

# **Country Review Report of the United States of America**

Review by Sweden and the Former Yugoslav Republic of Macedonia of the implementation by the United States of America of Articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and Articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

## I. Introduction

The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to Article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.

In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States Parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

The Review Mechanism is an intergovernmental process whose overall goal is to assist States Parties in implementing the Convention.

The review process is based on the terms of reference of the Review Mechanism.

## II. Process

The following review of the implementation by the United States of America of the Convention is based on the completed response to the comprehensive self-assessment checklist received from the United States, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Sweden and the Former Yugoslav Republic of Macedonia, by means of e-mail exchanges and any further means of direct dialogue in accordance with the terms of reference and involving the following experts:

### Sweden

- Ms. Birgitta Elisabet NYGREN, Ambassador at Large for Corruption Issues, Ministry for Foreign Affairs;
- Mr. Gunnar Fredrik STETLER, Director, National Anti-Corruption Unit, Swedish Prosecution Authority; and
- Ms. Claudia Hanna HENZEL, Intern, Ministry for Foreign Affairs

### The Former Yugoslav Republic of Macedonia

- Ms. Elena HRISTOSKA, Senior Associate, Ministry of Justice, International Legal Cooperation Department;
- Mr. Vladimir GEORGIEV, State Adviser for Anticorruption Policies, State Commission for Prevention of Corruption;
- Mr. Kiro CVETKOV, Junior Associate, Ministry of Justice, International Legal Cooperation Department; and
- Ms. Aneta STANCHEVSKA, Minister Assistant for Internal Control and Professional Standards, Ministry of Interior.

## UNODC-Secretariat

- Mr. Dimitri Vlassis, Chief, Corruption and Economic Crime Branch; and
- Mr. Dimosthenis Chrysikos, Crime Prevention and Criminal Justice Officer, Corruption and Economic Crime Branch.

During the country visit (see below), the review team was also assisted by Ms. Lindy Muzila, Crime Prevention Expert (Stolen Asset Recovery Initiative).

A country visit, agreed to and organized by the U.S. authorities, was conducted from 5 to 7 April 2011 in Washington, D.C.

During the country visit, the members of the review team had meetings with representatives from the Department of State (Bureau for International Narcotics and Law Enforcement Affairs (INL)); Department of Justice; the Office of the U.S. Attorney (Eastern District of Virginia); the Federal Bureau of Investigation (Public and International Corruption Units); the Department of Homeland Security; and the Financial Crimes Enforcement Network (FinCEN).

The reviewing experts also met representatives from civil society and the private sector (Transparency International-U.S.A.; Pfizer; Paul Weiss Rifkind Wharton and Garrison LLP; Regulatory Data Corp, Inc.; Government Accountability Project; and Public Citizen).

### **III. Executive summary**

#### ***Legal system***

*The United States signed the UNCAC on 9 December 2003. The Convention was approved by the U.S. Senate on 15 September 2006. The ratification documentation was deposited with the United Nations on 30 October 2006 with a reservation preserving the right to assume obligations under the Convention in a manner consistent with the fundamental U.S. principles of federalism. Article VI of the U.S. Constitution states that such ratified treaties, along with federal law, constitute the “supreme Law of the Land.”*

#### ***Overall findings***

*Combating corruption is among the highest priorities of U.S. law enforcement authorities and substantial resources are devoted to the fight against corrupt practices. An inevitable outcome of the federal system is that federal and state authorities are involved in the investigation and prosecution of corruption offences.*

*Over the years, the United States has significantly strengthened its overall anti-corruption measures,*

*implementing a large number of statutory amendments and structural changes. Consequently, U.S. authorities have demonstrated impressive results against corruption in terms of legislative and regulatory enforcement action, as well as indictments and convictions even in cases involving high-level corruption. Some elements for improvement, as indicated during the country review, are highlighted below.*

*One question raised was how the UNCAC can be implemented domestically consistent with the U.S. federal system. In this regard, the United States reserved the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. Although the reviewing experts found no evidence of gaps, the point was raised that given the complexity of the federal and state system, it might be possible for some criminal conduct not to be covered. The United States asserted that there are no gaps. In fact, most corruption cases pursued by the Justice Department are against state and local officials.*

### ***Criminalization and law enforcement***

#### ***Criminalization***

*Domestic public corruption, whether active or passive, is criminalized under both federal and state laws. Under a broad range of federal laws, corruption committed by and against federal, state, and local officials is a criminal offence.*

*Concerning foreign public officials, active bribery is penalized under the Foreign Corrupt Practices Act (FCPA) of 1977. The FCPA concentrates on bribery in business activity, and applies to U.S. citizens and companies, whether operating in the United States or abroad, and with respect to foreign nationals and companies provided that acts in furtherance of the misconduct occur within the territorial jurisdiction of the United States.*

*Relevant jurisprudence resulting from challenges to the definition of “foreign official” in the FCPA has been reported which confirms the U.S. government interpretation that this definition covers employees of public enterprises, as well as all those holding legislative, judicial, or executive positions. The definition also includes officials of political parties.*

*The reviewing experts observed that, while the FCPA criminalizes many forms of payment made to foreign government officials and employees, there is an exception for*

*facilitation or expediting payments made to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official. In contrast, the principal domestic bribery statute contains no such exception.*

*In this regard, the competent U.S. authorities stated that the FCPA provisions provided additional clarification as to the reach of the Act, as such payments would lack the necessary intent to corrupt and would thus not fall within the parameters of the Act's prohibitions in any event. However, the U.S. noted that facilitation payments could violate the accounting provisions of the FCPA, and there had been prosecutions for such violations. The examiners noted that the United States may well be the only country to have prosecuted such payments to foreign officials.*

*Notwithstanding the fact that the obligation of appropriate mens rea to establish a criminal offence is part of the "fundamental principles" of the U.S. legal system, as well as a constituent element of the offence in article 16, paragraph 1, of the UNCAC ("committed intentionally"), the reviewing experts noted that the Convention contains no enumerated exception for facilitation payments. Accordingly, the United States should consider continuing to review its policies and approach on facilitation payments in order to effectively combat the phenomenon. The U.S. authorities should also continue to encourage companies to prohibit or discourage the use of facilitation payments, for example through including rules on facilitation payments in internal company controls, ethics and compliance programmes or measures.*

*For reasons of policy and jurisdictional concerns, the United States has not criminalized passive bribery of foreign public officials and is not required to do so under the UNCAC. However, foreign public officials have been prosecuted for money-laundering based on corruption or pursuant to the mail and wire fraud statutes, where such officials have fallen within U.S. jurisdiction.*

*The United States has implemented legislation to criminalize both the active and passive forms of trading in influence. Post employment restrictions on federal employees are also statutorily enumerated to prevent the exercise of any influence to obtain an undue advantage for a third person.*

*Constitutional limitations pertaining to the presumption of innocence hinder the—optional—criminalization of illicit enrichment. However, evidence of unexplained wealth can be introduced at trial as circumstantial evidence to support charges of public corruption or other offences. Moreover,*

*criminal statutes obligate senior-level officials in the federal Government to file truthful financial disclosure statements, subject to criminal penalties.*

*The United States has not enacted legislation at the federal level establishing domestic bribery in the private sector (commercial bribery) per se as a criminal offence because, pursuant to the U.S. Constitution, such crimes are exclusively reserved to the States to criminalize unless an additional element of the crime is added to the underlying offence which provides a basis for federal jurisdiction. In such cases, prosecution at the federal level may be and has been carried out through, inter alia, the mail and wire fraud statutes and the Travel Act. On the state level, 38 states have explicitly prohibited commercial bribery, whilst some states prosecute commercial bribery using generally applicable fraud statutes. In the states where commercial bribery is not a crime, the conduct is often punishable under unfair trade practices laws. Notwithstanding the lack of a federal commercial bribery law, commercial bribery can be and has been effectively prosecuted in the United States.*

*The reviewing experts noted that there had been increased enforcement of laws prohibiting foreign commercial bribery over the past fourteen years, even though it is not a mandatory UNCAC offence. Although other statutes criminalizing pertinent conducts were used to criminalize domestic bribery in the private sector at the federal level, such bribery seemed not to attract equal attention as official bribery.*

*There is no federal statute that prohibits embezzlement in the private sector in all circumstances. However, various federal laws can be used to cover many situations involving embezzlement in the private sector, while embezzlement from a private entity is primarily criminalized under state legislation.*

*Sections 1956 and 1957 of Title 18 of the Criminal Code criminalize money-laundering. In addition, the Bank Secrecy Act (BSA) and its implementing regulations require financial institutions and persons to file certain reports of financial transactions and create criminal offences for failure to file a report when required.*

*The United States has adopted a list approach to define the scope of predicate offences. The list includes almost all of the 20 designated categories of offences set out in the Glossary to the FATF 40 Recommendations. However, only 12 out of the 20 designated categories of offences are deemed predicate offences for money-laundering if they occurred abroad. Legislative language had been proposed to allow the expansion of the number of predicate offences and, thus, include any foreign crime that would be a felony predicate offence if it had occurred within the United States. In the meantime, U.S. law*

*specifies that offences occurring in another country and covered by any multilateral treaty under which the United States would be obligated to prosecute can be considered predicate offences, which would cover the mandatory UNCAC offences.*

*The money-laundering laws criminalize the laundering of property by any third party as well as the person who committed the predicate offence.*

*A number of federal laws criminalize as a form of obstruction of justice the use of inducement, threats or force to interfere with witnesses or officials. Moreover, several federal laws criminalize as obstruction of justice the interference with actions of judicial or law enforcement officials.*

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

- 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;*
- 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.*

## ***Law enforcement***

### ***1. Legal framework supporting law enforcement***

*The sanctions applicable to both legal and natural persons involved in corruption-related offences appear to be sufficiently dissuasive. The maximum sentences are set forth by law, but the recommended ranges of possible penalties are set forth in the Federal Sentencing Guidelines. Factors considered in the determination of the sentences include the type of conduct associated with the offence and the criminal history of*

*the defendant. Criminal violations may also be punished by the imposition of fines. Civil and administrative sanctions are also available for the government to redress corruption.*

*The statute of limitations for most non-capital federal offences is five years, which can further be “tolled” (i.e. suspended) for up to three years where there are initiated, but not completed, MLA proceedings. The reviewing experts took note of the assurances provided by the U.S. authorities regarding the adequacy of the limitations period and indicated that the lack of available statistics created difficulties in thoroughly assessing the issue. However, they recommended that a possible extension of the 5-year statute of limitations might be considered for practical reasons, as the lack of longer limitations period may create difficulties in the investigation of complex corruption cases, where the evidence gathering is challenging and may also involve multiple jurisdictions. In addition, an extension of the limitations period could also serve the purposes of legislative consistency and coherence, as such period is longer for a few other select economic crimes.*

*Under general legal principles, the United States may hold legal persons criminally responsible, as it does for individuals. A corporation is held accountable for the unlawful acts of its officers, employees and agents when these persons act within the scope of their duties and for the benefit of the corporation. The corporation is generally liable for acts of its employees with the exception of acts which are outside the employee’s assigned duties or are contrary to the company’s interests, or where the employee actively hides the activities from the employer. The criminal responsibility of the legal person is engaged by the act of any corporate employee, not merely high-level executives. Sanctions against legal persons, which may be criminal, civil or administrative, can be mitigated if an effective compliance programme is already in place.*

*Generally, no public official in the U.S. federal Government has constitutional or statutory immunity from criminal investigation or prosecution relating to corruption. Certain procedural and timing considerations, however, do exist for certain categories of officials.*

*Prosecutors have discretionary powers to prosecute or decline to pursue allegations of criminal violations of criminal law. Those discretionary powers are based on considerations such as strength of the evidence, deterrent impact, adequacy of other remedies, and collateral consequences, and do not include political or economic factors. At the federal level, prosecutorial discretion is vested solely in the Department of*



*Justice and the Attorney General, and protected from influence by improper political considerations. Allegations of prosecutorial misconduct can be brought before the courts at any time, including selective prosecution based on a number of prohibited factors.*

*In terms of prosecuting foreign and transnational bribery, the reviewing experts noted that law enforcement had been effective in combating and deterring corruption and, within the framework of prosecutorial discretion and other aspects of the U.S. legal system, had developed a number of good practices demonstrating a significant enforcement level in the United States.*

*Measures to ensure that an accused person does not flee or leave the country pending trial were within the purview of the judicial authorities.*

*When considering the early release of persons convicted for UNCAC offences, the gravity of the offence is considered. There is regular follow-up and reporting conducted by the Bureau of Justice Statistics, often corroborated by independent federally funded grantees, which constitutes a good practice and could serve as an example for other States Parties.*

*The United States has established disciplinary procedures to enable the removal, suspension or re-assignment of federal officials. The requirements for launching such procedures vary depending on the type of officials involved.*

*At the U.S. federal level, there is a two-tier system of conviction-based in personam forfeiture and non-conviction-based in rem forfeiture. These two parallel systems provide for the forfeiture of both the instrumentalities and proceeds of crime. Thus, the U.S. legal system goes beyond the UNCAC optional requirement on non-conviction based confiscation (article 54, paragraph 1 (c)). Administrative forfeiture can also be applied under certain conditions.*

*Under the U.S. legislation, defences are available in both civil and criminal forfeiture proceedings to bona fide third parties.*

*The United States relies on a wide range of protection measures for witnesses and victims. Protection is provided not only to persons that actually testify in criminal proceedings, but also to potential witnesses, as well as the immediate and extended family members of the witnesses and potential witnesses and the persons closely associated with them, if an analysis of the threat determines that such protection is necessary.*

*From an operational point of view, the protection of witnesses' and victims' physical security can be secured through the Federal Witness Security Program, if these persons meet the requirements for participation in that Program. Other procedures are also in place to provide limited protection through financial assistance for relocation.*

*With regard to the protection of reporting persons, the Federal Whistleblower Protection Act of 1989 makes the Office of the Special Counsel (OSC) responsible for, inter alia, protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices; and receiving, investigating, and litigating allegations of such practices.*

*The protection of witnesses may also be extended to cooperating informants and defendants who agree to become government trial witnesses. The discretionary powers of the prosecution services are of relevance. In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by recommending that the defendant receive a lower sentence in exchange for his/her cooperation.*

*The United States is empowered to annul or void fraudulently obtained contracts with the federal Government and may sue for rescission in federal court to annul a fraudulently procured contract. The federal Government is also empowered to administratively bar a private firm from receiving further government contracts due to, inter alia, the contractor's corrupt acts in the acquisition or performance of a government contract.*

*The reviewing experts observed that U.S. legislation was in compliance with article 40 of the UNCAC on bank secrecy. The U.S. authorities may wish to have in mind that, in terms of implementation, bank secrecy may also apply to the activities of professional advisors that could be linked to those of their clients under investigation (for example, the activities of lawyers acting as financial intermediaries).*

*The rules of criminal jurisdiction, as contained in the U.S. legislation, apply to all corruption-related offences. With regard to bribery of foreign public officials, the FCPA, as amended, asserts jurisdiction for acts committed abroad by U.S. nationals and businesses, as well as for acts in furtherance of a bribe committed within the territory of the U.S. by foreign nationals and foreign businesses.*

*The United States reserved the right not to apply in part the obligation set forth in article 42, paragraph 1 (b), of the UNCAC. Thus, the United States does not provide for plenary jurisdiction over offences that are committed on board ships flying its flag or aircraft registered under its laws. However, the abovementioned provision is implemented to the extent provided for under the U.S. federal law. During the country visit, it was noted that the establishment of jurisdiction aboard ships and planes would be revisited, as various new legislative proposals were under discussion.*

*Jurisdiction based on the passive and active personality principles is recognized under the U.S. law, but only in limited circumstances. The following remarks are made with the intention to assist the U.S. authorities in rendering law enforcement mechanisms more efficient and effective:*

- Ensure that the overall statute of limitations period applicable to UNCAC offences is sufficient to allow adequate investigation and prosecution;*
- Explore the possibility of studying whether any significant correlations exist between recidivism rates and various corruption offences;*
- 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.*

*In addition, the reviewing experts noticed that there had been few formal “internal” evaluations aimed at assessing the effectiveness of implementation measures for a series of UNCAC provisions. For most of the issues under consideration, an “external” evaluation was made in the context of other anti-corruption mechanisms, all of which have found the U.S. criminal and civil regimes for anti-corruption enforcement effective, and in many respects the United States has been commended for good practices developed in prosecuting corruption. It was further reported that the Department of Justice (DOJ) was constantly strengthening*

*efforts to improve the process of assessing the effectiveness of domestic anti-corruption measures. The reviewing experts invited national authorities to continue devoting efforts and resources to assess internally the impact of anti-corruption legislation, procedures and mechanisms in place.*

### ***Institutional framework***

*Primary responsibility for the criminalization and enforcement aspects of the UNCAC at the federal level lies with the DOJ. Regarding corruption of domestic officials, the Public Integrity Section within the DOJ specializes in enforcing domestic U.S. anti-corruption laws. Under the umbrella of the DOJ, the Federal Bureau of Investigation (FBI) has, inter alia, the authority to investigate corruption matters throughout the federal government and also at the state and municipal levels. The DOJ has 93 Attorney's Offices that also prosecute domestic corruption offences and, especially in large cities, have specialized public corruption units.*

*Three governmental agencies have primary responsibility for the prosecution of bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anticorruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit. Within the federal legislative branch, committees of the House of Representatives and Senate have investigative jurisdiction to explore conditions that may need to be addressed by legislation, and oversight jurisdiction to address possible corruption within executive agencies.*

*Within the federal judicial branch, a statutory mechanism enables the designation by each federal judicial circuit of a committee to consider allegations of corrupt behaviour of a judge.*

*Every large agency of the federal executive branch has a statutory Inspector General (IG) to improve legislative oversight. The IG of these agencies typically has a quasi-independent status within the organization, is removable only by the President and has specific reporting responsibilities outside its agency and directly to Congress.*

*The reviewing experts noted that, in general, the United States had put in place an impressive array of institutions, bodies and agencies to detect, investigate and prosecute. They were of the view that the large number of institutions involved in the fight against corruption demonstrated the awareness of the danger*

*that corruption represents at all levels of the Government and the public, as well as the high level of resources available to address this danger. However, they stressed that this “plethora” of institutional mechanisms entailed a potential overlap of their competencies, thus creating the need for better inter-agency coordination which would prevent fragmentation of efforts and ensure the existence of an efficient “checks and balances” system as an effective reaction to corruption.*

*Moreover, the reviewing experts stressed the importance of the independent status of the authorities specialized in combating corruption through law enforcement.*

### ***International cooperation***

*The United States is engaged internationally in building and strengthening the capacity of prosecutors in foreign countries to fight corruption through their overseas prosecutorial and police training programmes. Anti-corruption assistance programmes are conducted at both the bilateral and regional levels.*

### ***Extradition***

*The U.S. extradition regime, based on a network of treaties supplemented by conventions, is underpinned by a solid legal framework allowing for an efficient and active use of the extradition process. The shift from rigid list-based treaties to agreements primarily based on the minimum penalty definition of extraditable offences (in most cases deprivation of liberty for a maximum period of at least one year, or more severe penalty) for establishing double criminality has given the extradition system much more flexibility, and this should be highlighted as a good practice.*

*The possibility for the U.S. to extradite its own nationals is an additional asset that can assist in dealing with issues of double jeopardy, jurisdiction and coordination. This policy of the United States to extradite its own nationals should also be highlighted as a good practice.*

*The U.S. authorities indicated that no implementing legislation was required for the implementation of Article 44 of the UNCAC. It was further reported that the United States may only seek extradition an extradition request on the basis of a bilateral extradition treaty, and therefore the UNCAC alone cannot be used as the basis for extradition, although it is available to expand the scope of the extraditable offence when a bilateral treaty is already in place.*

*The United States does not refuse extradition requests solely on the ground that the offence for which extradition is sought involves fiscal matters.*

*The United States has bilateral extradition treaties with 133 States or multilateral organizations, such as the European Union. All incoming and outgoing extradition requests are reviewed and evaluated by the Office of International Affairs, Department of Justice and by the Office of the Legal Adviser, Department of State.*

### ***Mutual legal assistance***

*The United States has provided and requested formal assistance in many cases for corruption offences using existing bilateral MLATs, as well as the UNCAC and other multilateral instruments. It has notified the Secretary-General that the Office of International Affairs of the Criminal Division of the Department of Justice acts as the central authority for all incoming and outgoing MLA requests.*

*Most of the bilateral treaties concluded by the U.S. authorities contain no dual criminality requirement as a condition for granting assistance. For the treaties with double criminality provisions, those provisions are mostly limited to requests for assistance requiring compulsory or coercive measures.*

*The United States also retains the ability to deny assistance where the matter involved is of a de minimis nature, or is opposed to its essential interests, or where the assistance can be sought through other means, such as informal police cooperation.*

*Assuming that U.S. essential interests are not implicated,, U.S. law does not impede assistance in the absence of dual criminality where the assistance does not require certain compulsory measures, such as requests for search warrants. Furthermore, assistance is not denied on the grounds of bank secrecy or solely on the ground that the related offence involves fiscal matters.*

*Incoming MLA requests are executed in accordance with the U.S. law and, to the extent not contrary to domestic legislation, in accordance with the procedures specified in the request. One instance where the United States may not be able to execute an incoming request due to its domestic law is when the requesting State seeks to compel testimony from a defendant who has a right pursuant to the Fifth Amendment of the U.S. Constitution not to incriminate himself/herself.*

*The time frame for dealing with incoming MLA requests obviously varies depending on the applicable international instruments, the type of assistance, the complexity of the case, the type and location of the assistance sought, the quality of the initial request and whether additional information is needed. A newly enacted statute would likely increase efficiency in executing incoming MLA requests. The reviewing experts encouraged the U.S. authorities to continue to make best efforts to ensure such efficiency, including by giving careful consideration to the collection of data on the time frame for dealing with incoming MLA requests.*

### ***Other forms of international cooperation***

*The United States has several bilateral agreements on transfer of prisoners and is a party to the Council of Europe Convention on the Transfer of Sentenced Persons (1983) and the Inter-American Convention on Serving Criminal Sentences Abroad (1993). The Office of Enforcement Operations of the Criminal Division of the DOJ acts as the point of contact for these matters.*

*The U.S. authorities reported no cases of transfer of criminal proceedings involving U.S. citizens to foreign fora, due partly to the national policy of extraditing U.S. citizens.*

*The United States may consider the UNCAC as a legal basis for law enforcement cooperation in respect of the offences covered by this Convention. Additionally, the country has entered into bilateral or multilateral agreements or arrangements on direct cooperation with foreign law enforcement agencies.*

*The presence of law enforcement attachés abroad and the extensive use of the informal law enforcement channels in appropriate instances should be commended as a good practice. The Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury, which is the U.S. financial intelligence unit (FIU) and part of the Egmont Group, also plays a significant role in promoting information-sharing with foreign counterparts in money-laundering cases.*

*The United States further concluded bilateral and multilateral agreements that allow for the establishment of joint investigative bodies. Joint investigations can also take place on a case-by-case basis, at the level of informal law enforcement cooperation, and entail information-sharing and cooperation on developing effective investigative strategies.*

*With the consent of the other country involved, and in compliance with U.S. domestic law, there have been instances, on a case-by-case basis, where special investigative techniques have been employed. Electronic surveillance and undercover operations are permissible under U.S. legislation.*

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

- *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 U.S. jurisdiction on the understanding that such offences would constitute crimes had they been committed in U.S. territory;*
- *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.*

#### **IV. Implementation of the Convention**

##### **A. Ratification of the Convention**

The United States signed the UNCAC on 9 December 2003. Pursuant to Article II(2) of the United States Constitution and Senate Resolution 150906/109-6, the UNCAC was approved by the United States Senate on 15 September 2006. The ratification documentation was then deposited with the U.N. on 30 October 2006 at the direction of the Secretary of State, which included a reservation preserving the right to assume obligations under the Convention in a manner consistent with the fundamental U.S. principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention.

##### **B. Legal system of the United States**

Article VI of the United States Constitution states that such ratified treaties, along with federal law, constitute the “supreme Law of the Land.” The UNCAC therefore ranks high among the laws of the United States,

In U.S. practice, treaty provisions may be self-executing or non-self-executing. A self-executing provision is one which requires no implementing legislation to take effect as U.S. law; a non-self-executing provision is one which requires implementing legislation to be enforced as domestic law. Excepting Articles 44 (Extradition) and 46 (Mutual Legal Assistance), the obligatory provisions of the Convention would require legislation but, with the reservations taken, the existing body of federal and state law and regulations is adequate



to satisfy the Convention's requirements for legislation, and thus further legislation to implement the Convention was not required, and the Convention is consistent with existing U.S. law.

Primary responsibility for enforcement aspects of the UNCAC lies with the U.S. Department of Justice (DOJ).

Regarding corruption of domestic officials, DOJ has a dedicated unit within its Criminal Division in Washington, D.C., the Public Integrity Section, which specializes in enforcing the nation's anti-corruption laws. The promotion and implementation of the prevention provisions of Chapter II are carried out by a number of government entities through a variety of systems and programs.

DOJ's Public Integrity Section was created in 1976 to consolidate into one unit DOJ's responsibilities for the prosecution of criminal abuses of the public trust by government officials. The Section currently has 29 attorneys working full-time to prosecute selected cases involving federal, state, or local officials, and also to provide advice and assistance to prosecutors and investigators in the 94 United States Attorneys' Offices around the country. The Criminal Division supplements the resources available to the Public Integrity Section with attorneys from other sections within the Criminal Division - including the Fraud, Organized Crime and Racketeering, Computer Crimes and Intellectual Property, and Asset Forfeiture and Money Laundering sections, to name just four - and from the 94 U.S. Attorneys Offices.

The United States federal judicial system is broken into 94 separate districts, 93 of those districts are assigned a senior prosecutor (called the United States Attorney, who is an official of DOJ) and a staff of prosecutors to enforce federal laws in that district. (One U.S. Attorney serves in two districts.) Those offices, in addition to the Public Integrity Section, also enforce the United States anti-corruption laws.

DOJ has also dedicated increased resources to combating domestic public corruption. The Federal Bureau of Investigation, for example, currently has 639 agents dedicated to investigating public corruption matters, compared to 358 in 2002. Using these resources, DOJ aggressively investigates, prosecutes, and punishes corruption of and by public officials at all levels of government (including local, state, and national public officials), in all branches of government (executive, legislative, and judicial), as well as individuals from major United States political parties.

For example, DOJ recently convicted one former Member of Congress of substantial public corruption charges, and has indicted a sitting Member of Congress on significant corruption and other charges. DOJ also recently convicted two former state governors of bribery offences, and conducted a large-scale bribery investigation into the activities of a well-known Washington, D.C. lobbyist. To date, that investigation has netted a total of 11 bribery-related convictions. Those convictions have included a guilty plea by the former Deputy Secretary of the Department of the Interior and the jury conviction of a former official of the United States General Services Administration, among others.

Statistically, DOJ has increased its enforcement efforts against public corruption in recent years. Over the period from 2003 to 2009 (the most recent period for which data is available), the Department charged 8,203 individuals with public corruption offences nationwide and

obtained 7,149 convictions. In addition, over the five-year period from 2001 to 2005, the Department charged 5,749 individuals with public corruption offences nationwide and obtained 4,846 convictions. Compared with the preceding five year period from 1996-2000, the 2001-2005 figures represent an increase of 7.5 percent in the number of defendants charged and a 1.5 percent increase in the number of convictions.

Three governmental agencies have primary responsibility for the prosecution of bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anticorruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit. includingThe Foreign Corrupt Practices Act (FCPA) Unit of the Fraud Section of the DOJ Criminal Division handles all criminal prosecutions and for civil proceedings against non-issuers, with investigators from the FCPA Squad of the Washington Field Office of the FBI. The Fraud Section formed its dedicated unit in 2006 to handle prosecutions, opinion releases, interagency policy development, and public education on the foreign bribery offense. In total, the Fraud Section has the equivalent of 12-16 attorneys working full-time on FCPA matters. The goal is to increase this figure to 25 .

Prosecutors from a local United States Attorney's Office and the Asset Forfeiture and Money Laundering Section often assist in specific cases.

In 2008, the FBI created the International Corruption Unit (ICU) to oversee the increasing number of corruption and fraud investigations emanating overseas. Within the ICU, the FBI further created a national FCPA squad in its Washington, D.C. Field Office to investigate or to support other FBI units investigating FCPA cases. The United States Department of Homeland Security also has a specialized unit dedicated to the investigation and prosecution of foreign corruption.

The SEC Enforcement Division is responsible for civil enforcement of the FCPA with respect to issuers of securities traded in the United States. In January 2010, the Division created a specialized FCPA unit with approximately 30 attorneys. In addition, the SEC has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The FCPA Unit also has in-house experts, accountants, and other resources such as specialized training, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses.

In addition, the Department of Justice's Asset Forfeiture and Money Laundering Section (AFMLS) takes the lead in implementation of the Kleptocracy Initiative. As noted above, the initiative is an asset forfeiture program which focuses upon the identification and confiscation of the proceeds of foreign corruption, the U.S. has restrained and/or sought forfeiture of more, since the initiative's inception, more than \$77 million in corruption proceeds. The Initiative is implemented through a Kleptocracy Team comprised of a dedicated group of prosecutors and financial investigators from the Federal Bureau of Investigation and the Department of Homeland Security, and is supported by other Department of Justice components including the Fraud Section and Office of International Affairs.

Beyond domestic efforts, the United States works internationally to build and strengthen the ability of prosecutors around the world to fight corruption through their overseas prosecutorial and police training programs. Anticorruption assistance programs are conducted bilaterally

and regionally, including at various U.S.-supported International Law Enforcement Academies established in Europe, Africa, Asia and the Americas. Assistance efforts involve the development of specialized prosecutorial and investigative units, anticorruption task forces, anticorruption commissions and national strategies, internal integrity programs, and specific training on how to investigate and prosecute corruption.

For example, DOJ, in coordination with the Department of State, sends experienced U.S. prosecutors and senior law enforcement officials to countries throughout the world to provide anticorruption assistance, both on short term and long term assignments. On a long term basis, DOJ has posted Resident Legal Advisors (RLA's) and Senior Law Enforcement Advisors (SLEA's) throughout the world to work with partner governments on anticorruption efforts and to assist our partners with building sound and fair justice systems and establishing non-corrupt institutions. They provide specialized anticorruption assistance, tailored to partner country needs, including pilot programs on asset recovery. They offer expertise on a broad array of anticorruption measures, such as legislative drafting and institutional development, through consultations, workshops, seminars and training programs. DOJ's international assistance programs are coordinated by the Criminal Division's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and International Criminal Training Assistance Program (ICITAP).

### **C. U.S. Framework of Laws**

The United States has a complex and detailed preventive legal system in place, which includes, but is not limited to, the following provisions of law:

➤ Laws or other measures that promote the participation of society:

- U.S. Constitution, 1st Amendment Right to Petition,
- Administrative Procedures Act 5 U.S.C. 551 et. seq. (in part provides the public with notice and the opportunity to comment on substance of proposed rules and regulations),
- Federal Advisory Committee Act 5 U.S.C. app. [5 U.S.C.A. app. 2] (structural and procedural requirements for approximately 1000 Federal advisory committees with substantial numbers of members of the public).

➤ Laws and other measures that reflect proper management of public affairs and public property:

(1) Public Property:

- Title 40 United States Code (laws dealing with Public Buildings, Property and Works)
- Title 41 United States Code (laws dealing with Public Contracts)
- Title 41 Code of Federal Regulations (regulations concerning Public Contracts and Property Management)
- Title 48 Code of Federal Regulations (regulations concerning Federal Acquisition)
- 18 U.S.C. § 641 (criminal code provisions on misuse of public money, property and records)

(2) Financial:

- U.S. Constitution, art. I, § 9, cl. 7

- Title 31 United States Code (laws dealing with Money and Finance, including such acts as:

- § Anti Deficiency Act (P.L. 97-258)
- § Federal Managers Financial Integrity Act (P.L. 97-255)
- § Chief Financial Officers Act (P.L. 101-576)

- OMB Circular A-11 Preparation and Submission of Budget Estimates and Execution of the Budget (guidance to agencies from the Office of Management and Budget)
- Title 31 Code of Federal Regulations (regulations concerning management of federal receipts and disbursements)

➤ Integrity systems:

- Ch. 11 of Title 18, United States Code (bribery and criminal and civil conflicts of interest statutes) [18 U.S.C. §§ 201-219]
- 5 U.S.C. App § 501 et. seq. (outside activity and compensation restrictions)
- 5 C.F.R. Part 2635, Executive Branch Standards of Ethical Conduct (code of conduct) ([www.usoge.gov/pages/laws\\_regs\\_fedreg\\_stats/oge\\_regs/5cfr2635.html](http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html))
- 5 C.F.R. Part 2638, Subpart G - Executive Agency Ethics Training Programs
- Rules of the House of Representatives Numbers 23-26 (code of conduct) ([www.rules.house.gov/ruleprec/110th.pdf](http://www.rules.house.gov/ruleprec/110th.pdf))
- Senate Code of Official Conduct, Rules 34 to 43 of Rules of the U.S. Senate (<http://rules.senate.gov/senaterules>)
- Code of Conduct for United States Judges ([www.uscourts.gov/guide/vol2/ch1.html](http://www.uscourts.gov/guide/vol2/ch1.html))
- Code of Conduct for Judicial Employees ([www.uscourts.gov/guide/vol2/ch2a.html](http://www.uscourts.gov/guide/vol2/ch2a.html))
- Code of Conduct for Federal Public Defender Employees ([www.uscourts.gov/guide/vol2/ch2b.html](http://www.uscourts.gov/guide/vol2/ch2b.html))

➤ Statutes that are applicable to the conduct of public officials and thus integrity (Title 18, United States Criminal Code:

- Sec. 286 - Conspiracy to defraud Government with respect to claims
- Sec. 287 - False, fictitious or fraudulent claims
- Sec. 371 - Conspiracy to commit offence or to defraud the U.S.
- Sec. 431 - Contracts by Members of Congress
- Sec. 432 - Officer or employee contracting with Member of Congress
- Sec. 433 - Exemptions with respect to certain contracts
- Sec. 641 - Public money, property or records
- Sec. 666 - Theft or bribery concerning programs receiving federal funds
- Sec. 1001 - False statements
- Sec. 1341 - Mail fraud-frauds and swindles
- Sec. 1342 - Mail fraud- fictitious name or address
- Sec. 1343 - Fraud by wire, radio or television
- Sec. 1344 - Bank fraud
- Sec. 1345 - Injunctions against fraud
- Sec. 1346 - Definition of “scheme or artifice to defraud”
- Sec. 1905 - Disclosure of confidential information.

➤ Statutes that are applicable to the conduct of foreign public officials and thus integrity:

- Title 15, United States Criminal Code, Section 78m, 78dd-1 et seq., and 78ff

- Statute that is applicable to the conduct of private corruption
  - Title 18, United States Criminal Code, Section 1952
  
- Primary statutes relating to money laundering
  - 18 U.S.C. §§1956 and 1957
  
- Restrictions regarding the judicial branch and executive branch administrative decision makers:
  - Judicial discipline, 28 U.S.C. § 351351351-364
  - Practice of law by justices and judges, 28 U.S.C. § 454
  - Disqualification of a justice, judge, or magistrate, 28 U.S.C. § 455
  - Ex parte communications with administrative agencies, 5 U.S.C. § 557(d)
  
- Restrictions regarding procurement activities:
  - Procurement integrity, 41 U.S.C. § 210121012101-2107
  - Interest of Member of Congress, 41 U.S.C. § 22
  
- Statutes (non-criminal) involving gifts and travel:
  - Gifts to federal employees, 5 U.S.C. § 7353
  - Gifts to superiors, 5 U.S.C. § 7351
  - Foreign Gifts and Decorations Act, 5 U.S.C. § 7342
  - Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2458a
  - Acceptance of travel and related expenses from non-federal sources, 31 U.S.C. §1353
  - Acceptance of contributions, awards and other payments, 5 U.S.C. § 4111
  
- Other conflicts (criminal and non-criminal) related to employment, whistle blowing, and political activities:

Criminal:

- Expenditure to influence voting, 18 U.S.C. § 597
- Coercion by means of relief appropriations, 18 U.S.C. § 598
- Promise of appointment by candidate, 18 U.S.C. § 599
- Promise of employment of other benefit for political activity, 18 U.S.C. § 600
- Deprivation of employment or other benefit for political contribution, 18 U.S.C. § 601
- Solicitation of political contributions, 18 U.S.C. § 602
- Making political contributions, 18 U.S.C. § 603
- Solicitation [for political purposes] from persons on relief, 18 U.S.C. § 604
- Disclosure [for political purposes] of names of persons on relief, 18 U.S.C. § 605
- Intimidation to secure political contributions, 18 U.S.C. § 606
- Place of solicitation [of political contributions], 18 U.S.C. § 607
- Absent uniformed services voters and overseas voters, 18 U.S.C. § 608
- Use of military authority to influence vote of member of Armed Services, 18 U.S.C. §609
- Coercion of political activity, 18 U.S.C. § 610

Non-criminal:

- Anti-nepotism law, 5 U.S.C. § 3110
- Relatives of Justice or judge, 28 U.S.C. § 458
- Recommendations for employment by Members of Congress, 5 U.S.C. § 3303

- Restrictions on dual pay, 5 U.S.C. § 5533
- Whistleblower protection, subchapter 11 of chapter 12, Title 5, U.S.C.
- Political activities (Hatch Act), subchapter 111 of chapter 73, Title 5, U.S.C.
- Tax treatment for sales of property in order to comply with conflict of interest requirements, 26 U.S.C. § 1043

➤ Transparency and Accountability:

- Freedom of Information Act, 5 U.S.C. § 552
- Electronic Government Act, ch. 36 of title 44, United States Code
- Government in the Sunshine Act 5 U.S.C. § 552b
- Federal Records Act 31 U.S.C. § 3101
- U.S. Constitution, art. I, §5, published proceedings of Congress
- Rules 5, 6 and 11 of the U.S. House of Representatives (notice, open hearings, televised proceedings, press gallery) ([www.rules.house.gov/ruleprec/110th.pdf](http://www.rules.house.gov/ruleprec/110th.pdf))
- Rules 26 and 33 of the U.S. Senate (notice, open meetings, televised proceedings, press gallery) (<http://rules.senate.gov/senaterules>)
- Judicial rules of procedure, including the Federal rules of criminal procedure and civil procedure ([www.uscourts.gov/rules](http://www.uscourts.gov/rules))

➤ Examples of oversight by one branch of government over another (preventive checks and balance):

- Congressional oversight over use of appropriations by executive and judicial branches (art. I, § 9 of the Constitution)
- Constitutional power of the Executive to prosecute criminal or civil misconduct by an official of any branch (art. II, § 1 of the Constitution)
- Constitutional power of Senate to confirm Presidential appointees to executive branch and to the federal courts (art. II, § 2)
- Constitutional power of the Congress to impeach, try and remove the President and any Federal Judge or Justice (art. I, §§ 2 and 3)
- Constitutional power of the Federal judiciary to judge the Constitutionality of federal laws and of the manner of their execution (art. III, § 2)

➤ Examples of oversight within branches:

- Inspectors General within agencies of the executive branch - Inspector General Act of 1978, 5 U.S.C. app. [5 U.S.C.A. app. 3]
- Office of Government Ethics for executive branch agency ethics programs - 5 U.S.C. app. § 401 et. seq.
- Peer oversight of Members of Congress (Constitution art. I, § 5) and rules of each house to establish appropriate committees for that purpose
- Judicial Conference Committee on Conduct and Disability for federal judges

➤ Examples of oversight by public:

- Appeals of agency decisions 5 U.S.C. § 701 et. seq.
- Challenges by disappointed bidders in procurements Part 33 of Title 48, C.F.R.
- Qui Tam proceedings 31 U.S.C. § 3730.

Taken together, these institutions, policies, laws, regulations and procedures demonstrate the existence of a comprehensive anti-corruption preventive policy in the United States.

## **Overall assessment**

The basic conclusion of the reviewing experts as a result of the review process was that combating corruption is among the highest priorities of U.S. law enforcement authorities and substantial resources are devoted to the fight against corrupt practices. An inevitable outcome of the federal system and the strict separation of powers is that various authorities are involved in the investigation and prosecution of corruption offences.

Over the years, the United States has significantly strengthened its overall anti-corruption measures, implementing a large number of statutory amendments and structural changes. Consequently, U.S. authorities have demonstrated impressive results against corruption in terms of legislative and regulatory enforcement action, as well as indictments and convictions even in cases involving high-level corruption,, and in pursuing the recovery of assets derived from large-scale corruption . Some elements for improvement, as indicated during the country review process, are highlighted in the report, together with good practices and examples of implementation, where available.

## **Gap analysis**

### **A. Implementation of the UNCAC in consistency with the United States federal system**

One issue raised during the review process was the question of how the UNCAC can be implemented consistent with the United States federal system. In this regard, the United States reserved the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. With respect to articles of the Convention that require States Parties to establish criminal offenses or related measures if they have not already done so (in particular Articles 15, 16, 17, 23, 25, 27, 29, 31-32, 35-37), it should be noted preliminarily that these obligations apply at the national level. Existing federal criminal law has limited scope, generally covering conduct involving interstate or foreign commerce, or another important federal interest. Under the fundamental principles of federalism, offenses of a local character are generally within the domain of the states, but not all forms of conduct proscribed by the Convention are criminalized by all U.S. states in the form set forth by the Convention. For example, some states may not criminalize all of the forms of conduct set forth under Article 25, Obstruction of Justice.

Although the reviewing experts found no evidence of gaps, the point was raised that given the complexity of the federal and state system, it might be possible for some criminal conduct not to be covered.

The United States explained that there are no gaps. In fact, most corruption cases pursued by the U.S. Justice Department are against state and local officials.

The U.S. authorities noted, specifically, that, in the absence of a reservation, there would be a narrow category of such conduct that the United States would be obligated under the Convention to criminalize, although under the U.S. federal system such obligations would generally be met by state governments rather than the federal government. Because there may be situations where state and federal law will not be entirely adequate to satisfy an obligation in Chapters II and III of the Convention, the United States made the following reservation: “The Government of the United States of America therefore reserves to the obligations set forth in the Convention to the extent that they (1) address conduct that would fall within this narrow category of highly localized activity or (2) involve preventive measures not covered by federal law governing state and local officials. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other States Parties in accordance with the provisions of the Convention”.

Furthermore, the United States submitted the following understanding: “The United States understands that, in view of its federalism reservation, the Convention does not warrant the enactment of any legislative or other measures; instead, the United States will rely on existing federal law and applicable state law to meet its obligations under the Convention”.

With the U.S. reservation and understanding, the United States noted that in Chapter III (Criminalization and law enforcement), gaps arise only in provisions that are non-obligatory, e.g., portions of Articles 16, 27, 30-32, 37 and 39, as well as the entirety of Articles 18-22, 24, 33, and 41. The United States can implement the obligations of Chapter III under existing federal and state law.

#### **B. “Internal” / “external” evaluation of the effectiveness of implementation of UNCAC provisions**

In the context of the review process, the reviewing experts noted that for most of the issues under consideration, an “external” evaluation was made in the context of other anti-corruption mechanisms. Indeed, many U.S. anti-corruption initiatives and actions have been subject to evaluation by competent international and regional mechanisms with a mandate on anti-corruption issues (Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC); OECD Working Group on Bribery in International Business Transactions; Council of Europe/GRECO). All these mechanisms have found the U.S. criminal and civil regimes for anti-corruption enforcement effective, and in many respects the United States has been commended for good practices developed in prosecuting corruption. It was further reported that the Department of Justice (DOJ) was constantly strengthening efforts to improve the process of assessing the effectiveness of domestic anti-corruption measures.

On the other hand, the review team noted there had been few formal “internal” evaluations aimed at assessing the effectiveness of implementation measures for a series of UNCAC provisions. Hence, the reviewing experts invited national authorities to continue devoting efforts and resources to assess internally the impact of anti-corruption legislation, procedures and mechanisms in place.

□

#### **D. Implementation of selected articles**

##### **Article 15 Bribery of national public officials**



## **Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The U.S. authorities reported that measures described in this provision were adopted and implemented.

#### 18 U.S.C. § 201. Bribery of public officials and witnesses (see annex)

The federal bribery statute, 18 U.S.C. § 201(b), criminalizes the corrupt promise or transfer of any thing of value to influence an official act of a federal official, a fraud on the United States, or the commission or omission of any act in violation of the official's duty. 18 U.S.C. § 201(b)(1)–(2) provides:

(b) Whoever –

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent –

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

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

For the purpose of this section-

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

Below are some examples of cases:

➤ United States v. Hall, Pressley, and Pressley, Northern District of Alabama. Trial, February, 2011:

Terry Hall, a civilian contractor, was indicted on May 1, 2009, for allegedly paying more than \$2.8 million in bribes to a United States Army contracting official, United States Army Major Eddie Pressley, stationed at Camp Arifjan, Kuwait, and to the official's wife, Eurica Pressley. All three were charged with bribery, conspiracy to commit bribery, honest services wire fraud, money laundering conspiracy, and engagement in monetary transactions in criminal proceedings. Hall operated several companies that had contracts with the United States military in Kuwait, including Freedom Consulting and Catering Company (FCC) and Total Government Allegiance (TGA). As a result of these bribes, FCC and TGA allegedly received approximately \$21 million from contracts to deliver bottled water and to erect security fencing for the Department of Defense (DOD) in Kuwait and Iraq. Eddie Pressley allegedly arranged for a blanket purchase agreement (BPA) for bottled water to be awarded to FCC and thereafter Eddie Pressley arranged for orders from Hall's companies. As a result, DOD paid FCC approximately \$9.3 million. Eddie Pressley also allegedly arranged for DOD to award a contract to FCC to construct a security fence at Camp Arifjan, for which DOD paid FCC approximately \$750,000. Eddie and Eurica Pressley subsequently moved funds to a possibly fictitious corporation for the purpose of transferring these bribe payments to several foreign banks, allegedly to launder these illegal proceeds. A second contracting official, former United States Army Major James Momon, arranged for orders from TGA under the same bottled water BPA, as a result of which DOD paid Hall approximately \$6.4 million. Hall allegedly paid Momon at least \$200,000 in exchange for these and other official acts. Momon previously pled guilty to bribery and conspiracy to commit bribery for receiving bribes from various contracting officers at Camp Arifjan.

➤ United States v. Abramoff, District of Columbia:

Former lobbyist Jack Abramoff was charged and pled guilty on January 3, 2006, to conspiracy to commit bribery and honest services wire and mail fraud; mail fraud; and tax evasion arising from a scheme to defraud four Native American Indian tribes by charging fees that incorporated huge profit margins and then splitting the net profits in a secret kickback arrangement. Abramoff admitted that over a 10-year period ending in 2004, he and others engaged in a pattern of corruptly providing items of value to public officials, with the intent to influence acts by the public officials that would benefit Abramoff and his clients. For example, Abramoff admitted that he and others provided things of value to public officials and members of their staff, including but not limited to a lavish trip to Scotland to play golf on world-famous courses, tickets to sporting events, meals at upscale restaurants, and campaign contributions. Abramoff also admitted evading payment of almost \$1.7 million in taxes from 2001 through 2003 by hiding income in certain nonprofit entities that he controlled. On September 4, 2008, Abramoff was sentenced to forty-eight months of imprisonment, three years of supervised release, and ordered to pay \$23,134,695 in restitution to victims.

➤ United States v. Fisher, District of Columbia:

James Fisher, an employee of the General Services Administration responsible for negotiating contracts for repair and maintenance at U.S. government facilities that were overseen by his GSA field office, pled guilty to bribery. The charge arose from his accepting approximately \$40,000 in cash and other things of value between 2003 and 2007 from a private maintenance company for steering numerous work orders to the company. Fisher was sentenced on May

13, 2008, to eighteen months' imprisonment, two years' supervised release, and a \$5,000 fine. As part of his plea agreement, Fisher also consented to forfeiting \$40,000.

➤ United States v. Graham and Shipley, District of Arizona:

On March 24, 2008, the last of over fifty defendants were sentenced as a result of an FBI undercover operation (Operation Lively Green) into a widespread bribery and extortion scheme. Joy McBrayer Graham, former Arizona Army National Guardswoman, pled guilty on January 26, 2006, and Mark Ryan Shipley, a civilian falsely purporting to be serving in the Arizona Army National Guard, pled guilty on October 10, 2007, to conspiring to obtain cash bribes from persons they believed to be narcotics traffickers but were in fact FBI special agents in return for the defendants using their official positions to assist, protect, and participate in the activities of an ostensible narcotics trafficking organization. In order to protect the shipments of cocaine, the defendants wore official uniforms, carried official forms of identification, used official vehicles, and used their colour of authority where necessary to prevent police stops and seizures of the narcotics as they drove through checkpoints guarded by the United States Border Patrol, the Arizona Department of Public Safety, and Nevada law enforcement officers. Graham was sentenced to four years of probation and a \$3,000 fine. Shipley was sentenced to 24 months of imprisonment, three years of supervised release, and a \$3,000 fine.

➤ United States v. Money, District of Columbia:

Daniel Money, a former government contractor, pled guilty on September 5, 2008, to bribing a government official in order to win two service contracts. Money owned Daniel Construction, which provided maintenance, repair, electrical, and other related services to government agencies. He also worked for the U.S. Department of the Treasury as a planner. Money agreed to pay a government official a total of \$55,000 in bribe payments in exchange for the award of two contracts to Daniel Construction. The first contract, in the amount of \$188,000, was awarded to Money's company resulting in a minimum profit of \$95,000. Money was arrested before the second contract was awarded, and he pled guilty on September 5, 2008. Money was sentenced on February 5, 2009, to 30 months of imprisonment, three years of supervised release, and a \$7,500 fine. Money was also ordered to forfeit the \$95,000 which constituted the profit that Money made on the contract that he performed as part of the bribery scheme.

➤ United States v. Plaskett and Briggs, District of the Virgin Islands:

Dean Plaskett, former Commissioner of the U.S. Department of Virgin Islands Department of Planning and Natural Resources, and Marc Briggs, former Commissioner of the U.S. Virgin Islands Department of Property and Procurement, were convicted on February 27, 2008, for their role in a bribery and kickback scheme involving a fictitious company by the name of Elite Technical Services that received over \$1.4 million in government contracts. Once the contracts were awarded, the defendants and their associates, including at least two other territorial government officials, received over \$300,000 in return for steering at least seven contracts to the company. Following a two-week trial, Plaskett and Briggs were convicted of demanding and accepting bribes and kickbacks in connection with the award of a \$650,000 government contract to the shell company. On August 14, 2008, Plaskett was sentenced to nine years of imprisonment and Briggs was sentenced to seven years of imprisonment, plus three years of supervised release. In addition, Plasket was ordered to pay a money judgment of \$1,086, 237 and Briggs was ordered to pay a money judgment of \$960,482.

