one working day. The GET was informed that under current statutes a public record is kept of all who request a copy of an individual's report in order to be able to trace illegal or commercial use of the information. The GET accepts that these measures are in place for the sake of the individual's rights to privacy and security, and that these measures also serve the purpose to encourage those who are required to file disclosures cooperate.
139. The USA is at the forefront of involving the private sector through the use of contractors to deliver programmes and provide services. The involvement is extending ever more deeply with contractors undertaking a growing number of functions within the executive branch of the federal Government. This approach is clearly perceived as having significant benefits for the effectiveness and efficiency of the public administration and is, to a varying extent, being followed by other countries. It is, however, recognised that such increased involvement brings with it increased risks, including that of corruption. The GET was therefore concerned to learn that no overall framework or principles exist to govern the standards of conduct expected of contractors and their employees, even those working within executive branch agencies, and an appropriate way to address the issue should be sought. **The GET therefore recommends that the federal**

government study the use of contractors and their employees in the federal workplace in order to provide a foundation for an appropriate approach for addressing, on a systematic basis, conduct standards expected of contractors working within public administration.

140. The mobility of individuals in senior political positions to and from the private sector is said to be a key consequence of the U.S. Constitution's requirement that Presidents are elected for four year terms, during which the President appoints to the most senior positions in the executive branch, individuals who to carry out the President's stated policies. The GET was informed that individuals appointed to these positions ("political employees") most often come from outside the career ranks and during or at the end of a term, return to the private sector. Moreover, in recent years, there has also been a recognition that individuals in non-political positions (career employees) often do not spend the whole of their careers in the public service. Staff fluidity has obvious benefits for the public administration but also brings risks of favouritism and corruption through misuse of public position for current or future gain. To address this concern, for those coming into the government, the Standards of Conduct limit the official actions that a new executive branch officer or employee may take with regard to his/her former employer and others with whom s/he has had a recent fiduciary relationship. The GET also acknowledged that the criminal conflict of interest law provides strict prohibitions on the actions of officers and employees when financial conflicts of interest exist, specifically including situations when they are negotiating for future employment or when they have agreements or continuing rights to regain specific employment in the private sector. The criminal law also provides for restrictions on activities former federal employees may undertake. These post-employment restrictions primarily limit representations of others (with or without compensation) before officers and employees of the executive branch, and vary in length of time and breadth depending on an individual's level of official position. There are, however, no generally applicable employment bars after public service or prior approval requirements, except for certain narrowly defined functions, for example individuals involved in major procurements and individuals involved in the examination of regulated financial institutions.
141. The lack of general restrictions or permissive control over the nature of employment of public officials (of any seniority) strikes the GET on the one hand as exposing the public administration to risks of corruption both political and economic. On the other hand, the USA has in place a body of rules which focus on the individual actions of the person concerned following or preceding public service and not on the actual or possible interests of his/her employer *vis-à-vis* public administration. Moreover, there are some time limited employment bars in place for particular situations. The GET is of the opinion that although the present system may be effective on the whole, there may be situations where post-service employment may raise legitimate concerns as to its ethical correctness, even if there is no specific evidence of particular objectionable action. *The GET therefore observes that ways should be sought to make wider use of employment bars in situations where public employees move to the private sector ("revolving doors").*
142. The Standards of Conduct provide that public employees at the federal executive branch are obliged to report suspicions of, *inter alia*, corruption to the appropriate authorities. Moreover, federal employees are not excluded from reporting to the law enforcement. The GET wishes to stress that it is essential that all public officials are obliged and actively encouraged to report substantive suspicions of corruption they come across in the service. **The GET recommends that the Office of Government Ethics (OGE) include in its training and educational materials, the obligation of executive branch officials at the federal level to report suspicions of corruption and related illegal activities, and, as a member of the Council on**

Governmental Ethics Laws (COGEL), to inform the other members of COGEL of the importance of an obligation to report suspicions of corruption.

143. Reporting of corruption can only be efficient when those who report are sufficiently protected from retaliation. Regarding the protection of “whistleblowers” the USA has traditionally been at the forefront and the Whistleblower Protection Act of 1989 not only prohibits reprisal but makes it possible to file complaints with the Office of Special Counsel. The GET was informed that based on decisions of the US Merit Systems Protection Board (MSPB) and the Federal Circuit, the current provisions of the Whistleblower Protection Act do not cover, as a form of reprisal, the withdrawal by an agency of an individual's clearance to receive and have access to national security information (a security clearance). Consequently, to be a covered type of reprisal requires a change in the law. The GET understands that amendments to the Whistleblower Protection Act are now pending in Congress. In addition, the GET also noted that a recent decision by the Supreme Court<sup>15</sup> while not affecting the federal Whistleblower Protection Act, held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes (Freedom of Speech), and the Constitution does not insulate their communications from employer discipline. The GET recognises that the issues raised are elements of an on-going policy debate in the USA on the balance between competing legitimate interests for national security and the protection of individuals' fundamental rights. Nevertheless, *the GET observes that the protection of whistleblowers should be carefully addressed in the current policy debate when legislative reforms concerning national security measures are being considered so that the viability of whistleblower protection in the USA is maintained.*

#### IV. THEME III – LEGAL PERSONS AND CORRUPTION

##### a. Description of the situation

144. There are a number of different legal persons in the USA. Business corporations, partnerships, limited liability companies, associations etc are examples of the most common forms of legal persons. By far the most important legal person in the USA is the “corporation”, which typically can be described as a legal entity distinct from the individuals who compose the business. It has its own rights, abilities and obligations similar to a natural person.

