USA Response: Submission of Follow up on Chapters III and IV

The United States is pleased to provide the following response to the request for information provided by Secretariat contained in CU 2023/247/(A)DTA/CEB/CSS:

UNCAC Chapters III and IV Recommendations

Criminalization: Overall, the domestic criminalization provisions comply with the UNCAC requirements. The following observations are brought to the attention of the U.S. authorities with a view to ensuring full compliance with the Convention and further strengthening the implementation and impact of the U.S. anti-corruption legislation:

Recommendation: Continue to periodically review its policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments e.g. in internal company controls, ethics and compliance programmes or measures

U.S. update: The United States periodically reviews its approach on facilitation payments, and in public statements continues to encourage companies to prohibit or discourage the use of such payments.

Recommendation: While noting that the current U.S. law recognizes the mandatory UNCAC offences as predicate offences for money-laundering purposes, continue efforts to amend federal legislation, and to the extent not yet accomplished state laws, to expand the general scope of predicate offences for money-laundering purposes and increase the number of predicate offences relating to conduct committed outside U.S. jurisdiction.

U.S. update: The United States incorporates by reference its 2015 response, USA 2015-03-27 Response to UNCAC Note Verbale on

Impact of IRG - Final (unodc.org). Further, since 2020, the United States has enacted legislation expanding the scope of its money laundering and related legislation. Under the National Defense Authorization Act of 2023 (2023 NDAA), the statute of limitations for money laundering offenses under section 1956 of Title 18 was extended from five to seven years. Additionally, as part of the National Defense Authorization Act of 2021 (2021 NDAA), the United States codified the Anti-Money Laundering Act of 2020, which contains multiple provisions that affect U.S. money laundering and asset recovery authorities. Relevant amendments include, *inter alia,* the following:

- Subpoena authority for obtaining bank records from foreign banks with correspondent accounts: Section 6308 allows the Department and the Secretary of the Treasury to obtain a broader set of bank records from foreign banks with correspondent accounts. It also provides for additional penalties for non-compliance with a subpoena.
- Beneficial ownership information: Sections 6401 through 6403 create new requirements for certain new and existing corporations and limited liability companies to disclose to FinCEN information about their beneficial owners.
- Criminalization of the concealment of source of assets: Section 6313 creates a new offense (codified at 31 U.S.C. § 5335) that criminalizes the activity of a person who knowingly conceals, falsifies, or misrepresents material facts concerning the ownership or control of assets, or the source of funds, in certain monetary transactions.
- Additional penalties for BSA violations: Sections 6309, 6310, and 6312 provide for additional penalties for certain BSA violations. Section 6309 authorizes the Secretary of the Treasury to impose additional civil penalties against a repeat BSA violator, and section 6310 prohibits certain persons found to have committed an "egregious violation" of the BSA or its regulations from serving on the board of directors of a U.S. financial institution for a period of 10 years from the date of conviction or judgment.

Section 6312 requires that a person convicted of violating the BSA or its regulations, in addition to any other fine under the BSA, be fined an amount equal to the profit gained by such person by reason of such violation. If the person is a partner, director, officer, or employee of a financial institution, it also requires the repayment of certain bonuses to the institution. In addition to the amendments previously noted, the U.S. notes that U.S. asset recovery authorities have long authorized money laundering charges and permitted the initiation of U.S. civil forfeiture proceedings, as well, based on either U.S. money laundering offenses committed with respect to foreign predicates (e.g., bribery). Particularly, the U.S. money laundering statutes, 18 U.S.C. §§ 1956 and 1957, have certain extraterritorial application, in addition to the usual territorial rule that an offense committed in the United States can be prosecuted here. For instance, under 18 U.S.C. § 1956(f), the United States has extraterritorial jurisdiction over a money laundering offense committed by a U.S. citizen. The United States also has jurisdiction over conduct by a foreign person in violation of §§ 1956 and 1957 that occurs in part in the United States. For example, a transfer conducted in dollars between two foreign banks can be enough to satisfy jurisdictional requirements when that transfer briefly touches the United States as it passes through a U.S. correspondent bank account. The underlying predicate crimes, or specified unlawful activities, which generate the proceeds laundered into or through the United States, may also occur entirely abroad.

Law Enforcement: The following remarks are made with the intention to assist the U.S. authorities in rendering law enforcement mechanisms more efficient and effective:

<u>Recommendation</u>: Ensure that the overall statute of limitations period applicable to UNCAC offences is sufficient to allow adequate investigation and prosecution

U.S. update: The United States incorporates by reference its 2015 response, USA 2015-03-27 Response to UNCAC Note Verbale on Impact of IRG - Final (unodc.org). Also, as noted above, in 2023, the statute of limitations for money laundering offenses was extended from five to seven years. Further, the United States would also note that its Department of Justice has advanced proposals to amend 18 U.S.C. § 3293 to provide for a 10-year statute of limitations for all crimes (or an enumerated set of offenses) that involve the transfer of digital assets. The Department has also proposed amendments to 18 U.S.C. § 3292 to provide for a longer period of tolling (or "suspension") of the limitations period when the United States' official request to obtain foreign evidence pertains to an offense involving the transfer of digital assets. *See, e.g.,* The Report of the Attorney General Pursuant to Section 5(b)(ii of Executive Order 14067: The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets, https://www.justice.gov/media/1245466/dl?inline=

Recommendation: Explore the possibility of studying whether any significant correlations exist between recidivism rates and various corruption offences.