Information was also reported on related legal cases or other processes, including statistics on number of investigations, prosecutions and convictions/acquittals provided per annum figures since the year 2003 (in some cases – earlier), as follows:

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TABLE III: Federal Public Corruption Convictions by District Over the Past Decade

TABLE IV: Public Integrity Section’s Federal Prosecutions of Corrupt Public Officials in 2009

**TABLE I  
NATIONWIDE FEDERAL PROSECUTIONS OF CORRUPT PUBLIC  
OFFICIALS IN 2009**

Federal Officials	Charged 425	Convicted 426	Awaiting Trial 107
State Officials	Charged 93	Convicted 102	Awaiting Trial 57
Local Officials	Charged 270	Convicted 257	Awaiting Trial 148
Others Involved	Charged 294	Convicted 276	Awaiting Trial 161
Totals	Charged 1,082	Convicted 1,061	Awaiting Trial 473

**TABLE II  
PROGRESS OVER THE LAST TWO DECADES: FEDERAL PROSECUTIONS  
BY UNITED STATES ATTORNEYS’ OFFICES OF CORRUPT PUBLIC  
OFFICIALS**

FEDERAL OFFICIALS:

	1990	1991	1992	1993	1994
Charged	615	803	624	627	571
Convicted	583	665	532	595	488
Awaiting Trial as of 12/31	103	149	139	133	124

STATE OFFICIALS:

	1990	1991	1992	1993	1994
Charged	96	115	81	113	99
Convicted	79	77	92	133	97
Awaiting Trial as of 12/31	28	42	24	39	17

**LOCAL OFFICIALS:**

	1990	1991	1992	1993	1994
Charged	257	242	232	309	248
Convicted	225	180	211	272	202
Awaiting Trial as of 12/31	98	88	91	132	96

**PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENCES:**

	1990	1991	1992	1993	1994
Charged	208	292	252	322	247
Convicted	197	272	246	362	182
Awaiting Trial as of 12/31	71	67	126	99	95

**TOTALS:**

	1990	1991	1992	1993	1994
Charged	1,176	1,452	1,189	1,371	1,165
Convicted	1,084	1,194	1,081	1,362	969
Awaiting Trial as of 12/31	300	346	380	403	332

**TABLE II (continued)**

**FEDERAL OFFICIALS:**

	1995	1996	1997	1998	1999
Charged	527	456	459	442	480
Convicted	438	459	392	414	460
Awaiting Trial as of 12/31	120	64	83	85	101

12/31					
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STATE OFFICIALS:

	1995	1996	1997	1998	1999
Charged	61	109	51	91	115
Convicted	61	83	49	58	80
Awaiting Trial as of 12/31	23	40	20	37	44

LOCAL OFFICIALS:

	1995	1996	1997	1998	1999
Charged	236	219	255	277	237
Convicted	191	190	169	264	219
Awaiting Trial as of 12/31	89	60	118	90	95

PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENSES:

	1995	1996	1997	1998	1999
Charged	227	200	292	364	302
Convicted	188	170	243	278	306
Awaiting Trial as of 12/31	91	80	106	128	89

TOTALS:

	1995	1996	1997	1998	1999
Charged	1,051	984	1,057	1,174	1,134
Convicted	878	902	853	1,014	1,065
Awaiting Trial as of 12/31	323	244	327	340	329

**TABLE II (continued)**

FEDERAL OFFICIALS:

	2000	2001	2002	2003	2004
Charged	441	502	478	479	424
Convicted	422	414	429	421	381

Awaiting Trial as of 12/31	92	131	119	129	98
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**STATE OFFICIALS:**

	2000	2001	2002	2003	2004
Charged	92	95	110	94	111
Convicted	91	61	132	87	81
Awaiting Trial as of 12/31	37	75	50	38	48

**LOCAL OFFICIALS:**

	2000	2001	2002	2003	2004
Charged	224	299	259	268	309
Convicted	184	262	119	252	232
Awaiting Trial as of 12/31	110	118	106	105	148

**PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENSES:**

	2000	2001	2002	2003	2004
Charged	266	249	318	410	313
Convicted	261	188	241	306	311
Awaiting Trial as of 12/31	121	126	139	168	136

**TOTALS:**

	2000	2001	2002	2003	2004
Charged	1,087	1,136	1,150	1,213	1,163
Convicted	920	1,011	868	1,020	1,027
Awaiting Trial as of 12/31	437	413	412	419	453

**TABLE II (continued)**

**FEDERAL OFFICIALS:**

	2005	2006	2007	2008	2009	Totals
Charged	445	463	426	518	425	10,205
Convicted	390	407	405	458	426	9,179

Awaiting Trial as of 12/31	118	112	116	117	107	
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STATE OFFICIALS:

	2005	2006	2007	2008	2009	Totals
Charged	96	101	128	144	93	1,995
Convicted	94	116	85	123	102	1,781
Awaiting Trial as of 12/31	51	38	65	61	57	

LOCAL OFFICIALS:

	2005	2006	2007	2008	2009	Totals
Charged	309	291	284	287	270	5,214
Convicted	232	241	275	46	257	4,374
Awaiting Trial as of 12/31	148	141	127	127	148	

PRIVATE CITIZENS INVOLVED IN PUBLIC CORRUPTION OFFENSES:

	2005	2006	2007	2008	2009	Totals
Charged	313	295	303	355	294	5,765
Convicted	311	66	249	302	276	5,086
Awaiting Trial as of 12/31	136	148	179	184	161	

TOTALS:

	2005	2006	2007	2008	2009	Totals
Charged	1,163	1,150	1,141	1,304	1,082	23,179
Convicted	1,027	1,030	1,014	1,129	1,061	20,420
Awaiting Trial as of 12/31	453	439	487	489	473	

**TABLE III  
UNITED STATES ATTORNEYS' OFFICES' FEDERAL PUBLIC CORRUPTION  
CONVICTIONS BY DISTRICT OVER THE PAST DECADE**

U.S. Attorney's	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
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Office											
Alabama, Middle	3	9	7	6	7	9	11	8	3	5	68
Alabama, Northern	9	15	11	6	4	17	33	39	17	18	169
Alabama, Southern	0	2	10	2	2	0	7	5	0	5	33
Alaska	6	6	5	0	0	1	3	15	8	1	55
Arizona	8	1	4	10	9	48	16	32	20	19	167
Arkansas, Eastern	7	0	0	18	18	4	8	8	7	2	69
Arkansas, Western	1	0	3	1	0	0	2	0	1	1	9
California Central	31	33	35	45	22	42	36	55	41	43	383
California Eastern	18	18	20	20	39	30	18	13	9	15	200
California Northern	18	3	4	5	14	3	4	2	3	2	58
California Southern	7	12	5	5	2	10	7	6	5	9	68
Colorado	3	22	16	7	8	11	4	3	4	14	92
Connecticut	8	14	3	12	8	24	11	17	5	2	104
Delaware	1	8	7	3	5	2	7	5	7	1	46
District of Columbia	46	43	44	20	33	15	25	22	66	28	342
Florida, Middle	28	8	9	14	10	13	39	28	51	30	230
Florida, Northern	8	5	5	4	2	5	17	19	3	27	95
Florida, Southern	71	83	38	37	78	24	27	22	12	12	404
Georgia, Middle	2	11	1	8	4	7	3	0	7	3	46
Georgia, Northern	--	10	26	12	9	21	6	7	15	21	127
Georgia, Southern	0	3	6	1	0	4	0	1	2	1	18
Guam & NMI	19	19	13	16	9	5	2	0	3	6	92
Hawaii	3	2	10	4	14	4	5	1	2	1	46
Idaho	5	4	7	4	3	1	1	1	1	1	28
Illinois, Central	3	2	5	5	14	3	6	8	6	6	58
Illinois, Northern	49	24	19	54	22	51	30	28	43	47	367
Illinois, Southern	7	4	6	1	6	20	2	6	7	5	64
Indiana	7	4	4	10	13	9	5	15	9	10	86

Northern											
Indiana, Southern	4	2	2	10	4	5	4	9	5	8	53
Iowa	0	0	2	8	1	1	2	9	9	4	36
Kansas	8	5	6	0	5	3	0	2	5	4	38
Kentucky, Eastern	25	15	25	22	27	10	23	33	22	22	224
Kentucky, Western	0	2	2	4	1	4	4	6	6	19	48
Louisiana, Eastern	18	20	19	17	29	26	26	29	26	20	230
Louisiana, Middle	2	6	2	2	0	8	13	6	3	10	52
Louisiana, Western	3	6	9	6	1	4	10	7	10	14	70
Maine	5	2	0	5	2	3	4	4	8	5	38
Maryland	8	8	6	12	28	17	36	21	39	32	207
Massachusetts	6	15	8	22	17	15	28	29	19	28	187
Michigan, Eastern	7	18	14	10	17	11	13	7	20	7	124
Michigan, Western	47	9	10	14	13	11	12	5	13	11	102
Minnesota	4	8	8	3	9	3	6	3	7	13	64
Mississippi, Northern	9	5	7	14	9	5	5	18	13	13	98
Mississippi, Southern	14	19	13	13	5	0	2	7	4	2	79
Missouri, Eastern	3	4	10	3	4	8	12	12	22	16	94
Missouri, Western	9	6	3	7	6	13	8	8	9	8	77
Montana	16	3	13	2	7	1	8	0	8	7	65
Nebraska	0	0	1	2	2	4	3	0	8	2	22
Nevada	6	5	6	6	0	0	3	4	0	7	37
New Hampshire	2	0	5	3	0	2	0	0	4	1	17
New Jersey	28	28	28	41	44	39	47	62	49	44	410
New Mexico	7	2	2	2	5	3	6	3	6	9	45
New York, Eastern	21	10	38	7	25	31	20	26	14	12	204
New York Northern	8	11	5	22	16	11	9	7	10	2	101
New York, Southern	48	34	33	28	28	28	16	9	9	9	242
New York, Western	4	13	6	6	7	12	6	2	15	15	86
North Carolina,	0	7	4	9	18	2	20	18	4	4	86

Eastern											
North Carolina, Middle	4	5	12	6	0	3	2	5	1	3	41
North Carolina, Western	5	1	3	5	7	8	2	3	12	2	48
North Dakota	2	2	5	16	5	9	2	6	4	0	51
Ohio, Northern	36	34	29	28	32	28	31	37	29	49	333
Ohio, Southern	20	17	21	9	26	21	12	12	8	7	153
Oklahoma, Eastern	2	10	0	0	0	2	5	3	8	0	30
Oklahoma, Northern	3	2	5	3	0	2	3	3	3	12	36
Oklahoma, Western	4	0	2	1	4	17	10	3	11	10	62
Oregon	4	3	1	3	0	4	6	11	3	5	40
Pennsylvania Eastern	30	36	57	57	26	26	30	19	15	20	316
Pennsylvania Middle	14	20	9	13	12	19	27	16	16	16	162
Pennsylvania Western	7	5	6	4	3	11	10	5	5	5	61
Puerto Rico	10	9	101	24	31	6	20	2	37	28	268
Rhode Island	5	2	6	0	2	4	2	1	2	1	25
South Carolina	13	8	5	8	8	0	3	4	8	7	64
South Dakota	2	2	4	3	2	3	13	4	11	8	52
Tennessee, eastern	3	2	9	8	6	9	7	12	6	7	69
Tennessee, Middle	0	0	4	6	8	5	9	6	1	4	43
Tennessee, Western	8	13	8	11	16	22	19	24	5	10	136
Texas, Eastern	4	14	5	5	8	5	3	4	10	5	63
Texas, Northern	6	3	13	33	14	22	16	6	23	41	177
Texas, Southern	29	30	10	17	11	25	21	34	64	26	267
Texas, Western	5	15	21	16	27	17	9	11	15	27	163
Utah	2	2	8	5	0	6	1	7	5	3	39
Vermont	2	2	0	3	0	2	0	1	5	0	15
Virgin Islands	6	4	6	2	2	2	8	3	2	0	35
Virginia,	22	22	7	8	21	23	38	23	72	57	303

Eastern											
Virginia, Western	7	3	13	3	16	2	13	13	2	5	77
Washington, Eastern	1	0	3	2	3	6	1	4	5	0	25
Washington, Western	16	10	3	1	15	7	1	5	7	3	68
West Virginia, Northern	0	0	0	0	0	3	0	0	2	2	7
West Virginia, Southern	6	3	4	8	10	14	9	2	4	2	62
Wisconsin, Eastern	8	10	10	8	10	18	11	7	6	4	92
Wisconsin, Western	4	3	0	3	3	2	5	5	0	5	30
Wyoming	1	0	0	2	1	8	0	1	1	2	16

The above information was collected and analyzed by the following method – The Department of Justice Public Integrity Section maintains information on cases prosecuted, and annually publishes a report detailing the significant cases.

U.S. measures to criminalize bribery of national public officials have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the Group of States against Corruption (GRECO/Council of Europe).

The MESICIC reviews of the United States, as well as an explanation of the MESICIC’s methodology, are available at [http://www.oas.org/juridico/english/mesicic\\_rounds.htm](http://www.oas.org/juridico/english/mesicic_rounds.htm).

The GRECO’s third evaluation round compliance report on the United States is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_On\\_e\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_On_e_EN.pdf)

An explanation of the GRECO’s methodology is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.asp).

**(b) Observations on the implementation of the article**

According to the U.S. response, the principal statute prohibiting bribery of a national public officials, consistent with UNCAC Article 15 (a), is Title 18, United States Code, section 201(b)(1) – “Bribery of public officials and witnesses.”

As defined in 18 U.S.C. § 201(a)(1) (see annex), the term “public official” is found to be in compliance with article 2 of the UNCAC.

The cited Title 18 U.S.C. § 201(a) and (b) cover all required elements of article 15(a) of the UNCAC: public official; giving, offering or promising anything of value; directly or indirectly; with intention; any other person or entity; to do or omit to do any act in violation of the lawful duty.

U.S. has provided examples of cases related to this article and a comprehensive list of tables that include charges, convictions and pending cases.

In addition, the United States maintains comprehensive statistics in the Nationwide Federal Prosecutions of Corrupt Public Officials which includes federal officials, state officials, and local officials, as well as statistics of private citizens involved in public corruption offenses. The United States Attorneys' Offices' also maintain statistics on federal public corruption cases by district, including convictions obtained on cases over the past decade

A high percentage of persons who are charged with public corruption are convicted.

According to Table 2 "Progress over the last two decades: Federal prosecutions by United States Attorneys' Offices of corrupt public officials", over the five-year period from 2001 to 2005, DOJ charged 5,749 individuals with public corruption offences nationwide and obtained 4,846 convictions. Compared with the preceding five year period from 1996-2000, the 2001-2005 figures represent an increase of 7.5 percent in the number of defendants charged and a 1.5 percent increase in the number of convictions.

The U.S. authorities indicated that the national measures to criminalize bribery of national public officials have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the Group of States against Corruption (GRECO)/Council of Europe. The GRECO's third evaluation round compliance report on U.S.A. is available at:

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_Online\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_Online_EN.pdf)

Moreover, adopted on March 25, 2011, the United States' MESICIC Final Report for the Third Round of Review regarding its implementation of the Inter-American Convention against Corruption stated that "With respect to provisions related to the criminalization of the acts of corruption provided for in paragraph (b) of the Article VI(1) of the Convention that have been examined by the Committee, based on the information made available to it, the Committee observes that they constitute a set of provisions relevant to the promotion of the purposes of the Convention" and concludes that "The United States has adopted measures which criminalize the acts of corruption provided for by Article VI(1) of the Convention". No recommendations were formulated by the Committee in this Section.

Consequently, U.S. legislation is in compliance with article 15(a) of the UNCAC. Additionally, the provision was found to be successfully implemented in practice.

It could be understood that, consistent with the U.S. federal system of government, the different states may enact and have enacted their own laws prohibiting the conduct described in Article 15(a).

## **Article 15 Bribery of national public officials**

## Subparagraph (b)

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### (a) Summary of information relevant to reviewing the implementation of the article

The U.S. authorities reported that measures described in this provision were adopted and implemented. Texts from national legislation are as follows: – 18 U.S.C. § 201(b)(2); 18 U.S.C. § 201(c); 18 U.S.C. § 1346; 18 U.S.C. § 1951; 18 U.S.C. § 1952 (see annex).

For purposes of convenience, 18 U.S.C. § 201(b)(2) is presented below, while the rest of the provisions are found in the annex.

#### **18 U.S.C. § 201(b)(2). Bribery of public officials and witnesses**

(b) Whoever-

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

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

Below are some examples of recent cases related to this article:

➤ United States v. Cockerham, Cockerham, Blake, and Pettaway, Western District of Texas:

A former United States Army contracting officer, his wife, his sister, and his niece were sentenced on December 2, 2009, for their participation in a bribery and money laundering scheme related to bribes paid for contracts awarded in support of the Iraq war. The individual sentences are as follows:

- John Cockerham, a former major in the United States Army, was sentenced to 210 months of imprisonment, 3 years of supervised release, and \$9.6 million in restitution.

- Melissa Cockerham, John Cockerham's wife, was sentenced to 41 months of imprisonment, 3 years of supervised release, and \$1.4 million in restitution.

- Carolyn Blake, John Cockerham's sister, was sentenced to 70 months of imprisonment, 3 years of supervised release, and \$3.1 million in restitution.

- Nyree Pettaway, John Cockerham's niece, was sentenced to 12 months and 1 day of imprisonment, 2 years of supervised release, and \$5 million in restitution.

John Cockerham had previously pleaded guilty to conspiracy, bribery, and money laundering for his participation in a complex bribery scheme while working as an Army contracting officer in Kuwait for approximately two years. Cockerham was responsible for awarding contracts for services to be delivered to troops in Iraq, including bottled water. In return for awarding contracts, Cockerham received more than \$9 million in bribery proceeds. Cockerham directed the contractors to pay his wife and sister, among others, in order to conceal the receipt of these bribe payments. Both Melissa Cockerham and Carolyn Blake had previously pleaded guilty to money laundering. They accepted \$1.4 million and \$3 million respectively and placed these funds in safe deposit boxes in foreign banks in an attempt to hide the illegal proceeds. They also pleaded guilty to obstruction of justice for impeding and obstructing the investigation. Nyree Pettaway previously pleaded guilty to conspiring with John Cockerham, Carolyn Blake, and others to obstruct the money laundering investigation related to Cockerham's receipt of bribes. Pettaway assisted with the creation of cover stories for the millions of dollars Cockerham received and also gave millions of dollars to coconspirators for safekeeping.

➤ United States v. Harrison, Driver, Whiteford, and Wheeler, District of New Jersey:

Former Lt. Col. Debra Harrison was sentenced on June 26, 2009, for her role in a scheme to steal more than \$300,000 from the Coalition Provisional Authority South Central Region (CPA-SC). She had previously pled guilty to honest services wire fraud. As part of this scheme, she also received a Cadillac Escalade from Philip Bloom, a contractor at the CPA-SC. Harrison was assigned to the CPA-SC as the deputy comptroller and acting comptroller. She stole the money from the CPA-SC and then transported it back to her home in Trenton. William Driver, her husband and an accountant, used the stolen funds, along with his wife, for home improvements and made the payments in cash to evade transaction reporting requirements. Harrison received a sentence of 30 months of imprisonment followed by 2 years of supervised release and restitution of \$366,340. Driver pleaded guilty to money laundering charges on August 5, 2009, and he was sentenced on December 14, 2009, to 3 years of probation and \$36,000 in restitution.

Curtis Whiteford, a former colonel, and Michael Wheeler, a former lieutenant colonel, both previously in the United States Army Reserves, were previously convicted of conspiracy to commit bribery and interstate transportation of stolen property. Whiteford was the second most senior official and highest-ranking military officer at CPA-SC and Wheeler was an advisor and project officer for CPA reconstruction projects. Whiteford and Wheeler conspired with at least three others: Robert Stein, at the time the comptroller and funding officer for the CPA-SC; Philip H. Bloom, a United States citizen who owned and operated several companies in Iraq and Romania; and United States Army Lt. Col. Bruce D. Hopfengardner. They rigged the bids on contracts being awarded by the CPA-SC so that more than twenty contracts were awarded to Bloom. In total, Bloom received approximately \$8 million in rigged contracts. Bloom, in return, provided Whiteford, Harrison, Wheeler, Stein, Hopfengardner, and others with more than \$1 million in cash, SUVs, sports cars, a motorcycle, jewelry, computers, business-class airline tickets, liquor, promise of future employment with Bloom, and other items of value. Whiteford was sentenced on December 8, 2009, to 5 years of imprisonment followed by 2 years of supervised release and was ordered to pay \$16,200 in restitution.

Other activity in this case has included:

- Robert Stein, co-conspirator, was previously sentenced to 9 years of imprisonment and forfeiture of \$3.6 million on charges of conspiracy, bribery, money laundering, and weapons possession charges.
- Philip Bloom, contractor, was previously sentenced to 46 months of imprisonment and forfeiture of \$3.6 million on charges of conspiracy, bribery, and money laundering.
- Lt. Col. Bruce Hopfengardner, co-conspirator, was previously sentenced to 21 months of imprisonment and forfeiture of \$144,500 for conspiracy and money laundering.
- Seymour Morris, Jr., a civilian and businessman, who allegedly assisted Bloom in making these wire transfers of stolen CPA funds and funnelling those monies to the co-conspirators, was previously acquitted at trial.

The method of the collection and analysis of the information – the Department of Justice Public Integrity Section maintains information on cases prosecuted and annually publishes a report detailing the significant cases.

The effectiveness of the measures adopted to criminalize passive bribery of national public officials have been assessed by the Group of States against Corruption (GRECO)/Council of Europe, as well as the Mechanism for the Follow-up on the Implementation of the Inter-American Convention Against Corruption (MESICIC).

The GRECO's third evaluation round compliance report on the United States is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_Online\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_Online_EN.pdf)

The MESICIC reviews of the United States as well as an explanation of MESICIC's methodology, are available at <http://www.oas.org/juridico/english/mesicicrounds.htm>.

#### **(b) Observations on the implementation of the article**

According to the U.S. response, the principal statutes prohibiting bribery of a national public officials, consistent with Article 15 (b) of the UNCAC are Title 18, United States Code, sections 201(b)(2) and 201(c) – “Bribery of public officials and witnesses” (see annex).

In addition, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use many other federal criminal laws to punish the conduct described in Article 15(b). Those laws include, but are not limited to, Title 18 U.S.C. §1346 (definition of “scheme or artifice to defraud” another of the intangible right to honest services), Title 18 U.S.C. § 1951(Interference with Commerce by Threats or Violence – the Hobs Act), Title 18 U.S.C. § 1952 (Interstate of Foreign Travel in Aid of Racketeering Enterprises), among others. In addition, and consistent with the U.S. federal system of government, the various states also may and have enacted their own laws prohibiting the conduct described in Article 15(b).

18 USC § 201(a)(b)(2) covers required elements of article 15(b) of the UNCAC: public official (defined in 18 USC § 201(a)); corruptly demands, seeks, receives, accepts or agrees to receive or accept anything of value; directly or indirectly; personally or for any other person or entity; to do or omit to do any act in violation of the official duty.



The United States has provided examples of cases related to this article and a comprehensive list (same as for article 15(a) of the UNCAC – see above) of tables that include charges, convictions and pending cases. From the statistics, it can be understood that a high percentage of persons who are charged with public corruption are convicted..

The U.S. authorities indicated that the U.S. measures to criminalize bribery of national public officials have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the Group of States against Corruption (GRECO)/Council of Europe.

Adopted on March 25, 2011, the United States' MESICIC Final Report for the Third Round of Review regarding its implementation of the Inter-American Convention against Corruption stated that “With respect to provisions related to the criminalization of the acts of corruption provided for in paragraph (a) of the Article VI(1) of the Convention that have been examined by the Committee, based on the information made available to it, the Committee observes that they constitute a set of provisions relevant to the promotion of the purposes of the Convention” and concludes that “The United States has adopted measures which criminalize the acts of corruption provided for by Article VI(1) of the Convention”. No recommendations were formulated by the Committee in this Section.

Consistent with the U.S. federal system of government, the different states may enact and have enacted their own laws prohibiting the conduct described in Article 15(b)

Consequently, the U.S. legislation is in compliance with article 15(b) of the UNCAC. In addition, the provisions domesticating the UNCAC provision were found to be implemented successfully in practice.

## **Article 16 Bribery of foreign public officials and officials of public international organizations**

### **Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The U.S. authorities reported that measures described in this provision were adopted and implemented. The U.S. Foreign Corrupt Practices Act (FCPA), Title 15, United States Code, sections 78m, 78dd-1 et seq., and 78ff establishes as a criminal offence the conduct described in article 16(1) of the UNCAC (see annex).

Additionally, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use other federal criminal laws to punish the conduct described in article 16(1). Those laws include, but are not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud),

1343 (wire fraud), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), and 1956 (money laundering), among others.

Enforcing the FCPA is a significant priority for the Criminal Division of the United States Department of Justice, the FBI, and the U.S. Securities and Exchange Commission (SEC). Since 2001, the Department of Justice and the SEC's Enforcement Division have substantially increased enforcement of this law prohibiting bribery of foreign public officials. In the last five years, FCPA enforcement has hit historic highs. These prosecutions involve both individuals and companies, foreign and domestic, from a broad range of industries involving bribery in a broad range of geographical locations.

In addition to those law enforcement efforts, senior law enforcement officials from the DOJ and SEC, as well as senior officials from the U.S. Department of Commerce, have conducted outreach to the global business community in speeches, interviews and otherwise, to reinforce the message that bribery is not only a crime but is also detrimental to business. The Departments of Commerce and State also provide training on the FCPA to U.S. Foreign Commercial Service and Foreign Service Officers, who in turn may provide general information on the statute to U.S. businesses. Finally, the DOJ and SEC have dedicated additional resources to enforcing the FCPA, including dedicating full-time prosecutors, FBI agents and SEC investigators to FCPA enforcement. Cumulatively, these efforts have had the effect of increasing awareness of the FCPA among businesses and individuals doing business overseas.

Other texts:

Translations of the FCPA into Arabic, Azerbaijani, Bengali, Bulgarian, Burmese, Chinese (simplified and traditional), Czech, Danish, Dari, Dutch, Estonian, Farsi, Finnish, French, German, Greek, Hebrew, Hindi, Hungarian, Icelandic, Indonesian Bahasa, Italian, Japanese, Javanese, Kazakh, Korean, Kurdish, Kyrgyz, Lingala, Malay, Norwegian, Pashtu, Polish, Portuguese, Punjabi, Romanian, Russian, Slovak, Slovenian, Spanish, Swahili, Swedish, Tagalog, Tamil, Thai, Turkish, Ukrainian, Urdu, Uzbek, and Vietnamese are available at <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>.

<http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-chinese.pdf><http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-russiachinese.pdf>

Examples of cases:

- Summaries of all cases brought since 1998 are available at <http://www.justice.gov/criminal/fraud/fcpa/docs/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf><http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-c.pdf>
- Summaries of key judicial opinions (the opinions themselves are available at <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html>).

In United States v. Kay, 513 F.3d 432 (5th Cir. 2007), cert. denied, U.S., 129 S. Ct. 42 (2008), the 5th Circuit ruled that any payments to foreign officials that might assist in obtaining or retaining business by lowering the costs of operations can fall within the FCPA, even where such a payment is not directly related to securing a contract. The judges rejected the

defendants' argument that to interpret the business nexus requirement that broadly rendered the statute unconstitutionally vague. The court also ruled that in proving the "knowing" element of an FCPA offense, the United States need only prove the defendants understood that their actions were illegal. No specific knowledge about the FCPA or its prohibitions is required.

In United States v. Kozeny, et al., No. 05-cr-518 (S.D.N.Y. 2005), the District Court judge issued a series of rulings on three key issues under the FCPA in the course of the trial and conviction of defendant Frederic Bourke. First, the judge ruled that the "knowing" standard under the FCPA can be met by evidence that the defendant "consciously avoided" or was "wilfully blind" to the substantial likelihood that there was bribery. Second, the Court held that for purposes of the affirmative defence of legality under local law, it is not enough that the local law merely relieve the payor of criminal liability; rather, it must affirmatively render the payment legal. Lastly, the trial court rejected the view that economic extortion can be a defence to an FCPA bribery charge, stating that the jury would receive an instruction on extortion only if the defendant laid a sufficient evidentiary foundation of "true extortion," which would involve threats of injury or death, rather than a threat to business interests or business demands.

- DOJ also issues opinions interpreting the FCPA in particular non-hypothetical factual circumstances. Those opinions are available at <http://www.justice.gov/criminal/fraud/fcpa/summaries/>.

Some of the opinions are as follows:

Opinion Procedure Release No. 10-10: In April 2010, the Department responded to an opinion request regarding whether certain payments to a foreign government official would be appropriate under the FCPA. The requestor, who was contracting with a U.S. government agency to perform work overseas, was obligated to hire and compensate individuals at the direction of a U.S. government agency. One individual so identified, who was hired on the basis of the individual's qualifications, also served as a paid officer for an agency of the foreign country in a position unrelated to the work the individual would perform for the requestor. Based upon all of the facts and circumstances, as represented by the requestor, the Department determined that while the individual was a foreign official within the meaning of the FCPA, and would receive compensation from the requestor through a subcontractor, the individual would not be in a position to influence any official act or decision affecting the requestor. In addition, the requestor is contractually bound to hire and compensate the individual as directed by the U.S. government agency, and the requestor did not play any role in selecting the individual. As such, the payment was not being corruptly made, was not made to obtain or retain business, and was not made to secure an improper advantage. Accordingly, the Department indicated that, based on the facts as presented, it would not take any enforcement action.

Opinion Procedure Release No. 09-01: In August 2009, the Department issued an opinion that donations of medical devices to a government agency, as opposed to individual government officials, through a program open to all medical device manufacturers, fell outside the scope of the FCPA, as the FCPA covers only the offering of things of value to individual government officials, not to a government itself.

Opinion Procedure Release No. 08-01: In January 2008, the Department issued an opinion in response to an inquiry from a U.S. public company regarding its intent to acquire a foreign

company that managed public services for a foreign municipality. The foreign company was majority-owned by an individual determined to be a “foreign official” within the meaning of the FCPA. The U.S. company was concerned that payments to the owner of the foreign company in connection with the purchase might run afoul of the FCPA. The Department determined that, in light of the U.S. company’s extensive due diligence, the transparency of the transaction, the undertakings of both the foreign owner and the U.S. company, and the terms of the transaction, it would not take enforcement action.

Opinion Procedure Release No. 08-02: In June 2008, the Department issued an opinion in response to an inquiry from a Halliburton Company (Halliburton). Halliburton intended to acquire a business in a foreign jurisdiction where they would not be able to conduct full due diligence in advance of acquisition. The company provided a detailed procedure for conducting staged due diligence quickly after acquisition. The Department determined that, assuming Halliburton completed each of the steps detailed in the submission, including full disclosure to the Department, the Department would not take any enforcement action against Halliburton for the acquisition, any pre-acquisition unlawful conduct by the business being acquired, if timely disclosed to the Department, or any post-acquisition conduct by the business being acquired, if it is halted and disclosed to the Department in a timely fashion.

Opinion Procedure Release No. 08-03: In July 2008, the Department issued an opinion in response to an inquiry from TRACE International (TRACE), a U.S. non-profit business membership organization, declining to take enforcement action if TRACE paid a limited stipend to cover certain travel expenses for Chinese journalists (who are employees of the state, and therefore foreign officials under the FCPA) to attend a press conference to be held by TRACE. TRACE represented that the journalists are not typically reimbursed by their employers for such costs; that stipends will be equally available to all journalists regardless of whether they later provide coverage of the conference and regardless of the nature of such coverage; that TRACE has no business pending with any government agency in China; and that it had obtained written assurances from an established international law firm that the payment of the stipends is not contrary to Chinese law.

Statistics through 2010 are available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf>.

The method of the collection and analysis of the information – DOJ's statistics on FCPA enforcement are collected through internal case management systems.

The U.S. enforcement of the Foreign Corrupt Practices Act has been assessed by a number of international organizations. Those assessments are all available at: <http://www.justice.gov/criminal/fraud/fcpa/intlagree/>

Most recently, the United States efforts were assessed by the Organization of Economic Cooperation and Development’s Working Group on Bribery in October 2010. That detailed review and report are available at: <http://www.oecd.org/dataoecd/10/49/46213841.pdf>

In preparation for that review, the United States provided the Working Group with over 1000 pages of material, which were also provided to the UNCAC examiners, which are available at: <http://www.justice.gov/criminal/fraud/fcpa/intlagree/>.

**(b) Observations on the implementation of the article**

According to the U.S. response, the principal statute prohibiting bribery of a foreign public officials or an officials of a public international organization is the U.S. Foreign Corrupt Practices Act (FCPA), Title 15, United States Code, sections 78m, 78dd-1 et seq., and 78ff which establishes as a criminal offence the conduct described in article 16(1) of the UNCAC.

In addition, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use other federal criminal laws to punish the conduct described in Article 16(1). Those laws include, but are not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud), 1343 (wire fraud), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), and 1956 (money laundering), among others.

The definition of “foreign public official” and of “official of a public international organization”, as set forth in § 78dd-1. [Section 30A of the Securities & Exchange Act of 1934], is as follows:

(f) Definitions.

For purposes of this section:

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

(B) For purposes of subparagraph (A), the term "**public international organization**" means—  
(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or  
(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

The definition is reiterated in § 78dd-2, § 78dd-3.

The FCPA concentrates on bribery in business activity, and applies to U.S. citizens and legal persons, whether operating in the United States or abroad, and with respect to foreign nationals and legal persons, provided that some act in furtherance of misconduct conduct occurs within the territorial jurisdiction of the United States. The FCPA also applies to any company listed on a U.S. stock exchange, as well as the officers, directors, employees, and agents of a listed company, regardless of nationality. Violation of the FCPA may result in a civil enforcement action by the Securities and Exchange Commission or in a criminal prosecution by the Department of Justice,. Additionally, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use other federal criminal laws to punish the conduct described in article 16, paragraph 1, of the UNCAC, such as those on conspiracy to commit an offence against the United States, mail fraud, wire fraud, interstate and foreign travel or transportation in aid of racketeering enterprises, and money laundering.

Due to an absence of explicit language in the definition of “foreign official” in FCPA, two questions were raised by the reviewing experts concerning the scope of this definition: The first was whether it covers a person holding a “judicial office of a foreign country”; and the second whether it covers a person “exercising a public function for a foreign country, including for a . . . public enterprise” (i.e. a state-owned or controlled enterprise).

Concerning the first question, the U.S. authorities confirmed that, although the definition does not specifically refer to judicial officers, these would be covered by the following part of the FCPA definition of a foreign official “any officer or employee of a foreign government.” It was explained that national practice supports this interpretation, as allegations of bribery of a foreign judicial officer have been pursued.

Regarding the second question on the bribery of employees of state-owned or controlled enterprises, relevant jurisprudence has been reported<sup>1</sup> which confirms the U.S. government interpretation that the FCPA covers employees of public enterprises, as well as all those holding legislative, judicial, or executive positions, in the definition of “foreign official.” The definition also includes officials of political parties.

Moreover, the reviewing experts took into account the legal framework criminalizing bribery of international public officials and observed that, that while the FCPA criminalizes many forms of payment made to foreign government officials and employees, Sections 78dd-1, 2, and 3 provide an exception for “*facilitation or expediting payments*” made to to secure the performance of a routine, non-discretionary governmental action by a foreign official, political party, or party official. In contrast, the principal domestic bribery statute in the country under review contains no such exception for facilitation or expediting payments made to domestic government officials or employees.

In this connection, the competent U.S. authorities stated that the FCPA provisions provide additional clarification as to the reach of the Act, as such payments would lack the necessary intent to corrupt and would thus not fall within the parameters of the Act’s prohibitions in any event. In this regard, they reminded that within the parameters of the U.S. legal system, to establish a crime of bribery, there is a *mens rea* requirement, whereby, in order to constitute a bribe, a payment must be intended to corrupt the recipient, meaning “[acting] knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favour” (United States v. Kay, 513 F.3d 432, 450 (5th Cir. 2007)).

Notwithstanding the fact that the obligation of appropriate *mens rea* to establish a criminal

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<sup>1</sup> In the case *U.S. v. Nam Quoc Nguyen, et al.* (E.D. Pa., September 4, 2008), the District Court held in favour of the United States Government in a case involving allegations that the defendants bribed employees of a foreign state-owned company. The defendants argued that the definition of “foreign official” in the FCPA does not include employees of state-owned enterprises, because in order for an organization to be considered an “agency or instrumentality” of a foreign government, it must serve a “purely public purpose”. Although the Court ruled in favour of the United States, it did not issue a written opinion, and the defendants did not file an appeal. Subsequent to the site visit, there have been five additional rulings in this area, all of which have upheld the Department of Justice’s position that employees of state-owned and state-controlled enterprises are included in the definition of foreign official. District Court opinions are not binding on higher courts or courts of other U.S. jurisdictions. The DOJ informed the evaluators that this means the Government interpretation could be disputed again. However, the DOJ believes the argument would fail again given the FCPA legislative history, and because numerous cases have been brought by the DOJ and SEC in which the definition of “foreign official” has been broadly interpreted.

offense is part of the “fundamental principles” of the U.S. legal system, as well as a constituent element of the offence established in accordance with article 16, paragraph 1, of the UNCAC (“*committed intentionally*”), the reviewing experts were of the view that the Convention contains no such exception for facilitation payments. Accordingly, U.S. authorities should consider continuing to review its policies and approach on facilitation payments in order to effectively combat the phenomenon. U.S. authorities presently actively encourage companies to prohibit or discourage the use of facilitation payments in internal company controls, ethics and compliance programmes or measures, and should continue to do so. The reviewing experts note that “facilitation or expediting payments” can be, and have been, prosecuted under the accounting provisions of the FCPA, and that the United States may well be the only country to have prosecuted such payments to foreign officials.

At the enforcement level, the reviewing experts took into account the information above and found that the relevant U.S. legal framework was in compliance with article 16, paragraph 1, of the UNCAC. Furthermore, the review team also welcomed the evidence provided in the U.S. response that the enforcement of the FCPA is a significant priority for the Criminal Division of the U.S. Department of Justice and the U.S. Securities and Exchange Commission (SEC). Based on the information provided, the reviewing experts acknowledged that, in terms of prosecuting foreign and transnational bribery, law enforcement had been effective in combating and deterring corruption and, within the framework of prosecutorial discretion and other aspects of the U.S. legal system, had developed a number of good practices demonstrating a significant enforcement level in the United States.

### **(c) Successes and good practices**

As noted by the OECD, good practices developed within the U.S. legal and policy framework that have helped achieve a significant enforcement level. The U.S. has investigated and prosecuted cases involving various business sectors and various modes of bribing foreign public officials. In addition, it has been conducting proactive investigations, using information from a variety of sources and innovative methods like plea agreements, deferred prosecution agreements, non-prosecution agreements, and the appointment of corporate monitors. Vigorous enforcement and record penalties, alongside increased private sector engagement, has encouraged the establishment of robust compliance programmes and measures, particularly in large companies, which are verified by the accounting and auditing profession and monitored by senior management.

## **Article 16 Bribery of foreign public officials and officials of public international organizations**

### **Paragraph 2**

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

For reasons of policy and jurisdictional concerns, the United States considered, but decided not to criminalize the solicitation or acceptance of a bribe by a foreign official under the Foreign Corrupt Practices Act. The conduct is covered by domestic bribery statutes in other countries and there are jurisdictional issues related to bribery of foreign officials.

However, the United States can and has prosecuted foreign officials for money laundering based on corruption, as both violations of the FCPA and wholly foreign corruption are predicate crimes for money laundering. Employees of public international organizations have been prosecuted in the United States for corruption pursuant to the wire fraud statute, where such employees were located in the United States. See 18 U.S.C. 1341, 1343 and 18 U.S.C. 1952, 1956, 1957 (see annex)..

Below are examples of cases related to this article:

- United States v. Juthamas Siriwan, et al. (indictment available at <<http://www.justice.gov/criminal/fraud/fcpa/cases/docs/01-28-09siriwan-indictment.pdf>>)

On December 18, 2007, Gerald Green and Patricia Green, the owner-operators of Film Festival Management, a Los-Angeles based company, were arrested on a criminal complaint filed on December 7, 2007, which charged them in connection with a scheme to pay bribes to tourism authorities in Thailand. The Greens were subsequently indicted by a federal grand jury in Los Angeles on January 16, 2008, on one count of conspiracy to bribe a foreign public official in violation of the FCPA and six substantive violations of the anti-bribery provisions of the FCPA. The charges against the Greens were expanded pursuant to two superseding indictments, filed on October 1, 2008 and March 11, 2009, respectively, to include charges of conspiracy to commit money laundering, money laundering, obstruction of justice, and false subscription of a U.S. income tax return. According to court documents, the Greens paid bribes to Juthamas Siriwan, then the governor of the Tourism Authority of Thailand (TAT) in exchange for receiving contracts to manage and operate Thailand's yearly "Bangkok International Film Festival," as well as contracts related to a promotional book on Thailand and the provision of an elite tourism "privilege card" marketed to wealthy foreigners. Ultimately, between 2002 and 2007, the Greens paid approximately \$1.8 million in bribes to Juthamas Siriwan through numerous bank accounts in Singapore, the United Kingdom, and the Isle of Jersey in the name of a friend of the former governor and the former governor's daughter, Jittisopa Siriwan. The contracts received by the Greens resulted in more than \$13.5 million in revenue to businesses they owned. For their alleged roles in this bribery scheme, Juthamas Siriwan and Jittisopa Siriwan were indicted by a federal grand jury in Los Angeles on January 28, 2009. This indictment charges the former governor and her daughter with one count of conspiracy to commit international money laundering seven counts of transporting funds to promote unlawful activity, namely felony bribery in violation of the FCPA, and one count of aiding and abetting.

- United States v. Basu and Sengupta

In 2002, the Department of Justice charged two World Bank officials, Ramendra Basu, a national of India, and Gautam Sengupta, with conspiring to steer World Bank contracts to certain consultants in exchange for kickbacks. According to court documents, the two defendants conspired with a Swedish consultant and others to use their official positions with the World Bank to steer World Bank contracts in Ethiopia and Kenya to certain Swedish companies in exchange for approximately \$127,000 in kickbacks. In addition, the defendants



admitted that in January 1999, they received a request for a \$50,000 bribe from a Kenyan government official working on a Project Implementation Unit involved in a World Bank-financed project, which was to be paid by the Swedish consultant. Collectively, Basu and Sengupta forwarded this request to the Swedish consultant and passed along related bank account information, despite knowing that the requested payment was meant to corruptly influence an act or decision of the foreign official in his official capacity, in violation of the anti-bribery provisions of the FCPA. Sengupta pleaded guilty on February 13, 2002, and was sentenced in 2006 to two months imprisonment and one year of supervised release, which was to include four months of home confinement. Sengupta was also sentenced to pay a criminal fine of \$3,000. Basu pleaded guilty on December 17, 2002, and was sentenced on April 22, 2008, to 15 months in prison, 2 years of supervised release, and 50 hours of community service.

➤ United States v. Antoine and Duperval

On December 4, 2009, two former executives of a Florida-based telecommunications company, the president of a Florida-based intermediary company, and two former Haitian government officials were charged in an indictment for their alleged roles in a foreign bribery, wire fraud, and money laundering scheme that lasted from at least November 2001 through March 2005. Joel Esquenazi, the former president of the telecommunications company; Carlos Rodriguez, the former executive vice-president of the telecommunications company; Marguerite Grandison, the former president of Telecom Consulting Services Corp.; Robert Antoine, a former director of international relations at the Republic of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti (Haiti Teleco); and Jean Rene Duperval, another former director of international relations at Haiti Teleco, (Haiti Teleco) were charged in connection with a scheme whereby the telecommunications company paid more than \$800,000 to shell companies, including Grandison's Telecom Consulting Services Corp., to be used for bribes to foreign officials of Haiti Teleco. The purpose of these bribes was to obtain various business advantages from the Haitian officials for the telecommunications company, including issuing preferred telecommunications rates, reducing the number of minutes for which payment was owed, and giving a variety of credits toward owed sums, as well as to defraud the Republic of Haiti of revenue. On March 12, 2010, Robert Antoine pleaded guilty to conspiracy to commit money laundering. By pleading guilty, Antoine became the first foreign official ever convicted of money laundering in the United States where the specified unlawful activity to which the laundered funds related was a felony violation of the FCPA. On June 1, 2010, Antoine was sentenced to 48 months' imprisonment and ordered to pay \$1,852,209 in restitution and to forfeit \$1,580,771.

**(b) Observations on the implementation of the article**

The review team took into account the optional nature of the provision under review, as well as the fact that for reasons of policy and jurisdictional concerns, the United States has not criminalized passive bribery of foreign public officials. However, the United States has prosecuted foreign public officials based on offenses such as money laundering, wire fraud, and interstate transportation of stolen property where jurisdiction could be exercised. In addition, officials of public international organizations have been prosecuted in the United States for corruption pursuant to the wirefraud statute, where such employees were located in the country

## **Article 17 Embezzlement, misappropriation or other diversion of property by a public official**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

U.S. authorities reported that measures described in this provision were adopted and implemented.

The primary anti-embezzlement statute applicable to officials of the U.S. federal government is Title 18, United States Code, section 654 (officer or employee of United States converting property of another). Other anti-embezzlement laws include Title 18, United States Code, section 641 (embezzlement of public money, property or records by any person); section 645 (embezzlement by federal court officers); and section 666 (theft or bribery concerning programs receiving federal funds).

In addition to those laws, the United States has several other criminal laws that could potentially be used to punish the conduct described in Article 17, including, but not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud), 1343 (wire fraud), and 1346 (scheme or artifice to defraud another of the intangible right to honest services), among many others, depending upon the facts and circumstances of a given case.

For the text of all above legislative provisions, see the annex attached to this report.

Finally, consistent with the United States' system of federalism, individual states also have laws prohibiting the conduct described in Article 17.

Below are some examples of cases related to the current article:

#### ➤ United States v. Valdez, District of Columbia

Caroline Valdez, a former executive assistant to a Member of the United States House of Representatives was sentenced on September 25, 2009, to 3 years of probation based on her previous guilty plea to theft. As an executive assistant for nearly two years, Valdez had access to various official forms for travel, salaries, and other expense requests for payment. She submitted these reimbursement requests in order to obtain reimbursements for personal expenditures, including travel. On other reimbursement requests she inflated some legitimate expenses to obtain additional funds for her personal use. Valdez also had access to the Member's official credit card, which she used to make unauthorized purchases for her own benefit. In addition, Valdez forged the Member's signature on a reimbursement request form in order to obtain an unauthorized \$3,000 bonus. The amount Valdez embezzled totaled approximately \$7,000, which she has since paid back.

#### ➤ United States v. Ryan, District of Columbia

Bobbie Cyana Ryan, a former West Point employee, pleaded guilty on October 28, 2009, for her scheme to defraud and embezzle funds from the United States government by authorizing

nearly \$3 million in payments from the United States Military Academy in West Point, N.Y., to a bogus corporation she controlled. The charges include devising a scheme to defraud and transmitting funds in interstate commerce for the purpose of executing the fraud scheme; embezzling and converting government funds; and executing a financial transaction with criminally derived funds. Ryan worked in the Information, Education and Technology Division in the Office of the Dean at West Point. She was responsible for coordinating information technology training programs for West Point staff. Ryan, acting as the requesting and approving official, used her government purchase card and cards of her unknowing subordinates to authorize approximately \$2.9 million in payments to CWG Enterprises, Ryan's company. The payments were allegedly for either on-site training instructors or training reference materials when, in fact, no personnel were ever trained and no materials were ever provided. Based on false invoices created by Ryan, transfers of government funds were made to a bank account for CWG Enterprises. Ryan used these funds to pay for personal and family expenses.

U.S. measures to criminalize embezzlement have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC), the Organization for Economic Cooperation and Development (OECD), and the Group of States against Corruption (GRECO) of the Council of Europe.

The MESICIC's reviews of the United States, as well as an explanation of the MESICIC's methodology, are available at [http://www.oas.org/juridico/english/mesicic\\_rounds.htm](http://www.oas.org/juridico/english/mesicic_rounds.htm).

The OECD's reviews of the United States are available at: [http://www.oecd.org/infobycountry/0,3380,en\\_2649\\_34859\\_1\\_70867\\_119663\\_1\\_1,00.html](http://www.oecd.org/infobycountry/0,3380,en_2649_34859_1_70867_119663_1_1,00.html) and, an explanation of the OECD's methodology is available at: [http://www.oecd.org/findDocument/0,3354,en\\_2649\\_34859\\_1\\_119826\\_1\\_1\\_1,00.html](http://www.oecd.org/findDocument/0,3354,en_2649_34859_1_119826_1_1_1,00.html).

The GRECO's third evaluation round compliance report on United States. is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_One\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_One_EN.pdf)

**(b) Observations on the implementation of the article**

The cited provisions and texts checklist cover the requirements of article 17 of the UNCAC (intention; benefit for the public official or another; thing of value entrusted to the public official by virtue of his or her position).

No statistics have been provided, although the United States notes that statistics are maintained through the Department of Justice case tracking system. However, examples of cases related to the current article were provided.

The U.S. authorities stated that the national measures to criminalize embezzlement have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC), the Organization for Economic Cooperation and Development (OECD), and the Group of States against Corruption (GRECO) of the Council of Europe.

Moreover, adopted on March 25, 2011, the United States' MESICIC Final Report for the

Third Round of Review regarding its implementation of the Inter-American Convention against Corruption stated that “With respect to provisions related to the criminalization of the acts of corruption provided for in paragraph (a) of the Article VI(1) of the Convention that have been examined by the Committee, based on the information made available to it, the Committee observes that they constitute a set of provisions relevant to the promotion of the purposes of the Convention” and concludes that “The United States has adopted measures which criminalize the acts of corruption provided for by Article VI(1) of the Convention”. No recommendations were formulated by the Committee in this Section.

## **Article 18 Trading in influence**

### **Subparagraph (a)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The U.S. authorities reported that measures described in this provision were adopted and implemented.

The relevant provisions of the national legislation is the following: 18 U.S.C. 201 and 18 U.S.C. 207 on “Restrictions on former officers, employees and elected officials of the executive and legislative branches” (see annex).

Below are some examples of recent cases related to the provisions of this article:

➤ United States v. Abramoff:

On September 4, 2008, former lobbyist Jack Abramoff was sentenced after pleading guilty to conspiracy, honest services fraud, and tax evasion. From 1994 through early 2004, Abramoff lobbied public officials and conspired with a business partner to defraud four Native American Indian tribes by charging fees that incorporated huge profit margins and then splitting the net profits in a secret kickback arrangement. Abramoff received more than \$23 million in undisclosed kickbacks and other fraudulently obtained funds. As part of this conspiracy, Abramoff and others corruptly provided things of value to public officials—primarily Members of Congress and congressional staff members—with the intent to influence official acts that would benefit Abramoff and his clients. Abramoff was sentenced to 48 months of imprisonment, three years of supervised release, and was ordered to pay \$23,134,695 in restitution to victims.

➤ Todd Boulanger,

a lobbyist with Jack Abramoff, pleaded guilty to conspiracy to commit honest services fraud. He took part in a scheme to provide tickets for entertainment events to a staff person of a United States Senator. In total, Boulanger provided tens of thousands of dollars worth of

entertainment to Capitol Hill aides in return for their assistance in getting legislation passed that was favorable to his clients.

➤ Ann Copland,

a former congressional staff person, pleaded guilty to conspiring to commit honest services fraud. She worked as an assistant on legislative and administrative matters and was lobbied by Jack Abramoff, Todd Boulanger, and another lobbyist on matters involving a Native American tribe. She received more than \$25,000 worth of entertainment and meals in return for taking a variety of official actions beneficial to the lobbyists and their clients.

➤ Horace M. Cooper

was indicted for conspiracy, fraudulent concealment, false statements, and obstruction of an official proceeding. During the time he worked at the Voice of America and the Department of Labor, Cooper allegedly conspired with Jack Abramoff and others to defraud the United States of Cooper's honest services. Cooper allegedly solicited and received from Abramoff and his colleagues thousands of dollars worth of meals and event tickets in return for using his official positions at these two agencies to advance Abramoff's interests and those of his clients. In addition, during the time he served as a congressional staff person, Cooper also allegedly received from Abramoff and others thousands of dollars worth of entertainment tickets.

U.S. measures to criminalize trading in influence have been assessed by the Group of States against Corruption (GRECO) of the Council of Europe

The GRECO's third evaluation round compliance report on the United States is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_Online\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_Online_EN.pdf)

**(b) Observations on the implementation of the article**

Article 18(a) of the UNCAC is non-mandatory and refers to active trading in influence. An undue advantage may be something tangible or intangible. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. The undue advantage or bribe must be linked to the official's influence over an administration or public authority of the State

The United States cited the following provisions which were found by the review team to be in compliance with the requirements of article 18(a) of the UNCAC: 18 USC 201 and 18 USC 207 (related to post employment restrictions of federal employees).

No statistics were provided. Still, the provided cases confirmed the application of article 18(a) of the UNCAC.

**Article 18 Trading in influence**

**Subparagraph (b)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The text of national legislation is as follows: **18 U.S.C. § 201.**

Below are some examples of cases relating to the current article:

•Thomas J. Spargo, former New York State Supreme Court Justice, was convicted of attempted extortion and soliciting a bribe. He was sentenced to 27 months of imprisonment followed by 2 years of supervised release. Spargo solicited a \$10,000 payment from an attorney with cases pending before him while Spargo was serving as a state supreme court justice.

•Fraser C. Verrusio, a former staff member in the United States House of Representatives, was indicted on charges of conspiring to accept an illegal gratuity, accepting an illegal gratuity, and making a false statement on a required financial disclosure form. Verrusio was charged with accepting an all-expense paid trip to Game One of the World Series for and because of his official assistance to an equipment rental company in securing favorable amendments to the Federal Highway Bill.

The Department of Justice, Public Integrity Section, collects information on relevant cases and publishes an annual report.

**(b) Observations on the implementation of the article**

Article 18(b) is non-mandatory and refers to passive trading in influence. An undue advantage may be something tangible or intangible. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. The undue advantage or bribe must be linked to the official's influence over an administration or public authority of the State.

In the passive version of this offence, the elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be committed by the public official or through an intermediary, that is, directly or indirectly. The subjective element is only that of intending to solicit or accept the undue advantage for the purpose of abusing one's

influence to obtain an undue advantage for a third person from an administration or public authority of the State

The United States authorities cited Title 18 USC 201, which was found by the review team to cover the requirements of article 18(b) of the UNCAC.

No statistics were provided. Still, the provided cases confirmed the application of article 18(b) of the UNCAC.

## **Article 19 Abuse of Functions**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The texts of national legislation related to the provision under review are the following: 18 U.S.C. § 201, 18 U.S.C. § 1346, 41 U.S.C. § 53.

Below is a recent example of a case related to this article:

#### ➤ United States v. Kent, Southern District of Texas

Former United States District Court Judge Samuel B. Kent was sentenced on May 11, 2009, to 33 months of imprisonment followed by 3 years of supervised release, a \$1,000 fine, and restitution of \$6,550. He pleaded guilty on February 23, 2009, to obstructing an investigation of a judicial misconduct complaint by a special investigative committee of the United States Court of Appeals for the Fifth Circuit. Kent was previously indicted on assaults on charges attempted aggravated alleged repeated employees of his chambers and the Office of the Clerk of Court, and obstruction of justice. A judicial misconduct complaint was filed against Kent and when he appeared before the Fifth Circuit's special investigative committee, he falsely testified about his conduct. As part of his plea, Kent admitted the repeated nonconsensual sexual contact with two of his employees. The United States House of Representatives voted to impeach Kent on June 19, 2009, the first impeachment of a federal judge since 1989. Kent resigned from the District Court on June 30, 2009.

### **(b) Observations on the implementation of the article**

Article 19 establishes an optional requirement for criminalization of public officials who abuse their functions by acting or failing to act in violation of laws to obtain an undue advantage. According to the interpretative note under article 19 of the Convention, this offence “may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information” (see *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, p. 194).

The United States cited as relevant provisions of the federal legislation the following: 18 USC 201, 18 USC 1346 and 41 USC 53.

In response to questions raised by the review team during the country visit on the connection between the aforementioned provisions and the requirements of article 19 of the UNCAC, the U.S. authorities clarified that in all these provisions there are elements that could also be considered as abuse of power/functions by state officials. It should be noted that under 18 USC 1346, a state official who accepts a bribe “is deemed to have deprived the government and the people of the State of the intangible right of honest services of their elected and appointed officials.” The review team welcomed these clarifications and concluded that the U.S. legal framework on this matter was compatible with article 19 of the UNCAC.

No statistics were provided.

### **Article 20 Illicit Enrichment**

*Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

U.S. authorities reported that measures described in this provision were not adopted or implemented because the implementation of article 20 of the UNCAC would require a defendant to bear the burden of establishing to legitimate source of the income in question. Due to the fact that the Constitution of the United States contains a presumption of innocence for the accused, it is not possible to criminalize illicit enrichment.

The United States intends to assist and cooperate with other States Parties to the extent permitted by domestic law.

The United States recognizes the importance of combating improper financial gains by public officials, and has criminal statutes to punish such conduct. These statutes obligate senior-level officials in the federal government to file truthful financial disclosure statements, subject to criminal penalties. They also permit prosecution of federal public officials who evade taxes on wealth that is acquired illicitly.