##### Establishment

145. There is no federal general mechanism for the establishment of legal persons. The legislation of each State decides the particular requirements for forming a legal person. As a result, the rules are not fully uniform, however, the GET was told that the differences play a minor role in reality. There are some States which are considered as more favourable for corporations than others, often depending on the tax situation. Once a legal person is established under the law of a particular State, there are federal rules/practices which allow them to operate in any of the jurisdictions of the USA. Licences etc for export/import are federal matters. Corporations may be *private* or *public*, the latter being owned through the issuance of stock certificates available to the general public.

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<sup>15</sup> 31 May 2006

## Registration

146. The GET was informed that all States have their own system for registration of legal persons and that the procedures are not fully uniform. Typically, there are forms to be submitted to the Secretary of State of the State under whose laws the legal person is being created. An established corporation may be required (however, not always) by other state laws to register also in another State prior to doing business there. Each State is responsible for keeping the registry of legal persons and there is no such registry held at federal level.
147. In the State of New York, persons aged 18 or more are entitled to form a corporation by filing an application for a certificate of incorporation with the New York Department of State. Although there is no required format to apply for the certificate, the following information is, as a minimum, required: the name of the corporation, purpose of the business (which may not be un-lawful), office location, stock structure and name, address and the signature of the incorporator, which may also be a legal person. The certificate is processed within one week to a month, and may also be expedited within 24 hours against an extra fee. Corporate by-laws are not to be submitted. The receipt of filing is the evidence of the incorporation. Limited liability companies (LLCs) are also required to be registered; LLCs carry the attributes of corporate liability limitations and the flow-through taxation associated with partnerships. The categories of legal persons that must be registered in New York State include business and not-for-profit corporations, limited partnerships, limited liability companies, and limited liability partnerships. In addition, in most cases general partnerships and sole proprietorships must meet certain filing requirements as well.
148. Before a corporation is registered in the State of New York it is checked that the minimum information is submitted. There is no material check carried out as to the correctness of the information provided, e.g. by using other information available, such as blacklists of corporations convicted for crime. It is entirely up to the corporation/incorporators to provide the registry with up to date information, such as a new address etc. The Registry, which is open to the public, is accessible via the Internet. In addition to the state system of registration of corporations, New York City keeps a registry for business corporations.

## Limitations in exercising functions in legal persons

149. Although there is no general criminal measure to prohibit individuals from holding a leading position in a legal person, the GET was told that a physical person who has been found guilty of a criminal offence may be prevented from holding a leading position in a particular legal person through conditions imposed by a court. This is possible at both federal and state levels..
150. Moreover, the US Securities and Exchange Commission (SEC), which is a federal authority with the primary mission to make sure that public companies disclose appropriate financial facts about the legal persons to the public, and thereby provide for a level of security to investors, has executive powers<sup>16</sup>, *inter alia*, to issue an order barring a person who has violated the antifraud provisions of the securities laws from serving as an officer or director of a publicly traded company. The SEC has used this authority 161 times in 2004 and 150 times in 2005. Similarly, federal banking regulatory agencies may bar convicted felons from serving in a leadership position in federally regulated financial institutions. The federal Government may be prohibited from doing business with corporations in certain circumstances where those corporations are

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<sup>16</sup> The SEC brings approximately 600 civil enforcement actions against individuals and companies that break securities laws every year, including insider trading, market manipulation, broker-dealer and regulated entity, and accounting fraud cases.

managed by persons who have been convicted of material felony crimes. For example, once a person has been convicted of health care fraud, that person may be prohibited from acting in a leading position with a provider of medical care that receives reimbursement from the Federal Medicare programme. Similarly, the Defense Department may decide not to do business with a corporation led by a person convicted of a material felony offence.

### Liability of legal persons

151. According to common law principles legal persons may always be liable for tort. Moreover, according to federal court case-law, legal persons, such as corporations, may be criminally liable for the acts of its agents, including acts related to corruption just as any natural person<sup>17</sup>. For the most part, federal criminal statutes make no special provision for legal persons; the US Code uses the words “person” or “whoever”, which covers legal as well as natural persons. A corporation may be responsible for the acts of agents made within the scope of its authority, even though the agent’s conduct may be contrary to the corporation’s actual instruction or contrary to the corporation’s stated policies<sup>18</sup>. Criminal liability can be attached to a legal person in some circumstances where the lack of supervision or control by a natural person, who has a leading position within the legal person, has facilitated the commission of active bribery, trading in influence<sup>19</sup> and money laundering. For example, according to the jurisprudence, a criminal conviction may be obtained in the face of wilful blindness or deliberate ignorance, and may be sufficient to convict a legal person<sup>20</sup>.
152. An actual benefit need not be effectively realised in order to convict a legal person of active bribery, trading in influence<sup>21</sup> or money laundering. Under the criminal domestic bribery and trading in influence statutes which are found in Title 18 of the US Code, Chapter 11, Sections 201, et seq., it is sufficient for criminal liability to attach where the “active bribery” or “trading in influence” was undertaken with the intent of the offerer to convey a benefit. In addition, the prohibition against active bribery of foreign public officials under the Foreign Corrupt Practices Act extends to offers, payments, promises to pay, or the authorisation of payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value.
153. A legal person may be convicted of criminal violations even where a natural person has not been convicted or identified. During the course of a criminal investigation, corporate management may be replaced and the new management may agree to enter a guilty plea before any natural persons have been convicted or identified, and then provide documentation and evidence which facilitates the subsequent identification and prosecution of natural persons. Under the Foreign Corrupt Practices Act, legal persons, and natural persons associated with a legal person, are