U.S. update: The United States incorporates by reference its 2015 response, USA 2015-03-27 Response to UNCAC Note Verbale on Impact of IRG - Final (unodc.org).

Recommendation: Continue ongoing efforts to supplement, where necessary, the existing jurisdiction regime to ensure that multiple jurisdictional bases are available for the prosecution, investigation and adjudication of UNCAC offences, including jurisdiction for offences committed on board a vessel or an aircraft. In doing so, and if deemed appropriate, to establish jurisdiction on the basis of the active and passive personality principles in a wider context, consider implementing the term "national" in a broader manner, hence encompassing both citizens and legal persons registered in the U.S. territory.

U.S. update: The United States incorporates by reference its 2015 response, USA 2015-03-27 Response to UNCAC Note Verbale on Impact of IRG - Final (unodc.org). In further response to this recommendation, we would note that U.S. money laundering statutes, 18 U.S.C. §§ 1956 and 1957, have certain extraterritorial application, in addition to the usual territorial rule that an offense committed in the United States can be prosecuted here. Under 18 U.S.C. § 1956(f), the United States has extraterritorial jurisdiction over a money laundering offense committed by a U.S. citizen. The United States also has jurisdiction over conduct by a foreign person in violation of §§ 1956 and 1957 that occurs in part in the United States. The underlying predicate crimes, or specified unlawful activities, which generate the proceeds laundered into or through the United States, may also occur entirely abroad. This would include certain foreign predicates for money laundering include bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official: 18 U.S.C. § 1956(c)(7)(B)(iv). Other possible foreign predicates for U.S. money laundering charges include offenses for which the United States could extradite an offender under a multilateral treaty, such as, e.g., UNTOC or UNCAC, if the offender were found within the territory of the United States. *See, e.g.,* 18 U.S.C. § 1956(c)(7)(B)(vi).

International Cooperation: The reviewing experts made the following remarks with the intention to assist the U.S. authorities in rendering international cooperation mechanisms more robust and effective:

Recommendation: Reduce the possibility of non-fulfilment of the double criminality requirement in the extradition context of money-laundering cases by expanding the scope of predicate offences to include those committed outside the U.S. jurisdiction on the understanding that such offences would constitute crimes had they been committed in U.S. territory

U.S. update: Non-fulfillment of extradition requests on the basis described in the recommendation has not been an impediment to

cooperation for the U.S. We are not aware of a case of non-fulfilment of the double criminality requirement in the extradition context of money-laundering cases where requests were based on conduct outside the United States that would not constitute a crime, had that conduct been committed in U.S. territory. Further, we note that our laws, as described in the Criminalization Section above are sufficiently broad enough to cover a broad range of foreign predicate offenses thus extending the reach of our money laundering laws to foreign offenses that would constitute crimes if the same occurred in the U.S. Given the breadth of our money laundering statutes, the risk of non-fulfillment based on the circumstances described by the recommendation is quite low.

Recommendation: Continue to make best efforts to ensure efficiency in executing incoming MLA requests, including by giving careful consideration to the collection of data on the time frame for dealing with such requests.

U.S. update: For more than ten years, the Department of Justice's Office of International Affairs (OIA), the U.S. Central Authority for mutual legal assistance in criminal matters, has been working to enhance the gathering of evidence in the United States on behalf of foreign partners. Specifically, OIA created two teams to respond to MLA requests to the United States—the Incoming MLA Team and the Cyber Team.

The Incoming MLA Team is staffed with attorneys with expertise in and authority to implement the Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111-79, 123 Stat. 2086, which is codified at Title 18, United States Code, Section 3512. Congress enacted this law to make it "easier for the United States to respond to foreign requests by allowing them to be centralized and by putting the process for handling them within a clear statutory scheme." 155 Cong. Rec. 6,810 (2009) (statement of Sen. Whitehouse). Under Section 3512, when executing a treaty or non-treaty request for assistance from a foreign

authority, an attorney for the U.S. government may file an application to obtain any requisite court orders. Section 3512 authorizes a federal court to issue such orders, and provides clear authority for the federal courts, upon application duly authorized by an appropriate official of the Department of Justice, to issue orders that are necessary to execute a foreign request.

The Cyber Team is staffed with attorneys with expertise in navigating the complexities of and high standard of proof required by the Electronic Communications Privacy Act of 1986 (ECPA) for obtaining content and non-content data from communication service providers.