Moreover, evidence of unexplained wealth can, and often is, introduced at trial as circumstantial evidence supporting other charges of public corruption. The offense of illicit enrichment as set for in Article 20, however, places the burden of proof on the defendant, which is inconsistent with the United States Constitution and fundamental principles of the United States legal system.

Therefore, the United States understands that it is not obligated to establish a new criminal offense of illicit enrichment under article 20 of the Convention.

#### **(b) Observations on the implementation of the article**



Article 20 establishes an optional requirement for criminalization of the illicit enrichment. The obligation for State parties to consider creating such an offence is subject to each State party's constitution and the fundamental principles of its legal system. This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law.

The review team took into account the explanations provided by the U.S. authorities regarding the constitutional impediments that render the criminalization of illicit enrichment not feasible. The reviewers also welcomed the existing legislation on the obligation of senior-level officials to submit financial disclosure statements, as well as the use of evidence of unexplained wealth as circumstantial evidence before the court supporting other charges of public corruption.

## **Article 21 Bribery in the private sector**

### **Subparagraph (a)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. Congress twice considered but did not adopt legislation establishing private sector bribery as a criminal offense.

Although the United States has not established private sector bribery as an offence, other criminal and civil statutes provide adequate remedies to address misconduct involving, for example, criminal or civil fraud, breach of fiduciary duty, books and records and internal controls violations or racketeering (RICO).

Commercial bribery has been criminalized in most, although not all, U.S. states pursuant to state law. The conduct described in article 21 could also be punishable under various federal criminal theories, including but not limited to mail and wire fraud, antitrust violations, conspiracy, and securities fraud, depending upon the facts of a given case. In particular, commercial bribery can be charged federally under the Travel Act, 18 U.S.C. 1952(b)(2) (interstate and foreign travel or transportation in aid of racketeering enterprises), which criminalizes bribery in violation of the laws of the state in which committed, based on state commercial bribery violations.

Even in the states where commercial bribery is not a crime, such conduct is often punishable under unfair trade practices laws, which define bribery as an improper means of gaining a competitive advantage, in addition to fraud or breach of fiduciary duty.

DOJ does not have a compilation of state commercial bribery cases or commercial bribery cases charged pursuant to 18 U.S.C. § 1341 or 1343. However, below are examples of prosecutions pursuant to 18 U.S.C. § 1952(b)(2):

➤ United States v. Ricotti, Edmonds, and Cosgrove

On July 22, 2009, Control Components Inc. (CCI), a Rancho Santa Margarita, California-based company, was charged with violations of the FCPA and the Travel Act, stemming from a decade-long scheme to secure contracts in approximately 36 countries by paying bribes to officials and employees of various foreign state-owned companies as well as foreign and domestic private companies. According to court documents, from 2003 through 2007, CCI, a manufacturer of service control valves for use in the nuclear, oil and gas, and power generation industries, made approximately 236 corrupt payments to officers and employees of foreign state-owned and private companies in more than 30 countries. Sales from these corrupt payments resulted in net profits to the company of approximately \$46.5 million.

According to the indictment of Stuart Carson, Hong (Rose) Carson, Paul Cosgrove, David Edmonds, Flavio Ricotti, and Han Yong Kim, these six defendants caused CCI to pay approximately \$4.9 million in bribes, in violation of the FCPA, to officials of foreign state-owned companies and approximately \$1.95 million in bribes, in violation of the Travel Act, to officers and employees of foreign and domestic privately owned companies. The alleged corrupt payments were made to foreign officials at state-owned entities including Jiangsu Nuclear Power Corp. (China), Guohua Electric Power (China), China Petroleum Materials and Equipment Corp., PetroChina, Dongfang Electric Corporation (China), China National Offshore Oil Corporation, Korea Hydro and Nuclear Power, Petronas (Malaysia), and National Petroleum Construction Company (UAE).

On July 31, 2009, CCI pleaded guilty in the Central District of California. As part of the plea agreement, CCI agreed to pay a criminal fine of \$18.2 million; create, implement and maintain a comprehensive anti-bribery compliance program; retain an independent compliance monitor for a three-year period to review the design and implementation of CCI's anti-bribery compliance program and to make periodic reports to CCI and the Department; serve a three-year term of organizational probation; and continue to cooperate with the Department in its ongoing investigation. Carsons, Cosgrove, Edmonds, and Ricotti have all pled guilty.

➤ United States v. Amoako, Ott, and Young

Three former executives of ITXC Corporation, a global telecommunications company based in Princeton, NJ, have pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with a scheme to bribe government telecommunications officials in four African countries. ITXC was a publicly traded company that provided telecommunication services, primarily Voice Over Internet Protocol (VOIP) services, to carriers across the globe. In pleading, the defendants admitted that between September 1999 and October 2004, they conspired with each other and other former ITXC employees and officers to make corrupt payments totaling approximately \$450,000 to employees of foreign state-owned and foreign-owned telecommunications carriers in Nigeria, Rwanda, Senegal, and Mali to obtain and retain contracts for ITXC. For example, in Nigeria, ITXC entered into a service agreement with and agreed to pay a consulting company headed by an official of NITEL, the state-

owned Nigerian telecommunications authority, in exchange for assistance in obtaining agreements with other service providers in the country.

Between November 2002 and May 2004, ITXC wire transferred approximately \$166,541.31 to the Nigerian bank account of the foreign official's company. Steven J. Ott, ITXC's Executive Vice-President of Global Sales, was sentenced on July 21, 2008 to five years' probation, including 6 months' home confinement and 6 months' community confinement, and a \$10,000 fine.

Roger Michael Young, ITXC's Managing Director for Africa and the Middle East, was sentenced on September 2, 2008 to five years' probation, including 3 months' home confinement and 3 months' community confinement, and a \$7,000 fine.

The third executive, Yaw Osei Amoako, was sentenced in August 2007 to 18 months' imprisonment and a \$7,500 fine. On May 6, 2008, the SEC announced that it had obtained final judgments in civil suits filed against Ott, Young, and Amoako.

Pursuant to these judgments, the defendants were permanently enjoined from future violations of the FCPA. In addition, Amoako agreed to disgorge \$150,411 in wrongfully-received profits and \$38,042 in pre-judgment interest.

➤ United States v. King and Hernandez

In 2001, the Department of Justice filed charges against two executives and a part-owner of Owl Securities and Investment Ltd., a Missouri company, as well as an agent that represented the company and its wholly-owned Costa Rican subsidiary, OSI Proyectos. According to court documents, OSI Proyectos was engaged in the development of port facilities in Costa Rica, including an international airport and various luxury properties. In 1998, the ruling Costa Rican political party signed a letter agreeing to allow OSI and its subsidiary to move forward with developing the port facilities. However, before it granted formal permission, Pablo Barquero Hernandez, OSI's Costa Rican Representative indicated that OSI would be required to pay a final "closing cost" or "toll" of \$1 million. This amount was later increased to \$1.5 million. Together, Robert Richard King, a large shareholder in OSI, and Hernandez allegedly agreed to pay the Costa Rican ruling party a \$1 million "closing cost" to secure the contract. For their roles in this bribery scheme, King and Hernandez were indicted by a federal grand jury in the Western District of Missouri on June 27, 2001. Two additional OSI executives were charged on August 3, 2001, for their roles in the illicit payments to Costa Rican officials. According to court documents, Richard K. Halford, then the CFO of OSI, had communicated with Hernandez and was aware of the payments to Costa Rican officials. He proposed opening a new account in Panama or the U.S. to route the payments. Albert Reitz, OSI's Vice President and Secretary, assisted in raising funds from investors to pay for the bribe. King was convicted at trial in June 2002 and sentenced in November of that year to 30 months imprisonment, 2 years' supervised release, and a \$60,000 fine. Hernandez is a fugitive.

The SEC can prosecute civil allegations of commercial bribery and kickbacks in relation to books and records and internal control violations.

U.S. measures to criminalize commercial bribery have been assessed by the Group of States against Corruption (GRECO) and the OECD Working Group on Bribery. The most recent

assessment on this issue can be found in the OECD Working Group on Bribery Phase 3 report on the United States, October 2010.

The GRECO's third evaluation round compliance report on the United States is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_Online\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_Online_EN.pdf)

An explanation of the GRECO's methodology is available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro\\_en.ap](http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.ap).

## **(b) Observations on the implementation of the article**

The reviewers noted that article 21(a) of the UNCAC establishes an optional requirement for the criminalization of active bribery in the private sector and brings out the importance of requiring integrity and honesty in economic, financial or commercial activities. The required elements of this offence are those of promising, offering or giving something to a person who directs or works for a private sector entity. An undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.

The review team took into account that the United States has not enacted legislation at the federal level establishing domestic bribery in the private sector (commercial bribery) per se as a criminal offence because, pursuant to the U.S. Constitution, such crimes are exclusively reserved to the states to criminalize unless an additional element of the crime is added to the underlying offence which provides a basis for federal jurisdiction. In such cases, prosecution at the federal level may be and has been carried out through, inter alia, the mail and wire fraud statutes and the Travel Act (examples of relevant cases have been provided). On the state level, 38 states have explicitly prohibited commercial bribery, whilst some states prosecute commercial bribery using generally applicable fraud statutes. In the states where commercial bribery is not a crime, the conduct is often also punishable under unfair trade practices laws. Notwithstanding the lack of a federal commercial bribery law, commercial bribery can be and has been effectively prosecuted in the United States.

The reviewing experts also noted that there had been increased enforcement of laws prohibiting foreign commercial bribery over the past fourteen years, even though it is not a mandatory UNCAC offence. Although other statutes criminalizing pertinent conducts were used to criminalize domestic bribery in the private sector at the federal level, such bribery seemed not to attract equal attention as official bribery.

## **Article 21 Bribery in the private sector**

### **Subparagraph (b)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. (see under article 21(a)).

**(b) Observations on the implementation of the article**

Article 21 (b) establishes an optional requirement for the criminalization of passive bribery in the private sector. The required elements are soliciting or accepting the bribe. The link with the influence over the conduct of the person who directs or works in any capacity for a private sector entity must also be established. As with the previous offence, the undue advantage may be for the person who directs or works in any capacity for a private sector entity or some other person or entity. The solicitation or acceptance must be by that person or through an intermediary, that is, directly or indirectly.

See observations of the review team under article 21(a).

**Article 22 Embezzlement of property in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

There is no single U.S. federal statute that prohibits embezzlement in the private sector in all circumstances. However, various federal laws can be used to cover many situations involving embezzlement in the private sector.

The primary federal laws that would be used for such prosecutions (presuming the crime crosses state lines) are the laws against wire fraud (18 U.S.C. 1343) and mail fraud (18 U.S.C. 1341), which prohibit the use of interstate communications in furtherance of a scheme to defraud someone of property, which may include conduct constituting embezzlement.

Additional laws include embezzlement from a federally insured bank (18 U.S.C. 656), from various federal supported lending, credit and insurance institutions (18 U.S.C. 657), involving a shipment in interstate or foreign commerce (18 U.S.C. 659) or within the special maritime and territorial jurisdiction (18 U.S.C. 661), from an employee benefit plan (18 U.S.C. 664), employment training fund (18 U.S.C. 665), or from certain state or local government programs that receive federal funds (18 U.S.C. 666).

Embezzlement from a private entity, however, is primarily criminalized under state law rather than federal.

Embezzlement encompasses concepts of breaches of fiduciary duties of trust and care. These concepts, as they relate to private organizations, are governed by state fiduciary and corporate/business laws rather than federal law.

As a statutory crime, embezzlement is defined somewhat differently in different states, but in general, embezzlement statutes cover the fraudulent conversion of the property of another by one who is already in lawful possession of the property. This differs from theft, in that theft statutes generally related to conversion of the property of another by someone who is not in lawful possession of the property.

Embezzlement may also be covered by statutes against “false pretenses,” which criminalizes a false representation of a material fact in order to cause a victim to pass title to property to a wrongdoer.

The wire fraud and mail fraud statutes (§ 1343. Fraud by wire, radio, or television; § 1341. Frauds and swindles) can also be of relevance.

#### **(b) Observations on the implementation of the article**

There is no single U.S. federal statute that prohibits embezzlement in the private sector in all circumstances. However, various federal laws can be used to cover many situations involving embezzlement in the private sector. The review team assessed the information provided by the U.S. authorities, as cited above, and concluded that the United States has adopted measures which are in compliance with article 22 of the UNCAC.

### **Article 23 Laundering of proceeds of crime**

#### **Subparagraph 1 (a) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States criminalized money laundering on October 27, 1986 (Title 18, U.S. Code, Sections 1956 and 1957 and Money Laundering Control Act of 1986, Pub. L. 99-570).

Section 1956 consists of three provisions dealing with domestic money laundering, international money laundering, and undercover "sting" cases, respectively. See 18 U.S.C. §§

1956(a)(1), (a)(2), and (a)(3). The conducts covered by section 1956 are punishable by a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than 20 years, or both.

Section 1957 makes it an offence simply to conduct any monetary transaction in criminal proceeds involving more than \$10,000. The conducts covered by section 1957 is punishable by a fine and/or imprisonment for not more than 10 years.

Below are some examples of cases related to the article:

➤ The prosecution of former United States Congressman William J. Jefferson provides a recent example of a case involving corruption and money laundering offenses. In 2009, a federal jury found former United States Congressman William J. Jefferson guilty on 11 charged counts, including solicitation of bribes, honest services wire fraud, money laundering, racketeering and conspiracy.

Jefferson was acquitted on three counts of honest services wire fraud, an obstruction of justice charge and of violating the Foreign Corrupt Practices Act.

According to evidence at trial, from August 2000 to August 2005 Jefferson used his position as an elected member of the U.S. House of Representatives to corruptly seek, solicit and direct that things of value be paid to himself and his family members in exchange for his performance of official acts to advance the interests of businesses who offered him the bribes.

The things of value, according to evidence at trial, included hundreds of thousands of dollars worth of bribes in the form of payments from monthly fees or retainers, consulting fees, percentage shares of revenues and profits, flat fees for items sold and stock ownership in the companies seeking his official assistance. In connection to the bribes, among other official acts, Jefferson sought to promote telecommunications deals in Nigeria, Ghana and elsewhere; oil concessions in Equatorial Guinea; satellite transmission contracts in Botswana, Equatorial Guinea and the Republic of Congo; and development of different plants and facilities in Nigeria.

The specific money laundering charges in this case alleged that the defendant engaged in money laundering by knowingly participating in the transfer of the proceeds of criminal activity, namely the bribery proceeds, from the Eastern District of Virginia to the Eastern District of Louisiana. The counts further allege that defendant knowingly caused another to engage in three separate monetary transactions, also in violation of the money laundering statute, 18 U.S.C. 1957. U.S. v. Jefferson, 562 F.Supp.2d 695 (E.D.Va. 2008) affirmed, 546 F.3d 300 (4th Cir. 2008).

The United States vigorously enforces its money laundering statutes, as evidenced by the volume of investigations, prosecutions, and convictions reported below.

As illustration, the statistics for money laundering cases, including but not limited to ones predicated on bribery or corruption, in 2004 are as follows:

***Report: Standard Case Count Report for FY2004***

- Statute, Number of Defendants, Number of Cases 18 U.S.C. § 1956 221983818 U.S.C. § 1957 455291 Report: Outcome/Disposition Report

- Statute, Number of Successful Charges 18 U.S.C. § 1956 173618 U.S.C. § 1957 358 Report: Outcome/Disposition Report

- StatuteFile Defendant CountTerminated Defendant CountGuilty18 U.S.C. § 1956  
2219173697018  
U.S.C. § 1957 455358178

The information is collected from databases maintained by the law enforcement agencies responsible for investigating money laundering cases and from the database containing case information for the United States' Attorney's Offices and the prosecutorial sections of the Department of Justice.

The U.S. measures to criminalize money laundering have been assessed by the Financial Action Task Force (FATF), the international standard setting body for Money Laundering and Terrorist Financing, to determine the level of compliance of the U.S. anti-money laundering and counter-terrorist financing (AML/CFT) regime with the FATF 40+9 Recommendations.

That assessment resulted in adoption of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism -United States of America (US MER) in June 2006. Strong U.S. commitment and aggressive action to identify, disrupt and dismantle money laundering and terrorist financing networks within its borders and abroad was specifically noted and reflected in the results of the FATF assessment. Of the 49 FATF Recommendations, the U.S. was found to be largely compliant (LC) or fully compliant (C) with 43 of the Recommendations. The U.S. MER notes that U.S. AML/CFT efforts "have produced impressive results in terms of prosecutions, convictions, seizures, asset freezing, confiscation and regulatory enforcement actions."."

A copy of the U.S. evaluation report can be found at: <<http://www.fatf-gafi.org/dataoecd/44/9/37101772.pdf>>

In addition, the U.S.'s anti-money laundering system has been evaluated by the International Monetary Fund in 2010 as part of the Article IV review.

U.S. measures to criminalize money laundering have also been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) and the Group of States against Corruption (GRECO)/Council of Europe.

The MESICIC's reviews of the U.S., as well as an explanation of the MESICIC's methodology, are available at <[http://www.oas.org/juridico/english/mesicic\\_rounds.htm](http://www.oas.org/juridico/english/mesicic_rounds.htm)>.

The GRECO's third evaluation round compliance report on U.S.A. is available at:  
[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_On\\_e\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_On_e_EN.pdf)

An explanation of the GRECO's methodology is available at:  
[http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.asp).

## **(b) Observations on the implementation of the article**

The conversion or transfer of property obtained by crime is criminalized in the United States legislation. The criminalization refers to a person who knows that such property is the proceeds of crime of crime and intends to hide or conceal the illicit origin of property. The



United States legislation also appropriately criminalizes the act of conversion or transfer for the purpose of assisting the person who committed the crime avoid the legal consequence of his or her actions. . There are appropriate incriminations referring to the cases when the criminal act is committed outside the territory of the USA.

Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 23(1)(a)(i) of the UNCAC.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 1 (a) (ii)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented (see also under subparagraph 1 (a) (i)).

#### **(b) Observations on the implementation of the article**

See the remarks under subparagraph 1 (a) (i). The robustness of the implementation of anti money-laundering measures by the U.S. authorities is also illustrated by the positive assessment of the application of international standards of the FATF, MESICIC and GRECO.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 1 (b) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States has adopted and implemented measures covering the acquisition or use of criminally derived property, but because the U.S. laws are transaction or transfer-based, they do not cover mere possession.

Below are some examples of cases related to this provision of the UNCAC:

Under the money laundering statutes, transporting property from one place to another is not a transaction. Rather, the government must demonstrate that the defendant affected a disposition of the property.

- See *United States v. Puig-Infante*, 19 F.3d 929, 938-40 (5th Cir. 1994) (transporting drug proceeds from Florida to Texas not a transaction absent evidence of disposition once cash arrived at destination);
- *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 925-26 (5th Cir. 1992) (carrying cash through airport not a transaction);

But see *United States v. Elso*, 422 F.3d 1305, 1310 n.7 (11th Cir. 2005) (defendant who retrieves third party's money from third party's house, puts it in his car, and drives away conducts a "transaction");

- *United States v. Silva*, 356 Fed. Appx. 740, 741 (5th Cir. 2009) (distinguishing *Puig-Infante*; courier may be convicted of attempting to conduct a financial transaction if she transports SUA proceeds with the intent to return them to the person who hired her).

Simple possession of criminal proceeds is also insufficient to show there was a transaction.

- See *United States v. Garza*, 118 F.3d 278, 284-85 (5th Cir. 1997) (the government must show more than that defendants were in possession of a stash of drug proceeds);
- *United States v. Ramirez*, 954 F.2d 1035, 1040 (5th Cir. 1992) (constructive possession of cash in a shoe box in brother's house is insufficient evidence of a transaction).

On the assessment of the effectiveness of the measures adopted to criminalize money-laundering, see above under subparagraph 1 (a)(i) of article 23 of the UNCAC.

## **(b) Observations on the implementation of the article**

Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 23(1)(b)(i) of the UNCAC.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 1 (b) (ii)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The US reported that measures described in this provision were adopted and implemented.

In 1992, the Congress enacted 18 U.S.C. § 1956(h), which is a separate conspiracy statute for § 1956 and § 1957 offences. The maximum penalty for a § 1956(h) conspiracy is the same as the penalty for the offence that is the object of the conspiracy, i.e., 20 years for a § 1956 offense, and 10 years for a § 1957 offence. The money laundering offences also are violated by attempts to commit financial or monetary transactions. 18 U.S.C. § 2 defines anyone who commits an offence against the U.S. or aids, abets, counsels, commands, induces or procures its commission as a principal and is punishable as such.

Regulatory & Other Statutory Controls

In addition to the two statutes criminalizing money laundering, the Bank Secrecy Act (BSA) provides additional powerful weapons for combating money laundering and the financing of terrorism. Depending on the specific statutory or regulatory requirement, the BSA and its implementing regulations apply generally to financial institutions. See 31 U.S.C. § 5312(a)(2) and 31 CFR § 103.11(n). The BSA and its implementing regulations require financial institutions and persons to file certain reports of financial transactions and create criminal offences for failure to file a report when required and/or the filing of reports containing material misstatements or omissions of fact. These record keeping and reporting requirements include:

- Requirement to report or record large cash transactions by financial institutions - Each banking institution, broker or dealer in securities, currency dealer or exchanger, transmitter of funds, issuer, seller or redeemer of traveler's checks or money orders other than the Postal Service, must file a Currency Transaction Report (CTR) for each deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to a designated institution that involves more than \$10,000 in currency. See 31 U.S.C. § 5313(a) and 31 CFR § 103.22(a)(1). For purposes of this CTR requirement, multiple currency transactions are treated as a single transaction if they total more than \$10,000 during any one business day.
- Requirement for casinos to report large cash transactions -Each casino must file a report of each currency transaction, involving cash in or out, of more than \$10,000. See 31 CFR § 103.21(a)(2). A currency transaction "involving cash" includes purchases and redemptions of chips and tokens, front money deposits and withdrawals, bets of currency, and payment on bets. As it is for non-casino financial institutions, multiple currency transactions are treated as a single transaction if the casino has knowledge that the transactions are by or on behalf of any person and result in either cash in or out totalling more than \$10,000 during any gaming day.
- Requirement for trades and businesses to report large cash transactions -Section 6050I of the Internal Revenue Code and 31 U.S.C. § 5331 require that any person who, in the course of engaging in a trade or business, receives more than \$10,000 in cash, cashier's check, bank draft, traveller's check or money order in a single transaction or two or more related transactions, file a Form 8300 (Reports Relating

to Currency in Excess of \$10,000 Received in a Trade or Business). See 26 U.S.C. § 6050I, 31 U.S.C. § 5331 and 31 CFR § 103.30. The Form must include the name, address, and taxpayer identification number of the person from whom the cash was received; the amount of cash received; the date and nature of the transaction, and such other information as the Secretary of the Treasury may prescribe.

- Requirement to report the cross-border transportation of large amounts of currency or monetary instruments -Each person must make a currency or money instrument report (CMIR) when he or she physically transports currency or other monetary instruments (including bearer negotiable instruments, securities and traveller's checks) in an aggregate exceeding \$10,000 (or its foreign equivalency) at one time, into or out of the United States. See CFR § 103.23(a) and 31 U.S.C. §§ 5316(a) and 5317. In addition, subsection 103.23(b) states that each person in the United States who receives currency or other monetary instruments from a place outside the United States, must report the amount, the date of receipt, the form of monetary instruments, and the person from whom the currency or monetary instruments were received. Subsection 103.23(c) further states that the CMIR requirement does not apply to certain entities, including the Federal Reserve or a bank or broker or dealer in securities with respect to currency or other monetary instruments mailed or shipped through the Postal Service or by common carrier.

Any attempt to structure transactions in an effort to avoid the above described reporting transactions has been criminalized at 31 U.S.C. § 5324.

### Bulk Cash Smuggling

As codified at 31 U.S.C. § 5332(a), the statute makes it an offence for any person, with the intent to evade a currency reporting requirement under section 5316, to conceal more than \$10,000 in currency in any fashion, and to transport, or attempt to transport, such currency into or out of the United States. Section 5332(b) provides for criminal forfeiture of the property involved in the offense, including a personal money judgment if the directly forfeitable property cannot be found and the defendant does not have sufficient substitute assets to satisfy the forfeiture judgment. Section 5332(c) authorizes civil forfeiture for the same offense.

In anticipation of legal attacks suggesting that the new statute is nothing more than a re-codification of the existing penalties for violating the CMIR requirement and that forfeiture of 100 percent of the smuggled currency would still violate the Eighth Amendment, Congress included a set of “findings” emphasizing the seriousness of currency smuggling and the importance of authorizing confiscation of the smuggled money. In particular, the findings state that the intentional transportation of currency into or out of the United States “in a manner designed to circumvent the mandatory reporting [requirements] is the equivalent of, and creates the same harm as, smuggling goods.” Moreover, the findings state that “only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of bulk cash is a critical part.”

### Section 1960

When it was enacted in 1992, 18 U.S.C. § 1960 made it a federal offence to conduct a money transmitting business without a state license. For various reasons, the statute proved to be of limited use to federal law enforcement. The amendments to section 1960 made by section 373 of the USA PATRIOT Act, however, have made the statute a much more effective tool against money laundering.

The current version of section 1960 converts the offence into a “general intent” crime. Under the current statute, it is an offense for anyone knowingly to conduct any “unlicensed money transmitting business,” which is defined as a business that is operated without an appropriate state license, “whether or not the defendant knew that the operation was required to be licensed” or that operation without a license was a criminal offence. It is also an offense for anyone to conduct a money transmitting business that fails to comply with the provisions of section 5330 (or the regulations that Treasury has promulgated in 31 C.F.R. § 103.41) Most important, the scope of section 1960 is expanded to include any business, licensed or unlicensed, that involves the movement of funds that the defendant knows were derived from a criminal offense, or were intended to be used “to promote or support unlawful activity.” Thus, under this provision, a person operating a money transmitting business-which could be anything from a mom-and-pop money remitting business to Western Union to a federally insured bank to an informal transfer system such as hawala-can be prosecuted for conducting transactions that the defendant knows involve illegal proceeds or funds that someone planned to use to commit an unlawful act. Moreover, as explained in the House Report, “It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.”

It is already an offence under sections 1956 and 1957 for any person to conduct a financial transaction involving criminally derived property. But section 1957 has a \$10,000 threshold requirement, and section 1956 requires proof of specific intent either to promote another offense or to conceal or disguise the criminal proceeds. Section 1960 contains neither of these requirements if the property is criminal proceeds; or alternatively, if there is proof that the purpose of the financial transaction was to commit another offense, it does not require proof that the transmitted funds were tainted by any prior misconduct. Thus, in cases where the defendant is a money transmitting business, section 1960 may prove more potent than either section 1956 or 1957 as a prosecutor’s tool.

Finally, the changes to section 1960 include an amendment to 18 U.S.C. § 981(a)(1)(A) authorizing civil forfeiture of all property involved in a section 1960 violation.

Aiding and abetting: 18 U.S.C. § 2  
Accessory after the fact: 18 U.S.C. § 3  
Misprison of a felony: 18 U.S.C. § 4  
Conspiracy: 18 U.S.C. § 371

On the assessment of the effectiveness of the measures adopted to criminalize money-laundering, see above under subparagraph 1 (a)(i) of article 23 of the UNCAC.

**(b) Observations on the implementation of the article**

The U.S. legislation has appropriately implemented this subparagraph. The review team noted that the reported legal provisions covered any person who performs a criminal act or assists,

encourages, manages, advises, notes or pursues a criminal offence. Also, attention is devoted to the subjective element in the performance of the criminal act.

Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 23(1)(b)(ii) of the UNCAC.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (a)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

To commit a money laundering offence, the property in the financial transaction must in fact be the proceeds of an offence constituting “specified unlawful activity” or “SUA”. The offences listed in Section 1956(c)(7), and all of the racketeering (RICO) predicates listed in 18 U.S.C. § 1961(1), qualify as SUAs.

Over the years, emerging money laundering typologies, international requirements, prosecutorial experiences, and case law interpretations have indicated the need for legislative changes to the money laundering statutes. The changes have increased the number of crimes which can generate proceeds for the money laundering laws to approximately 250 criminal offenses. Included among these offenses are the production, importation, sale, or distribution of a controlled substance (illegal drug); racketeering; fraud; counterfeiting; alien smuggling; human trafficking; trafficking in stolen property; gambling; customs violations; arms smuggling; terrorism; terrorist financing; sex trafficking and sexual exploitation of children; corruption and bribery; environmental crimes; piracy; securities fraud (including insider trading and market manipulation); and crimes of violence.

Also, see text of Section 1956 in one of the questions above for the list of additional predicates in 1956(c)(7), including foreign corruption offences.

These provisions of law are used on a regular basis and are a well-established part of U.S. law.

Statistics are not available as DOJ does not collect statistics on the use of these provisions in corruption cases.

#### **(b) Observations on the implementation of the article**

The review team noted the wide scope of offences to which the money laundering provisions of the U.S. legislation apply. Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 23 (2)(a) of the UNCAC.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (b)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented (see also under article 23 (2)(a) of the UNCAC) .

On the assessment of the effectiveness of the measures adopted to criminalize money-laundering, see above under subparagraph 1 (a)(i) of article 23 of the UNCAC.

#### **(b) Observations on the implementation of the article**

See under article 23 (2)(a) of the UNCAC).

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (c)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The list of specified unlawful activities only includes a limited number of crimes which if committed in another country are predicates for money laundering. See 18 U.S.C. § 1956(c)(7)(B).

Those foreign crimes which are predicate offences for money laundering are the following: the manufacture, importation, sale, or distribution of a controlled substance; murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence; fraud by or against a foreign bank; bribery of a public official or misappropriation, theft or embezzlement of public funds; smuggling munitions or technology with military applications; and any offense with respect to which the U.S. would be obligated by any multilateral treaty to extradite or prosecute the offender.

As of the time of the visit, legislative language has been proposed that, if passed, would expand the number of specified unlawful activities (predicate offences) for money laundering, to include any foreign crime that would be a felony predicate offence if it had occurred within the U.S.

On the assessment of the effectiveness of the measures adopted to criminalize money-laundering, see above under subparagraph 1 (a)(i) of article 23 of the UNCAC.

#### **(b) Observations on the implementation of the article**

The review team took note of the limited number of crimes which if committed in another country are predicate offences for money laundering purposes. The reviewers also noted that legislative language has been proposed which, if passed, would expand the number of specified unlawful activities (predicate offenses) for money laundering, to include any foreign crime that would be a felony predicate offense if it had occurred within the U.S.

Thus, the review team, while acknowledging that the current U.S. law recognizes the mandatory UNCAC offences as predicate offences for money-laundering purposes, encouraged the U.S. authorities to 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. The Department of Justice has proposed a comprehensive money laundering and forfeiture legislative proposal designed to address gaps in our current legal authority that collectively hamper the government's ability to exercise the full weight of its money laundering and forfeiture authorities. As such, consideration has been given to increasing the number of predicate offenses applicable to the money laundering offense.

### **Article 23 Laundering of proceeds of crime**

#### **Subparagraph 2 (d)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States has furnished copies of its laws to the Secretary-General of the United Nations as prescribed above.

### **Article 23 Laundering of proceeds of crime**

#### **Subparagraph 2 (e)**

*2. For purposes of implementing or applying paragraph 1 of this article:*



*(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The offence of money laundering applies to anyone who violates the elements of the money laundering statutes, including a person who may have also committed the underlying predicate crime.

**(b) Observations on the implementation of the article**

In the United States, the offence of money laundering applies to anyone who violates the elements of the money laundering statutes, including a person who may have also committed the underlying predicate offence.

**Article 24 Concealment**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

See information on national legislation and case law regarding money laundering.

The U.S. authorities reported that they have assessed the effectiveness of the measures adopted to criminalize the concealment or continued retention of property knowing that such property is the result of any of the offences established in accordance with the Convention.

**(b) Observations on the implementation of the article**

Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 24 of the UNCAC.

**Article 25 Obstruction of Justice**

**Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic legislation covers the following clusters of conducts related to article 25 of the UNCAC:

Use of inducement, threats or force to interfere with witnesses or officials

The United States has a range of federal laws criminalizing obstruction of justice, including laws that punish the conduct described in Article 25(a). Those laws include Title 18, United States Code, sections 201(b)(3) (bribery to influence testimony of a witness); 1512 (tampering with a witness, victim or an informant, including by force, threats or intimidation); 1503 (influencing or injuring a court officer or juror in a federal judicial proceeding); 1505 (obstruction of proceedings before departments, agencies and committees); 1511 (obstruction of state or local law enforcement); 1510 (obstruction of criminal proceedings, including bribery); and 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy) (see annex to the report). Consistent with the United States federal system of government, individual states also have laws criminalizing the conduct described in Article 25(a).

Interference with actions of judicial or law enforcement officials

The United States has several federal laws criminalizing obstruction of justice, including laws that punish the conduct described in Article 25(b). Those laws include Title 18, United States Code, sections 1503 (influencing or injuring a court officer or juror in a federal judicial proceeding, including by use of force, threats or intimidation); 1505 (obstruction of proceedings before departments, agencies and committees); 1511 (obstruction of state or local law enforcement); and 1510 (obstruction of criminal proceedings, including bribery) (see annex to the report). Consistent with the United States federal system of government, individual states also have laws criminalizing the conduct described in Article 25(b).

A good example in the corruption context is the case of former United States District Court Judge Samuel B. Kent, who was sentenced to 33 months imprisonment followed by three years of supervised release, a \$1,000 fine, and restitution of \$6,550 after pleading guilty to obstructing an investigation of a judicial misconduct complaint by a special investigative committee of the United States Court of Appeals for the Fifth Circuit.

**(b) Observations on the implementation of the article**

The review team noted that there are several U.S. federal laws criminalizing the conduct of obstructing the proper administration of justice and the execution of laws, as well as that of interfering with actions of judicial or law enforcement officials. Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 25(a) of the UNCAC.

**Article 25 Obstruction of Justice**

## **Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

See subparagraph (a).

### **(b) Observations on the implementation of the article**

See subparagraph (a). Based on the information provided by the U.S. authorities, the U.S. legislation was found to be compatible with article 25(b) of the UNCAC.

## **Article 26 Liability of legal persons**

### **Paragraph 1**

*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Under general legal principles, the United States holds legal persons criminally responsible, as it does for individuals. The United States Code provides that the “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” (1 U.S.C. § 1). A corporation is held accountable for the unlawful acts of its officers, employees, and agents when the officers, employees, or agents act (i) within the scope of his/her duties, and (ii) for the benefit of the corporation. In both instances, these elements are interpreted broadly. Thus, a corporation is generally liable for the acts of its employees with the limited exception of acts that are truly outside the employee’s assigned duties (“ultra vires”) or which are contrary to the corporation’s interests (e.g., where the corporation is the victim rather than the beneficiary of the employee’s unlawful conduct). Whether the corporate management condoned or condemned the employee’s conduct is irrelevant to the issue of corporate liability, although such factors can increase the severity of the sentence pursuant to the U.S. Sentencing Guidelines. The criminal responsibility of the legal person is engaged by the act of any corporate employee, not merely high-level executives. Participation, acquiescence, knowledge, or authorisation by higher level employees or officers is relevant to the determination of the appropriate sanction. Additionally, under the applicable sentencing guidelines, the sanction could be mitigated if an “effective” compliance program had been in place. This principle recognizes that a corporation is liable for the acts of its employees

although it cannot always control them. Thus, if a company has in place a compliance program that is effective and supported by management, and an employee still violates the law, the court can recognise the corporation's efforts as a mitigating factor in determining the level of the sanction.

In the past five years, the United States has taken action related to prosecuting legal persons for foreign bribery offences.

The U.S. measures relating to the liability of legal persons have been assessed by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC), the Group of States against Corruption (GRECO/Council of Europe) and the OECD Working Group on Bribery.

The MESICIC's reviews of the U.S., as well as an explanation of the MESICIC's methodology, are available at [http://www.oas.org/juridico/english/mesicic\\_rounds.htm](http://www.oas.org/juridico/english/mesicic_rounds.htm).

The GRECO second evaluation round reports on the United States of America at:

(Evaluation report):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)10\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)10_USA_EN.pdf)

(Compliance report):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)5\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)5_USA_EN.pdf)

and

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)5\\_Add\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)5_Add_USA_EN.pdf)

With regard to the effectiveness of U.S. criminal law establishing liability for legal persons in foreign bribery cases, the most recent assessment is the OECD Working Group on Bribery Phase 3 report on the United States, October 2010.

That report is available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

#### **(b) Observations on the implementation of the article**

The review team noted that under general legal principles, the United States may hold legal persons criminally responsible, as it does for individuals. A corporation is held accountable for the unlawful acts of its officers, employees and agents when these persons act within the scope of their duties and for the benefit of the corporation. The corporation is generally liable for acts of its employees with the exception of acts which are outside the employee's assigned duties or are contrary to the company's interests, or where the employee actively hides the activities from the employer. The criminal responsibility of the legal person is engaged by the act of any corporate employee, not merely high-level executives. The sanctions against legal persons, which may be criminal, civil or administrative, can further be mitigated if an effective compliance programme is already in place.

The Foreign Corrupt Practices Act (FCPA) also requires U.S. companies and foreign companies listed on U.S. stock exchanges engaged in international business to develop comprehensive corporate compliance programs in which corporations establish procedures to prevent the payment of bribes, conduct internal investigations when allegations of bribery are

brought to management's attention, and voluntarily disclose to the government any bribery uncovered as a result of their investigation. The U.S. Sentencing Guidelines also strongly encourage compliance programs more broadly, providing for reduced sentences when a company has an effective pre-existing compliance program.

This standard of liability of legal persons imposed by the USA is direct and effective, and has resulted in an impressive number of law enforcement actions in the past five years.

The MESICIC's review of the USA shows that from 2005 to 2010, the United States has taken the following actions related to prosecuting legal persons for foreign bribery offences and has achieved the following results:

- In 2005 a total of 10 criminal and civil actions were taken against legal persons and 6 against natural persons
- In 2006 a total of 6 criminal and civil actions were taken against legal persons and 12 against natural persons
- In 2007 a total of 33 criminal and civil actions were taken against legal persons and 17 against natural persons
- In 2008 a total of 27 criminal and civil actions were taken against legal persons and 18 against natural persons
- In 2009 a total of 17 criminal and civil actions were taken against legal persons and 47 against natural persons
- In 2010 (as of June 30) a total of 8 criminal and civil actions were taken against legal persons and 6 against natural persons

Consequently, the U.S. legislation was found to be compatible with article 26, paragraph 1, of the UNCAC.

## **Article 26 Liability of legal persons**

### **Paragraph 2**

*2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The USA reported that measures described in this provision were adopted and implemented. There are criminal, civil, and administrative sanctions applicable to legal persons. For examples in the foreign bribery context, see the response under paragraph 1 of article 26 of the UNCAC and charts available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf>.

#### **(b) Observations on the implementation of the article**

In the United States criminal, civil and administrative sanctions can be applied against legal persons. The parameters of sentencing are set forth in the Federal Sentencing Guidelines - Chapter 8, which stipulates that the sanctions imposed upon organizations and their agents,

taken together, will provide punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

In addition, the FCPA prescribes substantial civil and criminal penalties and imposes additional administrative sanctions. The following criminal penalties may be imposed for violations of the FCPA anti-bribery provisions: legal persons are subject to a fine of up to \$2,000,000 per offense; natural persons are subject to a fine of up to \$100,000 and imprisonment for up to five years per offense. Under the FCPA accounting provisions, legal persons are subject to a fine of up to \$25,000,000 per offense; natural persons are subject to a fine of up to \$5,000,000 and imprisonment for up to twenty years per offense. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. Fines imposed on individuals may not be paid by their employer or principal.

The reviewers were briefed that from 2005 to 2010 (as of June 30) the United States has secured more than \$2 billion in criminal penalties for FCPA violations.

Based on the information provided, the U.S. legislation was found to be compatible with article 26, paragraph 2, of the UNCAC.

## **Article 26 Liability of legal persons**

### **Paragraph 3**

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. Under the Principles of Federal Prosecution of Business Organizations, prosecution of individuals is taken into consideration in determining whether or not to prosecute a legal person. However, the pursuit of one prosecution does not limit or prohibit the pursuit of another. The United States has often prosecuted both legal and natural persons for the same criminal conduct.

For summaries, see <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-c.pdf>.

For the Principles of Federal Prosecution of Business Organizations, see [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm).

For the examples of the successful implementation of domestic measures adopted to comply with the provision under review and statistics, as well as the assessment of the effectiveness of the adopted measures, see the response to paragraph 1 of this article.

#### **(b) Observations on the implementation of the article**

The reviewers noted that, according to the data provided, a series of actions were undertaken in the United States against both legal and natural persons in the past years. They also noted that the Principles of Federal Prosecution of Business Organization (enacted in 1999, updated in 2003) have been drafted as a guideline to prosecutors in deciding whether to prosecute a corporation and/or its employees.

The review team further took into account the explanations provided by the U.S. authorities that the prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. In all cases involving wrongdoing by corporate agents, prosecutors do not limit their focus solely to individuals or the corporation, but consider both as potential targets.

In conclusion, and based on the information provided, the U.S. policy on this matter was found to be compatible with article 26, paragraph 3, of the UNCAC.

## **Article 26 Liability of legal persons**

### **Paragraph 4**

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. Legal persons are subject to sanctions as determined in individual cases in accordance with Chapter 8 of the U.S. Sentencing Guidelines, available at: [http://www.uscourts.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/Chapter\\_8.htm](http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm).

Also, the Securities and Exchange Commission (SEC) has regularly sought civil monetary penalties and the return of illegal profits (called disgorgement), which has resulted in sanctions of significantly large sums.

See [http://www.uscourts.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/Chapter\\_8.htm](http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm) for the 2010 Federal Sentencing Guidelines Manual.

For examples in the foreign bribery context, see chart 5 of statistics available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf>.

Statistics are tracked through the Department of Justice case management system, and the Enforcement Division of the Securities and Exchange Commission (SEC) maintains a computerized database of all investigations and filed enforcement actions.

On the assessment of effectiveness of measures adopted to ensure that legal persons held liable in accordance with the UNCAC, see information provided under article 26, paragraph 1, of the Convention.

#### **(b) Observations on the implementation of the article**

In the United States, appropriate sanctions are established in individual cases, in accordance with Chapter 8 of the USA Sentencing Guidelines.

In addition, the Securities and Exchange Commission (SEC) has regularly sought civil monetary penalties and the return of illegal profits (called disgorgement), which has resulted in sanctions of significantly large sums.

The conclusion of the review team, based on the information provided, was that the U.S. policy on this matter was compatible with article 26, paragraph 4, of the UNCAC.

## **Article 27 Participation and attempt**

### **Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The applicable domestic legislation includes statutes are 18 U.S.C. §§ 2, 3, 4, and 371. Section 371, moreover, prohibits not only conspiracy to commit specific offenses, but also conspiracy to defraud the United States.

Some examples of cases related to this article were reported, including the Abramoff case. Other cases are as follows:

- The Gray Enterprise: In January 2005, six individuals were indicted in a wide-ranging public corruption and fraud scheme, with charges including conspiracy to commit racketeering (RICO), extortion, mail fraud, and wire fraud. Three defendants were ordered to pay restitution:
- Emmanuel Onunwor, the former mayor of East Cleveland was convicted of 22 counts, including RICO conspiracy, extortion, mail fraud, bankruptcy fraud, and filing false tax returns. In addition to a fine and supervised release, Onunwor was sentenced to 108 months of imprisonment and ordered to pay restitution of \$5,111,000 to the City of East Cleveland.
- Nathaniel Gray, a Cleveland businessman, was convicted of 35 counts, including RICO conspiracy and numerous extortion and honest services counts relating to a bribery scheme for government contracts in four cities. Gray also pleaded guilty to for failing to pay approximately \$1.5 million in federal income taxes. He was sentenced to 180 months of imprisonment and three years of supervised release and was ordered to pay \$1 million in restitution for his unpaid taxes.



- Gilbert Jackson was convicted of RICO conspiracy, Hobbs Act extortion, honest services mail and wire fraud, and tax evasion resulting from multi-district probe of public corruption by city officials relating to contracting services in Cleveland, East Cleveland, New Orleans, and Houston. In addition to 82 months of imprisonment, Jackson was ordered to pay \$179,380 in restitution to the IRS for the tax evasion and \$100,000 in restitution to the City of Cleveland based on the other conduct.

The U.S. measures to criminalize participation in and attempt to commit an offence established in accordance with this Convention have been assessed by the Group of States against Corruption (GRECO/Council of Europe).

The GRECO's third evaluation round compliance report on U.S.A. is available at:

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)2\\_USA\\_Online\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)2_USA_Online_EN.pdf)

An explanation of the GRECO's methodology is available at:

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.asp).

#### **(b) Observations on the implementation of the article**

Based on the above information, the U.S. legislation was found to be compatible with article 27, paragraph 1, of the UNCAC.

#### **Article 27 Participation and attempt**

##### **Paragraph 2**

*2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. There is no separate, general U.S. federal attempt statute. However, many federal statutes defining substantive crimes include express provisions prohibiting an attempt to commit the substantive crime. For example, 18 U.S.C. 1347 prohibits an attempt to commit a limited class of crimes, such as mail fraud, wire fraud and bank fraud.

In addition, the Federal Rules of Criminal Procedure contemplates situations where a defendant may be found guilty of attempt. Specifically, Rule 31(c), Lesser Offense or Attempt, provides that a defendant may be found guilty of (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right. Jury instructions on attempt should be considered when an indictment charges a completed offense but does not also charge an attempt to commit that offense, if one of the parties requests an attempt instruction and the evidence would permit a rational jury to acquit on the charged offense but find the defendant guilty of attempt to commit it (see also Third Circuit Crim. Jury Inst. 7.01, Attempt).

One federal circuit court in the United States has generally defined the two requisite elements of an attempt as: “(1) an intent to engage in criminal conduct, and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense.” *United States v. Williams*, 704 F.2d 315 (6th Cir. 1983).

Another federal circuit court has stated that the “substantial step” required to convict must be “something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.” *United States v. Manley*, 632 F.2d 978 (2nd Cir. 1980)

Finally, conduct that constitutes an attempt to commit a substantive crime might, in cases involving two or more individuals, be reachable under the federal conspiracy statute, 18 U.S.C. § 371, which requires an agreement between two participants to commit a crime and an overt act in furtherance of the crime.

#### **(b) Observations on the implementation of the article**

Based on the above information, the U.S. legislation was found to be compatible with article 27, paragraph 2, of the UNCAC.

### **Article 27 Participation and attempt**

#### **Paragraph 3**

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

There is no U.S. federal statute prohibiting preparation for an offense. However, such conduct might be reachable in certain cases as aiding an abetting or as a gratuity. The federal conspiracy statute, 18 U.S.C. § 371, is useful in cases where there is corrupt activity by two or more individuals. Completion of the underlying substantive offense is not an element of the crime: all that is needed is an agreement to commit a federal crime and an overt act by one of the coconspirators in furtherance of the conspiracy. The federal aiding and abetting statute, 18 U.S.C. § 2(a), may be useful in situations where the defendant aids or counsels another regarding the commission of a crime, or induces the defendant to commit the crime.

Moreover, some of the most serious public corruption offenses do not require completion of the corrupt act. For example, under the federal bribery and conspiracy statutes, 18 U.S.C. § 201(b) and § 201(c), it is sufficient if the defendant offers to pay a bribe or gratuity to a public official; actual payment of the bribe is not an element of the offense. § 201(b)(1); § 201(c)(1)(A). Similarly, it is sufficient to prove the crime of bribery or an illegal gratuity involving a public official by proving that the defendant public official sought, or agreed to accept, a bribe or gratuity. 18 U.S.C. § 201(b)(2); § 201(c)(1)(B). Likewise, the FCPA prohibits the offer, authorization, or promise of a bribe, as well as the payment of a bribe.

Again, acceptance of the bribe is not required to prove the offense. See also the federal vote-buying statutes, 42 U.S.C. § 1973i(c) and 18 U.S.C. § 597, criminalizing offers of payment for voting in a federal election. Neither of these statutes requires proof that the offer was accepted by the voter or that the payment was made to the voter.

**(b) Observations on the implementation of the article**

Based on the above information, the U.S. legislation was found to be compatible with article 27, paragraph 3, of the UNCAC.

**Article 28 Knowledge, intent and purpose as elements of an offence**

*Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The standard jury instruction which is given to jurors by the judge in U.S. criminal trials, and which summarizes U.S. law, indicates that the fact finder is:

“...permitted to draw reasonable inferences from the evidence which are justified in light of common experience.”

In other words, the fact finder may make deductions and reach conclusions that reason and common sense lead him or her to draw from the facts which have been established by the evidence.

This would apply in all criminal cases, including those in which the government is attempting to prove the commission of offenses covered in the Convention.

The distinction between bribery and an illegal gratuity provides a good example of how intent can be a critical element of a crime. The U.S. federal bribery statute, 18 U.S.C. § 201(b), is limited by an intent element.

The United States Supreme Court has explained that “[b]ribery requires intent ‘to influence’ an official act or ‘to be influenced’ in an official act . . . for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.” *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999).

Absent such intent, the giving of the thing of value may qualify as an illegal gratuity, which is “a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.” *Id.* at 405.

A gratuity is not illegal if it is a “status gratuity,” a payment given for or because of the recipient's official position, or in an effort to win generalized sympathy from a public official.

Instead, there must be “a link between a thing of value conferred upon a federal official and a specific 'official act' for or because of which it was given.” *Id.* at 414.

The difference between a bribe and an illegal gratuity turns on the defendant’s intent: “The distinguishing feature of each crime is its intent element. Bribery requires intent ‘to influence’ an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.

An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.” *Sun-Diamond Growers of California*, 526 U.S. at 404-05.

#### **(b) Observations on the implementation of the article**

Based on the above information, the U.S. judicial practice was found to be in line with article 28 of the UNCAC.

#### **Article 29 Statute of limitations**

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic legislation related to the article includes the following provisions: 18 U.S.C. §§ 3282, 3288, 3289, 3290, 3293, and 3296.

The statute of limitations for most non-capital offenses is five years. The statute of limitations may be tolled for up to three years where a mutual legal assistance request has been made but not been completed. Statistics are unavailable.

The statute of limitations applicable in FCPA cases was assessed by the OECD Working Group on Bribery Phase 3 review of the United States, October 2010.

#### **(b) Observations on the implementation of the article**

The statute of limitations for most non-capital federal offences is five years, and it begins to run from the time the crime is complete. The statute of limitations can be “tolled” (i.e., suspended) for up to three years where there are initiated, but not completed, MLA proceedings. The reviewing experts took note of the assurances provided by the U.S. authorities regarding the adequacy of the limitations period and indicated that the lack of available statistics created difficulties in thoroughly assessing the issue. However, they recommended that a possible extension of the 5-year statute of limitations might be

considered for practical reasons, as the lack of longer limitations period may create difficulties in the investigation of complex corruption cases, particularly violations of the FCPA, where the evidence gathering is challenging and may also involve multiple jurisdictions. Techniques for paying and concealing bribes are increasingly sophisticated and corruption offenses may potentially remain undetected for many years. The United States should ensure that the overall limitation period applicable to corruption offences is sufficient to allow adequate investigation and prosecution. In addition, an extension of the limitations period could also serve the purposes of legislative consistency and coherence, as such period is longer for a few other select economic crimes.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 1**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Several remedies are available to redress acts of corruption, including administrative, civil, and criminal sanctions. The visibility of punishment plays a significant role in prevention because of its deterrent effect.

When an official is convicted of engaging in domestic corruption, the typical sanction is a term of imprisonment for serious crimes, such as bribery. For less serious crimes, such as a violation of the prophylactic provisions of conflicts-of-interest laws, the punishment might be a period of supervised release or probation. The ranges of possible penalties are set forth in the Federal Sentencing Guidelines. Generally, more serious offenses carry stiffer penalties. The Sentencing Guidelines also permit judges to consider an offender's criminal history when imposing a sentence.

Criminal violations may also be punished by the imposition of fines. In most cases, this would require the culpable official to disgorge the amount that was wrongfully obtained by paying restitution and to pay a fine. Civil and administrative sanctions are also available for the government to redress corruption. In the contracting context, for example, the United States may sue for rescission in federal court to annul a fraudulently procured contract. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract.

United States law also requires the sentencing judge to order restitution when there is an identifiable victim. See 18 U.S.C. § 3663; U.S.S.G. § 5E1.1. In corruption cases, the victim is often the United States, and there are many examples of individuals convicted of corruption offenses paying restitution to the United States.

Private individuals who are victims of corruption may bring private actions for monetary damages against the violator in state or federal court. These lawsuits may be common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories.

The United States is also empowered to annul or void fraudulently obtained contracts with the federal government and may sue for rescission in federal court to annul a fraudulently procured contract (see also under article 34 of the UNCAC). The authority to sue rests with the Attorney General. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract. 18 U.S.C. § 218 further permits the government to void contracts related to conviction under certain criminal conflicts of interest statutes set forth in Title 18 of the United States Code. Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations. Subpart 3.2 of those regulations specifically requires that government contracts permit termination in the event of a bribery or gratuities violation. Finally, the federal government is empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons, including the contractor's corrupt acts in the acquisition or performance of a government contract.

As with bribery, a term of imprisonment is the most common sanction for similar crimes, such as fraud and embezzlement. Fines and restitution are also common. The term of imprisonment and the amount of the fine varies according to the severity of the crime, the offender's criminal history, and any applicable statutory maximum or minimum penalties.

Below are some examples of the successful implementation of domestic measures adopted to comply with the provision under review:

➤ United States v. Abramoff: On September 4, 2008,

Former lobbyist Jack Abramoff was sentenced after pleading guilty to conspiracy, honest services fraud, and tax evasion. From 1994 through early 2004, Abramoff lobbied public officials and conspired with a business partner to defraud four Native American Indian tribes by charging fees that incorporated huge profit margins and then splitting the net profits in a secret kickback arrangement. Abramoff received more than \$23 million in undisclosed kickbacks and other fraudulently obtained funds. As part of this conspiracy, Abramoff and others corruptly provided things of value to public officials-primarily Members of Congress and congressional staff members-with the intent to influence official acts that would benefit Abramoff and his clients. Abramoff was sentenced to 48 months of imprisonment, three years of supervised release, and was ordered to pay \$23,134,695 in restitution to victims.