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<sup>17</sup> The liability of a corporation for the crimes of those acting on its behalf is well-established as part of the law of respondeat superior. *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 42 (1<sup>st</sup> Cir. 1991); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990); *United States v. Gold*, 743 F.2d 800, 822-23 (11<sup>th</sup> Cir. 1984), cert. denied, 469 U.S. 1217 (1985); *United States v. Cinciotta*, 689 F.2d 238, 241-42 (1<sup>st</sup> Cir.), cert. denied, 459 U.S. 991 (1982); *Boise Dodge, Inc. v. United States*, 406 F.2d 771, 772 (9<sup>th</sup> Cir. 1969); *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9<sup>th</sup> Cir. 1995). See *United States v. Carter*, 311 F.2d 934, 941-42 (6<sup>th</sup> Cir.), cert. denied sub nom. *Felice v. United States*, 373 U.S. 915 (1963).

<sup>18</sup> *United States v. Beusch*, 596 F.2d 871, 877 (9<sup>th</sup> Cir. 1979).

<sup>19</sup> The term “trading in influence” is not directly provided for in the US legislation. US authorities stress that depending on the particular facts of the relevant behaviour, various criminal statutes could be implicated, such as federal mail and wire fraud violations (including honest services fraud) under 18 U.S.C. §§ 1341, 1343, 1346; federal extortion offenses under 18 U.S.C. § 1951; federal Travel Act violations pursuant to 18 U.S.C. § 1952; and federal violations of the prohibition against interstate transportation or receipt of property stolen or taken by fraud in violation of 18 U.S.C. §§ 2314, 2315.

<sup>20</sup> *United States v. Walker*, 191 F.3d 326, 337 (2d Cir.1999) (quoting *United States v. Gabriel*, 125 F.3d 89, 98 (2d Cir.1997) (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195 (2d Cir.1989)).

<sup>21</sup> trading in influence, see footnote 15

independently criminally liable for the prohibited corrupt acts described in the statute, 15 U.S.C. Section 78dd-1, et seq.

154. Whether the legal person or the individual acting on behalf of the legal person is to be prosecuted or both, is subject to prosecutorial discretion. It is also a discretionary decision whether the liability of the legal person is to be determined in the same legal proceeding as the liability of the natural person. Criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to active bribery, trading in influence or money laundering do not exclude criminal liability of a legal person. In other words, prosecution of a legal person may be preceded by prosecution of natural persons involved in the same offence, including the natural persons through whom the legal person acted.
155. Within the framework of a prosecutor's discretion the government may enter a *Deferred Prosecution Agreement (DPA)* with a defendant corporation. Basically, this means that the government agrees not to prosecute a corporation after a period of time if the corporation abides by the terms of the agreement, admits to the wrong-doing, and typically agrees to adopt or enhance a compliance programme. DPAs may be used as alternatives to criminal prosecution, for example, if such a prosecution would carry significant consequences and harm to innocent shareholders, employees etc. A DPA, which lasts for a precise period of time, often also includes supervision of the corporation by an independent monitor.
156. The GET was told that prosecutors are increasingly exercising their discretionary powers with regard to corporations. The *Principles of Federal Prosecution of Business Organizations* (1999, updated in 2003) have been drafted as a guideline to prosecutors in deciding whether to prosecute a corporation and/or its employees. The single overarching principle states that "corporations should not be treated leniently because of their artificial nature, nor should they be subject to harsher treatment." The Principles also state that "charging a corporation does not mean that individual directors, officers employees, or shareholders should not also be charged". The Principles incorporate by reference Department of Justice guidance on the principles governing non-prosecution agreements generally.
157. The GET was informed that corporate liability following the same pattern as explained above, exists in every State. Moreover, the Supreme Court has held that a corporation could be criminally liable for violations of the Inter-State Commerce Act committed by its agents and officers.
158. Different criminal provisions may be used to prosecute bribery in the private sector, commonly referred to as "commercial bribery", - where public officials are not involved. Commercial bribery is generally a state law crime, but can be prosecuted as a predicate act of a federal crime. For example, a scheme to defraud which is based in part upon a commercial bribe paid to another person, in violation of a state law may be prosecuted as a violation of the federal criminal statutes. Private sector bribery may also be prosecuted under the mail and wire fraud statutes.
159. The US authorities do not maintain particular statistics regarding proceedings against legal persons for corruption offences. However, the GET was provided with examples of criminal and civil proceedings which had been instituted against legal persons for violations of the Foreign Corrupt Practices Act.