The OECD Working Group on Bribery evaluated the effectiveness of U.S. sanctions under the Foreign Corrupt Practices Act (bribery of foreign officials) in October 2010.

**(b) Observations on the implementation of the article**

The United States applies different kind of sanctions regarding corruption-related offences: **criminal, civil and administrative sanctions.**

The parameters of sentencing are set forth in the **Federal Sentencing Guidelines**, as rules setting out uniform sentencing policy for individuals and organizations convicted of felonies and serious misdemeanours in the USA federal court system. The Guidelines fall within the responsibility of the United States Sentencing Commission, established by the Congress in 1984, as an independent agency competent for the sentencing policy on federal level.

There are two primary factors taken into consideration in the determination of the sentences by

the Guidelines<sup>2</sup>, apart from the gravity of the crime:

- the type of conduct associated with the offence; and
- the criminal history of the defendant.

Regarding the criminal sanctions, the usual sanction for the more serious corruption-related crimes such as bribery, fraud and embezzlement, is a term of **imprisonment** while the usual sanction for the less serious crimes such as violation of the conflict of interest regulations is a **supervised release** or **probation**. **Fines** and **restitution** of assets of crime are also applied for the more serious crimes and in many cases they are applied together, so that the perpetrator must return the assets of crime and to pay a fine. The duration of the imprisonment and the amount of the fine vary according to the severity of the crime, the criminal history of the perpetrator and other applicable statutory maximum or minimum penalties.

Civil and administrative sanctions are also applied and the most common ones are **to annul or void a contract** and **restitution** of property obtained by crime. The private individuals who are victims of corruption may bring private actions for monetary damages against the violator in state or federal court and also the United States may sue for rescission in federal court. This happens in a contracting context, when often, the victim of corruption is the United States. In these cases, the federal court may annul or void the fraudulently obtained contract or may pronounce restitution of the amounts paid by the Government under the contract. In the cases of rescission, the procedures for voiding contracts are set forth in the **Federal Acquisition Regulations**. Paragraph 3.2 determines that in the cases of bribery the government contracts are terminated. In the cases where restitution is pronounced, the court is obliged to consider<sup>3</sup>: - the amount of the loss sustained by each victim as a result of the offence and – the financial resources of the defendant and the defendant's dependants and such other factors as the court deems appropriate. Also, the federal government of the United States is authorized to **administratively bar a private firm** from receiving government contracts based upon a number of reasons, including the contractor's previous corrupt acts and behaviour in the acquirement and execution of a government contracts.

Consequently, the United States has achieved significant results in putting in place adequate and dissuasive sanctions for all criminal acts covered by the UNCAC. Thus, the requirement of article 30, paragraph 1, of the Convention is found to be fulfilled.

In addition, the information provided by the U.S. authorities demonstrate that in corruption cases the U.S. courts usually pronounce more sentencing measures together, which generally includes an imprisonment sentence (or supervised release / probation / home imprisonment or even few of these sentence measures together) and a monetary sentence (fine / restitution or even both). This enables not only the effective prison term punishment, but also the restitution of the assets of crime and adequate compensation of the harm caused to the victim (individual, legal person or the state). Another positive dimension of this practice is its preventive effect, considering the fact that the multiple sanctions divert the possible perpetrators from the possible crime.

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<sup>2</sup> [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Sentencing\\_Table.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Sentencing_Table.pdf)

<sup>3</sup> 18 USAC § 3663

## Article 30 Prosecution, adjudication and sanctions

### Paragraph 2

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

#### (a) Summary of information relevant to reviewing the implementation of the article

The United States reported that measures described in this provision were adopted and implemented. No public official in the US federal government has statutory or Constitutional immunity from criminal investigation or prosecution relating to corruption. Certain procedural and timing considerations do exist for certain officials and those are discussed below by position and branch of government in which the individual serves.

Legislative Branch: Outside the scope of narrowly protected legislative activity, members of Congress are subject to criminal prosecution to the same degree as other citizens. Pursuant to the “Speech or Debate” clause of the United States Constitution, legislative acts may not be used to prove the elements of a criminal prosecution of a Member of Congress. The Speech or Debate Clause of the Constitution provides that, “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” U.S. Constitution, Article 1, Section 6, Clause 1.

The United States Supreme Court has noted that the clause is intended “to protect the integrity of the legislative process by insuring the independence of individual legislators.” United States v. Brewster, 408 U.S. 501, 507 (1972). While the clause generally precludes the use of a legislative act, such as a vote or the content of a speech in legislative session, to prove an offense, it does not insulate a Member of Congress from prosecution for corrupt conduct. Indeed, the protection may be better understood as an issue relating to the inadmissibility of certain evidence rather than as an absolute bar to prosecution. Generally, bribery and other corrupt conduct may be proven by evidence independent of protected legislative activity.

The distinction is demonstrated by reference to Supreme Court cases. The United States Supreme Court stated that the Speech or Debate Clause precluded prosecution in the case of United States v. Johnson, 383 U.S. 169, 184-85 (1966), involving prosecution for conspiracy to defraud, because the indictment focused on the contents of floor speech in the House of Representatives and on the indicted congressman's motives for making it. A similar holding was reached United States v. Helstoski, 442 U.S. 477, 487-90 (1979). But the court has made it clear, in the Brewster case referenced above, involving charges of bribery against a Member of Congress, that the protection is strictly limited to conduct that constitutes “an act which was clearly a part of the legislative process.” In that case, the Court underscored the narrow focus of the protection, stating: “The illegal conduct [alleged in the Brewster case] is taking or agreeing to take money for a promise to act in a certain way. There is no need for the [prosecutor] to show that [the defendant Member of Congress] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.” Thus, the Court upheld the indictment because it was unnecessary to prove specific legislative acts in order to prove violation of bribery statute.



Executive Branch: The issue of whether a sitting President may be criminally prosecuted while in office has not been definitively resolved. The issue is not explicitly addressed in the United States Constitution or by statute. No President has been charged with a criminal offense while in office. It is clear that a sitting President does not have immunity from criminal investigation.

The Office of Legal Counsel in the Department of Justice, which provides legal interpretations to the Attorney General, has previously addressed the issue of whether a sitting President could be criminally prosecuted. The Office prepared a comprehensive analysis and reached the conclusion: “that by virtue of his unique position under the Constitution the President cannot be the object of criminal proceedings while he is in office.” See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973). More recently, the Department of Justice has referred to “the evident immunity of a sitting President from criminal prosecution,” noting that “[t]he available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President.” Brief for the United States as Amicus Curiae in Support of Petitioner at 16, Clinton v. Jones, 520 U.S. 681 (1997) (No. 95 1853). In any event, there is no apparent basis to establish that any immunities or privileges would apply in a corruption prosecution initiated against a former President, even in connection with conduct that occurred during his term in office. It should be noted that, pursuant to Constitutional provisions, Congress could remove a President from office for committing a serious crime. Other executive branch officials do not have immunities or privileges protecting them from criminal prosecution for offenses involving corruption when in office.

Judicial Branch: No immunities or privileges apply to members of the judicial branch that would prevent them from being prosecuted for corruption. The courts have consistently upheld the power of the executive branch to prosecute sitting federal judges for criminal offenses involving corruption, e.g., United States v. Hastings, 681 F.2d 706, 709 (11th Cir. 1982); United States v. Claiborne, 727 F.2d 842, 845 49 (9th Cir. 1984). Indeed, the case of former Judge Samuel Kent is one recent example of a federal judge being prosecuted while in office. Another recent example is the case of Judge Jack Camp, a senior judge on the Northern District of Georgia, who recently pled guilty to possession of controlled substances and conversion of government property.

The issue of immunity from prosecution of corruption in the United States has been assessed by the Group of States Against Corruption (GRECO).

The reports of the first evaluation round are available at:

(Evaluation report):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2003\)2\\_UnitedStatesAmerica\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2003)2_UnitedStatesAmerica_EN.pdf)

(Compliance reports):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1\(2006\)1\\_UnitedStatesAmerica\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1(2006)1_UnitedStatesAmerica_EN.pdf)

and

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1\(2006\)1\\_Add\\_UnitedStatesAmerica\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1(2006)1_Add_UnitedStatesAmerica_EN.pdf)

An explanation of the GRECO's methodology is available at:  
<http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro.en.ap>

## **(b) Observations on the implementation of the article**

The reviewing experts observed that the U.S. legal system is fully in line with article 30, paragraph 2, of the UNCAC regarding the required balance between the immunities and jurisdictional privileges accorded to public officials for the performance of their functions, on the one hand, and the possibility of effective investigation, prosecution and adjudication of corruption-related offences, on the other. Generally, no public official in the U.S. federal government has constitutional or statutory immunity from criminal investigation or prosecution relating to corruption. Certain procedural and timing considerations, however, do exist for certain officials, as follows:

- In the legislative branch and outside the scope of narrowly protected legislative activity, members of Congress are subject to criminal prosecution to the same degree as other citizens. Pursuant to the “Speech or Debate” clause of the U.S. Constitution, legislative acts may not be used to prove the elements of a criminal prosecution of a Congress member. While the clause generally precludes the use of a legislative act, such as a vote or the content of a speech in legislative session, to prove an offense, it does not insulate a Congress member from prosecution for corrupt conduct. Indeed, the protection may be better understood as an issue relating to the inadmissibility of certain evidence rather than as an absolute bar to prosecution. Generally, bribery and other corrupt conduct may be proven by evidence independent of protected legislative activity.
- In the executive branch, the immunity from criminal prosecution of the President applies only in his term in office and derives from the nature of the presidential political system of the country and the unique position of the President under the U.S. Constitution. No President has been charged with a criminal offense while in office. It should be noted, however, that pursuant to constitutional provisions, the Congress can remove from office the President, the Vice President and all civil officers of the United States “...on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanours”. Other executive branch officials do not have immunities or privileges protecting them from criminal prosecution for offenses involving corruption when in office.
- In the judicial branch, no immunities or privileges apply to its members that would prevent them from being prosecuted for corruption. The courts have consistently upheld the power of the executive branch to prosecute sitting federal judges for criminal offenses involving corruption.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 3**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with*

*this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Federal prosecutors are entrusted with discretion to decide if and when to bring a criminal prosecution. Resources which guide federal prosecutors' discretion are the Principles of Federal Prosecution (PFP) and the Principles of Federal Prosecution of Corporations (PFPC). Pursuant to these principles, a "determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances." PFP 9-27.001.

The Principles of Federal Prosecution provide that a federal prosecutor should commence a prosecution "if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction." PFP 9-27.220. A prosecutor may, however, decline prosecution, even when there is sufficient evidence to proceed, if "(1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution." *Id.*

Whether or not there is a "substantial federal interest" is dependent upon federal law enforcement priorities and resources; the nature and seriousness of the offense, including the impact of the offense upon the community; the deterrent effect of prosecution; the person's culpability; the person's criminal history; the person's willingness to cooperate; and the probable sentence resulting from a conviction. PFP 9-27.230. A prosecutor may not, in considering whether to bring charges, consider a person's race, religion, sex, national origin, or political association, activities, or beliefs. PFP 9-27.260.

Once a decision to charge has been made, the prosecutor should, in most circumstances, charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." PFP 9-27.300. In evaluating which charges to bring, the prosecutor should consider the probable sentence, whether such sentence "is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *Id.*

Prior to or after charges have been brought, a prosecutor may negotiate a plea agreement with the defendant. However, "charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct." *Id.* Once charges have been brought, "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons." PFP 9-27.400. The prosecutor may, however, enter into an agreement in which the government agrees to make certain recommendations to the court concerning sentencing, provided that in all cases the agreement and the underlying facts of the offense are disclosed in full to the court. In determining whether such a plea agreement is appropriate, the prosecutor will consider the defendant's willingness to cooperate, the defendant's criminal history; the nature and seriousness of the charge, the defendant's remorse or contrition; the desirability of a

prompt and certain disposition of the case; the likelihood of obtaining a conviction at trial; the probable effect on witnesses; the probable sentence; the public interest in having the case tried rather than disposed of by a guilty plea; the expense of trial and appeal; the office's workload; and the effect upon the victim's right to restitution." PFP 9-27.420. Any plea agreement should entail having the defendant plead guilty to "the most serious readily provable charge" for which the government has an "adequate factual basis," which carries an appropriate sentence, and which will not "adversely affect the investigation or prosecution of others." PFP 9-27.430.

The operating premise in the United States is that the government is entitled to every individual's testimony unless a legally recognized exception provides otherwise. In some circumstances, the prosecutor may determine that it is in the public interest not to charge an individual but to instead grant him or her immunity from prosecution in exchange for his or her cooperation against other participants in the criminal activity whose culpability is greater. In making this decision, the prosecutor "should weigh all relevant considerations, including:

- the importance of the investigation or prosecution to an effective program of law enforcement;
- the value of the person's cooperation to the investigation or prosecution; and
- the person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity." PFP 9-27.620.

The OECD Working Group on Bribery evaluated the use of prosecutorial discretion under the Foreign Corrupt Practices Act (bribery of foreign officials) in October 2010.

#### **(b) Observations on the implementation of the article**

The review team noted that, in line with article 30, paragraph 3, of the UNCAC, prosecutors have discretionary powers in the United States to prosecute or decline to pursue allegations of criminal violations of federal criminal law. Those discretionary powers are based on considerations such as strength of the evidence, deterrent impact, adequacy of other remedies, and collateral consequences, and do not include political or economic factors. At the federal level, prosecutorial discretion is vested solely in the Department of Justice and the Attorney General, and protected from influence by improper political considerations. Allegations of prosecutorial misconduct can be brought before the courts at any time, including selective prosecution based on a number of prohibited factors.

The United States has **written rules** for the application of the discretionary rights (the **Principles of Federal Prosecution (PFP)** and the Principles of Federal Prosecution of Business Organizations), which is absolutely very positive when it comes to discretion and discretionary powers. These principles aim to promote the reasoned exercise of prosecutorial discretion by the attorneys with respect to: initiating and declining prosecution, selecting charges, and entering into plea agreements or deferred prosecution agreements. Since the prosecutors have this wide scope of discretionary power the Principles of Federal Prosecution serve as guidelines for weighting the appropriate considerations and desirable practices. Although they are not statute-based, they form a part of the US Attorneys' Manual – a handbook issued by the US Department of Justice binding on all federal prosecutors.

The Principles of Federal Prosecution provide that a federal prosecutor should **initiate prosecution** if he/she believes that the person's conduct constitutes a federal offence and that

the admissible evidence will probably be sufficient to obtain and sustain a conviction and may **decline prosecution** in three cases: - if there is no substantial federal interest in question, - if the person is subject to effective prosecution in another jurisdiction and – if there is adequate non-criminal alternative to prosecution (PFP 9-27.220). Prior to or after charges have been brought, a prosecutor may negotiate a **plea agreement** with the defendant.

Whether there is a “substantial federal interest” in a particular prosecution depends upon: federal law enforcement priorities and resources; the nature and seriousness of the offense, including the impact of the offense upon the community; the deterrent effect of prosecution; the person’s culpability; the person’s criminal history; the person’s willingness to cooperate; and the probable sentence resulting from a conviction (PFP 9-27.230).

In determining whether a plea agreement is appropriate, the prosecutor must consider: the defendant’s willingness to cooperate; the defendant’s criminal history; the nature and seriousness of the charge; the defendant’s remorse or contrition; the desirability of a prompt and certain disposition of the case; the likelihood of obtaining a conviction at trial; the probable effect on witnesses; the probable sentence; the public interest in having the case tried rather than disposed of by a guilty plea; the expense of trial and appeal; the office’s workload; and the effect upon the victim’s right to restitution. (PFP 9-27.420).

The exercise of the prosecutors’ discretionary powers , is informed by the numerous criteria set by the Principles of Federal Prosecution. These criteria must be taken into consideration and respected by the prosecutors when deciding whether to prosecute or not and whether to negotiate a plea agreement or other resolution. Determinations of how to proceed in each case is based on these criteria and the particular merits of the case and the evidence supporting it, and is rational and objective. The prosecutors, taking into consideration all the principles and facts, should reach conclusions that contribute to achieving maximum effectiveness.

A good example is that in the United States, in some circumstances, the prosecutor may determine that it is in the public interest not to charge an individual but to instead grant him/her immunity from prosecution in exchange for his/her cooperation against other participants in the criminal activity whose culpability is greater. In making this decision, the prosecutor should weigh all relevant considerations. In this case and similar cases, the prosecutors, weighing all relevant considerations, decide to choose the law enforcement measure that would enable maximum effect. In a concrete case, the prosecutor can decide that prosecuting other persons involved in the criminal act whose culpability is greater, using the contribution as a witness of someone involved but less culpable, is more useful and effective in the overall execution of the justice than charging that person.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 4**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

In the United States, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. Furthermore, defendants have a right to be present when his presence is related to his ability to defend against the charge.

➤ See Kentucky v. Stincer, 482 U.S. 730 (1987).

This right exists pursuant to the Fifth and Sixth Amendments to the United States Constitution, has been explained in many Supreme Court opinions, and is codified under Rule 43 of the Federal Rules of Criminal Procedure, and applicable federal statutes. However, a defendant may waive his right to be present at any critical stage of the proceedings, such as by voluntarily choosing not to attend his trial. See Fed. R. Crim. P. 43.

#### **(b) Observations on the implementation of the article**

In the initial response to the self-assessment checklist, as reflected above, the U.S. authorities provided information on the legal framework which guarantees the right of the defendant to be present at any stage of the criminal proceeding as a pre-condition of the fairness of the procedure.

In addition and in response to queries raised by the review team during the country visit, the U.S. authorities reported on measures to ensure that an accused person does not flee or leave the country pending trial and clarified that such measures were within the purview of the judicial authorities.

The review team took into account the additional information, as well as the existing legislative framework regulating the conditions and requirements for pre-trial detention of the defendants (Bail Reform Act of 1966, as amended in 1984).

In conclusion, the review team found the U.S. legal framework and judicial practice to be in conformity with, and serve the purpose of, article 30, paragraph 4, of the UNCAC.

### **Article 30 Prosecution, adjudication and sanctions**

#### **Paragraph 5**

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. The relevant domestic legislation includes the following provisions: 18 U.S.C. § 3553(a) [Factor to be considered in imposing a sentence]; 18 U.S.C. § 3583; U.S.S.G. § 7B1.3 (Policy Statement)

18 U.S.C. § 3583 provides for a period of supervised release following imprisonment. The length of supervised release is linked to the seriousness of the crime.

There is no parole in the federal system. In 1984, Congress enacted the Comprehensive Crime Control Act (Public Law Number 98-473) which abolished parole for all offenses committed after November 1, 1987. Although parole no longer exists in the federal system, prisoners may be eligible for good-time credit. 18 U.S.C. § 3624(b) provides, “a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.”

Information and statistics on probation and parole in the United States can be found in the publication "Probation and Parole in the United States, 2009," compiled by the Bureau of Justice Statistics. The report, among other things, presents the number of adults under community supervision (probation or parole) at yearend 2009 and the rate of change in both populations during the year. The report examines factors associated with changes in the probation and parole populations since 2000 and during 2009. Includes a discussion about changes in the probation and parole populations in selected states, the number of entries onto and exits from community supervision, the rate at which probationers and parolees exit supervision, outcomes of supervision, and changes in the type of offenses among both populations.

The report is available at the following link:

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2233>

**(b) Observations on the implementation of the article**

The review team took into account that 18 U.S.C. § 3583 provides for a period of supervised release following imprisonment. The length of supervised release is linked to the seriousness of the crime.

Title 18 U.S.C. § 3583(a) determines that “the court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment”. The provision also determines that “the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime”.

Following this, title 18 U.S.C. § 3583(b) determines the authorized terms of supervised release. This means that consideration is given to the type and the gravity of the crime in determination of the period for supervised release. The gravity of the crime is also taken into consideration as a factor in deciding whether to include or not a term of supervised release as part of the sentence.

As determined in Title 18 U.S.C. § 3583(c): “The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

Article 18 USAC. § 3553(a) determines the factors to be considered in imposing a sentence and one of them is “**the seriousness of the offence**”. Besides the “seriousness of the offence”, this article introduces other elements which are taken into consideration in determination of the sentence (which also influence on the gravity of the crime), such as “the nature and circumstances of the offense and the history and characteristics of the defendant”. Besides, this Article also determines that “the court shall impose a sentence sufficient, but not greater than necessary”.

As determined in the 7B1.3 - Revocation of probation or supervised release (Policy Statement) - of the USA Federal Sentencing Guidelines, the court **shall revoke probation** or supervised release upon a finding of a grade A or B violation and **may revoke probation** or supervised release or extend the term of probation or supervised release and/or modify the conditions of supervision upon a finding of a Grade C violation. In the cases of a revocation of probation or supervised release, the applicable range of imprisonment is set in the 7B1.4 of the Federal Sentencing Guidelines. This implies that although probation is included as part of the sentence to certain perpetrators by taking into consideration the gravity of the crime, it can be revoked if the person commits another offence while being on probation, which, among other effects, deters the persons on probation from committing offences.

While many States parties provide for the possibility of early release/release on parole, others have moved away from the parole system, preferring a “true sentence” or a precisely determined sentencing system and USA is one of these countries. Namely, in the USA federal system, there is no parole. In 1984, the Congress has enacted the Crime Control Act which abolished the parole for all offences committed after November 1987. Taking into consideration the importance of the human rights protection, prisoners may be available for good-time credit. In awarding the credit, the Bureau of Prisons considers whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted.

There is regular follow-up and reporting conducted by the Bureau of Justice Statistics, often corroborated by independent federally funded grantees, which constitutes a good practice and could serve as an example for other States parties.

### (c) **Successes and good practices**

The existence of a regular follow-up and reporting conducted by the Bureau of Justice Statistics, often corroborated by independent federally funded grantees, on the effectiveness of early release/release on parole procedures.



## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 6**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. The applicable disciplinary proceedings for different categories of public officials are as follows:

##### President, Vice President, Cabinet and Federal Judges:

Article 2, Section 4 of the Constitution specifies that the President, Vice President and all civil officers of the United States, including federal judges, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Article 1, Section 2 states that the House of Representatives shall have the sole power of impeachment (bringing the charges somewhat similar to an indictment process) and Article 1, Section 3 states that the Senate shall have the sole power to try all impeachments. It further states that a conviction and judgment in such a trial shall not extend further than to removal from office but that any party so convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law. In addition, members of the Cabinet, while requiring Senate confirmation of their appointment, once appointed serve at the pleasure of the President and can be removed by the President at any time. Each House of Congress has developed its own written procedures for carrying out its respective role in this process. Within the federal judicial system, the chief judge of each district court has the responsibility to enforce the court's rules and orders on case assignments including a system that checks to determine if any assignment to a particular judge would be improper.

##### Members of Congress:

Article 1, Section 5 of the Constitution states that each house of Congress has the power to determine its rules, punish its member for disorderly behavior and with the concurrence of two thirds, expel a Member. Each house of congress has established those rules of procedure pursuant to this authority. The most common types of discipline are expulsion, censure or reprimand although the House may discipline its Members in other ways including loss of seniority and suspension or loss of certain privileges.

##### All other federal officials:

Legal authority and procedures exist for the removal, suspension or reassignment of all other federal officials. The exact procedures will vary depending upon the type of position held. Such disciplinary or corrective action may be in addition to any action or penalty prescribed

by law. Most US federal officials serve in the executive branch; therefore using, as an example, the career officials of the executive branch (both senior executive service and civil service), the basic authorities for their removal, suspension or reassignment are found in chapter 75 of title 5, United States Code and the procedures in Part 752 of title 5, Code of Federal Regulations.

Below are some examples of the successful implementation of domestic measures adopted to comply with the provision under review:

Since 1789, there have been 15 judges impeached, of which 8 were removed, 4 were acquitted, and 3 resigned before completion of the trial before the Senate. Looking at the period covering the last 50 years, 5 judges have been impeached of which 4 were removed, including one in 2010, and one resigned followed by a decision by the House not to pursue the articles of impeachment and the Senate's dismissal based on the House action.

There have been two Presidents impeached by the House, both acquitted by the Senate. The first (President Andrew Johnson) occurred in 1868 and the most recent (President William Clinton) occurred in 1999. In 1974, the House began the process to impeach President Richard Nixon and he resigned after the Judiciary committee adopted 3 articles of impeachment but before the full House acted.

Since 1789, the Senate has expelled only fifteen of its entire membership. Of that number, fourteen were charged with support of the Confederacy during the Civil War. In several other cases, the Senate considered expulsion proceedings but either found the member not guilty or failed to act before the member left office. In those cases corruption was the primary cause of complaint. The two most recent cases were in 1982 and 1995. The Senate has censured 9 of its members.

Since 1789, other than three Members of the House expelled at the beginning of our Civil War for disloyalty to the Union by taking up arms, there have been two Members expelled from the House, one in 1980 and one in 2002. Respectively, the bases for removal for these two individuals included bribery, and conspiracy to commit bribery and acceptance of illegal gratuities. Other Members of the House have resigned in the face of potential action against them by the House.

Because discipline or corrective action is the responsibility of the employing agency and not a central office within the federal government, there are no consolidated statistics available for disciplinary or corrective actions taken against officials other than those noted above. An indication that agencies are in fact taking adverse actions against employees which would include, but is not limited to suspension, reassignment or removal, the Merit Systems Protection Board statistics for 2009 indicate that their regional and field offices handled over 2600 appeals from such actions.

**(b) Observations on the implementation of the article**

The review team noted that the United States has established disciplinary procedures to enable the removal, suspension or re-assignment of federal officials. The requirements for launching such procedures vary depending on the type of officials involved. The acts which could justify

such disciplinary measures may be “high crimes and misdemeanors” (impeachment process for the President, the Vice President and all civil officers of the United States, as well as the federal judges); “misconduct, neglect of duty, malfeasance” (for all other federal officials); or violations of internal rules and ethical standards which may include, among others, non-compliance with the prohibition of receiving gifts and the obligation for financial disclosure and violations of political financing regulations (for members of the Senate and the House of Representatives).

The reviewing experts took into account the comprehensive regulatory framework which defines the disciplinary measures and sanctions and noted the conformity of such framework with the optional requirements of article 30, paragraph 6, of the UNCAC, to the extent that the broadly delineated conduct under scrutiny includes committed – or suspected – offences covered by the UNCAC.

## **Article 30 Prosecution, adjudication and sanctions**

### **Subparagraph 7 (a)**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office; and*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Neither the United States Department of Justice nor the United States federal judiciary possesses the power to expel United States Senators or Representatives from Congress, or to unilaterally prevent individuals convicted of bribery from running for Congress. The minimum qualifications for serving in the House of Representatives and the Senate are set forth in the Constitution, and beyond that, only those bodies may determine the qualifications of their members. However, the House of Representatives and the Senate each possess the power, granted by the United States Constitution, to expel their own members. U.S. Const. art. I, § 8. Congress’s decision to expel a Member does not prevent the Department of Justice from criminally prosecuting that individual as well. Importantly, however, the Department of Justice routinely requires defendants who plead guilty to corruption offenses to agree not to accept or compete for public office or positions.

Although federal law does not-and cannot-bar felons from holding state or local elected office, states can enact laws prohibiting convicted felons from holding elected offices at the state or local levels. Many states have enacted such laws.

#### **(b) Observations on the implementation of the article**

The review team noted that, generally, the U.S. federal law does not include non-conviction criteria, including non-conviction for corruption offences, as eligibility criteria for the highest state public functions, including the President and the Vice-President of the State, the

members of the Congress and the federal judges. However, states can enact laws prohibiting convicted felons from holding elected offices at the state or local levels and many states have enacted such laws. Also, there are certain disqualification measures applied to the holders of public office who can be the subject of an impeachment procedure (the President, Vice-President and all civil officers including the federal judges), if they are found guilty.

## **Article 30 Prosecution, adjudication and sanctions**

### **Subparagraph 7 (b)**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(b) Holding office in an enterprise owned in whole or in part by the State.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented in part due to specificities of the domestic legal system. The only specific provision is found in Article I, Section 3 of the U.S. Constitution, which provides:

“Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.”

This applies only to officials who have been impeached and convicted, and only the U.S. Senate can disqualify the official from holding any future office of honor, trust, or profit.

Less formally, the Department of Justice routinely requires defendants who plead guilty to corruption offenses to agree not to accept or compete for public office or positions.

#### **(b) Observations on the implementation of the article**

The review team took into account the explanations provided by the U.S. authorities regarding the partial implementation of this provision of the UNCAC, as well as the optional nature of the latter and the clause foreseen therein which makes its implementation at the domestic level subject to “the fundamental principles of the [national] legal system”.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 8**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. The Department of Justice can elect to pursue criminal charges against a civil servant who is currently in or who has been removed from office. Removal is a separate action that does not preclude prosecution.

**(b) Observations on the implementation of the article**

As mentioned above under article 30, paragraph 6, of the UNCAC, all federal officials, , can be removed, suspended and/or reassigned. Focusing the attention of the federal officials in the executive branch, these disciplinary measures can be applied due to the reason of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function (Title 5- Chapter 75 of the U.S.C. and the Title 5 – Part 752 of the Code of Federal Regulations). The disciplinary and corrective actions undertaken in these cases may be in addition to any action or penalty prescribed by law. The Department of Justice can decide to pursue criminal charges against a civil servant who is removed from office. The removal is a separate action that does not preclude criminal prosecution.

This means that the exercise of the disciplinary powers against the civil servants in the United States is without prejudice to the criminal procedures and sanctions for the committed criminal offences. The disciplinary and corrective actions do not preclude the criminal procedure against the civil servants who have committed criminal offence.

Thus, the reviewing experts were satisfied that the requirement contained in article 30, paragraph 8, of the Convention was fulfilled, to the extent that the committed criminal offences include offences established in accordance with the UNCAC.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 9**

*9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

No comments.

**(b) Observations on the implementation of the article**

No comments.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 10**

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. law provides for periods of supervised release for offenders. The Office of Probation and Pretrial Services, which is part of the Judicial Branch, oversees offenders on supervised release. As stated on the website of the United States Federal Courts, “Supervision addresses several key criminal justice goals. Through supervision, officers:

- Enforce the court’s order. Officers make sure people on supervision comply with the conditions the court has set for their release to the community.
- Protect the community. Officers reduce the risk that people on supervision commit crimes. They also reduce the risk that people who are awaiting trial flee rather than return to court as required.
- Provide treatment and assistance. Officers help people on supervision correct problems that may be linked to their criminal behavior by directing them to services to help them. These services may include substance abuse or mental health treatment, medical care, training, or employment assistance.

More information about supervised release is available on the internet at <http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/Supervision.aspx> .

In addition to government-run programs, many private entities, such as nonprofit organizations and religious groups, provide services to help individuals released from prison reenter society.

The statistics on recidivism rates are available on the following link:

<http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st705.pdf>

Statistics on the outcomes of supervised release were also made available.

**(b) Observations on the implementation of the article**

The reviewing experts took note of the information provided by the U.S. authorities on the outcomes of supervised release by offence and invited the U.S. authorities to explore the possibility of studying whether any significant correlations exist between recidivism rates and various corruption offences; and consequently whether the measures taken to promote the reintegration of offenders into society pursuant to article 30, paragraph 10, of the UNCAC, are effective.

**Article 31 Freezing, seizure and confiscation**

## **Subparagraph 1 (a)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. has parallel civil (in rem) and criminal (in personam) forfeiture systems, which provide for the forfeiture of both the instrumentalities and proceeds of crime. Bribery and corruption offenses are listed as “specified unlawful activities” in Title 18, United States Code (U.S.C.) Section 1956(c)(7) as and Title 18, U.S.C., Section 1961(1), and the proceeds of these offenses may be forfeited civilly under Title 18, U.S.C. Section 981(a)(1)(C) (see annex).

Moreover, Title 28, U.S.C., Section 2461(c) authorizes criminal forfeiture for any offense for which there is civil forfeiture authority. Corruption crimes constitute both domestic and foreign predicates for money laundering under U.S. law, and property involved in a money laundering offense includes proceeds and facilitating property.

Title 18, U.S.C., Sections 981(a)(1)(A) and 982(a)(1) make all “property involved in” money laundering violations, such as Title 18, U.S.C., Sections 1956 and 1957 subject to civil and criminal forfeiture, respectively. Thus, the proceeds of corruption offenses are both criminally and civilly forfeitable either as property involved in money laundering, if a money laundering offense is the predicate for forfeiture, and through 981 or 2461. Proceeds under U.S. law are considered to be the direct proceeds generated by the criminal offense, as well as any indirect proceeds, meaning any property into which the direct proceeds were converted.

Section 2461(c) also explicitly incorporates the Federal Rules of Criminal Procedure. Rule 32.2 of the Federal Rules of Criminal Procedure allows for a criminal forfeiture judgment in the form of a money judgment for the amount of proceeds, which may be executed against any property of the defendant.

Also, if specific property is forfeited in a criminal forfeiture order and it is no longer available, other assets of the defendant can be forfeited as substitute property under Title 18, U.S.C., Section 982(b) and Title 21, U.S.C., Section 853(p).

DOJ does not collect statistics in such a way that would track the proceeds of cases based on corruption predicates.

The Financial Action Task Force (FATF) has conducted a review of U.S. measures in this area in the context of its review of the United States. FATF reviews are available at: <http://www.fatf-gafi.org/dataoecd/44/9/37101772.pdf>

The U.S. measures relating to confiscation, freezing and seizure of proceeds of crime have also been assessed by the Group of States Against Corruption (GRECO/Council of Europe).

The GRECO second evaluation round reports on the United States of America at:  
(Evaluation report):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)10\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)10_USA_EN.pdf)

(Compliance report):

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)5\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)5_USA_EN.pdf)

and

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)5\\_Add\\_USA\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)5_Add_USA_EN.pdf)

An explanation of the GRECO's methodology is available at:

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.asp).

#### **(b) Observations on the implementation of the article**

With regard to the confiscation of proceeds of corruption, it was reported that at the U.S. federal level there is a two-tier system of conviction-based *in personam* forfeiture and non-conviction-based *in rem* forfeiture. These two parallel systems provide for the forfeiture of both the instrumentalities and proceeds of crime. Thus, the reviewing experts noted that the U.S. legal system goes beyond the UNCAC requirements as the Convention only calls States parties to consider as an option the confiscation of property without a criminal conviction in the context of mutual legal assistance for purposes of confiscation (article 54, paragraph 1(c)). Administrative forfeiture can also be applied under certain conditions.

#### **(c) Successes and good practices**

The United States has successfully implemented a two-tiered system of confiscation/forfeiture through its authority to pursue conviction-based *in personam* forfeiture and non-conviction-based *in rem* forfeiture.

### **Article 31 Freezing, seizure and confiscation**

#### **Subparagraph 1 (b)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**



The United States reported that measures described in this provision were adopted and implemented in a part.

The U.S authorities can confiscate such property, equipment or other instrumentalities in the context of money laundering cases that are based on the predicate offenses of bribery or corruption.

For the text of the legislation – see the annex to the present report.

On the issue of assessing the effectiveness of related measures, see above under subparagraph 1(a) of article 31 of the UNCAC.

**(b) Observations on the implementation of the article**

See above under subparagraph 1(a) of article 31 of the UNCAC.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As part of the financial investigation, federal law enforcement agencies are empowered to identify and trace property that is subject to forfeiture under the relevant statutes. Those powers include the use of Grand Jury subpoenas and/or administrative subpoenas as well as search warrants.

Property subject to forfeiture can be seized, restrained, or otherwise preserved prior to trial in order to ensure that it remains available, provided that there is probable cause to believe that the property is subject to confiscation. The court in a criminal case is permitted to issue both pre-indictment and post-indictment restraining orders under 21 U.S.C. § 853(e).). The property can also be seized with a criminal seizure warrant (§853(f)) which requires a showing that a restraining order would not be adequate to preserve the property. Similarly, federal courts have broad authority in forfeiture proceedings in rem 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).

These provisions of law are used on a regular basis and are a well-established part of U.S. law.

**(b) Observations on the implementation of the article**

The review team noted that restraint measures against property subject to forfeiture can be taken under the U.S. legislation, provided that there is probable cause to believe that such property is subject to confiscation. The domestic legislation was found to be in compliance with paragraph 2 of article 31 of the UNCAC.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 3**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States has established two funds specific to the purpose of depositing and managing assets frozen, seized, or confiscated under U.S. laws. The Department of Justice's Assets Forfeiture fund is governed by Title 28, U.S.C., Section 524(c). The Department of the Treasury's Forfeiture Fund is governed by Title 31, U.S.C., Section 9703. The funds are available to the Attorney General and Secretary of the Treasury, respectively, without fiscal year limitation, for specified law enforcement purposes.

#### **(b) Observations on the implementation of the article**

Based on the information received, the reviewing experts were satisfied that the measures adopted to facilitate the administration of frozen, seized or confiscated property were in conformity with paragraph 3 of article 31 of the UNCAC.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 4**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See under paragraph 1(a) of article 31.

#### **(b) Observations on the implementation of the article**

See under paragraph 1(a) of article 31.

## **Article 31 Freezing, seizure and confiscation**

## **Paragraph 5**

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See under paragraph 1(a) of article 31.

The forfeiture authority for money laundering offenses extends to any property “involved in” the offense, which would include property commingled with proceeds as long as the requisite intent for money laundering included the commingling activity.

### **(b) Observations on the implementation of the article**

See under paragraph 1(a) of article 31.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 6**

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See under paragraph 1(a) of article 31.

### **(b) Observations on the implementation of the article**

See under paragraph 1(a) of article 31.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 7**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See under paragraph 2 of article 31.

**(b) Observations on the implementation of the article**

See under paragraph 2 of article 31.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 8**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were not adopted and implemented.

The main challenges for full adopting and implementing the provision under review are the specificities in the U.S. legal system. The requirement contemplated in paragraph 8 of article 31 is consistent with the concept of illicit enrichment. Consistent with Article 20 of the Convention, the United States has not criminalized illicit enrichment due to constitutional protections pertaining to the presumption of innocence of the accused.

**(b) Observations on the implementation of the article**

The reviewing experts took into account the constitutional impediments which prevent the U.S. authorities from implementing this provision of the UNCAC.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 9**

*9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The defenses available to third parties are slightly different for civil and criminal forfeitures under U.S. law. To protect the interests of innocent property owners who were unaware that their property was used for illegal purposes or who took all reasonable steps under the circumstances to stop it or true bona fide purchasers for value, Congress enacted a “uniform innocent owner” defense for civil forfeitures. Generally, if a claimant claims he is a bona fide purchaser, he must be a "purchaser" in the commercial sense, but he must also show that at the time of the purchase he "did not know and was reasonably without cause to believe that

the property was subject to forfeiture." Under that statute, persons contesting the forfeiture must establish their ownership interests and their innocence by a preponderance of the evidence. 18 U.S.C. 983 (d). Likewise, in criminal forfeiture, the rights of third parties are protected through the provisions of 21 U.S.C. 853(n). This provision allows third parties to assert either that they are bona fide purchasers who obtained the property following the offense giving rise to forfeiture, or that they had an interest superior to the defendant's in the property at the time of the offense. Pursuant to the "relation back" doctrine, once the government obtains a judgment of forfeiture, title vests in the U.S. as of the time that the commission of the act giving rise to the forfeiture occurs. Unless subsequent transferees can establish that they were bona fide purchasers, the U.S. is generally able to invalidate those subsequent transfers.

These provisions of law are used on a regular basis and are a well-established part of U.S. law.

**(b) Observations on the implementation of the article**

The review team welcomed the availability of defences for third parties in confiscation proceedings, in line with paragraph 9 of article 31 of the UNCAC. The reviewing experts noted that those defences were slightly different in civil and criminal forfeiture proceedings under the U.S. legislation. A "uniform innocent owner" defence for civil *in rem* forfeitures is provided for in legislation, according to which, if a claimant claims he is a bona fide purchaser, he must be a "purchaser" in the commercial sense, but he must also show that at the time of the purchase he "did not know and was reasonably without cause to believe that the property was subject to forfeiture". Persons contesting the forfeiture must establish their ownership interests and their innocence by a preponderance of the evidence. In criminal forfeiture, third parties may assert either that they are bona fide purchasers who obtained the property following the offense giving rise to forfeiture, or that they had an interest superior to the defendant's in the property at the time of the offence. Pursuant to the "relation back" doctrine, once the government obtains a judgment of forfeiture, title vests in the U.S. as of the time that the commission of the act giving rise to the forfeiture occurs. Unless subsequent transferees can establish that they were bona fide purchasers, the U.S. is generally able to invalidate those subsequent transfers.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 10**

*10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

No comments.

**(b) Observations on the implementation of the article**

No comments.

## **Article 32 Protection of witnesses, experts and victims**

### **Paragraph 1**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Retaliation and intimidation against witnesses are federal crimes that are outlawed by various federal statutes, specifically Title 18 of the United States Code, Sections 1512, 1513, 1514, 1514A, & 1515 (see annex).

In addition to criminal penalties that attach to witness tampering, intimidation and retaliation, the Attorney General of the United States, through the Organized Crime Control Act of 1970, was given the authority to provide for the security of witnesses who were cooperating in cases involving organized criminal activity or other serious offenses by relocating them and providing them with the necessary support services. Legislation was amended and updated in 1984, resulting in the Witness Security Reform Act of 1984 (18 U.S.C. 3521), which is the legislation under which the Witness Security Program currently operates. Protection is provided to both witnesses to be relocated in the community, and incarcerated witnesses (prisoner-witnesses).

Protection of victims, collaborators of justice, and witnesses, can be secured through the Federal Witness Security Program (Program), if they meet the requirements for participation in that Program. If such victims, cooperators, and witnesses do not qualify for participation in the Program, or do not wish to be considered for participation in it, procedures are in place by which the investigative agencies with which they cooperated can provide limited protection to them by providing them with money to relocate to another area. If protection is needed just for a short period of time before trial and during trial, the investigative agencies have the ability to secure safe housing for them for a short period of time. The federal prosecuting offices also have funds set aside to provide money to individuals to enable them to move to another area temporarily, while the danger is at its greatest, through the Emergency Witness Assistance Program (EWAP), administered by the Executive Office for United States Attorneys, Department of Justice Headquarters (DOJ HQ). As far as the EWAP funds are concerned, victims may qualify for the funds even if they do not actually testify, because they are considered potential witnesses.

The Executive Office for United States Attorneys (EOUSA), located at the Department of Justice headquarters in Washington, D.C., has a budget and resources committed to coordinating protective measures for federal prosecutors, and the United States Marshals Service (USMS) is involved in providing physical protection, when it is needed. The procedure is for the federal prosecuting office to notify the local USMS, or the Court Security Threat desk at USMS headquarters (USMS HQ), of the threat. The local USMS makes an

initial assessment of the threat, and if appropriate, provides an immediate protective detail of 72 hours. Beyond the 72 hours, the Judicial Security Division at USMS HQ makes an assessment of whether the threat warrants continuation of the detail. Funding for the initial 72 hours of protection is taken from the local District USMS funds, and funding for any further physical protection is taken from Judicial Security Division funds. If necessary, the chief prosecutor in the federal prosecuting office, which employs the threatened federal prosecutor, can make a request to EOUSA for authorization to use funds dedicated for that purpose, to enable the prosecutor to relocate temporarily. The necessity of continued relocation, and continued use of the funds, is reviewed at designated periods, and extensions of the authorization to use the funds can be granted, while the threat exists at the same level.

Immediate family members of victims, witnesses, and cooperators, can be protected along with the witness through the Federal Witness Security Program (Program), if the person directly concerned is to be relocated through the Program. Immediate family members of prisoner-witnesses can be protected through the Program, if an analysis of the threat determines that it is necessary. Consideration can be given to providing protection to extended family members through the Program, if the threat to them warrants it. If the investigative agency involved in the case is taking responsibility for the protection of the person directly concerned, family members can be protected in the same manner, if deemed by the investigative agency to be necessary and appropriate. The EWAP also provides for the protection of immediate family members.

The procedure for requesting placement of a witness in the Program for relocation in the community is that an application is submitted to the Office of Enforcement Operations (OEO) in the Criminal Division of the Department of Justice by the United States Attorney's Office handling the matter. As a screening mechanism, the Office of Enforcement Operations requires that the application be endorsed by the chief prosecutor in that office, the United States Attorney. (On rare occasions, witnesses who are to testify before legislative bodies of the United States on sensitive matters are protected through the Program, and in such cases, the legislative body is required to submit the application.) An assessment of the danger to the witness, including details concerning why there is no alternative to Program placement, and an assessment of the danger the witness would pose to the general public in a relocation community, are prepared by the field office of the investigative agency involved in the case, and forwarded to its headquarters for endorsement and forwarding to the OEO, as a further screening mechanism. The witness and adult family members are evaluated by a psychologist, as mandated by the Reform Act; the report is used in making an assessment of whether they will pose a risk to the public, if relocated. The psychological evaluation is arranged by OEO upon receipt of the application, and is conducted by psychologists employed by the Federal Bureau of Prisons for security reasons. All of the above documents are thoroughly reviewed and screened by OEO; the approval process consists of four levels of review. Criminal Intelligence Analysts receive the applications, gather all the other necessary documentation, and make the first recommendation on whether Program services should be authorized. Their immediate supervisor, a Deputy Chief Supervisory Intelligence Analyst, Special Operations Unit (SOU), reviews the documentary package, makes a recommendation, and routes the package to the Chief Supervisory Intelligence Analyst, SOU. The Chief Supervisory Intelligence Analyst reviews the package and makes a recommendation to the Deputy Director of the Program, who in-turn makes a final recommendation to the Director of the Program. The Director makes the final determination on whether to authorize Program services. If the Program is deemed necessary and appropriate, a memorandum authorizing

Program services is sent to the USMS, in which any contingencies to participation in the Program, such as counseling, are detailed.

The procedure for requesting placement of prisoner-witnesses in the Program is that an application from the federal prosecuting office is submitted, as well as an assessment of the danger to the witness by the investigative agency, as detailed above. Upon receipt of those documents, an assessment is made by OEO, as stated previously, as to the necessity of authorizing Program services while the prisoner is incarcerated. If the Program is deemed necessary, a memorandum authorizing Program services is sent to the Bureau of Prisons, which is the agency within DOJ that administers the day-to-day operation of the Program for prisoner-witnesses. If family members of a prisoner-witness are endangered as a result of the prisoner's cooperation, they can receive protection through the Program by the USMS while the prisoner is incarcerated. The family members are normally included in the application submitted for the prisoner-witness, but if not, a written request from the federal prosecutor requesting their Program placement is required. The investigative agency that submitted the assessment of the danger to the witness must submit an assessment of the danger to the witness' family as a result of the witness' cooperation, including details concerning why there is no alternative to use of the Program for the family members, and an assessment of the risk the adult family members would pose to the general public in the relocation community. The family members are evaluated by a psychologist, and interviewed by the USMS, as detailed in the preceding paragraph concerning relocated witnesses, and the same review process at OEO occurs. When prisoner-witnesses are due to be released from custody, the case is evaluated to determine if relocation services of the Program, as provided by the USMS, are warranted. The same factors are taken into consideration as with witnesses being relocated in the community initially, with the exception that the significance of the case and testimony are not evaluated again, and if a witness has family in the Program and will be joining that family, the threat is not evaluated, unless the witness would pose a risk to the community. If that is the case, the current threat is evaluated, and that is weighed against the risk the witness would pose to the public.

The OEO, U.S. Department of Justice, authorizes witnesses into, and oversees all aspects of, the Program. The U.S. Marshal's Service administers the day-to-day operation of the Program for witnesses relocated in the community, and Bureau of Prisons administers the day-to-day operation for prisoner-witnesses.

In OEO, the Director who is the head of the Program makes the decisions as to who should receive Program services, and is responsible for the overall operation for the Program. The Special Operations Unit (SOU) is comprised of a Chief, Deputy Chief, three prosecutors, the Chief Supervisory Intelligence Analyst, two Deputy Chief Supervisory Intelligence Analysts and, at the present time, eleven Criminal Intelligence Analysts. The SOU is the liaison between all entities that are involved in the Program, including law enforcement bodies; all requests concerning witnesses in the Program must come through the SOU. There is no outside training of new employees. The supervisory personnel of the SOU train them.

In the Bureau of Prisons (BOP), the Assistant Administrator, Inmate Monitoring Section (IMS), Correctional Programs Division, is responsible for administering the day-to-day operation of the Program for prisoner-witnesses. The Assistant Administrator supervises the Chief, Witness Security, who is the supervisor of 3 National Coordinators. The National Coordinators interact with staff at the facilities where the prisoner-witnesses are incarcerated, in providing Program services. The Unit Managers of the special units in which witnesses are



incarcerated are trained at BOP headquarters by IMS staff. All other staff of the special units are given a formal orientation by Unit Managers concerning the mission, goals, and uniqueness of the units; the operation of the units; staff professionalism; and uniqueness of issues in the special units. IMS staff receives a general orientation concerning IMS, and a general information package about the Program.

Some examples of the successful implementation of the measures are the following:

Some information on the number of witnesses or experts and their relatives or other persons close to them who have required protection are available:

Since 1971, the U.S. Marshals have protected, relocated and given new identities to more than 8,200 witnesses and 9,800 of their family members. Other statistics and information related to witnesses under protection are generally not made available to the public. Relevant officials running the program were made available during the site visit to answer further questions, if necessary.

The General Audit Office and US Department of Justice Inspector General have both reviewed aspects of the Federal Witness Security Program several times, and those reports discuss the effectiveness of the measures, which, as a general matter, have never resulted in anyone following the rules of the Program to be killed.

**(b) Observations on the implementation of the article**

The review team noted that the United States relies on a wide range of protection measures for witnesses and victims, insofar as they are witnesses, including through the criminalization at the federal level of retaliation and intimidation against those persons. Such protection is provided not only to persons that actually testify in criminal proceedings, but also to potential witnesses, as well as the immediate and extended family members of the witnesses and potential witnesses and the persons closely associated with the witnesses and potential witnesses, if an analysis of the threat determines that such extended protection is necessary. Protection is provided to both witnesses to be relocated in the community and incarcerated witnesses (prisoner-witnesses).

From an operational point of view, the protection of witnesses and victims can be secured through the Federal Witness Security Program, if these persons meet the requirements for participation in that Programme. If such victims and witnesses do not qualify for participation in the Program, or do not wish to be considered for participation in it, procedures are in place by which the investigative agencies with which they cooperated can provide limited protection to them through financial assistance for relocation. If protection is needed just for a short period of time before trial and during trial, the investigative agencies have the ability to secure safe housing for them for this period.

In addition to criminal penalties for witness tampering, intimidation and retaliation, the Attorney General of the United States has also the authority to provide for the security of witnesses who were cooperating in cases involving organized criminal activity or other serious offenses by relocating them and providing them with the necessary support services.

It was further reported by the U.S. authorities that since 1971 more than 8,200 witnesses and 9,800 of their family members have been protected, relocated and given new identities.

In view of the above, the reviewing experts noted that the United States has established a comprehensive legal framework for the physical protection of witnesses, ensuring compliance with article 32, paragraph 1 of the UNCAC. The protection procedure is very detailed and includes measures for relocation of the witnesses and non-disclosure of information for the identity and location of the protected persons. There are very few situations when the disclosure of the identity and location of the protected persons is allowed and they are generally based on breaking of a court order by the protected person.

The reviewing experts also took note of the U.S. response during the country visit that the Federal Witness Security Program was not applicable to expert witnesses, because such expert witnesses are not fact witnesses to the instant crime and generally are not subject to the same types of intimidation. Additionally, since there is usually not just a single potential expert witness in any given field, an expert witness can readily be replaced if he or she feels threatened in a particular case.

## **Article 32 Protection of witnesses, experts and victims**

### **Subparagraph 2 (a)**

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The relevant domestic provisions are the following: 18 U.S.C. §§ 3521, 3522, 3523, 3524, 3526, 3527 and 3528 and Title 28 of the Code of Federal Regulations, § 0.111B.

See also the response under paragraph 1 of article 32 of the UNCAC.

#### **(b) Observations on the implementation of the article**

See the comments under paragraph 1 of article 32 of the UNCAC.

## **Article 32 Protection of witnesses, experts and victims**

### **Subparagraph 2 (b)**

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution bars the use of video testimony in a U.S. trial, with the exception that some children have been permitted to testify via closed circuit television. Some victims or witnesses have also been permitted in rare cases to testify while partially disguised by a wig or glasses, or while screened from the public but not the jury. With respect to testimony from juveniles, see Title 18 of the United States Code, Section 3509(b) (see annex to the report).

See also Attorney General's 2005 Guidelines for Victim and Witness Assistance at Article IV.B.2.a.

Some examples of the successful implementation of domestic measures adopted to comply with the provision under review are the following: article IV. D. 7. of the Attorney General's 2005 Guidelines for Victim and Witness Assistance requires that prosecutors consider the use of alternatives to live testimony when children are victim/witnesses.

**(b) Observations on the implementation of the article**

See the comments under paragraph 1 of article 32 of the UNCAC.

**Article 32 Protection of witnesses, experts and victims**

**Paragraph 3**

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Agreements on the relocation of witnesses are permissible and have been occasionally executed in the past. However, they are generally not made a matter of public record.

**(b) Observations on the implementation of the article**

The review team was satisfied that this provision under review was adequately implemented by the U.S. authorities.

**Article 32 Protection of witnesses, experts and victims**

#### **Paragraph 4**

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Witnesses who are victims are subject to the same protections for witnesses. In addition, the following provisions recognize the need for security for victims and witnesses: 18 U.S.C. 3771(a) (1) and the Attorney General's 2005 Guidelines for Victim and Witness Assistance at Article IV.B.2.a.

*The Attorney General's 2005 Guidelines for Victim and Witness Assistance provide at IV. B.2:*

Services to Crime Victims

Department employees should consider the security of victims and witnesses in every case. Where necessary, prosecutors should inform the court of the threat level, risk, and resources available to create a reasonable plan to promote the safety of victims and witnesses. Department employees may make victims and witnesses aware of the resources that may be available to promote their safety, including protective orders, the Emergency Witness Assistance Program, the Federal Witness Security Program, and State and local resources. Prosecutors should consider moving for pre-trial detention of the accused pursuant to 18 U.S.C. § 3142(f) when circumstances warrant it.

See also the response under article 32, paragraph 1, of the UNCAC.

##### **(b) Observations on the implementation of the article**

The review team was satisfied that this provision under review was adequately implemented by the U.S. authorities. See also the comments under article 32, paragraph 1, of the UNCAC.

#### **Article 32 Protection of witnesses, experts and victims**

##### **Paragraph 5**

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Reference was made to 18 U.S.C. § 3771(a)(4) (see annex) as the domestic implementing provision, as well as to article IV. B.3.b.(2) of the Attorney General's 2005 Guidelines for Victim and Witness Assistance.

**(b) Observations on the implementation of the article**

The review team was satisfied that this provision under review was adequately implemented by the U.S. authorities. See also the comments under article 32, paragraph 1, of the UNCAC.

**Article 33 Protection of reporting persons**

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The relevant domestic provisions are the following: 18 U.S.C. §§ 4, 1510, 1511, 1512, 1513, 1514, 1514A, 1515, 1516, 1517 and 1518, which are related to the criminalization of obstruction of justice (see above under article 25 of the UNCAC).

In addition to statutes that make it a crime to interfere with those who cooperate with federal authorities, numerous protections are in place to protect government employees who act as whistleblowers by reporting internal misconduct. 5 U.S.C. § 1212 makes the U.S. Office of the Special Counsel (OSC) responsible for, inter alia, (1) protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices, and (2) receiving, investigating, and litigation allegations of prohibited personnel practices. Specifically, the Disclosure Unit within the Office of the Special Counsel “serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former employees, and applicants for federal employment.” As a further layer of protection, 5 U.S.C. § 1213(h) provides that the identity of any individual who makes a disclosure may not be disclosed by the Special Counsel without that individual’s consent, unless the Special Counsel determines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

Another mechanism to encourage cooperation is the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8) & (b)(9). The WPA prohibits taking (or not taking) personnel actions with respect to an employee or applicant for employment as a result of any disclosure of information by such an individual which the individual reasonably believes evidences: violation of law, rule, or regulation or gross management; gross waste of funds; abuse of authority; or a specific danger to public health or safety. Section 2302(b)(9) prohibits taking or not taking personnel actions with respect to an employee or applicant for employment, who files a complaint or grievance; assists another employee in filing a complaint or grievance or testifies on behalf of another employee; or provides information to the OSC and/or the relevant Inspector General. The OSC investigates and prosecutes violations of the WPA.

Additional information on the protection of reporting persons in the private sector was provided during the country visit at the meeting with civil society representatives. At this meeting, reference was made to institutionalized whistle-blower protection policies within companies, as well as hotlines for anonymous reporting via different means.<sup>4</sup>

## **(b) Observations on the implementation of the article**

The review team noted that the United States has developed a comprehensive policy and regulatory framework for the implementation of article 33 of the UNCAC. With regard to the protection of reporting persons, as foreseen in article 33 of the UNCAC, the Federal Whistleblower Protection Act of 1989 was enacted to remove fears of reprisal that may impede whistle-blowing. The Act makes the U.S. Office of the Special Counsel (OSC) responsible for, inter alia, protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices; and receiving, investigating, and litigation allegations of prohibited personnel practices. As a further layer of protection, the Act provides that the identity of any individual who makes a disclosure may not be disclosed by the Special Counsel without that individual's consent, unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

## **Article 34 Consequences of acts of corruption**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

## **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Several remedies are available to redress acts of corruption, including administrative, civil, and criminal sanctions. The visibility of punishment plays a significant role in prevention because of its deterrent effect.

When an official is convicted of engaging in domestic corruption, the typical sanction for serious crimes, such as bribery, is a term of imprisonment. For less serious crimes, such as a violation of the prophylactic provisions of conflicts-of-interest laws, the punishment might be a period of supervised release or probation. The ranges of possible penalties are set forth in the Federal Sentencing Guidelines.

Criminal violations may also be punished by the imposition of fines. In most cases, this would require the culpable official to disgorge the amount that was wrongfully obtained by paying restitution and by paying a fine. Civil and administrative sanctions are also available for the government to redress corruption.

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<sup>4</sup> Subsequent to the site visit, the United States implemented section 922 of the Dodd-Frank Act, which provides for the protection of whistleblowers who report violations of the securities laws to the SEC or the U.S. Department of Justice.

Private individuals who are victims of corruption may bring private actions for monetary damages against the violator in state or federal court. These lawsuits may be common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories.

The Foreign Corrupt Practices Act (FCPA) addresses foreign bribery. See responses to questions relating to article 16 of the UNCAC for further details on consequences of and penalties for violating this statute.

The United States is also empowered to annul or void fraudulently obtained contracts with the federal government and may sue for rescission in federal court to annul a fraudulently procured contract (see also under article 30, paragraph 1, of the UNCAC). The authority to sue rests with the Attorney General. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract. 18 U.S.C. § 218 further permits the government to void contracts related to conviction under certain criminal conflicts of interest statutes set forth in Title 18 of the United States Code. Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations. Subpart 3.2 of those regulations specifically requires that government contracts permit termination in the event of a bribery or gratuities violation. Finally, the federal government is empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons, including the contractor's corrupt acts in the acquisition or performance of a government contract.

The following cases demonstrate various sanctions imposed for public corruption offenses:

- Former United States District Court Judge Samuel B. Kent was sentenced to 33 months' imprisonment followed by three years of supervised release, a \$1,000 fine, and restitution of \$6,550 after pleading guilty to obstructing an investigation of a judicial misconduct complaint by a special investigative committee of the United States Court of Appeals for the Fifth Circuit.
- John Cockerham, a former major in the United States Army, was sentenced to 210 months of imprisonment, 3 years of supervised release, and \$9.6 million in restitution for his role, along with his wife, sister, and niece, in a bribery and money laundering scheme related to bribes paid for contracts awarded in support of the Iraq war. Melissa Cockerham, his wife, was sentenced to 41 months of imprisonment, 3 years of supervised release, and ordered to pay \$1.4 million in restitution. Carolyn Blake, his sister, was sentenced to 70 months of imprisonment, 3 years of supervised release, and ordered to pay \$3.1 million in restitution. Nyree Pettaway, his niece, was sentenced to 12 months and one day of imprisonment, 2 years of supervised release, and ordered to pay \$5 million in restitution.
- Cecilia Grimes, a partner in a Pennsylvania-based lobbying firm, was sentenced to 5 months of home detention for destroying evidence in connection with a public-corruption investigation. She was also sentenced to 3 years of probation and ordered to pay a \$3,000 fine.
- Former New York Supreme Court Justice Thomas J. Spargo was convicted of attempted extortion and soliciting a bribe from an attorney with cases pending before him. Former Justice Spargo was sentenced to 27 months of imprisonment followed by 2 years of supervised release.

- Former United States Embassy employee Jean G. Saint-Joy was sentenced to 18 months of imprisonment after pleading guilty to stealing approximately \$850,266 in government funds from the Department of State. Saint-Joy was also ordered to pay restitution in the amount of the theft, and the court entered an order of forfeiture.
- In April 2006, former Illinois Governor George Ryan was convicted of racketeering conspiracy, nine counts of mail fraud, three counts of making false statements, one count of income tax fraud, and four counts of filing false federal income tax returns. The thrust of the case was that during Ryan's terms as Illinois Secretary of State from 1991 to 1999 and as Governor from 1999 to 2003, Ryan and his associates engaged in a pattern of corruption that included performing official government acts, awarding lucrative government contracts and leases, and using the resources of the State of Illinois for the personal and financial benefit of Ryan, members of his family, his campaign organization, and certain associates. As a result of this corrupt scheme, Ryan received tens of thousands of dollars in benefits, including financial support for his successful 1998 campaign for Governor of Illinois. Following his conviction, Ryan was sentenced to 78 months' imprisonment and forfeited over \$3.1 million in proceeds derived from the racketeering activity.
- In November 2005, former Congressman Randall "Duke" Cunningham pleaded guilty to one count of conspiracy to commit bribery, honest services fraud, and tax evasion, and one count of tax evasion. Specifically, Cunningham admitted to receiving at least \$2.4 million in illicit payments and benefits from his co-conspirators, including cash, home payments, furnishings, cars, boats, and vacations, among other things. In exchange for this stream of benefits, Cunningham used his position to influence the United States Congress's appropriations of funds to benefit certain co-conspirators, and he used his office to pressure and influence the United States Department of Defense to award and execute government contracts to benefit certain co-conspirators. As part of his plea agreement, Cunningham agreed to forfeit his home, \$1,851,508 in cash, and several home furnishings. In March 2006, Cunningham was sentenced to 100 months' imprisonment.

**(b) Observations on the implementation of the article**

The United States has several remedies available to redress acts of corruption, which besides the criminal, include administrative and civil remedies. The U.S. authorities are empowered to annul or void fraudulently obtained contracts with the federal government and may sue for rescission in federal court to annul a fraudulently procured contract. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract. The federal government is also empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons, including the contractor's corrupt acts in the acquisition or performance of a government contract.

Furthermore, article 18 U.S.C. § 218 permits the government to void contracts related to conviction under certain criminal conflicts of interest statutes set forth in Title 18 of the United States Code. Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations. Subpart 3.2 of those regulations specifically requires that government contracts permit termination in the event of a bribery or gratuities violation. Finally, the federal government is empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons,



including the contractor's corrupt acts in the acquisition or performance of a government contract.

The review team noted that the United States applies, in accordance with the fundamental principles of its national law, a variety of measures for addressing the consequences of the acts of corruption (monetary penalties, restitution of property, rescission, annulling and voiding of the fraudulently obtained contracts, termination of the contract in the event of bribery, administrative bar to a private firm from receiving further government contracts), and thus fully complies with article 34 of the UNCAC. There are numerous practical examples indicating the successful implementation of this article by the United States.

### **Article 35 Compensation for damage**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Victims of corruption may obtain compensation for their losses by bringing private actions in state or federal court against the responsible persons or institutions, providing the victims can prove that they suffered damages as a result of the corruption. These lawsuits may be common-law actions or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories. In addition, common law permits rescission of fraudulently obtained contracts in certain instances. Such actions are governed by state law and are typically filed in state, not federal, court. In the context of government contracts, a disappointed bidder may protest the award of a contract on legal or equitable grounds, including corruption or other impropriety in the award of the contract under 48 C.F.R. § 33.1.

United States law also requires the sentencing judge to order restitution when there is an identifiable victim. See 18 U.S.C. § 3663 (contained in the annex to the present report); U.S.S.G. § 5E1.1. In corruption cases, the victim is often the United States, and there are many examples, cited below, of individuals convicted of corruption offenses paying restitution to the United States.

Furthermore, United States law provides numerous remedies when the federal government suffers losses as a result of fraud or corruption in the contracting context. Generally, persons (including individuals, corporations, and other entities) who engage in corruption to obtain public contracts are liable under the False Claims Act, 31 U.S.C. §§ 3729-3733, for three times the damages sustained by the United States due to the misrepresentation or fraud, plus a civil penalty of \$5,000 to \$10,000 for each false or fraudulent claim. Actions under the False Claims Act may be initiated by the United States (through the Attorney General and the Department of Justice) or by a private party (called a qui tam action). When the action is initiated by a private individual, the United States may pay that individual from 15 to 30 percent of the recovery as a reward for bringing the action.

The United States is also empowered to annul or void fraudulently obtained contracts with the federal government and may sue for rescission in federal court to annul a fraudulently procured contract (see also under articles 34 and 30, paragraph 1, of the UNCAC). The authority to sue rests with the Attorney General. In addition to rescission, relief may include damages and restitution of the amounts paid by the government under the contract. 18 U.S.C. § 218 further permits the government to void contracts related to conviction under certain criminal conflicts of interest statutes set forth in Title 18 of the United States Code. Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations. Subpart 3.2 of those regulations specifically requires that government contracts permit termination in the event of a bribery or gratuities violation. Finally, the federal government is empowered to administratively bar a private firm from receiving further government contracts based upon a number of reasons, including the contractor's corrupt acts in the acquisition or performance of a government contract.

The relevant regulatory framework is as follows:

- Federal Acquisition Regulation Subpart 3.204: "Treatment of violations. (a) Before taking any action against a contractor, the agency head or a designee shall determine, after notice and hearing under agency procedures, whether the contractor, its agent, or another representative, under a contract containing the Gratuities clause-(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and (2) Intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred). (b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness. (c) When the agency head or designee determines that a violation has occurred, the Government may-(1) Terminate the contractor's right to proceed; (2) Initiate debarment or suspension measures as set forth in Subpart 9.4; and (3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense."
- Federal Acquisition Regulation Subpart 3.07 sets forth the criteria for voiding and rescinding fraudulently procured contracts.

Some examples of the successful implementation of domestic measures adopted to comply with the provision under review and, if available, information on recent cases, including amount and type of compensation emanating from legal proceedings initiated by a victim against those responsible for a damage resulting from an act of corruption – the following cases are examples of situations where entities who suffered damage as a result of corruption instituted proceedings and obtained compensation:

- Hewlett-Packard Co. (HP) agreed to pay the United States \$55 million to settle claims that the company defrauded the General Services Administration and other federal agencies to resolve allegations under the False Claims Act that HP knowingly paid kickbacks to systems integrator companies in return for recommendations that federal agencies purchase HP's products. The settlement also resolved claims that HP 2002 contract with the General Services Administration was defectively priced because HP provided incomplete information to the government contracting officers during contract negotiations.

The allegations that HP paid kickbacks were first made in a lawsuit filed by whistleblowers in 2004.

- The Cockerham prosecution, discussed in detail in the answer to question 129, led to the conviction of four individuals for paying bribes to fraudulently obtain contracts awarded in support of the Iraq war. The case resulted in the defendants paying a total of \$19.1 million in restitution to the United States.
- Christopher Murray, a retired major in the United States Army, was sentenced to 57 months of imprisonment for a bribery scheme related to Department of Defense contracts awarded in Kuwait. As part of the scheme Murray solicited and received a total of \$245,000 in bribes and was ordered to pay \$245,000 in restitution.
- Jeffrey Davis, a former archives technician with the United States National Archives and Records Administration, was sentenced on September 10, 2009, for receiving supplementation of his salary from a source other than the government. He was sentenced to three years of probation, a \$1,500 fine, and \$3,998 of restitution.
- Four student aid lenders paid \$57 million to settle a qui tam action under the False Claims Act that they bilked the Department of Education out of millions of dollars by improperly using a loan subsidy. The action was filed by a former Department of Education official who reviewed the fraudulent filings. The Justice Department did not intervene in the case but did provide assistance to the official, who will take home \$16.65 million from the settlement.
- Fen-Phen Settlement Fund Fraud: In 2005, several individuals were sentenced based on their involvement in a scheme to defraud, through corruption of the state of Mississippi judicial process, a \$400 billion settlement fund that was established following a lawsuit for damages based on injuries caused by the “Fen-Phen” drugs. The defrauded corporation was the pharmaceutical company Wyeth.

The following individuals were convicted and sentenced:

- Samuel Johnson and Cora Durrell pleaded guilty after submitting false prescription documents to the settlement fund, leading to a \$250,000 award each. Johnson was sentenced to 21 months of imprisonment and was ordered to pay \$250,000 in restitution to Wyeth, the defrauded party. Durrell was sentenced to 18 months of imprisonment and ordered to pay \$250,000 in restitution to Wyeth.
- Ethel Fountain pleaded guilty to falsifying prescription documents and submitting those documents to the Fen-Phen settlement fund, for a \$250,000 award. She was sentenced to 18 months of imprisonment followed by 3 years of supervised release and was ordered to pay \$250,000 in restitution to Wyeth.
- Robert Buie pleaded guilty to falsifying prescription documents and submitting those documents to the Fen-Phen settlement fund, for a \$250,000 award. He was sentenced to 18 months of imprisonment followed by 3 years of supervised release

and ordered to pay \$250,000 in restitution to Wyeth. He also agreed to forfeit property purchased with the settlement money.

- Regina Reed Green pleaded guilty to falsifying prescription documents and submitting those documents to the Fen-Phen settlement fund, for a \$250,000 award. She was sentenced to six months of home confinement followed by 3 years of probation conditioned on her paying a tax debt, and she agreed to forfeit the \$250,000 award.
- Eva Johnson pleaded guilty to falsifying prescription documents and submitting those documents to the Fen-Phen settlement fund, for a \$750,000 award. She was sentenced to 31 months followed by 3 years of supervised release and was ordered to pay \$750,000 in restitution to Wyeth.
- Sabrena Johnson pleaded guilty to falsifying prescription documents and submitting those documents to the Fen-Phen settlement fund, for a \$250,000 award. She was sentenced to 18 months of imprisonment followed by 3 years of supervised release and was ordered to pay \$250,000 in restitution to Wyeth.

**(b) Observations on the implementation of the article**

The reviewing experts were informed that private individuals who are victims of corruption may bring private actions for monetary damages against the violator before a state or federal court. These lawsuits may be common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories. The U.S. legislation also requires the sentencing judge to order restitution when there is an identifiable victim. In corruption cases, the victim is often the U.S. Government and there are many examples of individuals convicted of corruption-related offenses paying restitution to it.

The review team concluded that the U.S. legislation is in full compliance with article 35 of the UNCAC and that it is implemented effectively in the U.S. court and administrative practice.

**Article 36 Specialized authorities**

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. Constitution places responsibility for the investigation and prosecution of federal crimes in the executive branch. The U.S. Department of Justice (DOJ), a component of the executive branch, is the authority responsible for the prosecution of federal laws in the United States. No express statutory mandate other than annual budgetary authorization and appropriation exists for the prosecutorial and investigative organizations found under the

umbrella of the DOJ. Their functions are assigned by the Attorney General in the case of the various specialized prosecutorial sections and by the Director of the FBI in the case of the Public Corruption Unit. Their powers derive from general statutory provisions giving the Attorney General and his legal subordinates authority to prosecute crimes, in the case of the Public Integrity Section, and providing the Director and Special Agents of the FBI authority to investigate and make arrests for crimes.

The DOJ has 94 United States Attorney's Offices located in different judicial districts across the country. Those offices handle the vast majority of federal criminal prosecutions and handle many corruption cases, particularly relating to corruption by local and state officials. Many U.S. Attorney's Offices, especially those in large cities, have a specialized public corruption unit.

In addition to U.S. Attorney's Offices, there are specialized units within the DOJ's Criminal Division in Washington, DC that investigate and prosecute complex corruption offenses. The Public Integrity Section is responsible for overseeing federal prosecutions of criminal abuse of the public trust and investigates and prosecutes cases involving corruption offenses by public officials at all levels of government. The Public Integrity Section has primary jurisdiction over allegations of criminal misconduct involving federal judges and oversees the investigation and prosecution of election and conflict-of-interest crimes. The Fraud Section has exclusively authority to investigate and prosecute criminal cases brought under the Foreign Corrupt Practices Act, the United States' main statute criminalizing foreign bribery. The Asset Forfeiture and Money Laundering and Organized Crime and Racketeering Sections, also part of the Criminal Division, provide assistance in public corruption prosecutions when warranted. Outside of the Justice Department, the Internal Revenue Service, the Securities and Exchange Commission, and agency Inspectors General, assist in the investigation and prosecution of corruption cases. The Securities and Exchange Commission also has a dedicated foreign bribery unit.

The Federal Bureau of Investigation (FBI), a division of the U.S. Department of Justice, is the primary investigative agency for public corruption offenses. The FBI has Public Corruption, International Corruption, Governmental Fraud, and Color of Law Units within the Integrity in Government/Civil Rights Section of its Criminal Investigative Division.

These units, which have been in existence for many years, address corruption both within the federal government and in state and local governments, with a particular emphasis on police and other official corruption related to drug trafficking, and the malicious denial of civil liberties by police or other public officials. The Special Agents assigned to these units serve as program managers and coordinators of the FBI's investigative program in these areas, with the actual investigations being conducted by Special Agents assigned to one of the FBI's 56 field offices, many of which have specialized corruption squads.

The Public Integrity Section and U.S. Attorney's Offices also work with other law enforcement agencies where appropriate to investigate and prosecute public corruption offenses. When the case involves misconduct by an employee of a federal agency, the investigation may be handled by that agency's Inspector General. The authority and role of federal inspectors general is described in more detail below. In cases involving contracting fraud in Iraq or Afghanistan -a current priority of the Public Integrity Section- the investigation is often handled by the Defense Criminal Investigative Service (part of the Department of Defense), the Army Criminal Investigative Command, the Navy Criminal

Investigative Service, or the Air Force Office of Special Investigations. Other law enforcement agencies with which public corruption prosecutors may work include the Postal Inspection Service, which investigates mail fraud crimes, and the Internal Revenue Service Criminal Investigation Division, which investigates tax fraud.

In addition to the specialized prosecutorial and investigative bodies described above, each agency of the federal executive branch also has a statutory Inspector General (IG). This concept was adopted by Congress in 1978 to improve legislative oversight of executive agencies, and progressively expanded with respect to number of agencies covered and to powers. The IG of a Department or agency will typically have a quasi-independent status within the organization, be subject to Senate confirmation, be removable only by the President, and have specific reporting responsibilities to Congress. The IGs are charged with combating fraud, waste, and abuse, including corruption. Their responsibilities also include program and financial auditing, management studies, and responding to complaints of retaliation against whistleblowers -- that is, persons who claim they have suffered unfavorable personnel actions as a consequence of reporting fraud, waste, or abuse. Many Department IGs work in partnership with the FBI in long-term, covert, and complex investigations requiring the application of special investigative techniques. Moreover, many of the larger federal investigative agencies, such as the FBI and the Drug Enforcement Administration, maintain their own internal integrity components.

Two other agencies play an important role in policing corruption within the Executive Branch of the United States government. First, the Office of Government Ethics (OGE) provides extensive training, education, and advice to the federal workforce on how to avoid conflict of interest and other potential corrupt activities. OGE, created in 1978, is separate from and independent of any other executive branch agency and monitors the efficacy of ethics training, advisory, and employee financial reporting programs at all executive branch agencies.

Second, the Office of Special Counsel (OSC) protects employees, former employees, and applicants for employment from prohibited personnel practices and receives and investigates allegations of such practices. OSC is empowered to refer a matter to the appropriate agency for internal disciplinary proceedings, and where OSC believes a criminal offense has occurred, it is required to report the matter to the Attorney General and the head of the agency involved.

Within the federal legislative branch, committees of the House and Senate have investigative jurisdiction to explore conditions that may need to be addressed by legislation, and oversight jurisdiction to address possible corruption within executive agencies. The Permanent Subcommittee on Investigations of the Governmental Affairs Committee has for decades been active in conducting investigative hearings on organized criminality, which often have involved aspects of corruption. In 2008, Congress created the Office of Congressional Ethics (OCE), which performs preliminary investigations of alleged ethical violations and serves as a sort of grand jury with the power to refer matters to separate ethics committees. Those committees -the Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives- judge allegations of ethical and criminal misconduct by members of their respective chambers and have the power to impose sanctions. The most severe sanction is expulsion. These sanctions are distinct from possible criminal prosecution.

Within the federal judicial branch, a statutory mechanism exists by which each federal judicial circuit, or regional grouping, may designate a committee to consider allegations that a trial or appellate judge of that circuit is disabled or has engaged in conduct prejudicial to the effective and expeditious administration of the courts, which would include corrupt behavior. Such committees may temporarily prevent new cases from being assigned to a judge under inquiry and may issue a public censure, but cannot remove a judge from office or initiate a prosecution. This mechanism came into existence in 1980. The Constitution provides for appointment of federal judges during good behavior and removal only by impeachment and conviction by the Congress. The FBI and prosecutors from the Public Integrity Section and other elements of the Criminal Division of the DOJ have conducted investigations and prosecutions of members of the federal judiciary and legislature. Federal judges have been impeached and removed from office by Congress after criminal prosecution for corruption offenses by the DOJ.

#### Staff Selection:

Officials throughout the United States federal government require a high degree of specialized skills to accomplish their duties. Specifically, extremely wide-ranging sets of skills are necessary for institutions fighting corruption to function effectively. Civil servants are generally hired through a competitive process that actively recruits qualified individuals and focuses on experience, education, and skills required to successfully fulfill requirements of particular positions. Routine specialized training and performance reviews - conducted at least annually- are designed to ensure that multidisciplinary expertise within institutions is retained and enhanced.

The United States has, at the federal level, a set of provisions related to the hiring of public servants.

Title 5 of the United States Code, titled Government Organization and Employees, provides for the following principal types of service in the Executive Branch:

- The Competitive Service, which, pursuant to 5 U.S.C. § 2101, applies to all civil service positions in the executive branch except: (1) positions specifically exempted from the competitive service by statute; (2) positions which require Senate confirmation; and (3) positions in the Senior Executive Service.
- The Excepted Service, which, pursuant to 5 U.S.C. § 2103, includes those positions in the civil service that are neither part of the competitive service nor the Senior Executive Service.
- The positions that require Senate confirmation, which comprise a small number of non-career officials who serve primarily in high-level positions of confidence. Although these appointments are not selected on a competitive basis, they are still subject to a vetting process. For example, an individual who the President wishes to appoint as a member of the Cabinet must go through a rigorous background check, a financial conflict of interest review, and Senate confirmation.
- The Senior Executive Service (SES), which is established by 5 U.S.C. § 3131. SES positions are those classified above a certain level and which are not required to be filled by presidential appointment and Senate confirmation.

The Office of Personnel Management is an independent body within the Executive Branch that is charged with the execution and administration of civil service rules and regulations. OPM is responsible for open competitive examinations for admission to the competitive

service and may require agencies to establish and maintain a system of accountability that sets standards for applying merit system principles. The job information system for the Federal Government, known as “USAJOBS,” provides online worldwide job vacancy information, employment information fact sheets, job applications, and forms. The site permits applicants to apply for vacant positions online and is update every business day. Vacancies within the Department of Justice and related agencies, such as the FBI, are posted on the website.

5 U.S.C. § 2301 establishes the merit system principles on which federal personnel management should be based. This provision requires, inter alia, that recruitment should be from qualified individuals, and that selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. Other portions of federal law provide further protections. The Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., prohibit various forms of discrimination in the hiring process. The Office of the Special Counsel (OSC), discussed in more detail earlier in this answer, enforces personnel provisions.

Federal prosecutors and law enforcement agents are hired through a competitive merit-based process.

Law enforcement officers and federal prosecutors are non-political, career employees. Only certain senior officials -the Attorney General, Deputy Attorney General, Assistant Attorneys General, and the 93 United States Attorneys- are nominated by the President and confirmed by the Senate. The FBI director is nominated by the President and confirmed by the Senate to a ten-year term.

#### Staff Training:

Prosecutors and law enforcement agents are required to undergo specialized training. The Department of Justice’s National Advocacy Center provides prosecutors with specialized training in several areas, including trial advocacy, grand jury practice, and investigative techniques. Furthermore, the U.S. Department of Justice provides training to federal prosecutors through the Executive Office for United States Attorneys Office of Legal Education (OLE). Each year, OLE offers a training seminar on public corruption that is open to federal prosecutors, and sometimes to investigative agents responsible for public corruption investigations. The seminar accommodates approximately 100 attendees and provides an overview of public corruption statutes, sessions on initiating investigations, charging decisions, the team approach to public corruption, undercover operations, planning arrests, handling confidential witnesses and confidential informants, financial investigations, election crimes including voter fraud and campaign finance fraud, administrative rules, and trial issues. A working group that includes senior prosecutors and investigators designs the course each year. At the end of each course, each student is asked to prepare an evaluation of the course. The working group that designs the course considers the evaluations from the last course in redesigning and/or revising the course.

All Federal Bureau of Investigation (FBI) special agents begin their careers at the FBI Academy in Quantico, Virginia, for 20 weeks of intensive training at one of the world’s finest law enforcement training facilities. During their time there, trainees live on campus and participate in a variety of training activities.



Classroom hours are spent studying a wide variety of academic and investigative subjects, including the fundamentals of law, behavioral science, report writing, forensic science, and basic and advanced investigative, interviewing, and intelligence techniques. Students also learn the intricacies of counterterrorism, counterintelligence, weapons of mass destruction, cyber, and criminal investigations to prepare them for their chosen career paths. The curriculum also includes intensive training in physical fitness, defensive tactics, practical application exercises, and the use of firearms. Over the course of their careers, agents are also updated on the latest developments in the intelligence and law enforcement communities through additional training opportunities.

An essential responsibility of the FBI Public Corruption Unit is the organization of in-service training courses for the investigation of corruption and other types of white-collar crime. At the conclusion of those courses a student evaluation form is used to gauge the effectiveness of the instructors and the utility of the content. Occasional follow-up is done for such in-service training to determine if after a certain period the participants are still working in the field, but no specific study is available for public corruption in-service training. The effectiveness of such training has not been measured by correlation to numbers of cases initiated or prosecuted, as it would be difficult if not impossible to isolate the influence of the training from the influence of other variables.

In addition to those outlined above, the following measures ensure independence:

- Offices of the Inspectors General within agencies of the federal government (with anonymous tip hotlines) and a requirement to report fraud, waste and abuse;
- Congressional committee oversight of the executive;
- The General Accountability Office as an arm of the legislative oversight of the executive;
- Congressional authority to impeach and remove the President, Vice President and federal judges and Justices for high crimes and misdemeanors;
- Executive branch authority to prosecute officers and employees of all branches;
- Requirement for government agencies to report criminal activity to the attorney general (28 U.S.C. § 535).

These listed standardized practices also help to ensure independence and combat corruption:

- Merit civil service system with standardized pay (which can be publicly known for any employee) at living wage levels;
- Prohibitions against nepotism;
- Pre-nomination clearance process followed by public Senate confirmation for political appointees;
- Whistleblower protections;
- Public and confidential financial disclosure filers who also receive annual ethics training;
- Professional training opportunities/requirements for employees throughout their careers;
- Retirement system for federal officers and employees that is standardized and paid at adequate living levels.

## **(b) Observations on the implementation of the article**

Primary responsibility for the criminalization and enforcement aspects of the UNCAC at the federal level lies with the DOJ. Regarding corruption of domestic officials, the Public Integrity Section within the DOJ specializes in enforcing domestic U.S. anti-corruption laws. Under the umbrella of the DOJ, the Federal Bureau of Investigation (FBI) has, inter alia, the authority to investigate corruption matters throughout the federal Government and also at the state and municipal levels. The DOJ has 93 Attorney's Offices that also prosecute domestic corruption offences and, especially in large cities, have specialized public corruption units.

Three governmental agencies are primarily responsible for the prosecution or other enforcement action relating to bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anticorruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit.

Within the federal legislative branch, committees of the House of Representatives and Senate have investigative jurisdiction to explore conditions that may need to be addressed by legislation, and oversight jurisdiction to address possible corruption within executive agencies.

Within the federal judicial branch, a statutory mechanism enables the designation by each federal judicial circuit of a committee to consider allegations of corrupt behaviour of a judge.

Every large agency of the federal executive branch has a statutory Inspector General (IG) to improve legislative oversight. The IG of these agencies typically has a quasi-independent status within the organization, is removable only by the President and has specific reporting responsibilities outside its agency and directly to Congress.

The reviewing experts noted that, in general, the United States had put in place an impressive array of institutions, bodies and agencies to detect, investigate, and prosecute. They were of the view that the large number of institutions involved in the fight against corruption demonstrated the awareness of the danger that corruption represents at all levels of the Government and the public, as well as the high level of resources available to address this danger. However, they stressed that this "plethora" of institutional mechanisms entailed a potential overlap of their competencies, thus creating the need for better inter-agency coordination to prevent fragmentation of efforts.

Moreover, the reviewing experts stressed the importance of the independent status of the authorities specialized in combating corruption through law enforcement.

## **Article 37 Cooperation with law enforcement authorities**

### **Paragraph 1**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Obtaining evidence necessary to convict persons involved in public corruption is particularly difficult. The secretive nature of the underlying activity as well as the real and perceived power of the participants make it very difficult for the prosecutor to obtain necessary testimony and other evidence. Participants often assert their privilege against self-incrimination-granted by the Fifth Amendment to the United States Constitution-and refuse to testify about any crimes in which they were involved. There are, however, several mechanisms through which prosecutors can encourage cooperation and possibly compel testimony.

First, the special power of U.S. prosecutors to “immunize” witnesses often allows the prosecutors to obtain important testimony. The prosecutor may determine that the cooperation or expected testimony of a minor criminal will be especially significant, and that the importance of the testimony or cooperation outweighs the need to prosecute a less culpable criminal. In these cases, the prosecutor may agree not to prosecute the person at all for the crimes about which he is to testify or cooperate. In this situation, which is rarely used, the prosecutor grants what is called “transactional immunity” from prosecution for particular crimes about which the witness provides information. The scope of transactional immunity is broad and reflects the reality that in some circumstances a witness may be more willing to suffer the consequences of refusal to testify (prosecution for contempt of court under 18 U.S.C. § 401) than to disclose information.

Second and more commonly, the prosecutor may determine that a narrower grant of immunity is appropriate. This narrower immunity, called “use” immunity, is designed to overcome a witness’s assertion of the privilege against self-incrimination, which is raised in response to a particular question. In these cases, the prosecutor asks the court to compel the witness to testify, and the witness is assured that the testimony he gives (and any information derived from that particular testimony) may not be used in a prosecution against him. This type of immunity is controlled by statute. A prosecutor may still prosecute a person who has been granted use immunity, as long as the evidence derived by reason of the immunized testimony, including leads (commonly called “fruits” of the testimony), are not used to develop a criminal case against the person who has testified under immunity. When a prosecutor brings charges in this type of case, the prosecutor must demonstrate this evidence derives from an independent source untainted by the defendant's own immunized testimony.

The federal immunity statute (18 U.S.C. §§ 6001-6005) (see annex) centralizes the decision to grant transactional or use immunity in the Attorney General and his or her designees down to the level of Assistant Attorneys General. The Attorney General has the power to veto requests for immunity from federal administrative agencies. Congress may also grant such immunity under certain procedures but must provide the Attorney General ten days notice. The Attorney General may defer the immunity for twenty days more by applying to the court. After the thirty-day period, however, Congress is free to obtain a court order to compel the witness to testify. The notice requirement and its extension gives the government time to make a record of its evidence against the witness and to prove, if necessary, that its evidence is independent of the witness’s testimony before Congress.

In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by agreeing to recommend that the defendant receive a lower sentence, in exchange for the defendant's cooperation. In a plea agreement, the defendant, generally through his attorney, agrees to plead guilty to some or all of the charges against him in return for certain actions by the prosecutor. A guilty plea must be made before a judge. Before the judge will accept the guilty plea, he will question the defendant to make sure that he understands his right to assert his innocence and demand a trial, that he makes his plea voluntarily, that he understands the terms of any plea agreement and the consequences of his guilty plea, and that he has not been subject to coercion or improper promises on the part of the prosecutor. If the judge is not satisfied by the defendant's responses to these questions or by the candor of the defendant's factual admission of his or her wrongdoing as a basis for his or her plea, the court can reject the defendant's plea and set the case for trial. The procedural requirements are set forth in Rule 11 of the Federal Rules of Criminal Procedure. Most plea agreements, though lengthy, are reduced to writing, signed by the defendant and the defense attorney, and filed with the court ahead of the appearance before the sentencing judge.

A defendant's cooperation may include everything, from a cooperator wearing a wire and taping conversations with co-conspirators, to testifying at trial. Section 5K1.1 of the United States Sentencing Guidelines permits a sentencing judge to reduce a defendant's sentence as a result of a motion, filed by the government, that the defendant has provided substantial assistance in an investigation and/or prosecution. Furthermore, 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) provide that the court may impose a sentence below the statutory minimum in cases of substantial assistance. Therefore, a prosecutor may use the plea agreement to obtain testimony of or other cooperation from a particular criminal when necessary in order to convict a more significant criminal.

Section 8C2.5 of the United States Sentencing Guidelines applies to organizational defendants and provides that a corporate defendant may receive a lower sentence if it self-reports wrongdoing or cooperates with the government. In the corruption context, this provision is most applicable in foreign bribery cases brought under the Foreign Corrupt Practices Act.

There are no specific mechanisms to induce cooperation solely for the purpose of depriving offenders of the proceeds of a crime and recovering such proceeds. As noted, however, United States laws regarding forfeiture and restitution apply in corruption cases.

Some examples of the successful implementation of domestic measures adopted to comply with the provision under review are the following:

The United States does not have figures on the number and nature of cases that have contributed to depriving offenders of the proceeds of crimes. However, the following cases provide examples of corruption cases since 2003 where the offender was ordered to pay restitution and forfeit illegally acquired assets.

- United States v. Abramoff: On September 4, 2008, former lobbyist Jack Abramoff was sentenced after pleading guilty to conspiracy, honest services fraud, and tax evasion. From 1994 through early 2004, Abramoff lobbied public officials and conspired with a business partner to defraud four Native American Indian tribes by charging fees that incorporated huge

profit margins and then splitting the net profits in a secret kickback arrangement. Abramoff received more than \$23 million in undisclosed kickbacks and other fraudulently obtained funds. As part of this conspiracy, Abramoff and others corruptly provided things of value to public officials-primarily Members of Congress and congressional staff members-with the intent to influence official acts that would benefit Abramoff and his clients. Abramoff was sentenced to 48 months of imprisonment, three years of supervised release, and was ordered to pay \$23,134,695 in restitution to victims.

- United States v. Harrison and related cases: Debra Harrison, a lieutenant colonel in the United States Army Reserves, Philip Bloom, a contractor, Lieutenant Colonel Bruce Hopfengardner, and Robert Stein, a contractor, were involved in a scheme to defraud the Coalition Provisional Authority -South Central Region in Al Hillah, Iraq. Specifically, the defendants engaged in a bid rigging and money laundering scheme related to contracts being awarded, and Bloom received more than \$8.6 million in rigged contracts. In return, Bloom provided his co-schemers with more than \$1 million in cash, SUVs, sports cars, a motorcycle, jewelry, computers, business class airline tickets, liquor, promises of future employment, and other things of value. As part of the scheme, Bloom laundered over \$2 million and used foreign bank accounts to send stolen money to his co-conspirators.

Relevant sentences include:

- ✓ Bloom: 46 months of imprisonment and an order to forfeit \$3.6 million for his role in the scheme.
- ✓ Hopfengardner: 21 months of imprisonment and an order to forfeit \$144,500 for his role in the scheme.
- ✓ Stein: 9 years of imprisonment and an order to forfeit \$3.6 million for his role in the scheme.

- United States v. Gompert: Scott Gompert, a former special agent with the United States Department of Health and Human Services, Office of the Inspector General, pleaded guilty to committing bank fraud by preparing fraudulent seizure warrants directing financial institutions holding fund derived from illegal activity to transfer those funds to an account Gompert established for his personal use. He amassed \$1,109,159 in criminal proceeds as a result of this scheme. On April 9, 2008, Gompert was sentenced to 26 months of imprisonment, three years of supervised release, and a \$5,000 fine. As part of his plea agreement, Gompert forfeited assets, including approximately \$550,000 in cash, a development property in Arizona, and a 2005 Toyota Avalon.

- United States v. Moolenaar: Lucien A. Moolenaar II, the former acting commissioner of the Virgin Islands Department of Health, was convicted of converting government funds, among other crimes, after engaging in deception to receive an additional \$102,497 in salary. On March 17, 2008, he was sentenced to 15 months imprisonment, two years of probation, three years of supervised release, and a \$30,883 fine. He had previously paid \$102,497 in restitution.

- United States v. Lane: Jesse D. Lane, a former civilian employee of the Department of Defense and member of the California Army National Guard, entered over \$340,000 in unauthorized pay entitlements for himself and co-conspirators. The co-conspirators then kicked back at least \$150,000 of the money received to Lane. Lane pleaded guilty to conspiracy and honest services wire fraud, and on October 15, 2007, he was sentenced to 30 months of imprisonment and ordered to pay \$323,228 in restitution.

• United States v. Harvey and Kronstein: From 1998 through May 18, 2001, Harvey was the Chief of the Acquisition Logistics and Field Support Branch within the U.S. Army Intelligence and Security Command at Fort Belvoir, Virginia, and was responsible for recommending the award, modification, and payment of maintenance and logistics contracts. Kronstein was the owner and CEO of a private contracting company. Kronstein caused payments of more than \$40,000 to be made to Harvey's spouse and third parties for Harvey's benefit in exchange for Harvey recommending that the agency award a sole-source, multi-million dollar maintenance and logistics contract to Kronstein's company and for Harvey recommending post-award contract modifications designed to increase the total payout to Kronstein's company. Harvey and Kronstein were convicted following a jury trial, and on March 6, 2007, Harvey was sentenced to 70 months of imprisonment and Kronstein was sentenced to 72 months of imprisonment. Both defendants were assigned joint liability for more than \$383,000 in restitution.

• United States v. Johnson: Robert E. Johnson, a former contracting officer with the United States Department of the Army, pleaded guilty to honest services wire fraud for using his position to illegally obtain more than \$150,000 from the Army by: (1) directing prime contracts to subcontract with two companies in which Johnson secretly held a financial interest; and (2) falsely certifying that the prime contractors and their subcontractors had provided services to the government when such services were not actually provided. On September 29, 2006, Harvey was sentenced to 24 months of imprisonment and ordered to pay \$150,049.42 in restitution.

• United States v. Thomas: Jack Thomas served as the manager of a congressional campaign in Georgia. Between September 2003 and February 2004, Thomas wrote unauthorized campaign checks to himself and others (including his wife and brother), and withdrew funds from the campaign committee's bank account for personal expenses through the use of a secret debit card. In total, he stole over \$40,000 from the campaign. After pleading guilty to mail fraud, Thomas was sentenced to six months of home confinement with electronic monitoring, four years of probation, and was ordered to pay \$42,000 in restitution.

• United States v. Diaz: Fidel Diaz, a former official with the Department of Defense, pleaded guilty to using his position to falsify numerous purchasing documents causing the purchase of non-existent electrical transformers from co-conspirators. He used official government credit cards to authorize the payment of \$308,978.58 to the companies owned by his co-conspirators as payment for the acquisition and delivery of 40 electrical transformers. In return, Diaz received over \$200,000 in kickbacks. On November 17, 2005, he was sentenced to 30 months of imprisonment, three years of supervised imprisonment, years supervised release, and was ordered to pay \$308,978.58 in restitution.

• United States v. Bhullar, D., Bhullar, N., Jaisingh, Johnson, Jam, Lee, Prasad, M., Prasad, V., Singh, Trinh, and Virk: This prosecution arose out of a visa fraud scheme in which two State Department employees were paid hundreds of thousands of dollars to issue visas to foreign nationals at various embassies around the world. Certain individuals acted as brokers for those nationals and collected substantial sums of money from the purchasing aliens/sponsors and forwarded substantial payments to the State Department employees. On February 11, 2005, Vinesh and Minesh Prasad and Kim Chi Lam, three visa brokers, were sentenced to 57, 41, and 30 months of imprisonment for their roles in the scheme. The Prasads agreed to forfeit \$75,000 and Lam agreed to forfeit approximately \$40,000 in illicit gains. In October 2004, the two State Department employees (who were married) were

sentenced to 60 and 63 months imprisonment, and they agreed to forfeit \$750,000 in illicit gains.

- The Gray Enterprise: In January 2005, six individuals were indicted in a wide-ranging public corruption and fraud scheme, with charges including conspiracy to commit racketeering (RICO), extortion, mail fraud, and wire fraud. Three defendants were ordered to pay restitution:

- ✓ Emmanuel Onunwor, the former mayor of East Cleveland was convicted of 22 counts, including RICO conspiracy, extortion, mail fraud, bankruptcy fraud, and filing false tax returns. In addition to a fine and supervised release, Onunwor was sentenced to 108 months of imprisonment and ordered to pay restitution of \$5,111,000 to the City of East Cleveland.
- ✓ Nathaniel Gray, a Cleveland businessman, was convicted of 35 counts, including RICO conspiracy and numerous extortion and honest services counts relating to a bribery scheme for government contracts in four cities. Gray also pleaded guilty to for failing to pay approximately \$1.5 million in federal income taxes. He was sentenced to 180 months of imprisonment and three years of supervised release and was ordered to pay \$1 million in restitution for his unpaid taxes.
- ✓ Gilbert Jackson was convicted of RICO conspiracy, Hobbs Act extortion, honest services mail and wire fraud, and tax evasion resulting from multi-district probe of public corruption by city officials relating to contracting services in Cleveland, East Cleveland, New Orleans, and Houston. In addition to 82 months of imprisonment, Jackson was ordered to pay \$179,380 in restitution to the IRS for the tax evasion and \$100,000 in restitution to the City of Cleveland based on the other conduct.

- The Fen-Phen settlement fund fraud, outlined in the answer to Question 389 in this document (Question 130 in the checklist of the U.S.), is another example.

**(b) Observations on the implementation of the article**

The review team took into account the information provided by the U.S. authorities on the implementation of this provision and noted the existence of measures in the United States to encourage informants and defendants who have participated in the commission of offences to supply useful information for investigative and evidentiary purposes (either through the provision of immunity or through plea agreements). Such measures lead to the conclusion that this provision of the UNCAC is complied with and effectively implemented.

**Article 37 Cooperation with law enforcement authorities**

**Paragraph 2**

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See the response under paragraph 1 of article 37 of the UNCAC.

Below are some examples of the successful implementation of domestic measures adopted to comply with the provision under review:

Nearly all major public corruption prosecutions involve the testimony of cooperating witnesses. For example, as part of his guilty plea to corruption crimes, former lobbyist Jack Abramoff cooperated with the government and gave assistance that led to the prosecution Robert Ney, a former Member of the United States House of Representatives, and Neil Volz, Ney's former chief of staff. Abramoff received a lower sentence as a result of this cooperation. Volz, in turn, cooperated with the government and testified in the trial of Kevin Ring, a former lobbyist and associate of Jack Abramoff. On November 15, 2010, a jury found Ring guilty of conspiracy to commit honest services fraud, providing illegal gratuities, and honest services fraud. Former lobbyist Todd Boulanger also testified in the Ring trial as part of his plea agreement with the government. Volz received a lower sentence as a result of his cooperation, and Boulanger has yet to be sentenced.

Another example involves a major investigation into and prosecution of a corrupt procurement practices at a federal agency. This investigation was based largely on the assistance of seven cooperating witnesses, all of whom received lower sentences as a result of their cooperation.

**(b) Observations on the implementation of the article**

See comments above under paragraph 1 of article 37 of the UNCAC.

Additionally, the review team noted that, generally, States parties to the UNCAC may implement the term “mitigating punishment” by providing for the possibility to impose a reduced sentence or execute a punishment in a more lenient way. According to that perspective, States Parties may regard that the mitigation of punishment includes two models:

- First, imposition by the court or judge of a sentence that is mitigated compared to a sentence that usually would have been imposed. For example, the court or judge could consider the possibility to substitute imprisonment with a monetary sanction.
- Second, the factual mitigation of punishment subsequent to the judgment and during its enforcement. This model could comprise benefits such as early release or parole.

It was noted that the United States use the second model for implementing this non – mandatory article. Thus, it is common for defendants in the U.S. to enter into plea agreements with the government. Many such agreements provide that the defendant will cooperate with the government's ongoing investigation and that the government may ask the court to exercise leniency in sentencing based on the defendant's assistance.

The examples provided by the U.S. authorities clearly demonstrate that the possibility of mitigating a sentence may not be only related to the cooperation, but also to the seriousness of the crime and the guilt of the accused persons. As a result, mitigation may not be available in the case of a major corruption offence and substantial wrongful behaviour on the part of the cooperating person.

**Article 37 Cooperation with law enforcement authorities**

**Paragraph 3**



*3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See the response under paragraph 1 of article 37 of the UNCAC, as well as the relevant provisions of the federal immunity statute (18 U.S.C. §§ 6001-6005 – see annex).

The U.S. law creates two types of immunity-transactional immunity and use immunity. “Transactional immunity” immunizes a defendant from prosecution for all crimes about which he testifies or cooperates. Although rarely granted, transactional immunity is typically used only with a minor criminal who can provide significant testimony against a more culpable individual. The second type of immunity - “use immunity” - is designed to overcome a witness’ assertion of the privilege against self-incrimination, which is raised in response to a particular question. In these cases, the immunity applies only to the response to a specific question, and the individual granted immunity may still be prosecuted so long as evidence derived by reason of the immunized testimony are not used in that prosecution.

**(b) Observations on the implementation of the article**

See comments above under paragraph 1 of article 37 of the UNCAC.

Additionally, the review team noted that immunity can be a powerful inducement to a principal witness to cooperate if the case cannot be brought to court without his/her help. On the other hand, the complete exception from punishment may undermine the validity of anticorruption norms when it is applied too often or – even worse – when the public gets the impression that immunity is granted to persons with political or financial influence. Thus, the United States laws clearly show that it is necessary to strike a balance between the advantages of granting immunity to deal with specific cases and the necessity to enhance the public’s confidence in the administration of justice.

While granting immunity is a powerful tool, the U. S. has taken into consideration the possibility of its abuse. Therefore, law enforcement agencies will try to verify the information provided before granting immunity. This would require law enforcement agencies to make every possible effort to corroborate the information submitted by the person with additional information. Moreover, United States laws provide for the possibility of withdrawing immunity in case the person has tried to mislead the law enforcement bodies.

**Article 37 Cooperation with law enforcement authorities**

**Paragraph 4**

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Several mechanisms for the protection of cooperating informants and defendants who agree to become government trial witnesses exist in the United States. See the response given under article 32 of the UNCAC (protection of witnesses, experts and victims).

**(b) Observations on the implementation of the article**

See the comments under paragraph 1 of article 32 of the UNCAC.

**Article 37 Cooperation with law enforcement authorities**

**Paragraph 5**

*5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented and referred to agreements or arrangements concluded by the U.S authorities in the field of international cooperation in criminal matters. In addition, in settlements with corporate defendants in FCPA matters, the United States generally requires that the corporate defendant cooperate with foreign authorities.

**(b) Observations on the implementation of the article**

The U.S. policy focusing on the conclusion of agreements or arrangements in the field of international cooperation which also regulate aspects of protection of witnesses and persons referred to in article 37 of the UNCAC was found by the review team to be in conformity with the provision under review.

**Article 38 Cooperation between national authorities**

**Subparagraph (a)**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

United States law provides several measures to facilitate cooperation between investigating authorities and other public authorities. All federal executive branch employees are required to comply with the Standards of Ethical Conduct for Employees (Standards) of the executive branch. 5 C.F.R. § 2635.101 et seq. The Standards include 14 principles that describe the basic obligations of public service. The preeminent principle in these Standards is that public service is a public trust and that each employee has a responsibility to the United States government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.

In addition to these general principles, more specific mechanisms are in place to guarantee cooperation. First, executive branch public officials are required to report instances of corruption directly to appropriate authorities, such as the agency's Inspector General. This obligation is codified in the Standards, which provide in relevant part that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2365.101(b)(11). An employee could thus inform a superior of corruption with the understanding that the superior would turn the information over to a proper investigatory authority. Failure to report corruption could have administrative consequences ranging from reprimand of the employee to dismissal of the employee from a government job.

Furthermore, all executive agency heads are required, pursuant to the Standards, "to report to the Attorney General or other authorized investigative authorities any information, allegation or complaint received regarding a violation of the U.S. criminal code." This obligation is also found in a U.S. law that requires all federal departments and agencies to report to the Attorney General all information indicating possible violation of federal criminal law, including public corruption. 28 U.S.C. § 535(b). Similarly, Offices of Inspectors General are required by statute to report possible violations of federal criminal law to the Department of Justice.

In addition to this general provision, numerous protections are in place to protect employees who act as whistleblowers by reporting internal misconduct. 5 U.S.C. § 1212 makes the U.S. Office of the Special Counsel (OSC) responsible for, inter alia, (1) protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices, and (2) receiving, investigating, and litigating allegations of prohibited personnel practices. Specifically, the Disclosure Unit within the Office of the Special Counsel "serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former employees, and applicants for federal employment." As a further layer of protection, 5 U.S.C. § 1213(h) provides that the identity of any individual who makes a disclosure may not be disclosed by the Special Counsel without that individual's consent, unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

Another mechanism to encourage cooperation is the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8) & (b)(9). The WPA prohibits taking (or not taking) personnel actions with respect to an employee or applicant for employment as a result of any disclosure of information by such an individual which the individual reasonably believes evidences: violation of law, rule, or regulation or gross management; gross waste of funds; abuse of

authority; or a specific danger to public health or safety. Section 2302(b)(9) prohibits taking or not taking personnel actions with respect to an employee or applicant for employment, who files a complaint or grievance; assists another employee in filing a complaint or grievance or testifies on behalf of another employee; or provides information to the OSC and/or the relevant Inspector General. The OSC investigates and prosecutes violations of the WPA.

The only penal obligation to report corruption is found in 18 U.S.C. § 4. This section is entitled Misprision of a Felony, and states that whoever, having actual knowledge of a felony, conceals and does not as soon as possible report that knowledge to a proper authority, shall be fined and/or imprisoned for not more than three years. The statute is little used because its penalty applies only if there is an affirmative act of concealment, not just non-disclosure. Moreover, the statute cannot be constitutionally applied to persons who are themselves criminally involved, as otherwise it would impermissibly conflict with the privilege against self-incrimination.

**(b) Observations on the implementation of the article**

The reviewing experts noted that, in general, the collaboration of officials and agencies with authorities in charge of enforcing the relevant laws is essential to the overall anti-corruption efforts. Article 38(a) of the UNCAC refers to the provisions of the Convention criminalizing bribery of national public officials, bribery in the private sector and money-laundering. The early notification of such offences to those agencies with the powers and expertise to investigate and prosecute them is of significant importance to ensure that perpetrators do not flee the jurisdiction or tamper with evidence and the movement of assets can be prevented or monitored. Many corruption cases are complex and covert; early notification by relevant public bodies or early cooperation at the request of investigative agencies is a standard good practice.

Bearing this in mind and based on the information provided, the review team welcomed the adoption and implementation in practice of measures to facilitate inter-agency cooperation in the United States. In this regard, the reviewing experts reiterated their comment made with regard to the implementation of article 36 of the UNCAC, namely that improved and enhanced inter-agency coordination could prevent fragmentation of efforts.