## Sanctions

160. Legal persons are subject to a wide range of sanctions, i.e. criminal as well as civil fines which may exceed those that can be imposed on natural persons. Legal persons may be prohibited from engaging in further illegal business and from making business transactions with federal authorities, and they may be denied licenses, such as export or import licences. Legal persons may also be subject to forfeiture (criminal and civil), see Theme I.
161. While each criminal statute may have a specified maximum fine, the US Criminal Code includes alternative sentencing provisions for organisations which, in many instances, may provide for a higher maximum fine for a legal person. Section 3571 of Title 18 provides that a fine for an organisation may be 1) the fine specified in the statute under which the conviction was obtained; 2) where the offence results in a pecuniary loss to a person other than the defendant - twice the amount of the gain or loss; or 3) \$500,000 for a felony conviction.
162. Under specific criminal statutes, a legal person convicted of a felony offence of bribing public officials or witnesses may be subject to maximum fines described in the preceding paragraph, or alternatively, three-times the "thing of value" offered or received as the bribe. 18 U.S.C. § 201. Bribery of members of the National legislature is subject to the fines in the previous paragraph, 18 U.S.C. §§ 203, 216. With respect to the bribery crimes under 18 U.S.C. §§ 203 through 209, the Attorney General of the United States is empowered to seek an injunction to bar a legal person or natural person from engaging in criminal behaviour in the future, 18 U.S.C. §§ 216 (b).
163. The sanctions available under New York State laws for corruption cases are set out in the penal code and include incarceration and or criminal fines. The actual sentence imposed depends on a variety of factors including if the offence is a felony or misdemeanour, any prior offences, and other possible mitigating factors. In addition, there are administrative consequences potentially flowing from a conviction for corruption or proof of participation in corrupt activities, including a prohibition from holding public office.
164. The money-laundering statutes provide penalties which subject the convicted legal person to the more severe of a maximum criminal fine of \$500,000 or twice the value of the monetary instrument or funds involved. In addition, a civil fine may be imposed, 18 U.S.C. §§ 1956, 1957.
165. The Foreign Corrupt Practices Act (FCPA) provides for both criminal and civil sanctions. In criminal prosecutions, a legal person may be fined up to \$2,500,000 per violation of the FCPA accounting provisions and \$2,000,000 per violation of the FCPA anti-bribery provisions. Moreover, under the Alternative Fines Act, the actual fine may be up to twice the loss to the victim or benefit the defendant sought to obtain by making the corrupt payment. In addition, the SEC has jurisdiction to bring civil charges under the FCPA. The SEC generally seeks disgorgement of ill-gotten gains from FCPA violators, as well as civil penalties, where appropriate.
166. Criminal sentences imposed by courts may include provisions which explicitly prohibit convicted legal persons from engaging in certain behaviour. For example, a legal person convicted of an offence must be sentenced to a term of probation. 18 U.S.C. § 3551 (c), according to which the convicted legal person is required, as a condition of probation, to refrain from committing any federal, state or local crime during the term of the probation, and the court has discretion to impose additional conditions, 18 U.S.C. § 3563 (a)(1), (b)(22). Where appropriate, relevant government regulatory and contracting agencies, such as the Securities and Exchange Commission (SEC), the federal banking regulators, the General Services Administration (GSA),

the Department of Defense and the Department of Health and Human Services, monitor the activities of the convicted legal person, potentially impose additional administrative penalties and sanctions and monitor the controlling persons of the convicted legal person, to ensure that any restrictions imposed on such persons by rule or law are complied with.

### Records

167. There is no central federal criminal registry for convicted legal persons. However, records of legal persons found liable for acts of corruption are maintained by both government and private entities. For example, the federal Government is generally prohibited from doing business with companies found criminally liable for acts of corruption or other material federal crimes. The US General Services Administration maintains a list of suspended or debarred companies and individuals and posts this list on a web page entitled "Excluded Parties List System" (<http://www.epls.gov/>) Other government agencies, such as the United States Defense Department and the Department of Health and Human Services maintain similar lists of legal persons and natural persons who are suspended or prohibited from doing business with those agencies, or participating in government grant or benefit payment programmes, and use these lists to police attempts of excluded natural persons to simply dissolve barred legal persons and form new corporate entities. The Securities and Exchange Commission, other securities-trading regulatory bodies, and the federal banking regulatory agencies similarly keep lists of natural persons who have been barred from serving in the management bodies of publicly traded companies. In addition, private enterprises such as the "Better Business Bureau" and various credit reporting agencies such as "Dun and Bradstreet" will keep such records which are either shared with the public or with subscribers to the service. However, it is not obvious that a bar from doing business at the federal level has an impact at state level.
168. It was explained to the GET that the various systems existing at state level, including the State of New York, are similar to what has been described about the federal level, i.e. there are no centralised criminal record registries for all convicted legal persons. That said, there is a wide spread system of "blacklisting" of corporations which have been convicted for crime. As a result, corporations blacklisted in a given State are in practice excluded from further business with governmental bodies of that State. However, this fact is not necessarily known in other States, and there does not appear to be a mechanism in place for such information.

### Tax deductibility

169. Payments made directly or indirectly in violation of a federal or a generally enforced state law are not deductible with respect to federal income tax<sup>22</sup>. Chapter 13 of Internal Revenue Service (IRS) Publication 535 (2004) specifically provides that engaging in the payment of bribes or kickbacks are serious criminal matters, which could result in criminal prosecution. Any payment that appears to have been made, either directly or indirectly, to an official or employee of any government or an agency or instrumentality of any government are not deductible for tax purposes and are in violation of the law. Payments directly or indirectly to a person in violation of any federal or state law that provides for a criminal offence or for the loss of a license or privilege to engage in a trade or business are also not allowed as a deduction for tax purposes.