**Article 38 Cooperation between national authorities**

**Subparagraph (b)**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(b) Providing, upon request, to the latter authorities all necessary information.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Many of these measures are discussed under subparagraph (a) of article 38 of the UNCAC, but additional mechanisms are important as well. The U.S. is empowered to compel the disclosure of information from public officials and authorities in criminal investigations through grand juries. Grand juries are empanelled by federal district courts and report to a supervising federal judge. The federal prosecutor serves as counsel to the grand jury. Grand juries can take testimonial evidence as well as subpoena documentary evidence, including financial records. Disclosure of ongoing grand jury proceedings is prohibited, except as permitted by law. Federal Rule of Criminal Procedure 6 imposes sanctions for violating grand jury secrecy provision, including contempt proceedings. Unless they assert Fifth Amendment rights against self-incrimination, witnesses who are subpoenaed before the grand jury must testify. In those cases, federal law allows judges to grant immunity to the witness, who then must testify. In public corruption cases involving Members of Congress or congressional staff members, those individuals may refuse to testify under the Speech or Debate Privilege, codified in Article I, section 6, clause 1 of the United States Constitution. As explained by the United States Supreme Court, the privilege protects officials “from inquiry into legislative acts or the motivation for actual performance of legislative acts.” *United States v. Brewster*, 408 U.S. 501, 509 (1972). Witness testimony may also be obtained outside of the grand jury process on a voluntary basis.

Mechanisms are also in place to encourage individuals to cooperate with government investigations. The government may enter into a plea agreement with a defendant and promise to recommend a lower sentence if the defendant provides substantial assistance with relevant investigations or prosecutions. And as outlined in the answer to Question 134 (in accordance with the Checklist of the USA), the United States government is empowered to enter into immunity agreements with defendants.

Furthermore, the government may enter into a non-prosecution agreement with a defendant, which most often occurs in foreign bribery prosecutions when the defendant is a corporation.

**(b) Observations on the implementation of the article**

See comments under subparagraph (a) of article 38 of the UNCAC.

**Article 39 Cooperation between national authorities and the private sector**

**Paragraph 1**

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

No further information was provided in the U.S. response to the self-assessment checklist, but substantive clarifications and explanations were provided to the review team during the country visit.

The Code of Federal Regulations (CFR) includes a definition of the financial institution (31 C.F.R. § 103.11(n)), which is described as “each agent, agency, branch or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities below:

- A bank (except bank credit card systems);
- A broker or dealer in securities;
- A money services business (MSB) as defined in 31 C.F.R. § 103.11(uu);
- A telegraph company;
- A casino;
- A card club;
- A person subject to supervision by any state or federal bank supervisory authority;
- A futures commission merchant; or
- An introducing broker in commodities.

Title 31 U.S.C. § 5318(g) requires a financial institution to report any transaction that it suspects:

- Involves funds derived from illegal activity or is intended or conducted to hidden or disguise funds or assets derived from illegal activity;
- Is designed, whether through structuring or other means, to evade the requirements of the Bank Secrecy Act;
- Has no business or other apparent lawful purpose or is not the sort of transaction in which the particular customer would be expected to engage.

Suspicious Activity Reports (SARs) cannot be:

- Referenced in an affidavit to support a search warrant;
- Shown to a witness during an interview; or
- Given to anyone outside of the investigation.

Disclosure of a SAR is prohibited by 31 U.S.C. § 5318(g)(2)(A). The penalty for disclosure is five years, or a \$250,000 fine or both (31 U.S.C. § 5322).

SAR supporting documents are available from the filing institution upon request. No subpoena is necessary (31 C.F.R. § 103.18(a)).

SARs do not indicate criminal activity, only a suspicion. A SAR is to be filed no later than 30 calendar days from the date of the initial detection of facts that may constitute a basis for filing a SAR. If no suspect can be identified, the time period for filing a SAR is extended to 60 days. Law enforcement has access to SARs through the Financial Crimes Enforcement Network (FinCEN).).

The U.S. Department of the Treasury established FinCEN in 1990. FinCEN’s initial charge was to support law enforcement by establishing a government-wide financial intelligence and analysis network. That responsibility is still at the core of FinCEN’s operations. FinCEN oversees the maintenance of a database with approximately 180 million records of financial transactions and other reports. This data represents the most broadly relied upon and largest source of financial intelligence available to law enforcement authorities at the federal, state and local level. FinCEN analyzes this data and makes it available to other government agencies for use in criminal law enforcement, tax, and regulatory investigations and proceedings, and certain intelligence matters.

Since its establishment, FinCEN has supported domestic law enforcement agencies and other authorities seeking to detect and deter crime by providing research, analytical reports and assistance with investigations and law enforcement initiatives. Going forward, FinCEN plans to continue this thrust through new analytical products and investigative support based on its expertise in financial crimes and financial systems, analysis of Bank Secrecy Act (BSA) information and other financial transaction data, and networking of law enforcement, regulatory and financial industry partners.

For ten years, at the direction of the Congress, FinCEN has been providing the publication “The SAR Activity Review-Trends, Tips and Issues” as a resource for the financial services industry. It has also matured into a resource for the law enforcement and regulatory communities as well.

**(b) Observations on the implementation of the article**

Based on the information received during the country visit, the reviewing experts recognized the existence of a solid legal framework which provides the basis for delineating the cooperation between financial institutions and law enforcement authorities. They further acknowledged the instrumental role of FinCEN in fostering such cooperation. While noting the compliance of the U.S. regulatory and institutional framework with article 39, paragraph 1, of the UNCAC, the reviewing experts underlined that legal persons or senior management and staff who either report to relevant law enforcement agencies, or cooperate with requests for information should, where they have acted in good faith and on reasonable grounds, have the assurance of confidentiality and, where the allegations do not lead to an investigation, should further enjoy protection from civil suits and claims for damages from those involved in the allegations.

**Article 39 Cooperation between national authorities and the private sector**

**Paragraph 2**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See the response under paragraph 1 of article 39 of the UNCAC. In addition, it was stressed that law enforcement agencies may offer and advertise monetary rewards for information that leads to the arrest or prosecution of a suspect. These rewards, however, generally apply to reactive investigations (e.g., a kidnapping or bank robbery) rather than corruption investigations, which are typically proactive and often covert.

**(b) Observations on the implementation of the article**

See comments under paragraph 1 of article 39 of the UNCAC.

## **Article 40 Bank secrecy**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Pursuant to the Right to Financial Privacy Act (12 U.S.C. chapter 35), the Government may obtain access to the financial records of any customer from a financial institution by obtaining an administrative subpoena, a search warrant, a judicial subpoena or by making a formal request (12 U.S.C. § 3402.). Search warrants must be obtained pursuant to the Federal Rules of Criminal Procedure (12 U.S.C. § 3406). In the other cases the customer may challenge a request for financial information before a court, and the court may deny access to the financial records where “there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry” (12 U.S.C. § 3410).

In addition, U.S. law generally does not require the denial of mutual legal assistance on the ground of bank secrecy. When seeking court orders on behalf of foreign States that seek mutual legal assistance, the United States has taken the position before its courts that assistance may not be declined as a result of privacy provisions of U.S. banking law. Moreover, it is the policy of the United States that where a domestic law provides for executive discretion in denying assistance, the executive branch does not decline assistance on that basis.

### **(b) Observations on the implementation of the article**

The reviewing experts observed that the U.S. legislation was in compliance with article 40 of the UNCAC on bank secrecy. The U.S. authorities may wish to have in mind that, in terms of implementation, bank secrecy may also apply to the activities of professional advisors that could be linked to those of their clients under investigation (for example, the activities of lawyers acting as financial intermediaries).

## **Article 41 Criminal record**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.



Use of prior convictions as evidence in civil and criminal trials is governed by the Federal Rules of Evidence. Generally, evidence of a prior crime of public corruption is not admissible in federal court to demonstrate that the defendant acted similarly in this case. However, such evidence is generally admissible for other purposes, notably to show proof of motive, opportunity, intent, preparation, plan, knowledge or absence of mistake. Fed. R. Evid. 404(b). Furthermore, should the defendant choose to take the stand in his or her defense, the fact of the prior conviction may be admissible for purposes of impeaching the defendant's credibility as a witness. Fed. R. Evid. 609.

Prior convictions may also be relevant in stages of a proceeding other from the trial. First, a prior conviction may influence a judge's decision whether to grant a defendant bond pending trial, sentencing, or appeal. See 18 U.S.C. § 3142(g) (instructing judges to consider a defendant's criminal history when determine whether to grant bail). Second, sentences resulting from **foreign convictions** are not formally counted in calculating a defendant's criminal history for sentencing purposes, U.S.S.G. § 4A1.2(h), but the sentencing judge is permitted to consider relevant foreign convictions in determining whether an upward departure from the defendant's criminal history category is necessary.

The Department of Justice does not keep statistics of how often a defendant's prior foreign conviction is used at trial, but use of prior convictions - foreign or domestic - is common.

**(b) Observations on the implementation of the article**

The review team took note of the optional requirement foreseen in article 41 of the UNCAC, as well as the clarifications provided by the U.S. authorities that, although sentences resulting from foreign convictions are not formally counted in calculating a defendant's criminal history for sentencing purposes, the sentencing judge is permitted to consider relevant foreign convictions in determining whether an upward departure from the defendant's criminal history category is necessary.

**Article 42 Jurisdiction**

**Subparagraph 1 (a)**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(a) The offence is committed in the territory of that State Party; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Whether a United States federal court can exercise jurisdiction over a prosecution is determined by relevant federal statutes and United States Constitution. It is a well-accepted principle of U. S. law that Congress may criminalize, the Department of Justice may prosecute, and federal courts may exercise jurisdiction over acts that violate United States law and are committed within the United States. Statutes criminalizing acts of domestic corruption

do not contain special jurisdictional provisions, so the primary jurisdictional constraints are found in the United States Constitution.

United States federal courts can properly exercise subject-matter jurisdiction over conduct alleged to violate a United States federal law. U.S. Const. art III, § 2. In addition, a defendant who commits crimes in the United States can reasonably expect to be tried for those crimes in the United States, in accordance with the territorial principle. See Restatement (Third) of Foreign Relations Law of the United States § 403 (1987).

With regard to the basic offence of the bribery of a foreign public official, the Foreign Corrupt Practices Act (FCPA), prior to its amendment in 1998, asserted only territorial jurisdiction. In light of the requirements of the Convention on Combating Bribery of Foreign Public Officials, the FCPA was amended to add a jurisdiction basis for acts committed abroad by U.S. nationals and businesses (nationality jurisdiction). It has also extended the territorial basis of jurisdiction to cover acts in furtherance of a bribe committed within the territory of the U.S. by foreign nationals and foreign businesses.

Below is one example of the successful implementation of domestic measures adopted to comply with the provision under review and related court or other recent cases:

It involves Pavel Lazarenko, the former Prime Minister of Ukraine, who was successfully prosecuted for laundering funds he had extorted from citizens of Ukraine and then laundered into and through the United States. Mr. Lazarenko received 97 months in prison, a fine of \$9 million and a forfeiture of \$22.8 million.

**(b) Observations on the implementation of the article**

The U.S. legislation was found to be compatible with article 42(1)(a) of the UNCAC. It is a well-accepted principle of U. S. law that Congress may criminalize, the Department of Justice may prosecute, and federal courts may exercise jurisdiction over acts that violate United States law and are committed within the United States. Statutes criminalizing acts of domestic corruption do not contain special jurisdictional provisions, so the primary jurisdictional constraints are found in the U.S. Constitution.

United States federal courts can properly exercise subject-matter jurisdiction over conduct alleged to violate a United States federal law. U.S. Const. art III, § 2. In addition, a defendant who commits crimes in the United States can reasonably expect to be tried for those crimes in the United States, in accordance with the territorial principle. See Restatement (Third) of Foreign Relations Law of the United States § 403 (1987).

With regard to the basic offence of the bribery of a foreign public official, the Foreign Corrupt Practices Act (FCPA), prior to its amendment in 1998, asserted only territorial jurisdiction. In light of the requirements of the OECD convention, the FCPA was amended to add a jurisdiction basis for acts committed abroad by U.S. nationals and businesses (nationality jurisdiction). It has also extended the territorial basis of jurisdiction to cover acts in furtherance of a bribe committed within the territory of the U.S. by foreign nationals and foreign businesses.

**Article 42 Jurisdiction**

### **Subparagraph 1 (b)**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. In many circumstances, however, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. As such, in most situations involving bribery of U.S. public officials, misappropriation of government property, or obstruction of U.S. investigations or proceedings, United States federal jurisdiction may extend over such offenses occurring outside the United States, either through an express statutory grant of authority (e.g., 18 U.S.C. §§ 1512(h), 1956(f), and 1957(d)), or, most frequently, through application of principles of statutory interpretation.

#### **(b) Observations on the implementation of the article**

The United States reserved the right not to apply in part the obligation set forth in article 42, paragraph 1 (b), of the UNCAC. Thus, the United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, the abovementioned provision is implemented to the extent provided for under the U.S. federal law.

During the country visit, it was noted that the establishment of jurisdiction aboard ships and planes would be revisited, as various new legislative proposals were under discussion.

The reviewing experts encouraged the U.S. authorities to 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.

### **Article 42 Jurisdiction**

#### **Subparagraph 2 (a)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(a) The offence is committed against a national of that State Party; or*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Passive personality jurisdiction is recognized under United States law, but only in limited circumstances. See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991)

(affirming jurisdiction over the prosecution of the hijacker of a Jordanian commercial aircraft that had two passengers who were U.S. citizens); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (exercising jurisdiction based on the passive personality principle over two Colombian nationals who attempted to murder two DEA agents in Colombia). Public corruption statutes do not authorize jurisdiction under this principle, nor has any United States federal court issued a decision discussing jurisdiction over a public corruption offense under the passive personality principle. This, however, does not mean that passive personality cannot serve as an adequate jurisdictional foundation in the corruption context; it is merely evidence of the fact that passive personality jurisdiction is not applicable to most corruption prosecutions.

Most corruption crimes do not have “victims” in the traditional sense; rather, the victims are the federal, state, or local government and the citizens residing in that governmental unit. As discussed in the U.S. response to Question 149, United States law does provide jurisdiction over corruption offenses targeting the federal government or state and local governments.

**(b) Observations on the implementation of the article**

Passive personality jurisdiction is recognized under the U.S. law, but only in limited circumstances. Public corruption statutes do not authorize jurisdiction under this principle, nor has any U.S. federal court issued a decision discussing jurisdiction over a public corruption offence under the passive personality principle. This, however, does not mean that passive personality cannot serve as an adequate jurisdictional foundation in the corruption context. As the U.S. authorities explained, it is merely evidence of the fact that passive personality jurisdiction is not applicable to most corruption prosecutions.

The reviewing experts encouraged the U.S. authorities to 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. In doing so, and if deemed appropriate, to establish jurisdiction on the basis of the passive personality principle 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.

**Article 42 Jurisdiction**

**Subparagraph 2 (b)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

United States federal courts presume that congressional statutes are not applicable extraterritorially unless the statute contains a clear statement demonstrating Congress’s intent that the statute apply extraterritorially. See *Small v. United States*, 544 U.S. 385, 388 (2005). Furthermore, nationality jurisdiction is permissible under United States law only in limited

circumstances. See *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (justifying jurisdiction under the nationality principle over a U.S. citizen who engaged in sexual acts with a minor in a foreign country because the applicable federal statute was clearly intended to apply extraterritorially). Domestic public corruption statutes, such as the anti-bribery statute (18 U.S.C. § 201), are clearly not intended to have extraterritorial effect. Of course, United States federal courts can validly exercise jurisdiction over a U.S. citizen or resident who engages in corruption aimed at the United States government, in violation of United States law.

The FCPA is expressly extraterritorial. It provides for jurisdiction over: (1) any company listed on a U.S. stock exchange, as well as its officers, employees, and agents; (2) U.S. citizens and companies incorporated in the United States; and (3) any individual or company that acts in furtherance of a crime within the territory of the United States.

**(b) Observations on the implementation of the article**

The review team noted that jurisdiction based on the active personality principle is permissible under U.S. law only in limited circumstances. However, U.S. federal courts can validly exercise jurisdiction over a U.S. citizen or resident who engages in corruption aimed at the U.S. government, in violation of the U.S. legislation.

**Article 42 Jurisdiction**

**Subparagraph 2 (c)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. money laundering laws extend to conduct committed abroad but related to offenses committed in the United States. This sort of jurisdiction comports with the Fifth Amendment to the United States Constitution and is appropriate under the objective territoriality principle of extraterritorial jurisdiction. Relevant statutes include 18 U.S.C. § 1956(a)(2), which criminalizes the laundering of illegally acquired through United States financial institutions; 18 U.S.C. § 1956(b)(2), which provides for jurisdiction over foreign persons for money laundering crimes in certain circumstances; and 18 U.S.C. § 1957(d)(2), which provides jurisdiction over certain money laundering offenses when the defendant is a United States national, regardless of where the crime was committed. In addition, these statutes may authorize jurisdiction over money laundering related to foreign corruption offenses.

**(b) Observations on the implementation of the article**

The review team noted that the United States has established jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences comprised by article 23, paragraph 1 (a) (i), (ii) or (b) (i) even if the participatory act has been committed abroad while the main act has been committed, or is intended to be committed, in the U.S. territory. Thus, the review team was satisfied that this provision of the UNCAC was adequately domesticated in the United States.

## **Article 42 Jurisdiction**

### **Subparagraph 2 (d)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(d) The offence is committed against the State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The case of commission of an offence against the State is the most common in corruption offenses, and jurisdiction is clearly proper in this context. The examples of prosecutions discussed under the other jurisdictional bases foreseen in article 42 of the UNCAC evidence this.

#### **(b) Observations on the implementation of the article**

The review team noted the explanations provided by the U.S. authorities that jurisdiction based on the so called “protection principle,” namely jurisdiction over offences committed against the State, is clearly established in the U.S. legislation and practice. The U.S. legislation was found to be compatible with article 42(2)(d) of the UNCAC.

## **Article 42 Jurisdiction**

### **Paragraph 3**

*3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The practice based on the axiom “*aut dedere aut judicare*” (domestic prosecution in lieu of extradition when the latter is denied on the grounds of nationality) is not particularly applicable in the United States, because the practice followed in extradition law and practice is to extradite own nationals. See also under article 44, paragraph 11, of the UNCAC.

**(b) Observations on the implementation of the article**

The review team took note of the clarification provided by the U.S. authorities that the initiation of domestic prosecution as an alternative to extradition when the latter is denied on the grounds of nationality is inapplicable in the United States because of the long standing tradition of permitting extradition of U.S. citizens.

**Article 42 Jurisdiction**

**Paragraph 4**

*4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

**(a) Summary of information relevant to reviewing the implementation of the article**

See the response under paragraph 3 of article 42 of the UNCAC.

**(b) Observations on the implementation of the article**

The review team noted that the U.S. authorities reiterated the long standing practice of extradition of nationals in the context of implementation of paragraph 4 of article 42 as well. However, this provision enables (does not obliges) States parties to the UNCAC to apply the axiom “*aut dedere aut judicare*” in cases where the extradition is denied on any other ground than nationality.

During the country visit, it was explained that this issue is dealt with in the bilateral extradition treaties concluded by the U.S. authorities. In view of that, the reviewing experts were satisfied that the U.S practice, as duly reported, complies with article 42, paragraph 4, of the UNCAC.

**Article 42 Jurisdiction**

**Paragraph 5**

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The U.S. government has broad authority to consult with other States Parties via DOJ's Office of International Affairs, the competent central authority for the U.S. in mutual legal assistance and extradition matters. See the responses under Chapter IV on International Cooperation chapter for more detail on legal and other authorities supporting such consultations and coordination.

U.S. authorities expressed their commitment to working in cooperation with foreign counterparts on transnational corruption cases. The United States has on a number of occasions voluntarily provided evidence to foreign jurisdictions, and there have also been examples in which foreign states have made the fruits of their investigations readily available to the United States. The United States also routinely requires parties to settlement agreements to cooperate with foreign authorities in transnational corruption cases.

**(b) Observations on the implementation of the article**

The reviewing experts were satisfied that the U.S practice, as duly reported, complies with article 42, paragraph 5, of the UNCAC.

**Article 42 Jurisdiction**

**Paragraph 6**

*6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is a sovereign nation, hence the Congress possesses the power to enact statutes that violate international law. As a matter of statutory interpretation, however, United States courts construe acts of Congress to accord with international law where possible. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). According to this principle, Congress should include a clear statement that a statute abrogates international law when it so intends. Therefore, international law is not an absolute limitation on the authority of Congress to prohibit conduct, or on the authority of United States courts to assert jurisdiction over such conduct.

**(b) Observations on the implementation of the article**

Based on the information provided, the review team noted that the United States can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law. The review team was satisfied that the U.S practice, as duly reported, complies with article 42, paragraph 6, of the UNCAC.

**Article 44 Extradition**



## **Paragraph 1**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Pursuant to 18 U.S.C. § 3181, extradition is granted by bilateral treaty only, except in the rare circumstances specifically enumerated in 18 U.S.C. Section 3181(b). Dual criminality is required for a fugitive to be extradited from the United States.

18 U.S.C. § 3184 applies to incoming extradition requests to the United States and provides the statutory basis for an extradition warrant and hearing.

The United States has bilateral extradition treaties with 133 states or multilateral organizations, such as the European Union. Extradition is routinely granted and questions of dual criminality are sometimes presented and resolved by U.S. courts.

The U.S. extradition regime, based on a network of treaties supplemented by conventions, is underpinned by a solid legal framework allowing for an efficient and active use of the extradition process. The shift from rigid list-based treaties to agreements primarily based on the minimum penalty definition of extraditable offences (in most cases deprivation of liberty for a maximum period of at least one year, or more severe penalty) for establishing double criminality has given the extradition system much more flexibility, and this should be highlighted as a good practice.

Although the U.S. authorities have not undertaken a specific assessment of this provision of the UNCAC, the United States has been or is currently being reviewed by the OECD, GRECO and OAS. As part of these reviews, the United States has examined and assessed its laws and practices, including those relating to extradition.

### **(b) Observations on the implementation of the article**

The review team noted that the extradition practice in the United States is based on a network of treaties and conventions which depart from the list-of-offences approach and adopt the more flexible approach of the minimum penalty definition of extraditable offences (in most cases deprivation of liberty for a maximum period of at least one year, or more severe penalty). In addition, 18 U.S.C. § 3184 applies to the extradition proceedings for incoming extradition requests. The reviewing experts were satisfied that the U.S. extradition law and practice is in conformity with article 44, paragraph 1, of the UNCAC.

### **(c) Successes and good practices**

The use of the minimum penalty definition (instead of a list-of-offences approach) for the identification of extraditable offences in extradition treaties or agreements.

## **Article 44 Extradition**

### **Paragraph 2**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As mentioned under paragraph 1 of article 44 of the UNCAC, the fulfilment of double criminality is a requirement for granting an extradition request. That said, as a party to the UNCAC, all mandatory offences of the Convention are criminal in the United States.

#### **(b) Observations on the implementation of the article**

The review team noted that the double criminality requirement applies in the U.S. law and practice without exception whatsoever. The reviewing experts observed that paragraph 2 of article 44 of the Convention allows for more flexibility in applying this principle, but acknowledged, at the same time, the optional nature of this provision.

Such flexibility may be helpful particularly in view of one of the findings related to the criminalization provisions of the UNCAC (limited scope of predicate offences for money laundering if they occurred in another country). The reviewers indicated that this limitation may pose challenges in the extradition context in view of the application of the double criminality requirement. Indeed, if (in case of a non-U.S. listed underlying offence) the facts cannot be translated to a criminal conduct punishable under U.S. law, the double criminality principle will not be met and extradition may be obstructed.

The reviewing experts encouraged the U.S. authorities to 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.

## **Article 44 Extradition**

### **Paragraph 3**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

18 U.S.C. § 3181 as well as the text of the applicable bilateral extradition treaties provide the regulatory framework to assess this issue.

This provision of the UNCAC is very similar to provisions in current U.S. bilateral extradition treaties. Accordingly, it can be said with confidence that there have been some cases where some of the non lead counts with shorter sentences have been included in the extradition order by the U.S. court and the subsequent surrender warrant issued by the U.S. Secretary of State.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 3, of the UNCAC.

**Article 44 Extradition**

**Paragraph 4**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

This section of the UNCAC allows the United States to expand the scope of extraditable offences of its existing bilateral "list" treaties and permits extradition requests made to the United States to proceed under 18 U.S.C. Section 3181 and 18 U.S.C. Section 3184. Additionally, as this provision of the Convention is deemed to be self executing, it therefore became the law of the United States upon ratification of the Convention by the U.S. Senate.

By way of explanation of how an extradition request is processed pursuant to 18 U.S.C. Sections 3181 and 3184, once an extradition package is completed by the foreign prosecutor, sent through the diplomatic channel and approved by OIA, it is sent to the U.S. Attorney's Office in the district where the fugitive is located, where an Assistant U.S. Attorney (AUSA) is assigned to handle the case. The AUSA will first present the request to the U.S. judge requesting that an arrest warrant be issued. Once the fugitive is arrested, the AUSA will represent the Government at the extradition hearing.

The purpose of the extradition hearing is for the U.S. judge to hear and consider the evidence presented by the requesting State and to determine whether it is sufficient to sustain the charges under the treaty. The requesting State has the burden of establishing that there is

“probable cause” to believe that the conditions of the treaty have been fulfilled. These conditions include the following findings: (1) personal and subject matter jurisdiction; (2) existence of treaty currently in force; (3) existence of the criminal charges in the foreign country; (4) dual criminality; and (5) sufficient facts showing “probable cause” that the fugitive before the court committed the offenses that are alleged in the extradition request.

If these conditions are sufficiently met, the judge will find that the fugitive is extraditable and issue a “certification of extraditability,” which normally contains an order remanding the fugitive into the custody of the U.S. Marshal’s Service, where the fugitive usually remains in custody pending the return to the requesting State.

Although there is no direct appeal of the judge’s certification of extraditability, the fugitive may obtain collateral review by applying to the U.S. District Court for a writ of habeas corpus. Habeas corpus is essentially a Federal remedy whereby a detainee petitions the court contesting the legality of detention. A court’s ruling on the habeas corpus petition can be appealed to the U.S. Circuit Court of Appeals. A decision of the Circuit Court of Appeals can be reviewed by the U.S. Supreme Court. However, the U.S. Supreme Court grants very few petitions of writ of certiorari and generally hears fewer than 100 cases per year.

If the certification of extraditability is sustained, the matter is then reviewed by the U.S. Secretary of State who decides whether to issue a surrender warrant. After the surrender warrant is signed, transfer arrangements are then coordinated by the U.S. Marshals Service.

As Article 44 is one of two articles of the UNCAC (along with article 46) which is deemed to be self-executing, it therefore became the law of the United States upon ratification of the Convention by the U.S. Senate. Accordingly, there are no other domestic measures which needed to be taken.

The United States is not aware of any instances where any of the offences established in accordance with the Convention have been deemed a political offence.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 4, of the UNCAC.

**Article 44 Extradition**

**Paragraph 5**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were not adopted and implemented.

The United States may only grant an extradition request on the basis of a bilateral extradition treaty, and therefore the UNCAC alone cannot be used as the basis for extradition, although it is available to expand the scope of the extraditable offence when a bilateral treaty is already in place.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 5, of the UNCAC.

**Article 44 Extradition**

**Subparagraph 6 (a)**

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States makes extradition conditional on the existence of a treaty. The U.S. authorities also informed the Secretary-General of the United Nations as prescribed above.

After the country visit, the U.S. authorities provided statistics focusing on extradition sought for corruption offences. With regard to incoming extradition requests involving corruption-related offences, between January 1, 2003 and November 11, 2010, the United States extradited or otherwise lawfully removed approximately 11 fugitives to nine different countries. To date, there have been no incoming extradition requests that have specifically invoked the UNCAC.

Moreover, the following other representative example was provided:

The United States extradited to Country X, a fugitive wanted for bribery and fraudulently obtaining false motor vehicle registrations. The fugitive was initially arrested pursuant to a provisional arrest request; Country X then supplied the complete extradition documents within the deadline set out in the bilateral extradition treaty. An extradition hearing was held in the U.S. court in which the defence unsuccessfully challenged the existence of dual criminality, the sufficiency of the evidence and the identity of the fugitive. The judge ruled that the fugitive was extraditable to Country X on all of the counts included in the request. A surrender warrant was signed by the U.S. Secretary of State and shortly thereafter the fugitive was returned to Country X.

As far as outgoing extradition requests are concerned, between January 1, 2003 and November 11, 2010, approximately 26 fugitives wanted for corruption-related offenses from 17 countries were extradited or otherwise lawfully removed to the United States. Specifically regarding the UNCAC, there were two pending outgoing cases to two countries in which the United States has invoked the UNCAC in its extradition requests.

Moreover, the following other representative example was provided:

Pursuant to the bilateral extradition treaty between the United States and Country X, the United States successfully made an extradition request to Country X seeking the extradition of a fugitive charged in the United States with violating the FCPA and related conspiracy to violate the FCPA. The U.S. charges related to the fugitive's participation in a scheme to bribe Government officials of Country Y to obtain engineering, procurement and construction contracts in that country. After the fugitive was extradited from Country X to the United States, he entered a guilty plea before a U.S. District Court judge.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 6(a), of the UNCAC.

**Article 44 Extradition**

**Subparagraph 6 (b)**

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States has bilateral extradition treaties with 133 states or multilateral organizations, such as the European Union. The EU treaty entered into force on February 1, 2010. The United States regularly assesses whether new extradition treaties should be negotiated. Since the United States ratified the UNCAC on October 30, 2006, 30 new extradition treaties, protocols, supplements or similar instruments have entered into force.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 6(b), of the UNCAC.

**Article 44 Extradition**

## **Paragraph 7**

*7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States indicated that this provision of the UNCAC is not applicable in the U.S. legal system as the United States makes extradition conditional on the existence of a bilateral extradition treaty.

### **(b) Observations on the implementation of the article**

The review team took note of the fact that this provision of the UNCAC is not applicable in the U.S. legal system as the United States makes extradition conditional on the existence of a bilateral extradition treaty.

## **Article 44 Extradition**

### **Paragraph 8**

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The terms of the specific bilateral extradition treaty would govern as well as 18 U.S.C. § 3181 and 18 U.S.C. § 3184. Usually, the offence for which extradition is being requested must have a maximum potential penalty of greater than one year of imprisonment.

As Article 44 is deemed to be self-executing, it therefore became the law of the United States upon ratification of the Convention by the U.S. Senate. Accordingly, there are no other domestic measures which needed to be taken.

### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 8, of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 9**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

For requests made under all of the bilateral extradition treaties for which the UNCAC would expand the list of extraditable offense, the fugitive can either waive or consent to extradition, making a hearing on the underlying request unnecessary. It also obviates the need for any appeals. The ability of the fugitive to make a knowing and voluntary waiver/consent greatly expedites and simplifies the extradition process.

As article 44 is deemed to be self-executing, it therefore became the law of the United States upon ratification of the Convention by the U.S. Senate. Accordingly, there are no other domestic measures which needed to be taken.

In addition, the following example was brought to the attention of the review team after the country visit: Country X requested that the United States provisionally arrest Y, who was wanted to stand trial on charges of fraud, forgery, embezzlement and money laundering, in connection with his official activities while employed by the Government of Country X. Namely, Y ordered goods from sham companies in the United States that Y had created and then pocketed the money; no goods were delivered. The Office of International Affairs received the written request from Country X the evening of February 28, 2008. On February 29, 2008, the United States District Court for the Southern District of Florida issued a provisional arrest warrant at the request of the United States Attorney's Office in Miami. Y was provisionally arrested the same day. Y waived his right to an extradition hearing and was surrendered to Country X on April 17, 2008.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 9, of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 10**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.



When permitted under the terms of the applicable bilateral extradition treaties, for which the UNCAC would expand the list of extraditable offenses, in the cases of urgency, a fugitive located in the United States can be arrested pursuant to a provisional arrest request. The requesting State must provide the essential information, including the reason why the request is urgent.

As article 44 is deemed to be self-executing, it therefore became the law of the United States upon ratification of the Convention by the U.S. Senate. Accordingly, there are no other domestic measures which needed to be taken in order to comply with this provision. Most of the United States bilateral treaties, except for some very old treaties, explicitly provide for provisional arrests.

Regarding information on recent court or other cases in which a person whose extradition was sought and who was present in your territory has been taken into custody and cases in which other appropriate measures were taken to ensure his or her presence at extradition proceedings:

In appropriate circumstances, provisional arrests are made in the United States. Once the fugitive is taken into custody, efforts are generally made by the prosecutor to ensure that the fugitive remains incarcerated pending the extradition hearing. Although an Assistant U.S. Attorney may oppose the setting of bail in a case, it is ultimately up to the U.S. judge to determine whether or not the fugitive remains incarcerated or if released pending the hearing, under what conditions.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 10, of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 11**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The relevant domestic regulation is 18 U.S.C. Section 3196.

18 U.S.C. § 3196. Extradition of United States citizens

If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

In addition, as a matter of policy, the United States will extradite its own nationals.

See also the response under article 42, paragraph 3, of the Convention.

**(b) Observations on the implementation of the article**

The review team took note of the clarification provided by the U.S. authorities that the initiation of domestic prosecution as an alternative to extradition when the latter is denied on the grounds of nationality is not applicable in the United States because of the long standing tradition of permitting extradition of U.S. citizens.

See also under article 42, paragraph 3, of the Convention.

**(c) Successes and good practices**

The practice to extradite own nationals.

It should be noted that the reviewing experts referred to this example of a good practice strictly in the U.S. context, bearing in mind that such a practice may not be followed in other jurisdictions due to constitutional impediments or other fundamental principles of the national legal systems.

**Article 44 Extradition**

**Paragraph 12**

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

This provision is not applicable as the United States extradites its own nationals, and therefore does not impose conditions including the return of the fugitive to serve the imposed sentence.

**(b) Observations on the implementation of the article**

The review team took note of the clarification provided by the U.S. authorities that this provision is not applicable because of the tradition of permitting extradition of U.S. citizens.

## **Article 44 Extradition**

### **Paragraph 13**

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

See the response under paragraphs 11 and 12 of article 44 of the UNCAC.

#### **(b) Observations on the implementation of the article**

See under paragraphs 11 and 12 of article 44 of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 14**

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

All extradition hearings in the United States are conducted in conformity with the U.S. Constitution as amended. Among other things, it guarantees due process and fundamental fairness.

As a result, the fugitive is entitled to an extradition hearing before a neutral and detached judge. The fugitive can file a habeas corpus petition challenging the findings of the court and can even ask the U.S. Supreme Court to consider hearing the case. Fugitives are represented by counsel of their own choosing at extradition hearings, and, if the fugitive cannot afford an attorney, the court will appoint an attorney to represent him or her. Once the judicial process is concluded, the U.S. Secretary of State reviews the finding of extraditability in determining whether a surrender warrant should be issued.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 14, of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 15**

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Pursuant to the UNCAC, the United States would reserve the right to refuse extradition, if after a careful and through review, the U.S. determined that the request was being made for one of these enumerated reasons. All extradition hearings in the United States are conducted in conformity with the U.S. Constitution as amended, which among other things, guarantees due process and fundamental fairness.

The United States is not aware of any cases being refused on such grounds.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 15, of the UNCAC.

## **Article 44 Extradition**

### **Paragraph 16**

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States does not refuse or deny extradition requests solely on the ground that the offense involves fiscal matters. As long as the offence meets the dual criminality requirement, sufficient evidence (probable cause) is included in the request, and the other requirements of the treaty are met, the United States will go forward with the request.

There are numerous incoming extradition requests to the United States involving corruption, fraud or other white collar and fiscal matter offenses where the fugitives were arrested and extradited from the United States. The United States has never refused or denied an extradition request on this basis.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 16, of the UNCAC.

**Article 44 Extradition**

**Paragraph 17**

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The provisions of article 44 are self-executing. Accordingly, upon ratification the provision became U.S. law. As a result, there is no text to cite.

The United States, through the U.S. State Department and the Office of International Affairs of the Criminal Division of the U.S. Department of Justice (OIA), would make every effort to consult with the requesting party if a request made under the UNCAC appears to be deficient. This would include giving the requesting country the opportunity to supplement a request with additional evidence or explanations. OIA routinely contacts its treaty partners and solicits their views if an extradition request appears that it might be denied. In the United States, as with most countries, an independent judge makes the final decision as to whether a particular fugitive is extraditable.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 17, of the UNCAC.

**Article 44 Extradition**

**Paragraph 18**

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States has bilateral extradition treaties with 133 States or multilateral organizations, such as the European Union. Updated extradition treaties with member states of the European Union have recently come into force.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. extradition law and practice is compatible with article 44, paragraph 18, of the UNCAC.

**Article 45 Transfer of sentenced persons**

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic law and regulations are the following: 18 U.S.C. §§ 4100 to 4115 and 28 C.F.R. §§ 0.64-1, 0.64-2.

The United States has several bilateral agreements on prisoner transfer and is a party to two multilateral conventions on the transfer of sentenced persons. These agreements are, generally, not related to extradition.

In the United States, the Office of Enforcement Operations of the Criminal Division of the U.S. Department of Justice acts as the point of contact for these matters.

The federal statute guides how to implement the international prisoner transfer treaties. The federal statute is found at 18 U.S.C. Section 4100, et. seq. Each state of the United States has enacted its own implementing legislation to authorize the transfer of prisoners in the custody of a state of the United States. The United States has transferred thousands of prisoners to and from the United States pursuant to prisoner transfer treaties since 1977.

During the country visit, the U.S. authorities provided detailed information about the legal framework regulating the transfer of prisoners to or from foreign countries, as well as the treaty network on transfer of prisoners which is of relevance for the United States (both bilateral treaties and transfer agreements and regional instruments, namely the Council of

Europe Convention on the Transfer of Sentenced Persons and the Inter-American Convention on Serving Criminal Sentences Abroad). Statistics for the period 2008-2010 were also provided.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of transfer of prisoners is compatible with article 45 of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 1**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is a party to 81 mutual legal assistance treaties (including associated protocols, supplements and similar instruments) and 3 mutual legal assistance agreements.

Article 46 is one of the two articles of the UNCAC (along with Article 44) which is deemed to be self executing. It therefore became the law of the United States upon the ratification of the Convention by the U.S. Senate.

As will be noted in great detail in subsequent responses, the United States is able to give a great deal of legal assistance under its very broad legal assistance statutes, namely 18 U.S.C. § 3512 and 28 U.S.C. § 1782. Additionally, informal legal assistance, where appropriate, is encouraged through the law enforcement channel.

The United States is able to give a great deal of legal assistance under its very broad legal assistance statutes, namely 18 U.S.C. Section 3512 and 28 U.S.C. Section 1782. Additionally, informal legal assistance, where appropriate, is encouraged through the law enforcement channel.

After the country visit, the U.S. authorities provided statistics focusing on MLA sought for corruption offences. With regard to incoming MLA requests involving corruption-related offences, between January 1, 2003 and November 11, 2010, the United States executed approximately 211 requests for legal assistance on behalf of 54 countries investigating offenses involving corruption. The assistance provided included: locating persons, service of documents, conducting interviews, taking depositions, obtaining bank records, obtaining

business records, obtaining official records, freezing assets, forfeiting assets and executing search and seizures.

Since the time the UNCAC entered into force for the United States on October 30, 2006 until April 21, 2011, the United States has received five incoming formal requests for assistance from four countries invoking the UNCAC; assistance was provided in four of these cases and one was still pending.

Moreover, the following other representative examples were provided:

The United States executed a formal legal assistance request on behalf of Country X, which invoked the UNCAC. U.S. authorities provided certified bank records to Country X to assist in its investigation of a public official who was accused of participating in a large scale, complex fraud scheme and was believed to have sent some of his illicit proceeds through banks located in the United States. The UNCAC was the sole treaty basis for the request, as there was no bilateral MLAT between the United States and Country X.

Pursuant to an MLAT request, authorities in Country X requested an interview of an individual located in the United States, in connection with alleged gifts, contributions and bribes involving a former high ranking official of Country X. The request was referred to the appropriate U.S. Attorney's Office for execution. Authorities from Country X requested, and were granted, permission to participate in the interview which was granted. The interview was conducted and transcripts of the interview were sent to the requesting country.

The United States executed a formal MLAT request by providing interviews of witnesses and co-defendants as well as bank and financial records to Country X which was investigating senior employees of a company that was involved in defense related activities. The target of the investigation was alleged to have taken bribes in exchange for hiring delivery companies that did not comply with the company's regulations regarding outside contractors. He was also being investigated for fraud and theft by a public servant.

The United States executed a formal request for legal assistance in which over \$750,000 was forfeited from U.S. bank accounts and returned to the Government of Country X. The defendant, D, who was ultimately convicted in Country X and sentenced to prison for his crimes, was on the board of directors of a military and police pension fund, where he improperly diverted funds intended for retired military and police officers for his own personal benefit. Defendant D and his associates utilized banking institutions in the United States to hide their illicit profits.

As far as outgoing MLA requests are concerned, between January 1, 2003 and November 11, 2010, the United States, pursuant to 124 requests for assistance, received assistance from 32 different countries for investigations involving corruption related offenses. The assistance received included: conducting interviews, obtaining bank and business records, obtaining official records, freezing and forfeiting assets, serving documents and notifying victims.

Since the time the UNCAC entered into force for the United States on October 30, 2006, until April 21, 2011, the United States has sent three formal outgoing requests to three countries invoking the UNCAC; assistance was provided in two of these cases and one was still pending.

Moreover, the following other representative example was provided:



The United States submitted a formal request for mutual legal assistance to Country X seeking bank records in connection with an investigation of an individual who was accused of creating fraudulent labour certifications for individuals attempting to obtain lawful permanent resident status in the United States. The proceeds of this activity were laundered through banks in country X. Country X provided properly certified bank records.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 1, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 2**

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations related to the provision under review are: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

There is at least one case in which the United States provided legal assistance made pursuant to the UNCAC in an investigation involving a corporate entity. Specifically, the United States provided bank records and certified copies of declaration to the authorities of the requesting State party who were investigating whether this company and its employees were giving kickbacks to public officials in order to obtain a large government contract.

The United States is not aware of any [recent] cases as of April 2011 in which USA denied mutual legal assistance to a requesting State Party with respect to investigations, prosecutions and judicial proceedings in relation to offences for which a legal person was or could be held liable under this Convention.

The United States is not aware of any [recent] cases as of April 2011 in which USA was denied mutual legal assistance by a requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to offences for which a legal person was or could be held liable under this Convention.

Below are some information on recent cases in which mutual legal assistance was received from a requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to offences for which a legal person was or could be held liable under this Convention:

There are at least two cases, charged under the Foreign Corrupt Practices Act, in which corporate entities were the targets, in which the United States received mutual legal assistance. Specifically, the United States obtained bank and business records from the requested countries.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 2, of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (a)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(a) Taking evidence or statements from persons;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic provisions are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782, the United States permits the taking of evidence and statement of persons for many criminal offenses, including those covered by the UNCAC.

This type of assistance is regularly requested by the United States to mutual legal assistance treaty partners. Requests for interviews have been requested and granted pursuant to the UNCAC in corruption cases.

This type of assistance is also regularly requested to the United States by mutual legal assistance treaty partners. Requests for interviews have been requested and granted pursuant to the UNCAC in corruption cases.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested ):

*Statements/Interviews/Testimony:*

Requests for Assistance Made to the United States

Between January 1, 2003 and November 11, 2010, the United States executed 72 requests to interview or depose a person(s) on behalf of 26 countries for investigations or proceedings involving corruption related offenses.

Requests for Assistance Sought by the United States

Between January 1, 2003 and November 11, 2010, the United States received assistance from 11 countries pursuant to 24 requests to interview a person(s)/depose a person(s) for investigations or crimes involving corruption related offenses.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(a), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (b)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(b) Effecting service of judicial documents;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

By way of explanation as to how the U.S. system works, pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782, the United States permits the effecting service of judicial documents for many criminal offenses, including those covered by the UNCAC.

Although requests from the United States for this particular type of legal assistance have not been made to date under the UNCAC, this type of assistance is occasionally requested by the United States to law enforcement treaty partners. It is also regularly requested by the law enforcement treaty partners.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

*Service of Documents:*

Requests for Assistance Made to the United States

Between January 1, 2003 and November 11, 2010, the United States executed 13 requests to serve judicial documents on behalf of five countries relating to investigations or proceedings involving corruption related offenses.

Requests for Assistance Sought by the United States

Between January 1, 2003 and November 11, 2010, the United States received assistance from two countries pursuant to two requests to serve judicial documents in connection with investigations or proceedings involving corruption related offenses.

Documents are often served by means other than a formal mutual legal assistance request. The figures listed above do not capture these alternative mechanisms for serving documents.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(b), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (c)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(c) Executing searches and seizures, and freezing;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are as follows: 18 U.S.C. § 3512, 28 U.S.C. § 1782, Fourth Amendment of the U.S. Constitution.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which need to be adopted in order to comply with the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that pursuant to 18 U.S.C. § 3512, 28 U.S.C. § 1782, Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment of the U.S. Constitution, the United States is able to obtain and execute searches and seizures warrants in execution of mutual legal assistance requests made pursuant to the UNCAC. Under U.S. law, the issuance of a search and seizure warrant requires a showing of "probable cause" in accordance with the Fourth Amendment of the U.S. Constitution. "Probable cause" means that a person of ordinary prudence and caution would have reasonable basis to believe that the location is likely to contain evidence or information about criminal activities. A request for a search warrant should contain sufficient information to establish "probable cause" to believe that the evidence sought constitutes evidence of the commission of a criminal offense or represents contraband, the fruits of a crime or criminally deprived property. The request for a search warrant should also include reasonable grounds to believe that the evidence sought can be found at the specified location, along with a detailed description of the items to be seized, with sufficient specificity so as to identify them (e.g., asking for specific records between certain limited dates or for specific personal property associated with the underlying crime.) So that law enforcement action is justified on its basis, the information contained within the request must also be accurate and up-to-date, not "stale" or so dated that it is unclear whether the information remains accurate.

Although requests from the United States for this particular type of legal assistance have not been made to date under the UNCAC, this type of assistance is regularly requested by the United States to treaty partners. It is also regularly requested by the treaty partners.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

#### *Search and Seizure:*

##### Requests for Assistance Made to the United States

Between January 1, 2003 and November 11, 2010, the United States executed one request to search premises and seize items on behalf of one country in connection with investigations or crimes involving corruption related offenses.

##### Requests for Assistance Sought by the United States

No outgoing requests were reported.

#### *Freezing Assets:*

##### Requests for Assistance Made to the United States

Between January 1, 2003 and November 11, 2010, the United States executed nine requests to freeze assets on behalf of 13 countries for investigations or crimes involving corruption related offenses.

##### Requests for Assistance Sought by the United States

Between January 1, 2003 and November 11, 2010, the United States received assistance from four countries pursuant to four requests to freeze assets in connection with investigations or proceedings involving corruption related offenses.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(c), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (d)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(d) Examining objects and sites;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are as follows: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782, the United States permits the examining of objects, sites and persons for many criminal offenses, including those covered by the UNCAC.

Although requests from the United States for this particular type of legal assistance have not been made to date under the UNCAC, this type of assistance is regularly requested by the United States to law enforcement treaty partners. It is also regularly requested by the treaty partners. When requested, the United States routinely provides this type of assistance.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(d), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (e)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(e) Providing information, evidentiary items and expert evaluations;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The USA reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782, the United States permits providing information, evidentiary items and expert evaluations for many criminal offenses, including those covered by the UNCAC.

Although requests from the United States for this particular type of legal assistance have not been made to date under the UNCAC, this type of assistance is occasionally requested by the United States to law enforcement treaty partners. It is also occasionally requested by the treaty partners. When requested, the United States routinely provides this type of assistance.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(e), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (f)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782, the United States is permitted to provide originals, certified copies of relevant documents and records for many criminal offenses,

including those covered by the UNCAC. Assistant United States Attorneys, acting as commissioners pursuant to the convention, can issue subpoenas to obtain these materials.

This type of assistance is regularly requested by the United States to mutual legal assistance treaty partners. Requests for records have been requested and granted pursuant to the UNCAC in corruption cases.

As an example, a State party with whom the United States does not have a bilateral mutual legal assistance treaty, made a request to the U.S. for bank records in connection with an investigation of a public official in that country, who was suspected of participating in a large scale fraud. The United States was able to obtain certified bank records and subsequently transmitted them to the requesting country.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

*Records:*

Requests for Assistance Made to the United States

Between January 1, 2003 and November 11, 2010, the United States executed 82 requests for the production of *bank records* on behalf of 35 countries' investigations involving corruption related offenses.

Between January 1, 2003 and November 11, 2010, the United States executed 83 requests for the production of *business records* on behalf of 31 countries' investigations involving corruption related offenses.

Between January 1, 2003 and November 11, 2010, the United States executed 16 requests for *business record certifications* on behalf of 10 countries' investigations involving corruption related offenses.

Between January 1, 2003 and November 11, 2010, the United States executed 19 requests for *official records* on behalf of 12 countries' investigations involving corruption related offenses.

Requests for Assistance Sought by the United States

Between January 1, 2003 and November 11, 2010, the United States received assistance from 21 countries pursuant to 37 requests for *bank records* for investigations involving corruption related offenses.

Between January 1, 2003 and November 11, 2010, the United States received assistance from 17 countries pursuant to 32 requests for *business records* for investigations involving corruption related offenses.

Between January 1, 2003 and November 11, 2010, the United States received assistance from three countries pursuant to three requests for *business record certifications* for investigations involving corruption related offenses.



Between January 1, 2003 and November 11, 2010, the United States received assistance from six countries pursuant to seven requests for *official records* (to include government and government agency records) for investigations involving corruption related offenses.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(f), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (g)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented. See above.

**(b) Observations on the implementation of the article**

See above.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (h)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(h) Facilitating the voluntary appearance of persons in the requesting State Party;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States does not need any legislation to facilitate the voluntary appearance of a person in the requesting state, as no compulsory process is necessary. The United States through a variety of channels can reach out to a person/witness and inquire if that person is willing to travel to the requesting state.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

Although requests from the United States for this particular type of legal assistance have not been made to date under the UNCAC, this type of assistance is regularly requested by the United States to law enforcement treaty partners, most often through informal law enforcement channels. It is also regularly requested by the treaty partners. When requested, the United States routinely provides this type of assistance.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

*Facilitating Voluntary Appearance of Witness:*

Requests for Assistance Made to the United States

No incoming requests were reported.

Requests for Assistance Sought by the United States

Between January 1, 2003 and November 11, 2010, the United States received assistance from one country pursuant to one formal request to invite a witness to appear voluntarily in connection with investigations involving corruption related offences.

Depending on the laws and policies of the particular foreign country, the United States is able to reach out to a voluntary witness in another country through a “variety of channels” including: having the Law Enforcement Attaché in that country reach out to the potential witness, have another representative (in the consular section) of the U.S. Embassy in that country inquire of the witness, have the AUSA or law enforcement agent directly contact the potential witness by telephone, email or mail or have OIA contact the foreign country’s Justice Ministry or Embassy in Washington to inquire about the assistance the potential witness may be able to provide. None of these options are captured in the figures given above, which are based on formal mutual legal assistance requests.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(h), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (i)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is able to give a great deal of legal assistance under its very broad legal assistance statutes, namely 18 U.S.C. § 3512 and 28 U.S.C. § 1782. Additionally, informal legal assistance, where appropriate, is encouraged through the law enforcement channel. The United States always tries to provide legal assistance, when requested, as long as it is permissible under U.S. domestic law.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

As noted, the United States in the Office of International Affairs currently has approximately 1,500 outgoing formal mutual legal assistance requests. Accordingly, the United States has asked for a wide range of assistance, including some of which would fit into this category.

Additionally, the United States has routinely made available to foreign courts and prosecutors witness testimony via videoconference.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(i), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 3 (j)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

*Identifying, freezing and tracing proceeds of crime:*

Requests for Assistance Made to the United States

Between January 1, 2006 and December 31, 2009, the United States executed nine requests to freeze assets on behalf of 13 countries for investigations involving corruption related offences.

### Requests for Assistance Sought by the United States

Between January 1, 2006 and December 31, 2009, the United States received assistance from four countries pursuant to four requests to freeze assets for investigations involving corruption related offences.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(j), of the UNCAC.

### **Article 46 Mutual legal assistance**

#### **Subparagraph 3 (k)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

A further break down of the figures to reflect specific types of assistance contemplated by article 46(3) of the UNCAC was provided after the country visit as follows (in some requests, more than one type of assistance was requested):

*Recovery (forfeiture and return) of assets:*

### Requests for Assistance Made to the United States

Between 2006 and 2009, the United States forfeited and returned a total of at least \$120 million, in at least three different matters, to at least three countries in connection with investigations involving corruption related offences.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 3(k), of the UNCAC.

### **Article 46 Mutual legal assistance**

#### **Paragraph 4**

*4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in*

*undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations related to the provision under review are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

There is a constant exchange of information between the United States and its law enforcement partners, through the law enforcement channel or from the U.S. central authority when the material is already publicly available.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice is compatible with article 46, paragraph 4, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 5**

*5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782 and the Fifth and Fourteenth Amendments to the U.S. Constitution.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States will comply with a request of confidentiality as long as the material shared does not contain exculpatory information.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

United States prosecutors, including federal, state and local prosecutors have a duty under the U.S. Constitution and under a series of U.S. Supreme Court cases including *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny, as well as under 18 U.S.C. Section 3500 (Jencks Acts), to disclose all exculpatory material in its possession or in the possession of any members of the prosecution team. As this is a Constitutional and ethical obligation of U.S. prosecutors, it is occurring every day in prosecutors' offices all over the United States.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice is compatible with article 46, paragraph 5, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 6**

*6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. and practice in the field of mutual legal assistance is compatible with article 46, paragraph 6, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 7**

*7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is bound by such treaty(ies) of mutual legal assistance.

As article 46 is deemed to be self executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

The United States is a party to 81 mutual legal assistance treaties (including associated protocols, supplements and similar instruments) and 3 mutual legal assistance agreements.