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<sup>22</sup> The Internal Revenue Code (I.R.C). 162(c)(1) (26 U.S.C. § 162(c)(1)). See also 26 C.F.R. §§ 1.212-1(p), 1.162-18, 1.952-1(a)(4), 1.964-1(5).

## Tax authorities

170. Criminal Investigation of the Internal Revenue Service (IRS) is the law enforcement component of the IRS, and has a major role to play in the detection of corruption and money laundering. IRS Criminal Investigation routinely works with other federal law enforcement agencies and DOJ to investigate corruption and related money laundering and financial crimes. Many of these investigations are accomplished in task force settings organised under a federal grand jury. As part of its procedures IRS Criminal Investigation refers tax administration cases involving corruption to the attention of the appropriate prosecution office in the DOJ (Tax Division). The DOJ attorneys who are pursuing tax matters are authorised to inform other Department attorneys of criminal acts in other areas which need investigation and prosecution.
171. Law enforcement bodies, other than Criminal Investigation of the IRS, may access individual tax records pursuant to the provisions of Title 26 of the US Code, Section 6103. Access for tax enforcement matters is permitted pursuant to Section 6103 (h) in which case the use of the disclosed information will be limited to use in the tax enforcement matter. Access for investigation of the possible violations of federal criminal laws is permitted pursuant to the procedures set forth in Section 6103 (i). The Secretary of the Treasury is specifically authorised to disclose evidence of federal crimes, other than tax crimes, to the DOJ pursuant to Section 6103(i)(3)(A). The DOJ may also apply to a Federal District Court for an *ex-parte* order to allow disclosure for purposes of a federal criminal investigation, Section 6103(1)(A).

## Accounting offences

172. The Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (7/30/2002) ("The S-O Act") establishes requirements for the retention of accounting records and books. Section 1520 of Title 18, United States Code, makes the destruction of corporate audit records before the expiration of five years, or before permitted by Securities and Exchange Commission (SEC) rule, punishable by up to 10 years' imprisonment, a fine, or both. The SEC has extended the retention period for corporate audit records to seven years for certain records relevant to their audits and reviews of issuers' financial statements. Records to be retained include an accounting firm's work papers and certain other documents that contain conclusions, opinions, analyses, or financial data related to the audit or review.
173. The rules established by the SEC are enforceable only against issuers, which are generally publicly traded legal persons, firms that audit such companies and other classes of legal persons engaged in the purchase or sale of securities, including but not limited to, broker-dealers and investment advisors. In addition, closely regulated industries such as federally regulated financial institutions including banks and savings and loans, are subject to strict accounting and financial record retention policies imposed by federal regulatory agencies such as the Comptroller of the Currency and the Federal Reserve Board. Also, certain classes of industries which do business with the federal Government, for example defence contractors, are obligated to comply with strict accounting records and make those records available to government agencies for review. Many types of associations are subject to civilly-enforced fiduciary duties to their members which obligate those associations to keep accounting records and books. Finally, the obligation of legal persons to file federal income and corporate tax returns, and other reports, such as wages paid to individual employees, require even private legal persons to maintain, usually for three years but under certain circumstances as long as six years, accounting records and books in order to provide documentation of federal tax returns sufficient to withstand audit by the IRS or individual state tax authorities.

174. The S-O Act includes criminal penalties for the destruction or concealment of accounting records by publicly traded companies and by accountants. Section 802 of the Act entitled "Criminal Penalties for Altering Documents" adds Section 1519 to Title 18 of the United States Code, which makes the destruction, alteration, concealment, or falsification of records in federal investigations and bankruptcy, in relation to or contemplation of any such matter or case, a federal felony, punishable by up to 20 years imprisonment, a fine, or both.
175. In addition, the S-O Act requires certain corporate officials to personally certify the truth and accuracy of the public disclosure filings made with the SEC. To the extent that these certifications are based on materially incomplete or false information, these officers may be criminally prosecuted under 18 U.S.C. Section 1350, which contains a requirement that the chief executive officer and the chief financial officer (or the equivalent thereof) of the "issuer" provide a statement which certifies that the periodic reports containing the financial statements, fully comply with the requirements of Sections 13(a) and 15(d) of the Securities Exchange Act of 1934, and that the information contained in the periodic reports fairly presents, in all material respects, the financial condition and results of operations of the issuer. Certifying a report, knowing that it does not comport with all of the requirements of § 1350, is punishable by a fine up to \$1,000,000 and imprisonment of up to 10 years. A wilful violation is punishable by a fine up to \$5,000,000 and imprisonment of up to 20 years.
176. There are general fraud statutes which may be used to prosecute legal persons and individuals who engage in a scheme to defraud by use of either the mail or private delivery services, or by wire. These provisions found in Title 18, United States Code, Sections 1341 and 1344, and the additional conspiracy statute (Section 371 of Title 18), which permits prosecution of individuals and legal persons who conspire to commit any other federal offence, provide a wide range of tools to investigate and prosecute the use of invoices or any other accounting documents or records containing false or incomplete information or double invoices.
177. Although private companies are not covered by the books and records and internal controls provisions of the Foreign Corrupt Practices Act and do not fall within the jurisdiction of the Securities and Exchange Commission, such companies generally are required by federal and state tax laws and state corporation laws to maintain accurate books and records sufficient to properly calculate taxes owed. Further, most larger private companies maintain their books and records to facilitate the preparation of financial statements in conformity with GAAP to comply with financial institution's lending requirements. Regardless of whether an entity is a public or private corporation, if it is a part of an industry regulated by a federal agency, that agency may also require the entity to keep certain types of records and follow particular accounting rules. For example, banks, entities operating in the international arena and those operating in the national security arena.
178. In addition, under the Foreign Corrupt Practices Act issuers (generally, publicly traded companies) are required to maintain accurate books and records as well as sufficient internal accounting controls; they can be sanctioned criminally and civilly for the failure to do so, 15 U.S.C. Section 78m (b).

#### Role of accountants

179. The obligations of accountants and auditors are determined by the nature of the legal entity which engages them. For example, the duties of accountants and auditors engaged by publicly-traded companies were in 2002 enhanced by the enactment of the Sarbanes-Oxley Act. The S-O Act creates a regulatory board called the Public Company Accounting Oversight Board which is

required "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors."

180. The Board is further directed, among other things, to: (1) register public accounting firms that prepare audit reports for issuers, in accordance with section 102; (2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers; (3) conduct inspections of registered public accounting firms; (4) conduct investigations and disciplinary proceedings concerning, and impose sanctions where justified upon registered public accounting firms and associated persons of such firms; (5) perform such other duties or functions as the Board (or the SEC, by rule or order) determines are necessary to promote high professional standards and improve the quality of audit services offered by, registered public accounting firms and associated persons in order to protect investors or to further the public interest; and (6) enforce compliance with the S-O Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and their associated persons. The Board inspection programme required by the S-O Act includes annual inspections of each registered public accounting firm that audits more than 100 issuers.
181. The S-O Act requires auditors and attorneys to report wrongdoings discovered "up the ladder" (i.e. to the corporation management, following its hierarchy) There was no obligation to report outside this structure, but no prohibition neither. The GET was informed that the SEC was considering the adoption of provisions regarding an auditor's/attorney's notification to the SEC (more commonly referred to as "noisy withdrawal") when the reporting of evidence of a material violation "up-the-ladder" to the public corporation's management structure has received no adequate response.
182. The Auditing Industry has also taken independent steps to amend and revise its standards to comply with the provisions of the S-O Act. For example, the American Institute of Certified Public Accountants is taking a number of steps which it details on a web page dedicated specifically to Sarbanes-Oxley issues which include revisions of the industry accounting standards.

#### **b. Analysis**

183. As the regulation of legal persons in the USA is basically a matter for the various states, it is difficult to gain a clear picture of all possible forms of legal persons and their particularities without a careful study of the legislation of each State. The GET was, however, informed by interlocutors at federal and state levels that, in practice, the variations do not pose any major problem and in most situations legal persons are free to operate in any of the jurisdictions; the rules being, above all, aimed at facilitating business. However, all forms of legal persons are registered in one way or the other in the respective States.
184. Having a closer look at the registration process of corporations in the State of New York, the GET noted that only very basic information is required for the registration (incorporator's name, address of the corporation and the general purpose of the corporation – "all legal activity"). Moreover, the registration process is a mere formality as no checks are carried out with regard to the correctness of the information provided; not even the identity of the incorporator is checked.

185. Registered information of corporations in New York State is public and accessible via the Internet; however, it cannot be guaranteed that this information is fully accurate. Similar systems appear to prevail in most, if not all States. Even though the GET understands that the vast majority of incorporators have no reason to provide false information, the very nature of the registration process is likely to give rise to abuses. Moreover, as there is no such thing as a federal registry of all established legal persons and the States have their own registration system, it can be generally difficult to trace legal persons used as vehicles for illegal activities, including corruption. This was confirmed by officials met by the GET.
186. Notwithstanding the shortcomings of the registration process, there are a number of other complementary systems in place aimed at avoiding that less scrupulous corporations do business, in particular with public institutions. When a company applies for a public contract it is the contracting authority which requires detailed information and it will use different sources of information, held by public or private entities, to assess the reliability of the contractor. These assessments focus on the actual activity performed by the company. There are, for example, public and private systems of certifying or "blacklisting" companies which do business with public authorities, at federal, state and local levels. Moreover, specific public institutions, such as defence and health authorities, which use outsourcing to corporations to a large extent, gather their own information on corporations. It should also be mentioned that with the introduction of the Sarbanes-Oxley Act, *publicly traded corporations* are subject to a comprehensive range of checks and sanctions at the federal level with the overall purpose of ensuring that the filings of such corporations properly reflect the company's business and properly disclose required information regarding its finances and corporate governance.
187. The US system of registration of legal persons reflects the Constitutional independence of the States, as well as a minimalist approach to public intervention in business, with the exception of publicly traded corporations and regulated entities which are required to make certain filings with the Securities and Exchange Commission (SEC). In the view of the GET, the fact that the rules for registration of legal persons vary from one State to another, in particular that the information required in the registration process is not uniform, and that the access to registered information is not centralised in the USA, makes the registration of legal persons - which are not covered by the regulations of the SEC - a weak instrument to control and prevent legal persons from being used as vehicles for any illegal activity, including corruption. The GET is of the opinion that the registration systems in all States would gain in effectiveness if they were harmonised to the extent possible and if federal oversight would be enhanced. At the same time the GET realises the constitutional difficulties to achieve these aims without thorough and long term preparations. **The GET therefore recommends that the appropriate federal authorities explore the possibilities to promote greater uniformity of registration requirements in the various States.**
188. A legal person can always be liable for tort and subject to criminal liability, at federal level. This is provided for by the simple means of equating legal with physical persons. Bribery is covered and trading in influence through other offences as well as money laundering.
189. The range of sanctions and measures available against legal persons appears to be sufficiently broad. Criminal fines may be imposed in accordance with different norms. In particular, the criterion of two times the gain or loss as a result of a corruption or other offence, seems to address properly the need for effective, proportionate and dissuasive sanctions. In the absence of records or statistics on legal persons being convicted for corruption and money laundering, the GET could not assess whether the sanctions as applied by the courts were also effective, proportionate and dissuasive in practice.