As of April 1, 2010, the Office of International Affairs of the Criminal Division (OIA), the designated central authority under the convention, had more than 5,300 pending requests (approximately 3,800 incoming mutual legal assistance requests and approximately 1,500 outgoing mutual legal assistance requests) and more than 42,000 closed mutual legal assistance requests.

Regarding countries with whom the United States does not have bilateral MLAT treaties, the United States has received six incoming mutual legal assistance requests from four different countries under the UNCAC. All of these requests were seeking bank records.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 7, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 8**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. §3512 and 28 U.S.C. § 1782.

The United States does not decline to give mutual legal assistance based on bank secrecy.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 8, of the UNCAC. For comparison purposes, see also under article 40 of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 9 (a)**

*9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is authorized to provide mutual legal assistance by statute, 18 U.S.C. § 3512 and 28 U.S.C. § 1782 (Assistance to foreign and international tribunals and to litigants before such tribunals). U.S. law does not impede assistance in the absence of dual criminality, where the assistance does not require certain types of compulsory action, such as search warrants.

The United States also retains the ability to decline to provide assistance in situations where the matter involved is of a de minimis nature. In rare instances, the United States may deny a request based on essential interests. To expedite requests, particularly those that require no compulsory action, the United States may direct the requesting authority to work through other means, such as informal police cooperation.

The United States is authorized by its treaty power under Article II, section 2, of the United States Constitution to negotiate bilateral and multilateral treaties to seek and provide mutual legal assistance. Those treaties constitute legal authority to engage in international cooperation.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team noted that most of the bilateral treaties concluded by the U.S. authorities contain no dual criminality requirement as a condition for granting assistance. For the treaties



with double criminality provisions, those provisions are mostly limited to requests for assistance requiring compulsory or coercive measures.

The reviewing experts were satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 9(a), of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Subparagraph 9 (b)**

*9.(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

See the response under article 46, paragraph 9(a) of the UNCAC.

The United States retains the ability to decline to provide assistance in situations where the matter involved is of a *de minimis* nature. This might include material which is sought in connection with a case which would be classified as a misdemeanor in the United States (less than one year of potential incarceration as the maximum penalty), cases where the underlying offenses involve theft, fraud or evasion of taxes or duties in which the aggregate loss is US\$5,000 or less, and cases where the underlying offenses involve small amounts of drugs.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

Examples of non-coercive actions taken by the United States include: facilitating the interviews/obtaining testimony of voluntary witnesses, providing publicly available government documents and effecting service of documents.

The United States has refused to provide assistance in criminal defamation cases. Defamation, including slander and libel, is not a crime in the United States. Additionally, to provide evidence in these cases would violate the First Amendment of the U.S. Constitution, which guarantees the right to free speech.

The United States is not aware of any recent cases in which request of USA for mutual legal assistance was refused on the ground of absence of dual criminality.

Because of the large number of incoming requests for legal assistance which are received and executed by the United States, it is difficult to provide a specific figure. Suffice it to say, the United States has provided assistance in cases in the absence of dual criminality, as long as certain coercive measures were not required in the United States and the essential interests of the United States were not implicated.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 9(b), of the UNCAC

**Article 46 Mutual legal assistance**

**Subparagraph 9 (c)**

*9. (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States is authorized to provide mutual legal assistance by statute, 18 U.S.C. § 3512 and 28 U.S.C. § 1782 (Assistance to foreign and international tribunals and to litigants before such tribunals). Assuming that U.S. essential interests are not implicated, U.S. law does not impede assistance in the absence of dual criminality, where the assistance does not require certain types of coercive action, such as search warrants.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 9(c), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 10 (a)**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

*(a) The person freely gives his or her informed consent;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic provision related to the provision under review is the following: 18 U.S.C. § 3508. Custody and return of foreign witnesses (see annex).

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 10(a), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 10 (b)**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

*(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 11 (a)**

*11. For the purposes of paragraph 10 of this article:*

*(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Subparagraph 11 (b)**

*11. For the purposes of paragraph 10 of this article:*

*(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

#### **(b) Observations on the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Subparagraph 11 (c)**

*11. For the purposes of paragraph 10 of this article:*

*(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

#### **(b) Observations on the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Subparagraph 11 (d)**

*11. For the purposes of paragraph 10 of this article:*

*(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 46, paragraph 10(a) of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 12**

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The regulations related to the provision under review include safe harbor provisions of the U.S. bilateral Mutual Legal Assistance Treaties.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 12, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 13**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances,*

*where the States Parties agree, through the International Criminal Police Organization, if possible.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States has notified the Secretary-General of the United Nations that the central authority for mutual legal assistance requests is the "Department of Justice, Criminal Division, Office of International Affairs." (C.N. 1133.2006.TREATIES-47.) The Code of Federal Regulations, 28 C.F.R. Section 0.64-1, also generally designates the Office of International Affairs of the Criminal Division of the Justice Department (OIA) as the central authority for mutual legal assistance treaties.

CFR § 0.64-1 Central or Competent Authority under treaties and executive agreements on mutual assistance in criminal matters.

The Assistant Attorney General, Criminal Division, in consultation with the Assistant Attorney General for National Security in matters related to the National Security Division's activities, shall have the authority and perform the functions of the "Central Authority" or "Competent Authority" (or like designation) under treaties and executive agreements between the United States of America and other countries on mutual assistance in criminal matters that designate the Attorney General or the Department of Justice as such authority. The Assistant Attorney General, Criminal Division, is authorized to re-delegate this authority to the Deputy Assistant Attorneys General, Criminal Division, and to the Director and Deputy Directors of the Office of International Affairs, Criminal Division.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

It should be noted, as a matter of explanation as to how the United States system works, as previously explained, requests for mutual legal assistance under the Convention are sent to the Office of International Affairs (OIA) of the Criminal Division of the U.S. Department of Justice. After the mutual legal assistance request has been reviewed by OIA and a determination that the request meets all of the requirements of the convention, the request is forwarded to one or more of the 94 U.S. Attorney's Offices for execution pursuant to 18 U.S.C. § 3512 and 28 U.S.C. § 1782. The request is sent to the U.S. Attorney office (or offices) where the evidence or witnesses are located. The usual practice is for the Assistant U.S. Attorney in that district to apply to the United States District Court for an order appointing him or her as a commissioner to execute the foreign request. Among the powers granted the commissioner under U.S. law (18 U.S.C. Section 3512 and 28 U.S.C. Section 1782) is the authority to issue subpoenas to compel the appearance of a witness to provide testimony or produce documents. Once the requested evidence is obtained by the commissioner, it is transmitted to OIA and then on to the authorities of the requesting State.

The Office of International Affairs in the Criminal Division of the U.S. Department of Justice (OIA), acting as the central authority for mutual legal assistance treaties, as of April 1, 2010, had more than 5,300 pending requests (approximately 3,800 incoming mutual legal assistance

requests and approximately 1,500 outgoing mutual legal assistance requests) and more than 42,000 closed mutual legal assistance requests.

The United States allows that requests for mutual legal assistance and any related communications be transmitted to the central authorities designated by States Parties.

The United States doesn't require that such requests and related communications be addressed to it through diplomatic channels.

The United States agrees that, in urgent circumstances, requests for mutual legal assistance and related communications be addressed to it through the International Criminal Police Organization.

Although it is permissible to send such a request through INTERPOL, it is not the preferred method. In urgent situations, for formal legal assistance requests, direct communication with the Office of International Affairs of the Criminal Division of the Justice Department, the designated central authority under the convention, is most desirable. For informal assistance, the use of the law enforcement channel is encouraged. The U.S. Law Enforcement Attaches, representing the FBI, DEA and ICE, stationed at U.S. Embassies around the world, can be particularly valuable resources.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 13, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 14**

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States has notified the Secretary-General of the United Nations that it will accept requests in English.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 14, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 15**

*15. A request for mutual legal assistance shall contain:*

- (a) The identity of the authority making the request;*
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*
- (e) Where possible, the identity, location and nationality of any person concerned; and*
- (f) The purpose for which the evidence, information or action is sought.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The elements prescribed in paragraph 15 of article 46 are included in outgoing MLA requests, as appropriate in a given case.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 15, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 16**

*16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The Office of International Affairs may seek additional information from the requesting State so that a legal assistance request can be executed in the United States pursuant to 18 U.S.C. §3512 or 28 U.S.C. § 1782.



When OIA needs additional information, it is usually because the requesting country, in its mutual legal assistance request, has failed to show a connection between the activity under investigation and the evidence sought in the United States. Sometimes the request fails to supply sufficient information to even locate a particular bank account or witness. There have been some instances where foreign prosecutors have simply forwarded a copy of their investigative file without any summary of the evidence and have left it for OIA to determine if there is a factual basis. Because of the large volume of requests which OIA receives each year, OIA is not in a position to review and summarize an entire case file to determine a connection between the evidence sought and the matter under investigation. In some instances, the rights of defendants or witnesses, who might have potential criminal liability, must also be explained.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 16, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 17**

*17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 (see annex) and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

The United States does its best, in accordance with U.S. domestic law, to follow the procedures set out in an incoming request for legal assistance. One instance where the United States may not be able to execute an incoming request due to its domestic law is when the requesting State seeks to compel testimony from a defendant who has a Fifth Amendment right under the U.S. Constitution, due to potential U.S. criminal liability, not to incriminate himself.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 17, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 18**

*18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations relating to the provision under review are: 18 U.S.C. § 3512 (see annex) and 28 U.S.C. § 1782.

The United States can assist in getting witnesses in the United States to testify as part of the execution of an incoming request for legal assistance. Due to the Confrontation Clause in the Sixth Amendment of the U.S. Constitution, which requires that a criminal defendant "confront" his accusers, in the absence of compelling circumstances, it is unlikely that the United States will make a request for video testimony for use in a criminal trial.

In a recent case, the United States, through a bilateral MLAT treaty request, was able to subpoena a witness who was able to provide video testimony to the requesting country in a bribery case in which police officers were accused of assisting an individual in improperly obtaining a license to sell alcoholic beverages.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 18, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 19**

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the*

*requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States complies with this provision concerning the use limitations of evidence provided under the Convention. One manner in which this is reinforced is that the Office of International Affairs of the Justice Department, acting as the central authority, in transmitting the evidence to the prosecutors in the field, reminds the prosecutors of the use limitation and the need to have OIA reach out to their foreign counterparts to obtain consent of the requested State if they want to use the evidence for another matter.

It should be noted that many of the bilateral MLATs to which United States is a party have broader use limitation provisions. Of course, when dealing with one of these treaty partners, these broader use limitations would apply.

As previously described in earlier responses, U.S. prosecutors have a Constitutional and ethical obligation to disclose exculpatory information or evidence to the accused. When U.S. prosecutors have had to turn over such exculpatory material, which has been obtained pursuant to an MLAT request, the U.S. has complied with this or similar provisions in its bilateral MLAT treaties.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with the Convention.

Some information on the handling of recent cases in which exculpatory evidence was disclosed by the U.S. authorities was reported as follows:

United States prosecutors, including federal, state and local prosecutors have a duty under the U.S. Constitution and under a series of U.S. Supreme Court cases including *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny, as well as under 18 U.S.C. Section 3500 (Jencks Acts), to disclose all exculpatory material in its possession or in the possession of any members of the prosecution team. As this is a Constitutional and ethical obligation of U.S. prosecutors, it is occurring every day in prosecutors' offices all over the United States.

The United States does not specifically keep track of the reason why another State would have made a request for legal assistance. Therefore, the United States does not know if any requests made to it were for the purpose of obtaining exculpatory material.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 19, of the UNCAC.

**Article 46 Mutual legal assistance**

## Paragraph 20

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As this provision is self-executing, article 46(20) can be the basis on which a U.S. prosecutor executing an incoming mutual legal assistance request can ask the court to keep the matter “under seal”. The requesting State prosecutor should also specifically ask that the matter be kept confidential.

U.S. courts have recognized the need for secrecy in the context of collecting evidence for use in a criminal proceeding by a foreign government. See e.g. *In re Letter of Request from the Government of France*, 139 F.R.D. 588, 589 (S.D.N.Y. 1991) (“secrecy of the Commissioner’s inquiry is essential to protect the French Court’s criminal investigation and honour the clear, remedial purposes of the [legal assistance] statute in furtherance of our nation’s international obligations. To allow otherwise would create grave risk that evidence would be concealed and destroyed, and French justice defeated.”)

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

It should be noted, as a matter of explanation as to how the United States system works, that when it is included in the request for legal assistance from the requesting State, the Assistant U.S. Attorney who has been appointed as a commissioner to collect evidence can ask the court to file the request “under seal”, which means that any filings associated with the request are kept confidential.

### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 20, of the UNCAC.

## Article 46 Mutual legal assistance

### **Subparagraph 21 (a)**

*21. Mutual legal assistance may be refused:*

*(a) If the request is not made in conformity with the provisions of this article;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

Regarding information on recent court or other cases in which USA refused mutual legal assistance because the request was not made in conformity with the provisions of this article, the following was reported:

As of April 1, 2010, the Office of International Affairs had more than 5,300 pending mutual legal assistance requests (approximately 3,800 incoming mutual legal assistance requests and approximately 1,500 outgoing mutual legal assistance requests).

With the large number of outgoing mutual legal assistance requests which are made to the United States, there have probably been some which have been denied on this basis. With the high volume of cases, it is extremely difficult to provide specific statistics.

After the country visit, the U.S. authorities provided statistics related to the denial of MLA requests: Of the over 200 formal MLA requests received related to corruption-related offenses between January 1, 2003 and November 11, 2010, the United States has denied three requests for legal assistance from three different countries. The first was denied based on prejudice to an “essential interest” of the United States; the second was denied because the request was related to a civil matter (contract dispute) and not a criminal matter; and the third request was denied as it was deemed of *de minimis* nature.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 21(a), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 21 (b)**

*21. Mutual legal assistance may be refused:*

*(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic legislations related to the provision under review are the following: 18 U.S.C. § 3512 (see annex) and 28 U.S.C. § 1782.

See also the response under article 46, paragraph 21(a) of the UNCAC.

OIA maintains records on more than 42,000 closed mutual legal assistance requests. There are a few cases in which mutual legal assistance requests could not be executed because they implicated an essential interest of the United States. Most of these incoming requests sought evidence for use in criminal defamation cases. To provide evidence in these cases would violate the First Amendment of the U.S. Constitution, which guarantees the right to free speech.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 21(b), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 21 (c)**

*21. Mutual legal assistance may be refused:*

*(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See above.

**(b) Observations on the implementation of the article**

See above.

**Article 46 Mutual legal assistance**

**Subparagraph 21 (d)**

*21. Mutual legal assistance may be refused:*

*(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

**(a) Summary of information relevant to reviewing the implementation of the article**

See above.

**(b) Observations on the implementation of the article**

See above.

## **Article 46 Mutual legal assistance**

### **Paragraph 22**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States does not refuse or deny mutual legal assistance requests solely on the ground that the offense involves fiscal matters. These requests are handled like any other request made pursuant to the Convention.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 22, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 23**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

When denying a request, the Office of International Affairs, as the designated Central Authority under the Convention routinely provides to the requesting State, in writing, the reasons why a request is being denied or refused.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

#### **(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 23, of the UNCAC.

## **Article 46 Mutual legal assistance**

### **Paragraph 24**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic provisions include 18 U.S.C. § 3512 (see annex) and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

The United States strives to execute all mutual legal assistance requests as soon as possible. With over approximately 3,800 pending incoming mutual legal assistance requests, it is difficult to give a customary amount of time that it takes to execute a request. Some can be completed within a week of receipt, while others can take over a year. It depends on a number of factors including the complexity of the request, the type and location on the assistance which is being sought, the quality of the initial request (including the quality of the English translation) and whether additional information is needed.

When OIA needs additional information, it is usually because the requesting country, in its mutual legal assistance request, has failed to show a connection between the activity under investigation and the evidence sought in the United States. Sometimes the request fails to supply sufficient information to even locate a particular bank account or witness. There have been some instances where foreign prosecutors have simply forwarded a copy of their investigative file without any summary of the evidence and have left it for OIA to determine if there is a factual basis. Because of the large volume of requests which OIA receives each year, OIA is not in a position to review and summarize an entire case file to determine a connection between the evidence sought and the matter under investigation.

Also, mutual legal assistance requests that need to be executed with the use of compulsory process and therefore the involvement of the U.S. Attorney's Offices with court authorization tend to take more time than those which can be handled through the law enforcement channel.

There is constant, nearly daily communication (either by email, telephone or fax) between the attorneys and support staff of the Office of International Affairs and their counterparts in other countries who have made a large number of mutual legal assistance requests to the United States. In addition to this regular communication, the United States Central Authority (OIA) seeks to have regular (annual) consultations with its largest MLAT and extradition treaty partners.



With countries with a small number or only an occasional request, OIA attempts to communicate either by email, telephone, fax or mail, depending on how OIA normally communicates with the central authority of the other country.

With over 1,500 outgoing formal requests and the large number of countries with whom the United States had made mutual legal assistance requests, it is difficult to give a customary length of time; some are done quickly others are never responded to at all. As with incoming requests, there are a number of factors that come into play.

There is constant, nearly daily communication (either by email, telephone or fax) between the attorneys and support staff of the Office of International Affairs and their counterparts in other countries who have made a large number mutual legal assistance requests to the United States. In addition to this regular communication, the United States Central Authority (OIA) seeks to have regular (annual) consultations with its largest MLAT and extradition treaty partners.

With countries with a small number or only an occasional request, OIA attempts to communicate either by email, telephone, fax or mail, depending on how OIA normally communicates with the central authority of the other country. On occasion, some countries to which the United States has made mutual legal assistance requests have not responded at all.

After the country visit and in response to queries raised by the reviewing experts, the U.S. authorities provided the following feedback.

When an urgent matter is brought to the attention of the United States Central Authority, best efforts are made to prioritize these matters and execute these cases as quickly as possible. The speed at which an incoming request for assistance can be completed includes a number of factors outside of the control of the executing authorities, including the quality of the request and its English translation, the quantity and types of assistance sought, as well as the locations of the evidence or materials sought in the United States.

The United States believes that the enactment of 18 United States Code Section 3512, which became U.S. law in October 2009, will help further increase the efficiency in the execution of incoming legal assistance requests by the United States. This statute permits the consolidation of the request for most types of evidence (with the exception of search warrants) into a single judicial district in which just one Assistant U.S. Attorney acting as commissioner can coordinate the execution of the foreign MLA request.

In addition, the following examples were brought to the attention of the review team after the country visit:

#### Example 1

Authorities in Country X were investigating Y, a law enforcement officer, for providing information stored in non-public, law enforcement computer databases to criminals in exchange for financial benefits. Authorities had evidence that Y communicated with his criminal associates via his personal email account. The mutual legal assistance treaty request sought IP-address information as well e-mail content for the account in question. The request was received by the Central Authority and was immediately referred to the appropriate U.S. Attorney's Office for execution. A search warrant was requested by the Assistant U.S. Attorney, acting as a commissioner, which was granted by the judge. The search warrant was

served on the company which possessed the records. Thirty-seven days after receiving the request, the certified evidence, including the content of the email account, was forwarded to Country X, in full execution of the MLAT request.

### Example 2

Prosecutors in Country X were investigating a former high ranking official of Country Y and others for bribery and fraud. Authorities believed a company in Country X bribed this high ranking official of Country Y over a period lasting a number of years, in order to secure a multi-million dollar government contract. The mutual legal assistance treaty request to the U.S. sought bank records for a period of two years from two different banks. The request was received by the U.S. Central Authority and immediately referred to the appropriate U.S. Attorney's Office for execution. Subpoenas for the requested bank records were obtained. Eighty-five days after receiving the request, certified bank records from both banks were forwarded to Country X, in full execution of the request.

### Example 3

Prosecutors in Country X were investigating Y for bribery. Authorities were looking into whether Y had bribed and otherwise offered campaign contributions to public officials in Country X to support a land development project. The mutual legal assistance treaty request to the U.S. sought the interview of three people who were located in the United States; the participation of authorities from Country X was also sought. The request was received by the U.S. Central Authority and immediately referred to the appropriate U.S. authorities for execution. Seventy-eight days later, the requested interviews were conducted with participation of authorities from the requesting country.

#### **(b) Observations on the implementation of the article**

The review team noted that the time frame for dealing with incoming MLA requests obviously varies depending on the applicable international instruments, the type of assistance, the complexity of the case, the type and location of the assistance sought, the quality of the initial request and whether additional information is needed. A newly enacted statute would likely increase efficiency in executing incoming MLA requests. The reviewing experts encouraged the U.S. authorities to continue to make best efforts to ensure such efficiency, including by giving careful consideration to the collection of data on the time frame for dealing with incoming MLA requests.

### **Article 46 Mutual legal assistance**

#### **Paragraph 25**

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

Although with the large number of requests in which the United States is involved, there are probably some instances where the mutual legal assistance has been postponed on the ground that it interferes with an ongoing matter. This highlights the need for good communication and coordination between OIA and its foreign counterparts.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 25, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 26**

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 26, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 27**

*27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is self-executing, this “safe harbor” provision of the Convention became U.S. domestic law upon ratification by the U.S. Senate. There are no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 27, of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 28**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

There have been instances when the requested State, after consultation with OIA, has paid the extraordinary expenses associated with executing a request for legal assistance. There have been a few occasions where, in MLAT requests made by the United States, since the costs of copying and transcription ended up costing tens of thousands of dollars, the United States agreed, after consultation with the central authority of the requested country, to cover these specific extraordinary expenses.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 28, of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (a)**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations related to the provision under review are: 18 U.S.C. § 3512 (see annex) and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

The United States regularly provided these types of publicly available documents to requesting State Parties. Since these documents are accessible to any member of the general public, the documents are usually obtained from the government agencies which possesses them or from the courthouse in the case of court records by U.S. law enforcement agents or support staff of the U.S. Attorney's Office.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. law and practice in the field of mutual legal assistance is compatible with article 46, paragraph 29(a), of the UNCAC.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (b)**

*29. The requested State Party:*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The domestic regulations are the following: 18 U.S.C. § 3512 and 28 U.S.C. § 1782.

As article 46 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

By way of explanation, the United States often provides these types of documents to requesting State Parties. Generally, the types of material include police and law enforcement reports and are usually given by the originating law enforcement agency to OIA for transmission to the requesting State under the terms of the Convention.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 29(b), of the UNCAC.

**Article 46 Mutual legal assistance**

**Paragraph 30**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As of April 2011, the United States had bilateral mutual legal assistance treaties with 81 States, including protocols, supplements and similar instruments. Updated mutual legal assistance treaty instruments with member states of the European Union have recently come into force. Additionally, the United States is a party to 3 mutual legal assistance agreements. During the country visit, more information was provided about the MLA treaties concluded by the U.S. authorities.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of mutual legal assistance is compatible with article 46, paragraph 30, of the UNCAC.

**Article 47 Transfer of criminal proceedings**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

As article 47 is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there were no additional domestic measures which needed to be adopted in order to comply with this provision of the Convention.

As of April 2011, the United States is not aware of any cases in which prosecution has been transferred. This is due in part to the policy that the United States will extradite its own nationals.

**(b) Observations on the implementation of the article**

The review team noted the lack of practical cases of transfer of criminal proceedings due to the fact that the United States extradites its own nationals. The reviewing experts were satisfied that the transfer of criminal proceedings can be used in the future based on the implementation of article 47 of the UNCAC, assuming that the United States can otherwise exercise jurisdiction under its domestic law. As this provision is deemed to be self-executing, upon the ratification of the Convention by the U.S. Senate, there are no additional domestic measures which need to be adopted in order to comply with this provision of the Convention.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (a)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States has notified the Secretary-General of the United Nations that the central authority for mutual legal assistance requests is the "Department of Justice, Criminal Division, Office of International Affairs." (C.N. 1133.2006.TREATIES-47.)

The Code of Federal Regulations, 28 C.F.R. Section 0.64-1, also generally designates the Office of International Affairs of the Criminal Division of the Justice Department as the central authority for mutual legal assistance treaties.

Significantly, Legal Attaches are posted at a number of the U.S. Embassies abroad representing numerous U.S. law enforcement agencies, including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), the Immigration and Customs Enforcement Division of the Department of Homeland Security (ICE), the U.S. Marshalls Service (USMS), Internal Revenue Service (IRS), Bureau for Alcohol Tobacco and Firearms (ATF) and the U.S. Secret Service (USSS).

Examples of the successful implementation of domestic measures adopted to comply with the provision under review are in the responses below.

The United States does not have a specific database through which information can be shared.

There is a constant exchange of information on corruption related offenses as well as with other types of criminal investigations between the Legal Attaches at a number of the U.S. Embassies abroad representing numerous U.S. law enforcement agencies. It is difficult to provide precise numerical data of this type of law enforcement cooperation.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of law enforcement cooperation is compatible with article 48, paragraph 1(a), of the UNCAC.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (b) (i)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See above.

**(b) Observations on the implementation of the article**

See above.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (b) (ii)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(ii) The movement of proceeds of crime or property derived from the commission of such offences;*



**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

In addition to the legal attaches posted at the U.S. Embassies and Consulates abroad, the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of Treasury, which was established in 1990 by Treasury Order Number 105-08, can be a valuable resource. FinCEN is the United States' financial intelligence unit (FIU) and is part of the Egmont Group. As the FIU in the United States, FinCEN is responsible for collection, analysis and dissemination of financial information for anti-money laundering and counter-terrorist financing purposes. To the extent that the offenses covered by the Convention involves these areas, FinCen can offer its fellow 120 Egmont partners valuable assistance.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of law enforcement cooperation is compatible with article 48, paragraph 1(b)(ii), of the UNCAC.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (b) (iii)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (c)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action*

*to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (d)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (e)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

For the applicable regulations and examples of the successful implementation of domestic measures adopted to comply with the provision under review and related analyses, reports or typologies related to means and methods used to commit offences established in accordance with the Convention, see also the previous responses.

The liaison officer positions within USA law enforcement authorities:

Attaches from the Federal Bureau of Investigation are posted at the U.S. Embassy or Consulates in the following countries: Afghanistan, Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Czech Republic, Denmark, Dominican Republic, El Salvador, Egypt, Estonia, Ethiopia, France, Germany, Georgia, Greece, Hong Kong, Hungary, Indonesia, India, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Republic of Korea, Lebanon, Malaysia, Mexico, Morocco, Netherlands (The Hague), Nigeria, Pakistan, Panama, Philippines, Poland, Qatar, Romania, Russia, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Switzerland, Thailand, Trinidad and Tobago, Turkey, United Arab Emirates, Ukraine, United Kingdom, Venezuela, and Yemen.

Attaches from the Immigration and Customs Enforcement section of the Department of Homeland Security are posted at the U.S. Embassy or Consulates in the following countries: Argentina, Austria, Brazil, Canada, China, Colombia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Greece, Guatemala, Honduras, Hong Kong, India, Italy, Jamaica, Japan, Jordan, Republic of Korea, Mexico, Morocco, Hong Kong, Italy, Japan, Republic Netherlands (The Hague), Pakistan, Panama, Philippines, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Thailand, United Arab Emirates, United Kingdom, Venezuela, and Vietnam.

Attaches from the Drug Enforcement Administration are posted at the U.S. Embassy or Consulates in the following countries: Afghanistan, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Curacao, Cyprus, Denmark, Dominican Republic, Ecuador, El Salvador, Egypt, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hong Kong, India, Indonesia, Italy, Japan, Jamaica, Kazakhstan, Republic of Korea, Malaysia, Mexico, Netherlands (The Hague), Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Russia, Singapore, South Africa, Spain, Suriname, Switzerland, Tajikistan, Thailand, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Venezuela, and Vietnam.

Attaches from the United States Secret Service are posted at the U.S. Embassy or Consulates in the following countries: Brazil, Bulgaria, Canada, China, Colombia, France, Germany, Italy, Mexico, Netherlands, Romania, Russia, South Africa, Spain, Thailand and the United Kingdom.

Attaches from the Bureau for Alcohol, Tobacco, Firearms and Explosives are posted at the U.S. Embassy or Consulates in the following countries: Canada, Colombia, El Salvador, Iraq and Mexico.

Attaches from the Internal Revenue Service of the U.S. Department of the Treasury are posted at the U.S. Embassy or Consulates in the following countries: Dominican Republic, Mexico and Jamaica.

The U.S. Marshals Service has foreign field offices at the U.S. Embassy or Consulates in the following countries: Dominican Republic, Mexico and Jamaica.

It should be noted that many of the attaches have regional coverage. As a result, for those with regional assignments, their work responsibilities include more than one country.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of law enforcement cooperation is compatible with article 48, paragraph 1(e), of the UNCAC.

**(c) Successes and good practices**

The presence of law enforcement attachés abroad and the extensive use of the informal law enforcement channels in appropriate instances.

## **Article 48 Law enforcement cooperation**

### **Subparagraph 1 (f)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

**(b) Observations on the implementation of the article**

See under article 48, paragraph 1(a) of the UNCAC.

## **Article 48 Law enforcement cooperation**

### **Paragraph 2**

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement*

*cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States entered into bilateral or multilateral agreements or arrangements on direct cooperation with law enforcement agencies of other States Parties.

The United States considers the UNCAC as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention in part.

The law enforcement assistance contemplated by this provision can be offered to other countries even without the existence of the UNCAC.

In addition to the role of the law enforcement attaches previously discussed, the United States is an active member of INTERPOL.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of law enforcement cooperation is compatible with article 48, paragraph 2, of the UNCAC.

**Article 48 Law enforcement cooperation**

**Paragraph 3**

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States attempts to use modern technology when providing assistance under the Convention, including, among other things, computers, email, and video technology, when appropriate.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of law enforcement cooperation is compatible with article 48, paragraph 3, of the UNCAC.

**Article 49 Joint investigations**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

The United States concluded bilateral or multilateral agreements that allow for the establishment of joint investigative bodies or has your country undertaken joint investigations on a case-by-case basis as described above.

In a number of contexts, U.S. law enforcement agencies currently pursue joint investigative efforts with foreign counterparts. For example, the U.S. Drug Enforcement Administration frequently works closely with certain drug enforcement agencies overseas to investigate drug trafficking activity that affects both countries. In an appropriate case, the United States would consider undertaking a joint investigative effort with another country where acts of corruption had a nexus with both the United States and that country. In large measure, joint investigative efforts take place on a case-by-case basis, at the level of informal police cooperation, and entail sharing information and cooperating on developing effective investigative strategies.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of joint investigations is compatible with article 49 of the UNCAC.

**Article 50 Special investigative techniques**

**Paragraph 1**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Electronic surveillance including the interception of wire, electronic and oral communications are included in 18 U.S.C. Sections 2510-2522 (Title III). It should be noted that real time Title III wiretaps cannot be obtained solely to execute a mutual legal assistance request.

It is well established in case-law that controlled deliveries are permissible under the Fourth Amendment of the U.S. Constitution and Rule 41 of the Federal Rules of Criminal Procedure and are routinely and lawfully undertaken by U.S. law enforcement.

It is also well established in case-law, e.g. *Lewis v. U.S.*, 385 U.S. 206 (1966), that undercover operations are permissible under the U.S. Constitution are routinely and lawfully undertaken by U.S. law enforcement.

One example of a case in which controlled delivery or other special investigative techniques have been used and admitted in court can be found in the U.S. Supreme Court's decision in *United States v. Grubbs*, 547 U.S. 90 (2006), in which the court upheld the defendant's conviction based on a controlled delivery of contraband and found that an "anticipatory search warrant" was constitutional under the Fourth Amendment of the U.S. Constitution.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of special investigative techniques is compatible with article 50, paragraph 1, of the UNCAC.

**Article 50 Special investigative techniques**

**Paragraph 2**

*2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Special investigative techniques are used often by U.S. law enforcement in domestic cases and when used in the international context are done on a case-by-case basis, as permitted by U.S. domestic law.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of special investigative techniques is compatible with article 50, paragraph 2, of the UNCAC.

**Article 50 Special investigative techniques**

**Paragraph 3**

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

Special investigative techniques are used often by U.S. law enforcement in domestic cases and when used in the international context are done on a case-by-case basis, as permitted by U.S. domestic law.

With the consent of the other country, and in compliance with U.S. domestic law, there have been instances, on a case-by-case basis, where special investigative techniques, including for example, the controlled delivery of narcotics, have been employed.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of special investigative techniques is compatible with article 50, paragraph 3, of the UNCAC.

**Article 50 Special investigative techniques**

**Paragraph 4**

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The United States reported that measures described in this provision were adopted and implemented.

One example where goods or funds have been intercepted or allowed to continue intact or removed or replaced in whole or in part can be found in the U.S. Supreme Court's decision in *United States v. Grubbs*, 547 U.S. 90 (2006), in which the court upheld the defendant's conviction based on a controlled delivery of contraband and found that an "anticipatory search warrant" was constitutional under the Fourth Amendment of the U.S. Constitution.

**(b) Observations on the implementation of the article**

The review team was satisfied that the U.S. practice in the field of special investigative techniques is compatible with article 50, paragraph 4, of the UNCAC.



**ANNEX I**  
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# **THE ATTORNEY GENERAL'S 2005 GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE**

## **IV. B.2: Services to Crime Victims**

Department employees should consider the security of victims and witnesses in every case. Where necessary, prosecutors should inform the court of the threat level, risk, and resources available to create a reasonable plan to promote the safety of victims and witnesses. Department employees may make victims and witnesses aware of the resources that may be available to promote their safety, including protective orders, the Emergency Witness Assistance Program, the Federal Witness Security Program, and State and local resources. Prosecutors should consider moving for pretrial detention of the accused pursuant to 18 U.S.C. § 3142(f) when circumstances warrant it.

## **CODE OF FEDERAL REGULATIONS**

### **28 C.F.R. § 0.111b “Witness Security Program.”**

(a) In connection with the protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Director of the United States Marshals Service and officers of the United States Marshals Service designated by the Director may:

- (1) Provide suitable documents to enable the person to establish a new identity or otherwise protect the person;
- (2) Provide housing for the person;
- (3) Provide for the transportation of household furniture and other personal property to a new residence of the person;
- (4) Provide to the person a payment to meet basic living expenses in a sum established in accordance with regulations issued by the Director, for such time as the Attorney General determines to be warranted;
- (5) Assist the person in obtaining employment;
- (6) Provide other services necessary to assist the person in becoming self-sustaining;
- (7) Protect the confidentiality of the identify and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons; and
- (8) Exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provision of law as may

be required to maintain the security of protective witnesses and the integrity of the Witness Security Program.

(b) The identity or location or any other information concerning a person receiving protection under 18 U.S.C. 3521 et seq., or any other matter concerning the person or the Program, shall not be disclosed except at the direction of the Attorney General, the Assistant Attorney General in charge of the Criminal Division, or the Director of the Witness Security Program. However, upon request of State or local law enforcement officials, the Director shall, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Director knows or the request indicates that the person is under investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence.

**5 C.F.R. § 2635.101(b)(11):**

“General principles. The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper. . . . (11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”

## **FEDERAL ACQUISITION REGULATIONS**

**Subpart 3.204:**

“Treatment of violations. (a) Before taking any action against a contractor, the agency head or a designee shall determine, after notice and hearing under agency procedures, whether the contractor, its agent, or another representative, under a contract containing the Gratuities clause-(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and (2) Intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred). (b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness. (c) When the agency head or designee determines that a violation has occurred, the Government may-(1) Terminate the contractor’s right to proceed; (2) Initiate debarment or suspension measures as set forth in Subpart 9.4; and (3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.”

# FEDERAL RULES OF CIVIL PROCEDURE

## Rule 32.2

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

- (i) lists any identified property;
- (ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Sentence and Judgment.

(A) When Final. At sentencing--or at any time before sentencing if the defendant consents--the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal. The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) Retaining the Jury. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Form. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) Publishing and Sending Notice. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.



(C) Means of Publication; Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(a) Stay Pending Appeal.

If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but

must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

**(e) Subsequently Located Property; Substitute Property.**

(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).

### **Rule 43. Defendant's Presence**

**(a) When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

**(b) When Not Required.** A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

**(c) Waiving Continued Presence.**

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing;  
or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.”

## **FEDERAL RULES OF EVIDENCE**

### **Fed. R. Evid. 404(b):**

“Other Crimes, Wrongs, or Acts.-Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”

### **Fed. R. Evid. 609(a):**

“For the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”

## **SECURITIES & EXCHANGE ACT OF 1934**

### **§78m. Periodical and other reports**

**(a) Reports by issuer of security; contents** Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962. (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

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

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and

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

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the

Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

### **§ 78dd-1. [ ]. Prohibited foreign trade practices by issuers**

#### **(a) Prohibition.**

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title [15 U.S.C.S. § 78l] or which is required to file reports under section 15(d) of this title [15 U.S.C.S. § 78o(d)], or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

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

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

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

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

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

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

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

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

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

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

**(c) Affirmative defenses.**

It shall be an affirmative defense to actions under subsection (a) or (g) that—

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

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

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

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

**(d) Guidelines by the Attorney General.**

Not later than one year after the date of the enactment of the Foreign Corrupt Practices Act Amendments of 1988 [enacted Aug. 23, 1988], the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United

States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue-

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 U.S.C.S. §§ 551 et seq.], and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title [5 U.S.C.S. §§ 701 et seq.].

**(e) Opinions of the Attorney General.**

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 U.S.C.S. §§ 551 et seq.], and that procedure shall be subject to the provisions of chapter 7 of that title [5 U.S.C.S. §§ 701 et seq.]. (2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other

department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

**(f) Definitions.**

For purposes of this section:

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

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

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

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

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

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

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

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

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



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

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

**(g) Alternative jurisdiction.**

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title [15 U.S.C.S. § 78l] or which is required to file reports under section 15(d) of this title [15 U.S.C.S. § 78o(d)], or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

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

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

**(a) Prohibition.**

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934 [15 U.S.C.S. § 78dd-1], or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer,

payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

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

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

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

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

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

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

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

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

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

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

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

**(b) Exception for routine governmental action.**

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

**(c) Affirmative defenses.**

It shall be an affirmative defense to actions under subsection (a) or (i) that—

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

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

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

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

**(d) Injunctive relief.**

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

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

**(e) Guidelines by the Attorney General.**

Not later than 6 months after the date of the enactment of the Foreign Corrupt Practices Act Amendments of 1988 [enacted Aug. 23, 1988], the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons

through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 U.S.C.S. §§ 551 et seq.], and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title [5 U.S.C.S. §§ 701 et seq.].

**(f) Opinions of the Attorney General.**

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 U.S.C.S. §§ 551 et seq.], and that procedure shall be subject to the provisions of chapter 7 of that title [5 U.S.C.S. §§ 701 et seq.].

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established

under paragraph (1), shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

**(g) Penalties.**

(1) (A) Penalties. Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than \$ 2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$ 100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Attorney General.

**(h) Definitions.**

For purposes of this section:

(1) The term "domestic concern" means—

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

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

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

of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

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

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

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

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

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

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

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

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

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

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

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

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

(v) actions of a similar nature.

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

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

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

(B) any other interstate instrumentality.

**(i) Alternative jurisdiction.**

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or

authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

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

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

#### **(a) Prohibition.**

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 [15 U.S.C.S. § 78dd-1] or a domestic concern (as defined in section 104 of this Act [15 U.S.C.S. § 78dd-2]), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

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

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

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

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

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

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

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

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

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

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

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

**(c) Affirmative defenses.**

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

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

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

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

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

**(d) Injunctive relief.**

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The



attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

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

**(e) Penalties.**

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

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$ 100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

**(f) Definitions.**

For purposes of this section:

(1) The term "person", when referring to an offender, means any natural person other than a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) actions of a similar nature.

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

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

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

(B) any other interstate instrumentality.

## **§ 78ff. Penalties**

**(a)** Willful violations; false and misleading statements.

Any person who willfully violates any provision of this title [15 U.S.C.S. §§ 78a et seq.] (other than section 30A [15 U.S.C.S. § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title [15 U.S.C.S. §§ 78a et seq.], or any person who

willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title [15 U.S.C.S. §§ 78a et seq.] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title [15 U.S.C.S. § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

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

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 U.S.C.S. § 78o(d)] or any rule or regulation thereunder shall forfeit to the United States the sum of \$ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

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

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 U.S.C.S. § 78dd-1] shall be fined not more than \$ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A [15 U.S.C.S. § 78dd-1] shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C.S. § 78dd-1] shall be fined not more than \$ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C.S. § 78dd-1] shall be subject to a civil penalty of not more than \$ 10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

## **US CODE**

**5 U.S.C. § 1213(h):**

“The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.”

**5 U.S.C. § 2302(b)(8) & (9):**

“Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of-(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A); (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or (D) for refusing to obey an order that would require the individual to violate a law.”

**5 U.S.C. § 7511. Definitions; application**

- (a) For the purpose of this subchapter—
  - (1) “employee” means—
    - (A) an individual in the competitive service—
      - (i) who is not serving a probationary or trial period under an initial appointment; or
      - (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
    - (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
      - (i) in an Executive agency; or
      - (ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)–  
(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or  
(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;  
(2) “suspension” has the same meaning as set forth in section 7501 (2) of this title;  
(3) “grade” means a level of classification under a position classification system;  
(4) “pay” means the rate of basic pay fixed by law or administrative action for the position held by an employee; and  
(5) “furlough” means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

**(b)** This subchapter does not apply to an employee–

(1) whose appointment is made by and with the advice and consent of the Senate;  
(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by–  
(A) the President for a position that the President has excepted from the competitive service;  
(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or  
(C) the President or the head of an agency for a position excepted from the competitive service by statute;  
(3) whose appointment is made by the President;  
(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;  
(5) who is described in section 8337 (h)(1), relating to technicians in the National Guard;  
(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;  
(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;  
(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10, or an intelligence activity of a military department covered under subchapter f chapter 83 of title 10 unless subsection (a)(1)(B) of this section or section 1005 the basis for this subchapter’s applicability;  
(9) who is described in section 5102 (c)(11) of this title; or  
(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

### **5 U.S.C. § 7512. Actions covered**

This subchapter applies to—

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less; but does not apply to—
  - (A) a suspension or removal under section 7532 of this title,
  - (B) a reduction-in-force action under section 3502 of this title,
  - (C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321 (a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
  - (D) a reduction in grade or removal under section 4303 of this title, or
  - (E) an action initiated under section 1215 or 7521 of this title.

### **5 U.S.C. § 7513. Cause and procedure**

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
- (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefore at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request

## **5 U.S.C. § 7514. Regulations**

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

## **18 U.S.C. § 2.**

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

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

## **18 U.S.C. § 3**

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

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

## **18 U.S.C. § 4**

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

## **18 U.S.C. § 201. Bribery of public officials and witnesses**

**(a)** For the purpose of this section-

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

**(b)** Whoever-

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; ...

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

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

**(c)** Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or



because of any official act performed or to be performed by such person, public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

## **18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches**

(a) Restrictions on All Officers and Employees of the Executive Branch and Certain Other Agencies.↵

(1) Permanent restrictions on representation on particular matters.-Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter↵

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) in which the person participated personally and substantially as such officer or employee, and
- (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.- Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter-

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
- (C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title.

(3) Clarification of restrictions.-The restrictions contained in paragraphs (1) and (2) shall apply-

- (A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and
- (B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

**(b) One-Year Restrictions on Aiding or Advising.-**

(1) In general.-Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from

disclosure under section 552 of title, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any negotiation period year employment Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) Definition.-For purposes of this paragraph-

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.-

(1) Restrictions.-In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.-

(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))-

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title,

(ii) employed in a position which is not referred to in clause (i) and for which that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, or, for a period of 2 years following the enactment of the National Defense Authorization Act for Fiscal Year 2004, a person who, on the day prior to the enactment of that Act, was employed in a position which is not referred to in clause (i) and for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5304 or section 5304a of title, was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service on the day prior to the enactment of that Act,

(iii) appointed by the President to a position under section 105(a)(2)(B) of title or by the Vice President to a position under section 106 (a)(1)(B) of title,

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above; or

(v) assigned from a private sector organization to an agency under chapter 37 of title.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that—

(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

**(d) Restrictions on Very Senior Personnel of the Executive Branch and Independent Agencies.**—

(1) Restrictions.—In addition to the restrictions set forth in subsections (a) and (b), any person who—

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105 (a)(2)(A) of title or by the Vice President to a position under section 106 (a)(1)(A) of title,

and who, within 2 years after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) Persons who may not be contacted.—The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are—

(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title.

**(e) Restrictions on Members of Congress and Officers and Employees of the Legislative Branch.**—

(1) Members of congress and elected officers of the house.—

(A) Senators.-Any person who is a Senator and who, within 2 years after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any Member, officer, or employee of either House of Congress or any employee of any other legislative office of the Congress, on behalf of any other person (except the United States) in connection with any matter on which such former Senator seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) Members and officers of the house of representatives.-

(i) Any person who is a Member of the House of Representatives or an elected officer of the House of Representatives and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in clause (ii) or (iii), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(ii) The persons referred to in clause (i) with respect to appearances or communications by a former Member of the House of Representatives are any Member, officer, or employee of either House of Congress and any employee of any other legislative office of the Congress.

(iii) The persons referred to in clause (i) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Representatives.

(2) Officers and staff of the senate.-Any person who is an elected officer of the Senate, or an employee of the Senate to whom paragraph (7)(A) applies, and who, within 1 year after that person leaves office or employment, knowingly makes, with the intent to influence, any communication to or appearance before any Senator or any officer or employee of the Senate, on behalf of any other person (except the United States) in connection with any matter on which such former elected officer or former employee seeks action by a Senator or an officer or employee of the Senate, in his or her official capacity, shall be punished as provided in section 216 of this title.

(3) Personal staff.-

(A) Any person who is an employee of a Member of the House of Representatives to whom paragraph (7)(A) applies and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Member of the House of Representatives.

(4) Committee staff.-Any person who is an employee of a committee of the House of Representatives, or an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, to whom paragraph (7)(A) applies and who, within 1 year after the termination of that person's employment on such committee or joint committee (as the case may be), knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or joint committee (as the case may be) or who was a Member of the committee or joint committee (as the case may be) in the year immediately prior to the termination of such person's employment by the committee or joint committee (as the case may be), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(5) Leadership staff. ▾

(A) Any person who is an employee on the leadership staff of the House of Representatives to whom paragraph (7)(A) applies and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives.

(6) Other legislative offices. ▾

(A) Any person who is an employee of any other legislative office of the Congress to whom paragraph (7)(B) applies and who, within 1 year after the termination of that person's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(7) Limitation on restrictions. ▾

(A) The restrictions contained in paragraphs (2), (3), (4), and (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic

rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (6) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title, is equal to or greater than the basic rate of pay payable for level IV of the Executive Schedule.

(8) Exception.-This subsection shall not apply to contacts with the staff of the Secretary of the Senate or the Clerk of the House of Representatives regarding compliance with lobbying disclosure requirements under the Lobbying Disclosure Act of 1995.

(9) Definitions.-As used in this subsection-

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, and an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the Government Accountability Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), (4), or (5) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term “Member of the House of Representatives” means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term “Member of the leadership of the House of Representatives” means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term “Member of the leadership of the Senate” means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

**(f) Restrictions Relating to Foreign Entities.**—

(1) Restrictions.—Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) Special rule for trade representative.—With respect to a person who is the United States Trade Representative or Deputy United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities at any time after the termination of that person’s service as the United States Trade Representative.

(3) Definition.—For purposes of this subsection, the term “foreign entity” means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

**(g) Special Rules for Detailees.**—For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

**(h) Designations of Separate Statutory Agencies and Bureaus.**—



(1) Designations.-For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

(2) Inapplicability of designations.-No agency or bureau within the Executive Office of the President may be designated under paragraph (1) as a separate department or agency. No designation under paragraph (1) shall apply to persons referred to in subsection (c)(2)(A)(i) or (iii).

(i) Definitions.-For purposes of this section-

(1) the term "officer or employee", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include-

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, and Members of Congress;

(2) the term "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action; and

(3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

(j) Exceptions.-

(1) Official government duties.-

(A) In general.-The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.

(B) Tribal organizations and inter-tribal consortiums.-The restrictions contained in this section shall not apply to acts authorized by section 104(j) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450i (j)).

(2) State and local governments and institutions, hospitals, and organizations.-The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of-

(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or

(B) an accredited, degree-granting institution of higher education, as defined in section 101 of the Higher Education Act of 1965, or a hospital or medical research

organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

(3) International organizations.-The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

(4) Special knowledge.-The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

(5) Exception for scientific or technological information.-The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.

(6) Exception for testimony.-Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence-

(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and

(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.

(7) Political parties and campaign committees.-

(A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

(B) Subparagraph (A) shall not apply to-

(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or

(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections [1] (c), (d), or (e) if, at the time of the

communication or appearance, the person is employed by a person or entity other than

(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or

(II) a person or entity who represents, aids, or advises only persons or entities described in subclause (I).

(C) For purposes of this paragraph

(i) the term “candidate” means any person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office;

(ii) the term “authorized committee” means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination for election, or the election, of such candidate, or to explore the possibility of seeking nomination for election, or the election, of such candidate, except that a political committee that receives contributions or makes expenditures to promote more than 1 candidate may not be designated as an authorized committee for purposes of subparagraph (A);

(iii) the term “national committee” means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level;

(iv) the term “national Federal campaign committee” means an organization that, by virtue of the bylaws of a political party, is established primarily for the purpose of providing assistance, at the national level, to candidates nominated by that party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) the term “State committee” means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level;

(vi) the term “political party” means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of such association, committee, or organization; and

(vii) the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

**(k)**

(1)

(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.

(B)

(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person's Federal Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Federal Government employment began.

(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person's Federal Government employment began shall apply to that person's employment by any such national laboratory after the person's employment by the Federal Government is terminated.

(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and shall identify—

(A) the officer or employee covered by the waiver by name and by position, and

(B) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(4) The President may not delegate the authority provided by this subsection.

(5)

(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.

(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.

(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title.

**(I) Contract Advice by Former Details.**—Whoever, being an employee of a private sector organization assigned to an agency under chapter 37 of title, within one year after the end of that assignment, knowingly represents or aids, counsels, or assists in

representing any other person (except the United States) in connection with any contract with that agency shall be punished as provided in section 216 of this title.

## **18 U.S.C. § 208.**

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights-

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States, if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall-

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

### **18 U.S.C. § 218:**

“In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or

transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.”

### **18 U.S.C. § 371**

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

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

### **18 U.S.C § 641. Public money, property or records:**

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted-

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

### **18 U.S.C § 645. Court officers generally**

Whoever, being a United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by

virtue of his official relation, position or employment, is guilty of embezzlement and shall, where the offense is not otherwise punishable by enactment of Congress, be fined under this title or not more than double the value of the money so embezzled, whichever is greater, or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.

It shall not be a defense that the accused person had any interest in such moneys or fund.

**18 U.S.C § 654. Officer or employee of United States converting property of another:**

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined under this title or not more than the value of the money and property thus embezzled or converted, whichever is greater, or imprisoned not more than ten years, or both; but if the sum embezzled is \$ 1,000 or less, he shall be fined under this title or imprisoned not more than one year, or both.

**18 U.S.C § 666. Theft or bribery concerning programs receiving Federal funds**

(a) Whoever, if the circumstance described in subsection (b) of this section exists—  
(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—  
(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—  
(i) is valued at \$ 5,000 or more, and  
(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or  
(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$ 5,000 or more; or  
(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$ 5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.



(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

## **18 U.S.C. § 981**

(a)

(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense—

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting “specified unlawful activity” (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of—

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of—

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic—

(i) of any individual, entity, or organization engaged in planning or perpetrating any any [FN1] Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as

defined in section 2332b(g)(5) [FN2] against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

(iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government. Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(2) For purposes of paragraph (1), the term “proceeds” is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term “proceeds” means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

**(b)**

(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if—

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and—

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or  
(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may—

- (1) place the property under seal;
- (2) remove the property to a place designated by him; or
- (3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and

not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine—

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency—

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or

(7) In [FN3] the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts

which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g)

(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that—

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms “related criminal case” and “related criminal investigation” mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In

determining whether a criminal case or investigation is “related” to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an necessary preserve property protect rights persons interest in the property while the stay is in effect.

(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

**(h)** In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

**(i)**

(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer-

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

**(j)** For purposes of this section--

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

**(k)** Interbank accounts.--

(1) In general.--

(A) In general.--For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

(B) Authority to suspend.--The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign financial institution (as defined in section 984(c)(2)(A) of this title) is located and the laws of the United States with respect to



liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for Government to trace funds.--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds.--If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title) may contest the forfeiture by filing a claim under section 983.

(4) Definitions.--For purposes of this subsection, the following definitions shall apply:

(A) Interbank account.--The term "interbank account" has the same meaning as in section 984(c)(2)(B).

(B) Owner.--

(i) In general.--Except as provided in clause (ii), the term "owner"--

(I) means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title) at the time such funds were deposited; and

(II) does not include either the foreign financial institution (as defined in section 984(c)(2)(A) of this title) or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

(ii) Exception.--The foreign financial institution (as defined in section 984(c)(2)(A) of this title) may be considered the "owner" of the funds (and no other person shall qualify as the owner of such funds) only if--

(I) the basis for the forfeiture action is wrongdoing committed by the foreign financial institution (as defined in section 984(c)(2)(A) of this title); or

(II) the foreign financial institution (as defined in section 984(c)(2)(A) of this title) establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution (as defined in section 984(c)(2)(A) of this title) had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign financial institution (as defined in section 984(c)(2)(A) of this title) shall be deemed the owner of the funds to the extent of such discharged obligation.

## **18 U.S.C. § 983**

(a) Notice; claim; complaint.--

(1)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the

Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person

without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall—

- (i) identify the specific property being claimed;
- (ii) state the claimant's interest in such property; and
- (iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not—

- (i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or
- (ii) before the time for filing a complaint has expired—

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the allegation only proceeding by Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in

the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

**(b) Representation.--**

(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as--

- (i) the person's standing to contest the forfeiture; and
- (ii) whether the claim appears to be made in good faith.