190. The GET was aware that the broad possibilities of subjecting legal persons to criminal liability and sanctions should, however, also be assessed in the light of the procedural law as prosecution in practice is subject to discretionary powers. This discretion is not legally limited, but the manners in which it is exercised, at federal level, is to be guided by the *Principles of Federal Prosecution of Business Organizations*, which forms a part of the US Attorneys' Manual. The Principles are critical to the decision of the prosecutor whether to prosecute the legal person or the physical person or both. The GET was provided with information indicating that since the Enron scandal in 2001, there had been a significant increase in the number of corporate financial offences and as a result a large number of convictions – more than 500 - at the federal level. Similarly, the Securities and Exchange Commission brings a high number of enforcement actions. The same information indicates, however, that most often prosecutors concentrate on the physical person involved and bring criminal charges only in respect of a small number of corporations, which may lead to the conclusion that the *Principles* favour the prosecution of physical rather than legal persons. The GET understood, however, that the situation is more complicated and that there is a possibility of the prosecutor to apply *Deferred Prosecution Agreements (DPA)* in this respect. A DPA means that the prosecutor drops a prosecution against a corporation which admits guilt and agrees to comply with civil sanctions following a particular scheme under monitoring. The application of this institution with regard to corporations may be justified in situations where prosecution of a legal person may carry significant collateral effects on innocent persons or groups of persons, such as employees or shareholders. The GET acknowledged the advantages of the flexible approach to using alternatives to criminal prosecution but wishes to stress nevertheless that there may be a serious risk that the criminal corporate liability legislation, if not sufficiently used, may lose its deterrent effect. The GET received several examples of relevant cases; however, it was disappointed by the lack of statistics without which the results of the discretionary powers in respect of prosecution of corporations cannot be assessed. The GET was also aware of the creation, in 2002, of the *Corporate Fraud Task Force* which has been, *inter alia*, gathering information with regard to the investigation and prosecution of financial crimes. Such information has included the use of DPAs. **The GET recommends that the information gathered/to be gathered by the Corporate Fraud Task Force be used, to the extent possible, by the Task Force or other appropriate body to analyse investigations and prosecutions, as well as alternatives to prosecutions including the deferred prosecution agreements (DPAs) in the context of corruption cases involving business entities.**
191. There is no central registry of convicted legal persons. Such information is publicly available from the courts at federal or state levels. Relevant information is also available from privately held data bases. Moreover, public authorities and institutions establish their own blacklists of legal persons, in order to avoid that public contracts are given to corporations that have been convicted. The GET was of the opinion that the described situation makes it difficult to retrieve information on legal persons convicted for criminal offences. Even though there is a wide range of means available to find such information, the GET took the view that much could be done in order to improve the availability of relevant information. **The GET recommends to consider means for tracking information about legal persons convicted of corruption offences at federal, state and local levels.**
192. It appears that the legal possibility to impose a prohibition on a convicted physical person from acting in a leading position of a legal person, was not much applied by the courts. A similar tool to bar individuals who have violated the securities laws from serving in high positions in a company is given to the Securities and Exchange Commission but while used, this authority is only possible in respect of publicly traded companies. The GET wishes to stress that prohibitions

of this type are critical to effectively address situations of repeated crime and where the protection of the public interest requires determined action. **The GET recommends that the use of the existing prohibitions of natural persons convicted of felony corruption offences from acting in leading positions in legal persons should be promoted.**

193. The accounting rules derive from various sources depending on the type of legal person and in which State it operates. The most general obligations are directly connected with the duties of legal persons as taxpayers of both federal and state taxes. Certain branches of industry are subjected to particular rules imposed by the relevant regulatory agencies. As regards publicly traded companies and regulated entities strict obligations have been imposed on them through the Sarbanes-Oxley Act, which also provides for criminal sanctions for the destruction or concealment of corporate audit files. This means, that no legal person is exempted from the obligation to keep books and records, however the exact scope of this obligation and the sanctions for violations differ.
194. Criminal Investigation of the Internal Revenue Service (IRS) is the key investigative authority in the area of tax offences and sometimes public corruption offences may come under its purview. The IRS cooperates with the Department of Justice, mainly with the Tax Division, in order to ensure that relevant cases are brought to the attention of specialised units of the Criminal Division, i.e. the Public Integrity Section or the Fraud Section. The GET understood that, while there is no legal obligation, when an IRS criminal investigation of a purely tax administration matter is opened, to inform the appropriate prosecution office, coordination between different authorities does occur, although through an informal process between the various agencies. The DOJ appears to have full access to relevant tax records when it is investigating a case together with the IRS, but it must request a court order for such access when it makes an investigation of its own. Despite the absence of formalised ways of cooperation between the IRS and the prosecution/law enforcement authorities, the GET did not gather evidence suggesting that the current system of cooperation and access to tax records presented major shortcomings in terms of effectiveness of investigations.
195. The GET did not obtain a clear picture of the reporting obligations of legal professionals, accountants and auditors in respect of offences, such as money laundering, they came across, other than those provided in the Sarbanes-Oxley Act, which has imposed obligations on accountants and auditors working for publicly traded corporations to report discovered wrongdoings to the management of the corporation. This is an area of concern in the USA and there is an ongoing reflection on the advisability of establishing a duty to the professionals concerned to report such wrongdoings to external (law enforcement) agencies.

## V. CONCLUSIONS

196. There is a clear policy in the United States that offenders should be deprived of the proceeds of crime to the extent possible. To this end there is a generally solid legal system in place at the federal level to provide for *in personam* confiscation where the offender has been convicted, and *in rem* forfeiture in cases where there is no conviction. Interim measures to secure a subsequent confiscation order are available; however, at the federal level, value based interim measures cannot be resorted to. Moreover, the confiscation/forfeiture regimes at state level are not uniform and there appears to be a need to harmonise these rules.
197. It is recognised in the United States that corruption poses a constant threat to the proper functioning of the public administration at all levels of government and, consequently, considerable resources are devoted to its prevention. In this connection a number of important

institutions and programmes have been established. An inevitable result of the federal system and the strict separation of powers is that corruption offences are capable of investigation and prosecution by a number of different authorities. Although there are risks of overlapping jurisdictions, a key benefit of the system is that it produces richness in the approaches to prevention, detection and prosecution of corruption in public administration. The United States has earned respect through a longstanding tradition of transparency through the Freedom of Information Act at federal level, and each State has its own freedom of information legislation. It is important that the openness of public administration is maintained to the extent possible, even in times where security aspects are high priority. In this context, the protection of whistleblowers is another important issue where the United States is encouraged to maintain its high standards. More could be done to assist the public in accessing information at federal level. In this context, the New York State Committee on Open Government is an interesting example. The Office of Governmental Ethics (OGE) plays an important role in the prevention of corruption at federal level through its ethics programme. The OGE fosters an ethical environment in the public administration; however, there is also a need to consider an ethical framework for “contractors” from the private sector, who contribute significantly to the carrying-out of the tasks in the public sector. The OGE through its participation in inter-governmental co-operation, is also an important source of inspiration for public administrations at state and local levels.

198. The regulation of legal persons reflects the constitutional independence of the states, and is almost exclusively dealt with at state level. The rules for registration of legal persons vary from one state to another; the information required in the registration process is not uniform and the access to registered information is not centralised. This makes state registration a weak instrument to control and prevent legal persons from illegal activity, including corruption. The registration systems would gain in effectiveness if they were more harmonised. Further, more information on the investigations, prosecutions and the use of alternative proceedings against corporations suspected of corruption would be beneficial in order to assess the proper functioning of the system. Finally, the tracking of information on legal persons convicted of corruption offences could be enhanced.
199. The present report highlights a few concerns with respect to a generally well developed system.
200. In view of the above, GRECO addresses the following recommendations to the United States of America:
  - i. to review the pertinent rules on confiscation/forfeiture and the use of interim measures, in order to ensure that all proceeds from acts of corruption and related instrumentalities are subject to confiscation, and to enable measures such as seizure and restraint orders, including in respect of substitute assets, to be taken as appropriate (paragraph 47);
  - ii. to consider enhancing the assistance to the public at the federal level with regard to access to public information (paragraph 135);
  - iii. that the federal government study the use of contractors and their employees in the federal workplace in order to provide a foundation for an appropriate approach for addressing, on a systematic basis, conduct standards expected of contractors working within public administration (paragraph 139);
  - iv. that the Office of Government Ethics (OGE) include in its training and educational materials, the obligation of executive branch officials at the federal level to report

suspicions of corruption and related illegal activities, and, as a member of the Council on Governmental Ethics Laws (COGEL), to inform the other members of COGEL of the importance of an obligation to report suspicions of corruption (paragraph 142);

- v. that the appropriate federal authorities explore the possibilities to promote greater uniformity of registration requirements in the various States (paragraph 187);
  - vi. that the information gathered/to be gathered by the Corporate Fraud Task Force be used, to the extent possible, by the Task Force or other appropriate body to analyse investigations and prosecutions, as well as alternatives to prosecutions including the deferred prosecution agreements (DPAs) in the context of corruption cases involving business entities (paragraph 190);
  - vii. to consider means for tracking information about legal persons convicted of corruption offences at federal, state and local levels (paragraph 191);
  - viii. that the use of the existing prohibitions of natural persons convicted of felony corruption offences from acting in leading positions in legal persons should be promoted (paragraph 192).
201. Moreover, GRECO invites the US authorities to take account of the *observations* (paragraphs 49, 50, 52, 134, 141 and 143) made in the analytical part of this report.
202. Finally, in conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the US authorities to present a report on the implementation of the above-mentioned recommendations by 31 May 2008.