(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B) (i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

**(c) Burden of proof.--**In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of

a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

**(d) Innocent owner defense.**—

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term “innocent owner” means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term “innocent owner” means a person who, at the time that person acquired the interest in the property—

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate, except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the

value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order—

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

(6) In this subsection, the term “owner”—

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include—

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion to set aside forfeiture.—

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—

(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced—

(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

**(f) Release of seized property.-**

(1) A claimant under subsection (a) is entitled to immediate release of seized property if-

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth-

(i) the basis on which the requirements of paragraph (1) are met; and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If-

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)-

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including-

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property-

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

**(g) Proportionality.-**

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

**(h) Civil fine.-**

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought



an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

**(i) Civil forfeiture statute defined.**--In this section, the term “civil forfeiture statute”--  
(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and  
(2) does not include--  
(A) the Tariff Act of 1930 or any other provision of law codified in title 19;  
(B) the Internal Revenue Code of 1986;  
(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);  
(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or  
(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

**(j) Restraining orders; protective orders.**--  
(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture--  
(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or  
(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--  
(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and  
(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.  
(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.  
(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 14 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence

## **18 U.S.C. § 986**

(a) At any time after the commencement of any action for forfeiture in rem brought by the United States under section 1956, 1957, or 1960 of this title, section 5322 or 5324 of title 31, United States Code, or the Controlled Substances Act, any party may request the Clerk of the Court in the district in which the proceeding is pending to issue a subpoena duces tecum to any financial institution, as defined in section 5312(a) of title 31, United States Code, to produce books, records and any other documents at any place designated by the requesting party. All parties to the proceeding shall be notified of the issuance of any such subpoena. The procedures and limitations set forth in section 985 of this title shall apply to subpoenas issued under this section.

(b) Service of a subpoena issued pursuant to this section shall be by certified mail. Records produced in response to such a subpoena may be produced in person or by mail, common carrier, or such other method as may be agreed upon by the party requesting the subpoena and the custodian of records. The party requesting the subpoena may require the custodian of records to submit an affidavit certifying the authenticity and completeness of the records and explaining the omission of any record called for in the subpoena.

(c) Nothing in this section shall preclude any party from pursuing any form of discovery pursuant to the Federal Rules of Civil Procedure.

### **(d) Access to records in bank secrecy jurisdictions.--**

(1) In general.--In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which--

(A) financial records located in a foreign country may be material--

(i) to any claim or to the ability of the Government to respond to such claim; or

(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and

(B) it is within the capacity of the claimant to waive the claimant's rights under applicable financial secrecy laws, or to obtain the records so that such records can be made available notwithstanding such secrecy laws, the refusal of the claimant to provide the records in response to a discovery request or to take the action necessary otherwise to make the records available shall be grounds for judicial sanctions, up to and including dismissal of the claim with prejudice.

(2) Privilege.--This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law.

### **18 U.S.C. § 1346.**

Under the federal mail and wire fraud statutes, any person is prohibited from using the United States mails, equivalent interstate and international delivery services, or interstate wires in furtherance of a “scheme or artifice to defraud.” 18 U.S.C. §§ 1341, 1343. Such a scheme is specifically defined to include “a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. Under this law, a person who bribes a state (or foreign) official and the state (or foreign) official who accepts the bribe is deemed to have deprived the government and the people of the State of the intangible right of honest services of their elected and appointed officials.

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

### **18 U.S.C. § 1341. Frauds and swindles**

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

### **18 U.S.C. § 1343. Fraud by wire, radio, or television**

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

### **18 U.S.C. § 1510. Obstruction of criminal investigations**

(a) Whoever wilfully endeavours by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.

(b)(1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished in response to that subpoena, shall be fined under this title or imprisoned not more than 5 years, or both.

(2) Whoever, being an officer of a financial institution, directly or indirectly notifies-

(A) a customer of that financial institution whose records are sought by a subpoena for records; or

(B) any other person named in that subpoena; about the existence or contents of that subpoena or information that has been furnished in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

(3) As used in this subsection-

(A) the term "an officer of a financial institution" means an officer, director, partner, employee, agent, or attorney of or for a financial institution; and

(B) the term "subpoena for records" means a Federal grand jury subpoena or a Department of Justice subpoena (issued under section 3486 of title 18), for customer records that has been served relating to a violation of, or a conspiracy to violate-

(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or chapter 53 of title 31; or

(ii) section 1341 or 1343 affecting a financial institution.

(c) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or

engage in investigations of or prosecutions for violations of the criminal laws of the United States.

**(d)(1) Whoever-**↯

(A) acting as, or being, an officer, director, agent or employee of a person engaged in the business of insurance whose activities affect interstate commerce, or

(B) is engaged in the business of insurance whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business, with intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that person engaged in such business or information that has been furnished to a Federal grand jury in response to that subpoena, shall be fined as provided by this title or imprisoned not more than 5 years, or both.

(2) As used in paragraph (1), the term “subpoena for records” means a Federal grand jury subpoena for records that has been served relating to a violation of, or a conspiracy to violate, section 1033 of this title.

**(e) Whoever,** having been notified of the applicable disclosure prohibitions or confidentiality requirements of section 2709(c)(1) of this title, section 626(d)(1) or 627(c)(1) of the Fair Credit Reporting Act (15 U. S.C. 1681u(d)(1) or 1681v(c)(1)), section 1114(a)(3)(A) or 1114(a)(5)(D)(i) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(3)(A) or 3414(a)(5)(D)(i)), or section 802(b)(1) of the National Security Act of 1947 (50 U.S.C. 436(b)(1)), knowingly and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall be imprisoned for not more than five years, fined under this title, or both.

## **18 U.S.C. § 1511. Obstruction of State or local law enforcement**

**(a)** It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if-↯

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

**(b)** As used in this section-↯

(1) “illegal gambling business” means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1986, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine under this title or imprisonment for not more than five years, or both.

## **18 U.S.C. § 1512. Tampering with a witness, victim, or an informant**

(a)

(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised

release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

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

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

**(b)** Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [FN1] supervised release,, [FN2] parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both.

**(c)** Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

**(d)** Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation [FN1] supervised release,, [FN2] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

## **18 U.S.C. § 1513. Retaliating against a witness, victim, or an informant**



**(a)(1)** Whoever kills or attempts to kill another person with intent to retaliate against any person for—

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings, shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

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

(B) in the case of an attempt, imprisonment for not more than 30 years.

**(b)** Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

**(c)** If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

**(d)** There is extraterritorial Federal jurisdiction over an offense under this section.

**(e)** Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

**(f)** Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

**(g)** A prosecution under this section may be brought in the district in which the official proceeding (whether pending, about to be instituted, or completed) was intended to be affected, or in which the conduct constituting the alleged offense occurred.

## **18 U.S.C. § 1514. Civil action to restrain harassment of a victim or witness**

(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2)(A) A temporary restraining order may be issued under this section without written or oral notice to the adverse party or such party's attorney in a civil action under this section if the court finds, upon written certification of facts by the attorney for the Government, that such notice should not be required and that there is a reasonable probability that the Government will prevail on the merits.

(B) A temporary restraining order issued without notice under this section shall be endorsed with the date and hour of issuance and be filed forthwith in the office of the clerk of the court issuing the order.

(C) A temporary restraining order issued under this section shall expire at such time, not to exceed 14 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 14 days or for such longer period agreed to by the adverse party.

(D) When a temporary restraining order is issued without notice, the motion for a protective order shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character, and when such motion comes on for hearing, if the attorney for the Government does not proceed with the application for a protective order, the court shall dissolve the temporary restraining order.

(E) If on two days notice to the attorney for the Government, excluding intermediate weekends and holidays, or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(F) A temporary restraining order shall set forth the reasons for the issuance of such order, be specific in terms, and describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(b)(1) A United States district court, upon motion of the attorney for the Government, shall issue a protective order prohibiting harassment of a victim or witness in a Federal criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2) At the hearing referred to in paragraph (1) of this subsection, any adverse party named in the complaint shall have the right to present evidence and cross-examine witnesses.

(3) A protective order shall set forth the reasons for the issuance of such order, be specific in terms, describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(4) The court shall set the duration of effect of the protective order for such period as the court determines necessary to prevent harassment of the victim or witness but in no case for a period in excess of three years from the date of such order's issuance. The attorney for the Government may, at any time within ninety days before the expiration of such order, apply for a new protective order under this section.

(c) As used in this section--

(1) the term "harassment" means a course of conduct directed at a specific person that--

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

### **18 U.S.C. § 1514A. Civil action to protect against retaliation in fraud cases**

(a) Whistleblower protection for employees of publicly traded companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities

and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

**(b) Enforcement action.-**

(1) In general.--A person who alleges discharge or other discrimination by any person in violation of subsection

(a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.--

(A) In general.--An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.--Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.--An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code. (d) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

**(c) Remedies.--**

(1) In general.--An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.--Relief for any action under paragraph (1) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

**(d) Rights retained by employee.--**Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

## **18 U.S.C. § 1515. Definitions for certain provisions; general provision**

**(a) As used in sections 1512 and 1513 of this title and in this section--**

(1) the term “official proceeding” means--

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a

special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) in a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term “physical force” means physical action against another, and includes confinement;

(3) the term “misleading conduct” means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term “law enforcement officer” means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term “bodily injury” means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.

## **18 U.S.C. § 1516. Obstruction of Federal audit**

(a) Whoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of \$100,000, directly or indirectly, from the United States in any 1 year period under a contract or subcontract, grant, or cooperative agreement, or relating to any property that is security for a mortgage note that is insured, guaranteed, acquired, or held by the Secretary of Housing and Urban Development pursuant to any Act administered by the Secretary,

or relating to any property that is security for a loan that is made or guaranteed under title V of the Housing Act of 1949, shall be fined under this title, or imprisoned not more than 5 years, or both.

(b) For purposes of this section—

(1) the term “Federal auditor” means any person employed on a full-or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States; and

(2) the term “in any 1 year period” has the meaning given to the term “in any one-year period” in section 666.

### **18 U.S.C. § 1517. Obstructing examination of financial institution**

Whoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States with jurisdiction to conduct an examination of such financial institution shall be fined under this title, imprisoned not more than 5 years, or both.

### **18 U.S.C. § 1518. Obstruction of criminal investigations of health care offenses**

(a) Whoever wilfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section the term “criminal investigator” means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.

### **18 U.S.C. § 1951. Interference with Commerce by Threats or Violence (The Hobbs Act)**

“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or

threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.”

### **18 U.S.C. § 1952: Interstate or Foreign Travel in Aid of Racketeering Enterprises**

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

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

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

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

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

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

(b) As used in this section (i) “unlawful activity” means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

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

The primary federal laws that would be used for such prosecutions (presuming the crime crosses state lines) are the laws against wire fraud (18 U.S.C. 1343) and mail fraud (18 U.S.C. 1341), which prohibit the use of interstate communications in furtherance of a scheme to defraud someone of property, which may include conduct constituting embezzlement.

Additional laws include embezzlement from a federally insured bank (18 U.S.C. 656), from various federal supported lending, credit and insurance institutions (18 U.S.C. 657), involving a shipment in interstate or foreign commerce (18 U.S.C. 659) or within the special maritime and territorial jurisdiction (18 U.S.C. 661), from an employee benefit plan (18 U.S.C. 664), employment training fund (18 U.S.C. 665), or from certain state or local government programs that receive federal funds (18 U.S.C. 666).

## **18 U.S.C. § 1956**

(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or  
(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a

place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or



(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to

conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

**(b) Penalties.**—

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) \$10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court may appoint a Federal Receiver, in accordance with subparagraph

(B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(C) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity” means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term “conducts” includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term “transaction” includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term “financial transaction” means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a

transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term “monetary instruments” means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term “financial institution” includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 [FN1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term “specified unlawful activity” means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [FN2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private

entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance entries), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating

to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 [7 U.S.C.A. § 2024] (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than \$5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) (E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or (F) any act or activity constituting an offense involving a Federal health care offense; (8) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and (9) the term “proceeds” means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

**(d)** Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

**(e)** Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

**(f)** There is extraterritorial jurisdiction over the conduct prohibited by this section if—  
(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and  
(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.—

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

## **18 U.S.C. § 1957**

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

**(d)** The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

**(e)** Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

**(f)** As used in this section—

(1) the term “monetary transaction” means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms “specified unlawful activity” and “proceeds” shall have the meaning given those terms in section 1956 of this title.

## **18 U.S.C. § 1960**

**(a)** Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.

**(b)** As used in this section—

(1) the term “unlicensed money transmitting business” means a money transmitting business which affects interstate or foreign commerce in any manner or degree and—

(A) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether

or not the defendant knew that the operation was required to be licensed or that the operation was so punishable;

(B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section; or

(C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity;

(2) the term “money transmitting” includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier; and

(3) the term “State” means any State of the United States, the District of Columbia, the Northern Mariana Islands, and any commonwealth, territory, or possession of the United States.

## **18 U.S.C. § 1961**

As used in this chapter—

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or naturalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport),



section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), [FN1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

**18 U.S.C. § 3142(g):**

“Factors to be considered.-The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as

required and the safety of any other person and the community, take into account the available information concerning . . . the history and characteristics of the person ....”

### **18 U.S.C. § 3181. Scope and limitation of chapter**

(a) The provisions of this chapter [18 U.S.C.S. §§ 3181 et seq.] relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

(b) The provisions of this chapter [18 U.S.C.S. §§ 3181 et seq.] shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that—

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title [18 U.S.C.S. § 16]; and

(2) the offenses charged are not of a political nature.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

### **18 U.S.C. § 3184. Fugitives from foreign country to United States**

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b) [18 U.S.C.S. § 3181(b)], any justice or judge of the United States, or any magistrate [United States magistrate judge] authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate [United States magistrate judge], to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate [United States magistrate judge] of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b) [18 U.S.C.S. § 3181(b)], he shall certify the same, together with a copy of all the testimony taken before him, to

the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

### **18 U.S.C. § 3196. Extradition of United States citizens**

If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

### **18 U.S.C. § 3282: Offenses Not Capital**

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

(b) DNA profile indictment.↵

(1) In general.-In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exception.-Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to↵

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) Defined term.-For purposes of this subsection, the term „DNA profile“ means a set of DNA identification characteristics.”

### **18 U.S.C. § 3288: Indictments and Information Dismissed After Period of Limitations**

“Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar

months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.”

### **18 U.S.C. § 3289: Indictments and Information Dismissed Before Period of Limitations**

“Whenever an indictment or information charging a felony is dismissed for any reason before the period prescribed by the applicable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.”

### **18 U.S.C. § 3290: Fugitives from Justice**

“No statute of limitations shall extend to any person fleeing from justice.”

### **18 U.S.C. § 3293: Financial Institution Offenses**

“No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate—

- (1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344;
- (2) section 1341 or 1343, if the offense affects a financial institution; or

(3) section 1963, to the extent that the racketeering activity involves a violation of section 1344; unless the indictment is returned or the information is filed within 10 years after the commission of the offense.”

### **18 U.S.C. § 3296: Counts Dismissed Pursuant to a Plea Agreement**

“(a) In general.--Notwithstanding any other provision of this chapter, any counts of an indictment or information that are dismissed pursuant to a plea agreement shall be reinstated by the District Court if—

- (1) the counts sought to be reinstated were originally filed within the applicable limitations period;
- (2) the counts were dismissed pursuant to a plea agreement approved by the District Court under which the defendant pled guilty to other charges;
- (3) the guilty plea was subsequently vacated on the motion of the defendant; and
- (4) the United States moves to reinstate the dismissed counts within 60 days of the date on which the order vacating the plea becomes final.

(b) Defenses; objections.--Nothing in this section shall preclude the District Court from considering any defense or objection, other than statute of limitations, to the prosecution of the counts reinstated under subsection (a).”

This right exists pursuant to the Fifth and Sixth Amendments to the United States Constitution, has been explained in many Supreme Court opinions, and is codified under Rule 43 of the Federal Rules of Criminal Procedure, and applicable federal statutes. However, a defendant may waive his right to be present at any critical stage of the proceedings, such as by voluntarily choosing not to attend his trial. See Fed. R. Crim. P. 43.

### **18 U.S.C. § 3508. Custody and return of foreign witnesses**

(a) When the testimony of a person who is serving a sentence, is in pretrial detention, or is otherwise being held in custody, in a foreign country, is needed in a State or Federal criminal proceeding, the Attorney General shall, when he deems it appropriate in the exercise of his discretion, have the authority to request the temporary transfer of that person to the United States for the purposes of giving such testimony, to transport such person to the United States in custody, to maintain the custody of such person while he is in the United States, and to return such person to the foreign country.

(b) Where the transfer to the United States of a person in custody for the purposes of giving testimony is provided for by treaty or convention, by this section, or both, that

person shall be returned to the foreign country from which he is transferred. In no event shall the return of such person require any request for extradition or extradition proceedings, or proceedings under the immigration laws.

Where there is a treaty or convention between the United States and the foreign country in which the witness is being held in custody which provides for the transfer, custody and return of such witnesses, the terms and conditions of that treaty shall apply. Where there is no such treaty or convention, the Attorney General may exercise the authority described in paragraph (a) if both the foreign country and the witness give their consent.

### **18 U.S.C. § 3509. Child victims' and child witnesses' rights**

(a) Definitions.--For purposes of this section--

(1) the term “adult attendant” means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term “child” means a person who is under the age of 18, who is or is alleged to be--

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term “physical injury” includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term “mental injury” means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term “exploitation” means child pornography or child prostitution;

(7) the term “multidisciplinary child abuse team” means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term “sexual abuse” includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term “sexually explicit conduct” means actual or simulated--

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

- (C) masturbation;
- (D) lascivious exhibition of the genitals or pubic area of a person or animal; or
- (E) sadistic or masochistic abuse;
- (10) the term “sex crime” means an act of sexual abuse that is a criminal act;
- (11) the term “negligent treatment” means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and
- (12) the term “child abuse” does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

**(b) Alternatives to live in-court testimony.-**

**(1) Child's live testimony by 2-way closed circuit television.-**

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are-

- (i) the child's attorney or guardian ad litem appointed under subsection (h);
- (ii) Persons necessary to operate the closed-circuit television equipment;
- (iii) A judicial officer, appointed by the court; and
- (iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant. The child's

testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child. The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing



the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) Handling of videotape.--The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

## **18 U.S.C. § 3512. Foreign requests for assistance in criminal investigations and prosecutions**

(a) Execution of request for assistance.

(1) In general. Upon application, duly authorized by an appropriate official of the Department of Justice, of an attorney for the Government, a Federal judge may issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.

(2) Scope of orders. Any order issued by a Federal judge pursuant to paragraph (1) may include the issuance of--

(A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;

(B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title [18 U.S.C.S. § 2703];

(C) an order for a pen register or trap and trace device as provided under section 3123 of this title [18 U.S.C.S. § 3123]; or

(D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.

**(b) Appointment of persons to take testimony or statements.**

(1) In general. In response to an application for execution of a request from a foreign authority as described under subsection (a), a Federal judge may also issue an order appointing a person to direct the taking of testimony or statements or of the production of documents or other things, or both.

(2) Authority of appointed person. Any person appointed under an order issued pursuant to paragraph (1) may—

(A) issue orders requiring the appearance of a person, or the production of documents or other things, or both;

(B) administer any necessary oath; and

(C) take testimony or statements and receive documents or other things.

**(c) Filing of requests.** Except as provided under subsection (d), an application for execution of a request from a foreign authority under this section may be filed—

(1) in the district in which a person who may be required to appear resides or is located or in which the documents or things to be produced are located;

(2) in cases in which the request seeks the appearance of persons or production of documents or things that may be located in multiple districts, in any one of the districts in which such a person, documents, or things may be located; or

(3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.

**(d) Search warrant limitation.** An application for execution of a request for a search warrant from a foreign authority under this section, other than an application for a warrant issued as provided under section 2703 of this title [18 U.S.C.S. § 2703], shall be filed in the district in which the place or person to be searched is located.

**(e) Search warrant standard.** A Federal judge may issue a search warrant under this section only if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under Federal or State law.

**(f) Service of order or warrant.** Except as provided under subsection (d), an order or warrant issued pursuant to this section may be served or executed in any place in the United States.

**(g) Rule of construction.** Nothing in this section shall be construed to preclude any foreign authority or an interested person from obtaining assistance in a criminal investigation or prosecution pursuant to section 1782 of title 28, United States Code.

**(h) Definitions.** As used in this section, the following definitions shall apply:

(1) Federal judge. The terms "Federal judge" and "attorney for the Government" have the meaning given such terms for the purposes of the Federal Rules of Criminal Procedure.

(2) Foreign authority. The term "foreign authority" means a foreign judicial authority, a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses, or an authority designated as a competent authority or central authority for the purpose of making requests for assistance pursuant to an agreement or treaty with the United States regarding assistance in criminal matters.

## **18 U.S.C. § 3521. Witness relocation and protection**

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation—

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence;

(H) protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons; and

(I) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Program. The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (G).

(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined \$5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person's information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for

protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

**(d)(1)** Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including--

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;

(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person. Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding shall be signed by the Attorney General and the person protected.

(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to any Assistant Attorney General in charge of the Criminal Division or National Security Division of the Department of Justice, to the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

## **18 U.S.C. § 3522. Probationers and parolees**

(a) A probation officer may, upon the request of the Attorney General, supervise any person provided protection under this chapter who is on probation or parole under State law, if the State involved consents to such supervision. Any person so supervised shall be under Federal jurisdiction during the period of supervision and shall, during that period be subject to all laws of the United States which pertain to probationers or parolees, as the case may be.

(b) The failure by any person provided protection under this chapter who is supervised under subsection (a) to comply with the memorandum of understanding entered into by that person pursuant to section 3521(d) of this title shall be grounds for the revocation of probation or parole, as the case may be.

(c) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with respect to a probationer or parolee transferred from State supervision pursuant to this section as they have with respect to an offender convicted in a court of the United States and paroled under chapter 311 of this title. The provisions of sections 4201 through 4204, 4205(a), (e), and (h), 4206 through 4215, and 4218 of this title shall apply following a revocation of probation or parole under this section.

(d) If a person provided protection under this chapter who is on probation or parole and is supervised under subsection (a) of this section has been ordered by the State court which imposed sentence on the person to pay a sum of money to the victim of the offense involved for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be distributed to the victim.

### **18 U.S.C. § 3523. Civil judgments**

(a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure of the identity and location of the person shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's ineffectual efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the United States and its officers or employees to any civil liability.

(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment

(hereinafter in this subsection referred to as the “petitioner”) resides. Such action shall be brought within one hundred and twenty days after the petitioner requested the Attorney General to disclose the identity and location of the protected person. The complaint in such action shall contain statements that the petitioner holds a valid judgment of a Federal or State court against a person provided protection under this chapter and that the petitioner sought to enforce the judgment by requesting the Attorney General to disclose the identity and location of the protected person.

(2) The petitioner in an action described in paragraph (1) shall notify the Attorney General of the action at the same time the action is brought. The Attorney General shall appear in the action and shall affirm or deny the statements in the complaint that the person against whom the judgment is allegedly held is provided protection under this chapter and that the petitioner requested the Attorney General to disclose the identity and location of the protected person for the purpose of enforcing the judgment.

(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. The clerk of the court shall forthwith furnish the guardian with a copy of the order of appointment. The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

(4) It is the duty of the guardian to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner under the judgment. The guardian shall, however, endeavor to carry out such enforcement duties in a manner that maximizes, to the extent practicable, the safety and security of the protected person. In no event shall the guardian disclose the new identity or location of the protected person without the permission of the Attorney General, except that such disclosure may be made to a Federal or State court in order to enforce the judgment. Any good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.

(5) Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law. The Federal Rules of Civil Procedure shall apply in any action brought under this subsection to enforce a Federal or State court judgment.

(6) The costs of any action brought under this subsection with respect to a judgment, including any enforcement action described in paragraph (5), and the compensation to be allowed to a guardian appointed in any such action shall be fixed by the court and shall be apportioned among the parties as follows: the petitioner shall be assessed in the amount the petitioner would have paid to collect on the judgment in an action not arising under the provisions of this subsection; the protected person shall be assessed the costs which are normally charged to debtors in similar actions and any other costs



which are incurred as a result of an action brought under this subsection. In the event that the costs and compensation to the guardian are not met by the petitioner or by the protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

No officer or employee of the Department of Justice shall in any way impede the efforts of a guardian appointed under this subsection to enforce the judgment with respect to which the guardian was appointed.

\pard bkmkend I60117268470C11DF8D20C6C8B2917A6B(c) The provisions of this section shall not apply to a court order to which section 3524 of this title applies.

## **18 U.S.C. § 3524. Child custody arrangements**

(a) The Attorney General may not relocate any child in connection with protection provided to a person under this chapter if it appears that a person other than that protected person has legal custody of that child.

(b) Before protection is provided under this chapter to any person (1) who is a parent of a child of whom that person has custody, and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, the Attorney General shall obtain and examine a copy of such order for the purpose of assuring that compliance with the order can be achieved. If compliance with a visitation order cannot be achieved, the Attorney General may provide protection under this chapter to the person only if the parent being relocated initiates legal action to modify the existing court order under subsection (e)(1) of this section. The parent being relocated must agree in writing before being provided protection to abide by any ensuing court orders issued as a result of an action to modify.

(c) With respect to any person provided protection under this chapter (1) who is the parent of a child who is relocated in connection with such protection and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a State court order, the Attorney General shall, as soon as practicable after the person and child are so relocated, notify in writing the child's parent who is not so relocated that the child has been provided protection under this chapter. The notification shall also include statements that the rights of the parent not so relocated to visitation or custody, or both, under the court order shall not be infringed by the relocation of the child and the Department of Justice responsibility with respect thereto. The Department of Justice will pay all reasonable costs of transportation and security incurred in insuring that visitation can occur at a secure location as designated by the United States Marshals Service, but in no event shall it be obligated to pay such costs for visitation in excess of thirty days a year, or twelve in number a year. Additional visitation may be paid for, in the discretion of the Attorney General, by the Department of Justice in extraordinary circumstances. In the event that the unrelocated parent pays visitation costs, the Department of Justice may, in the

discretion of the Attorney General, extend security arrangements associated with such visitation.

**(d)(1)** With respect to any person provided protection under this chapter (A) who is the parent of a child who is relocated in connection with such protection and (B) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, an action to modify that court order may be brought by any party to the court order in the District Court for the District of Columbia or in the district court for the district in which the child's parent resides who has not been relocated in connection with such protection.

(2) With respect to actions brought under paragraph (1), the district courts shall establish a procedure to provide a reasonable opportunity for the parties to the court order to mediate their dispute with respect to the order. The court shall provide a mediator for this purpose. If the dispute is mediated, the court shall issue an order in accordance with the resolution of the dispute.

(3) If, within sixty days after an action is brought under paragraph (1) to modify a court order, the dispute has not been mediated, any party to the court order may request arbitration of the dispute. In the case of such a request, the court shall appoint a master to act as arbitrator, who shall be experienced in domestic relations matters. Rule 53 of the Federal Rules of Civil Procedure shall apply to masters appointed under this paragraph. The court and the master shall, in determining the dispute, give substantial deference to the need for maintaining parent-child relationships, and any order issued by the court shall be in the best interests of the child. In actions to modify a court order brought under this subsection, the court and the master shall apply the law of the State in which the court order was issued or, in the case of the modification of a court order issued by a district court under this section, the law of the State in which the parent resides who was not relocated in connection with the protection provided under this chapter. The costs to the Government of carrying out a court order may be considered in an action brought under this subsection to modify that court order but shall not outweigh the relative interests of the parties themselves and the child.

(4) Until a court order is modified under this subsection, all parties to that court order shall comply with their obligations under that court order subject to the limitations set forth in subsection (c) of this section.

(5) With respect to any person provided protection under this chapter who is the parent of a child who is relocated in connection with such protection, the parent not relocated in connection with such protection may bring an action, in the District Court for the District of Columbia or in the district court for the district in which that parent resides, for violation by that protected person of a court order with respect to custody or visitation of that child. If the court finds that such a violation has occurred, the court may hold in contempt the protected person. Once held in contempt, the protected person shall have a maximum of sixty days, in the discretion of the Attorney General, to comply with the court order. If the protected person fails to comply with the order within the time specified by the Attorney General, the Attorney General shall disclose the new identity and address of the protected person to the

other parent and terminate any financial assistance to the protected person unless otherwise directed by the court.

(6) The United States shall be required by the court to pay litigation costs, including reasonable attorneys' fees, incurred by a parent who prevails in enforcing a custody or visitation order; but shall retain the right to recover such costs from the protected person.

(e)(1) In any case in which the Attorney General determines that, as a result of the relocation of a person and a child of whom that person is a parent in connection with protection provided under this chapter, the implementation of a court order with respect to custody or visitation of that child would be substantially impossible, the Attorney General may bring, on behalf of the person provided protection under this chapter, an action to modify the court order. Such action may be brought in the district court for the district in which the parent resides who would not be or was not relocated in connection with the protection provided under this chapter. In an action brought under this paragraph, if the Attorney General establishes, by clear and convincing evidence, that implementation of the court order involved would be substantially impossible, the court may modify the court order but shall, subject to appropriate security considerations, provide an alternative as substantially equivalent to the original rights of the nonrelocating parent as feasible under the circumstances.

(2) With respect to any State court order in effect to which this section applies, and with respect to any district court order in effect which is issued under this section, if the parent who is not relocated in connection with protection provided under this chapter intentionally violates a reasonable security requirement imposed by the Attorney General with respect to the implementation of that court order, the Attorney General may bring an action in the district court for the district in which that parent resides to modify the court order. The court may modify the court order if the court finds such an intentional violation.

(3) The procedures for mediation and arbitration provided under subsection (d) of this section shall not apply to actions for modification brought under this subsection.

(f) In any case in which a person provided protection under this chapter is the parent of a child of whom that person has custody and has obligations to another parent of that child concerning custody and visitation of that child which are not imposed by court order, that person, or the parent not relocated in connection with such protection, may bring an action in the district court of the district in which that parent not relocated resides to obtain an order providing for custody or visitation, or both, of that child. In any such action, all the provisions of subsection (d) of this section shall apply.

(g) In any case in which an action under this section involves court orders from different States with respect to custody or visitation of the same child, the court shall resolve any conflicts by applying the rules of conflict of laws of the State in which the court is sitting. (h)(1) Subject to paragraph (2), the costs of any action described in subsection (d), (e), or (f) of this section shall be paid by the United States.

(2) The Attorney General shall insure that any State court order in effect to which this section applies and any district court order in effect which is issued under this section are carried out. The Department of Justice shall pay all costs and fees described in subsections (c) and (d) of this section. (i) As used in this section, the term "parent" includes any person who stands in the place of a parent by law.

### **18 U.S.C. § 3525. Victims Compensation Fund**

(a) The Attorney General may pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection under this chapter.

(b) Not later than four months after the end of each fiscal year, the Attorney General shall transmit to the Congress a detailed report on payments made under this section for such year.

(c) There are authorized to be appropriated for the fiscal year 1985 and for each fiscal year thereafter, \$1,000,000 for payments under this section.

(d) The Attorney General shall establish guidelines and procedures for making payments under this section. The payments to victims under this section shall be made for the types of expenses provided for in section 3579(b) of this title, except that in the case of the death of the victim, an amount not to exceed \$50,000 may be paid to the victim's estate. No payment may be made under this section to a victim unless the victim has sought restitution and compensation provided under Federal or State law or by civil action. Such payments may be made only to the extent the victim, or the victim's estate, has not otherwise received restitution and compensation, including insurance payments, for the crime involved. Payments may be made under this section to victims of crimes occurring on or after the date of the enactment of this chapter. In the case of a crime occurring before the date of the enactment of this chapter, a payment may be made under this section only in the case of the death of the victim, and then only in an amount not exceeding \$25,000, and such a payment may be made notwithstanding the requirements of the third sentence of this subsection.

(e) Nothing in this section shall be construed to create a cause of action against the United States.

### **18 U.S.C. § 3526. Cooperation of other Federal agencies and State governments; reimbursement of expenses**

(a) Each Federal agency shall cooperate with the Attorney General in carrying out the provisions of this chapter and may provide, on a reimbursable basis, such personnel and services as the Attorney General may request in carrying out those provisions.

(b) In any case in which a State government requests the Attorney General to provide protection to any person under this chapter—

(1) the Attorney General may enter into an agreement with that State government in which that government agrees to reimburse the United States for expenses incurred in providing protection to that person under this chapter; and

(2) the Attorney General shall enter into an agreement with that State government in which that government agrees to cooperate with the Attorney General in carrying out the provisions of this chapter with respect to all persons.

### **18 U.S.C. § 3527. Additional authority of Attorney General**

The Attorney General may enter into such contracts or other agreements as may be necessary to carry out this chapter. Any such contract or agreement which would result in the United States being obligated to make outlays may be entered into only to the extent and in such amount as may be provided in advance in an appropriation Act.

### **18 U.S.C. § 3528. Definition**

For purposes of this chapter, the term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

### **18 U.S.C. § 3553.**

“(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement-

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.”

(e): “Limited authority to impose a sentence below a statutory minimum.-Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.”

### **18 U.S.C. § 3583: Inclusion of a Term of Supervised Release After Imprisonment**

“(a) In general.-The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

**(b) Authorized terms of supervised release.**-Except as otherwise provided, the authorized terms of supervised release are—

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

**(c) Factors to be considered in including a term of supervised release.**-The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

**(d) Conditions of supervised release.**-The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test.

The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense



that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

**(f) Written statement of conditions.**-The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

**(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.**-If the defendant-

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year; the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

**(h) Supervised release following revocation.**-When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

**(i) Delayed revocation.**-The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates.--Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.”

### **18 U.S.C. § 3663:**

“(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanour, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.” The remainder of section 3663 outlines factors the court should consider in awarding restitution.

### **18 U.S.C. § 3771. Crime victims' rights**

(a) Rights of crime victims.--A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

...(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding...”

Article IV. B.3.b.(2) of the Attorney General’s 2005 Guidelines for Victim and Witness Assistance provides:

“(2) The Right of Victims To Be Reasonably Heard. If a victim (or a lawful representative appearing on behalf of

the victim) is present and wants to make a statement at the sentencing of the convicted offender, the prosecutor should advocate for the victim's right to make a statement or present information in relation to the offender's sentence.”

## **18 U.S.C. § 6002**

“Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”

## **18 U.S.C. § 6003(b)**

“...(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment-(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.”

## **18 U.S.C. § 6004(a)**

“...(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.”

## **18 U.S.C. § 6005**

covers immunity in congressional proceedings.

## **21 U.S.C. § 853**

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

**(b) Meaning of term “property”**

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

**(c) Third party transfers**

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

**(d) Rebuttable presumption**

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section-

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that-

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with

the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

**(B) Failure to comply**

Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

**(f) Warrant of seizure**

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

**(g) Execution**

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

**(h) Disposition of property**

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

**(i) Authority of the Attorney General**

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

- (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;
- (2) compromise claims arising under this section;
- (3) award compensation to persons providing information resulting in a forfeiture under this section;
- (4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
- (5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

**(j) Applicability of civil forfeiture provisions**

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

**(k) Bar on intervention**

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

**(l) Jurisdiction to enter orders**

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

**(m) Depositions**

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

**(n) Third party interests**

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.



(o) Construction The provisions of this section shall be liberally construed to effectuate its remedial purposes.

**(p) Forfeiture of substitute property**

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

**(q) Restitution for cleanup of clandestine laboratory sites**

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

**28 U.S.C. § 524**

(a) Appropriations for the Department of Justice are available to the Attorney General for payment of—

(1) notarial fees, including such additional stenographic services as are required in connection therewith in the taking of depositions, and compensation and expenses of witnesses and informants, all at the rates authorized or approved by the Attorney General or the Assistant Attorney General for Administration; and

(2) when ordered by the court, actual expenses of meals and lodging for marshals, deputy marshals, or criers when acting as bailiffs in attendance on juries.

**(b)** Except as provided in subsection (a) of this section, a claim of not more than \$500 for expenses related to litigation that is beyond the control of the Department may be paid out of appropriations currently available to the Department for expenses related to litigation when the Comptroller General settles the payment.

**(c)(1)** There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following law enforcement purposes—

(A) the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, sell, or dispose of property under seizure, detention, or forfeited pursuant to any law enforced or administered by the Department of Justice, or of any other necessary expense incident to the seizure, detention, forfeiture, or disposal of such property including—

(i) payments for—

(I) contract services;

(II) the employment of outside contractors to operate and manage properties or provide other specialized services necessary to dispose of such properties in an effort to maximize the return from such properties; and

(III) reimbursement of any Federal, State, or local agency for any expenditures made to perform the functions described in this clause;

(ii) payments to reimburse any Federal agency participating in the Fund for investigative costs leading to seizures;

(iii) payments for contracting for the services of experts and consultants needed by the Department of Justice to assist in carrying out duties related to asset seizure and forfeiture; and

(iv) payments made pursuant to guidelines promulgated by the Attorney General if such payments are necessary and directly related to seizure and forfeiture program expenses for—

(I) the purchase or lease of automatic data processing systems (not less than a majority of which use will be related to such program);

(II) training;

(III) printing;

(IV) the storage, protection, and destruction of controlled substances; and

(V) contracting for services directly related to the identification of forfeitable assets, and the processing of and accounting for forfeitures;

(B) the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States or of sections 1956 and 1957 of title 18,

sections 5313 and 5324 of title 31, and section 6050I of the Internal Revenue Code of 1986;

(C) at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund;

(D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary;

(E)(i) for disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice; and

(ii) for payment for-

(I) costs incurred by or on behalf of the Department of Justice in connection with the removal, for purposes of Federal forfeiture and disposition, of any hazardous substance or pollutant or contaminant associated with the illegal manufacture of amphetamine or methamphetamine; and

(II) costs incurred by or on behalf of a State or local government in connection with such removal in any case in which such State or local government has assisted in a Federal prosecution relating to amphetamine or methamphetamine, to the extent such costs exceed equitable sharing payments made to such State or local government in such case;

(F)(i) for equipping for law enforcement functions of any Government-owned or leased vessel, vehicle, or aircraft available for official use by any Federal agency participating in the Fund;

(ii) for equipping any vessel, vehicle, or aircraft available for official use by a State or local law enforcement agency to enable the vessel, vehicle, or aircraft to assist law enforcement functions if the vessel, vehicle, or aircraft will be used in a joint law enforcement operation with a Federal agency participating in the Fund; and

(iii) payments for other equipment directly related to seizure or forfeiture, including laboratory equipment, protective equipment, communications equipment, and the operation and maintenance costs of such equipment;

(G) for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, chapter 96 of title 18, or sections 1956 and 1957 of title 18;

(H) the payment of State and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order; and

(I) payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency participating in the Fund.

Amounts for paying the expenses authorized by subparagraphs (B), (F), and (G) shall be specified in appropriations Acts and may be used under authorities available to the organization receiving the funds. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the Fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(2) Any award paid from the Fund, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, Attorney delegate, except that the authority to pay an award of \$250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award pursuant to paragraph (1)(B) shall not exceed \$500,000. Any award pursuant to paragraph (1)(C) shall not exceed the lesser of \$500,000 or one-fourth of the amount realized by the United States from the property forfeited, without both the personal approval of the Attorney General and written notice within 30 days thereof to the Chairmen and ranking minority members of the Committees on Appropriations and the Judiciary of the Senate and of the House of Representatives.

(3) Any amount under subparagraph (G) of paragraph (1) shall be paid at the discretion of the Attorney General or his delegate, except that the authority to pay \$100,000 or more may be delegated only to the respective head of the agency involved.

(4) There shall be deposited in the Fund—

(A) all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d)), or the Postmaster General of the United States pursuant to 39 U.S.C. 2003(b)(7);

(B) all amounts representing the Federal equitable share from the forfeiture of property under any Federal, State, local or foreign law, for any Federal agency participating in the Fund;

(C) all amounts transferred by the Secretary of the Treasury pursuant to section 9703(g)(4)(A)(ii) of title 31; and

(D) all amounts collected—

(i) by the United States pursuant to a reimbursement order under paragraph (2) of section 413(q) of the Controlled Substances Act (21 U.S.C. 853(q)); and

(ii) pursuant to a restitution order under paragraph (1) or (3) of section 413(q) of the Controlled Substances Act [21 U.S.C. § 853(q)] for injuries to the United States.

(5) Amounts in the Fund, and in any holding accounts associated with the Fund, that are not currently needed for the purpose of this section [FN1] shall be kept on deposit

or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

(6)(A) The Attorney General shall transmit to Congress and make available to the public, not later than 4 months after the end of each fiscal year, detailed reports for the prior fiscal year as follows:

(i) A report on total deposits to the Fund by State of deposit.

(ii) A report on total expenses paid from the Fund, by category of expense and recipient agency, including equitable sharing payments.

(iii) A report describing the number, value, and types of properties placed into official use by Federal agencies, by recipient agency.

(iv) A report describing the number, value, and types of properties transferred to State and local law enforcement agencies, by recipient agency.

(v) A report, by type of disposition, describing the number, value, and types of forfeited property disposed of during the year.

(vi) A report on the year-end inventory of property under seizure, but not yet forfeited, that reflects the type of property, its estimated value, and the estimated value of liens and mortgages outstanding on the property.

(vii) A report listing each property in the year-end inventory, not yet forfeited, with an outstanding equity of not less than \$1,000,000.

(B) The Attorney General shall transmit to Congress and make available to the public, not later than 2 months after final issuance, the audited financial statements for each fiscal year for the Fund.

(C) Reports under subparagraph (A) shall include information with respect to all forfeitures under any law enforced or administered by the Department of Justice.

(D) The transmittal and publication requirements in subparagraphs (A) and (B) may be satisfied by—

(i) posting the reports on an Internet website maintained by the Department of Justice for a period of not less than 2 years; and

(ii) notifying the Committees on the Judiciary of the House of Representatives and the Senate when the reports are available electronically.

(7) The provisions of this subsection relating to deposits in the Fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(8)(A) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (B), (F), and (G) of paragraph (1).

(B) Subject to subparagraphs (C) and (D), at the end of each of fiscal years 1994, 1995, and 1996, the Attorney General shall transfer from the Fund not more than \$100,000,000 to the Special Forfeiture Fund established by section 6073 of the Anti-Drug Abuse Act of 1988.

(C) Transfers under subparagraph (B) may be made only from the excess unobligated balance and may not exceed one-half of the excess unobligated balance for any year. In addition, transfers under subparagraph (B) may be made only to the extent that the sum of the transfers in a fiscal year and one-half of the unobligated balance at the beginning of that fiscal year for the Special Forfeiture Fund does not exceed \$100,000,000.

(D) For the purpose of determining amounts available for distribution at year end for any fiscal year, “excess unobligated balance” means the unobligated balance of the Fund generated by that fiscal year's operations, less any amounts that are required to be retained in the Fund to ensure the availability of amounts in the subsequent fiscal year for purposes authorized under paragraph (1).

(E) Subject to the notification procedures contained in section 605 of Public Law 103-121, and after satisfying the transfer requirement in subparagraph (B) of this paragraph, any excess unobligated balance remaining in the Fund on September 30, 1997 and thereafter shall be available to the Attorney General, without fiscal year limitation, for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice. Any amounts provided pursuant to this subparagraph may be used under authorities available to the organization receiving the funds.

(9)(A) Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, in her discretion, to warrant clear title to any subsequent purchaser or transferee of such property.

(B) For fiscal years 2002 and 2003, the Attorney General is authorized to transfer, under such terms and conditions as the Attorney General shall specify, real or personal property of limited or marginal value, to a State or local government agency, or its designated contractor or transferee, for use to support drug abuse treatment, drug and crime prevention and education, housing, job skills, and other community-based public health and safety programs. Each such transfer shall be subject to satisfaction by the recipient involved of any outstanding lien against the property transferred, but no such transfer shall create or confer any private right of action in any person against the United States.

(10) The Attorney General shall transfer from the Fund to the Secretary of the Treasury for deposit in the Department of the Treasury Forfeiture Fund amounts appropriate to reflect the degree of participation of the Department of the Treasury law enforcement organizations (described in section 9703(p) of title 31) in the law enforcement effort resulting in the forfeiture pursuant to laws enforced or administered by the Department of Justice.

(11) For purposes of this subsection and notwithstanding section 9703 of title 31 or any other law, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to-

(A) a judicial forfeiture proceeding when the underlying seizure was made by an officer of a Federal law enforcement agency participating in the Department of Justice Assets Forfeiture Fund or the property was maintained by the United States Marshals Service; or

(B) a civil administrative forfeiture proceeding conducted by a Department of Justice law enforcement component or pursuant to the authority of the Secretary of Commerce.

**(d)(1)** The Attorney General may accept, hold, administer, and use gifts, devises, and bequests of any property or services for the purpose of aiding or facilitating the work of the Department of Justice.

(2) Gifts, devises, and bequests of money, the proceeds of sale or liquidation of any other property accepted hereunder, and any income accruing from any property accepted hereunder—

(A) shall be deposited in the Treasury in a separate fund and held in trust by the Secretary of the Treasury for the benefit of the Department of Justice; and

(B) are hereby appropriated, without fiscal year limitation, and shall be disbursed on order of the Attorney General.

(3) Upon request of the Attorney General, the Secretary of the Treasury may invest and reinvest the fund described herein in public debt securities with maturities suitable for the needs of the fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States or comparable maturities.

(4) Evidences of any intangible personal property (other than money) accepted hereunder shall be deposited with the Secretary of the Treasury, who may hold or liquidate them, except that they shall be liquidated upon the request of the Attorney General.

(5) For purposes of federal income, estate, and gift taxes, property accepted hereunder shall be considered a gift, devise, or bequest to, or for the use of, the United States.

**28 U.S.C. § 535(b):**

“Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . . .”

**28 U.S.C. § 994(n):**

“The [United States Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.”

**28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals**

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be

given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

**(b)** This chapter [28 U.S.C. §§ 1781 et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

## **28 U.S.C. § 2461**

**(a)** Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

**(b)** Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

**(c)** If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

## **31 U.S.C. § 3729:**

“(a) Liability for certain acts. (1) In general-Subject to paragraph (2), any person who-(A) knowingly presents, or causes to be presented, a false or fraudulent claim for



payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G); (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property; (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [FN1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

### **31 U.S.C. § 5324**

(a) Domestic coin and currency transactions involving financial institutions.--No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508--

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508;

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

**(b) Domestic coin and currency transactions involving nonfinancial trades or businesses.--**No person shall, for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section--

(1) cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or any regulation prescribed under such section;

(2) cause or attempt to cause a nonfinancial trade or business to file a report required under section 5331 or any regulation prescribed under such section that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with 1 or more nonfinancial trades or businesses.

**(c) International monetary instrument transactions.--**No person shall, for the purpose of evading the reporting requirements of section 5316--

(1) fail to file a report required by section 5316, or cause or attempt to cause a person to fail to file such a report;

(2) file or cause or attempt to cause a person to file a report required under section 5316 that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.

**(d) Criminal penalty.--**

(1) In general.--Whoever violates this section shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both.

(2) Enhanced penalty for aggravated cases.--Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.

### **31 U.S.C. § 5332**

**(a) Criminal offense.--**

(1) In general.--Whoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than \$10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, shall be guilty of a currency smuggling offense and subject to punishment pursuant to subsection (b).

(2) Concealment on person.--For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual.

**(b) Penalty.**

(1) Term of imprisonment.--A person convicted of a currency smuggling offense under subsection (a), or a conspiracy to commit such offense, shall be imprisoned for not more than 5 years.

(2) Forfeiture.--In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property.

(3) Procedure.--The seizure, restraint, and forfeiture of property under this section shall be governed by section 413 of the Controlled Substances Act.

(4) Personal money judgment.--If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

**(c) Civil forfeiture.**

(1) In general.--Any property involved in a violation of subsection (a), or a conspiracy to commit such violation, and any property traceable to such violation or conspiracy, may be seized and forfeited to the United States.

(2) Procedure.--The seizure and forfeiture shall be governed by the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.

(3) Treatment of certain property as involved in the offense.--For purposes of this subsection and subsection (b), any currency or other monetary instrument that is concealed or intended to be concealed in violation of subsection (a) or a conspiracy to commit such violation, any article, container, or conveyance used, or intended to be used, to conceal or transport the currency or other monetary instrument, and any other property used, or intended to be used, to facilitate the offense, shall be considered property involved in the offense.

**31 U.S.C. § 9703**

**(a) In general.**--There is established in the Treasury of the United States a fund to be known as the "Department of the Treasury Forfeiture Fund" (referred to in this section as the "Fund"). The Fund shall be available to the Secretary, without fiscal year limitation, with respect to seizures and forfeitures made pursuant to any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury or the United States Coast Guard for the following law enforcement purposes:

(1)(A) Payment of all proper expenses of seizure (including investigative costs incurred by a Department of the Treasury law enforcement organization leading to seizure) or the proceedings of forfeiture and sale, including the expenses of detention,

inventory, security, maintenance, advertisement, or disposal of the property, and if condemned by a court and a bond for such costs was not given, the costs as taxed by the court.

(B) Payment for-

(i) contract services;

(ii) the employment of outside contractors to operate and manage properties or to provide other specialized services necessary to dispose of such properties in an effort to maximize the return from such properties; and

(iii) reimbursing any Federal, State, or local agency for any expenditures made to perform the functions described in this subparagraph.

(C) Awards of compensation to informers under section 619 of the Tariff Act of 1930 (19 U.S.C. 1619).

(D) Satisfaction of-

(i) liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate Customs officer according to law; and

(ii) subject to the discretion of the Secretary, other valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by a Department of the Treasury law enforcement organization. To determine the validity of any such lien or mortgage, the amount of payment to be made, and to carry out the functions described in this subparagraph, the Secretary may employ and compensate attorneys and other personnel skilled in State real estate law.

(E) Payment of amounts authorized by law with respect to remission and mitigation.

(F) Payment of claims of parties in interest to property disposed of under section 612(b) of the Tariff Act of 1930 (19 U.S.C. 1612(b)), in the amounts applicable to such claims at the time of seizure.

(G) Equitable sharing payments made to other Federal agencies, State and local law enforcement agencies, and foreign countries pursuant to section 616(c) of the Tariff Act of 1930 (19 U.S.C. 1616a(c)), section 981 of title 18, or subsection (h) of this section, and all costs related thereto.

(H) Payment for services of experts and consultants needed by a Department of the Treasury law enforcement organization to carry out the organization's duties relating to seizure and forfeiture.

(I) payment of overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in joint law enforcement operations with a Department of the Treasury law enforcement organization;

(J) payment made pursuant to guidelines promulgated by the Secretary, if such payment is necessary and directly related to seizure and forfeiture program expenses for-

(i) the purchase or lease of automatic data processing systems (not less than a majority of which use will be related to such program);

(ii) training;

(iii) printing; and

(iv) contracting for services directly related to-

(I) the identification of forfeitable assets;

(II) the processing of and accounting for forfeitures; and

- (III) the storage, maintenance, protection, and destruction of controlled substances.
- (2) At the discretion of the Secretary—
  - (A) payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Department of the Treasury law enforcement organization participating in the Fund;
  - (B) purchases of evidence or information by—
    - (i) a Department of the Treasury law enforcement organization with respect to—
      - (I) a violation of section 1956 or 1957 of title 18 (relating to money laundering); or
      - (II) a law, the violation of which may subject property to forfeiture under section 981 or 982 of title 18;
    - (ii) the United States Customs Service with respect to drug smuggling or a violation of section 542 or 545 of title 18 (relating to fraudulent customs invoices or smuggling);
    - (iii) the United States Secret Service with respect to a violation of—
      - (I) section 1028, 1029, or 1030 or [FN2] title 18;
      - (II) any law of the United States relating to coins, obligations, or securities of the United States or of a foreign government; or
      - (III) any law of the United States which the United States Secret Service is authorized to enforce relating to fraud or other criminal or unlawful activity in or against any federally insured financial institution, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation; and
    - (iv) the United States Customs Service or the Internal Revenue Service with respect to a violation of chapter 53 of this title (relating to the Bank Secrecy Act).
  - (C) payment of costs for publicizing awards available under section 619 of the Tariff Act of 1930 (19 U.S.C. 1619);
  - (D) payment for equipment for any vessel, vehicle, or aircraft available for official use by a Department of the Treasury law enforcement organization to enable the vessel, vehicle, or aircraft to assist in law enforcement functions, and for other equipment directly related to seizure or forfeiture, including laboratory equipment, protective equipment, communications equipment, and the operation and maintenance costs of such equipment;
  - (E) the payment of claims against employees of the Customs Service settled by the Secretary under section 630 of the Tariff Act of 1930;
  - (F) payment for equipment for any vessel, vehicle, or aircraft available for official use by a State or local law enforcement agency to enable the vessel, vehicle, or aircraft to assist in law enforcement functions if the vessel, vehicle, or aircraft will be used in joint law enforcement operations with a Department of the Treasury law enforcement organization;
  - (G) reimbursement of private persons for expenses incurred by such persons in cooperating with a Department of the Treasury law enforcement organization in investigations and undercover law enforcement operations;
  - (H) payment for training foreign law enforcement personnel with respect to seizure or forfeiture activities of the Department of the Treasury; and [FN3]

**(b) Limitations**

(1) Any payment made under subparagraph (D) or (E) of subsection (a)(1) with respect to a seizure or a forfeiture of property shall not exceed the value of the property at the time of the seizure.

(2) Any payment made under subsection (a)(1)(G) with respect to a seizure or forfeiture of property shall not exceed the value of the property at the time of disposition.

(3) The Secretary may exempt the procurement of contract services under the Fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(4) The Secretary shall assure that any equitable sharing payment made to a State or local law enforcement agency pursuant to subsection (a)(1)(G) and any property transferred to a State or local law enforcement agency pursuant to subsection (h)-

(A) has a value that bears a reasonable relationship to the degree of participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(5) Amounts transferred by the Attorney General pursuant to section 524(c)(1) of title 28, or by the Postmaster General pursuant to section 2003 of title 39, and deposited into the Fund pursuant to subsection (d), shall be available for Federal law enforcement related purposes of the Department of the Treasury law enforcement organizations.

(c) Funds available to United States Coast Guard

(1) The Secretary shall make available to the United States Coast Guard, from funds appropriated under subsection (g)(2) in excess of \$10,000,000 for a fiscal year, an amount equal to the net proceeds in the Fund derived from seizures by the Coast Guard.

(2) Funds made available under this subsection may be used to--

(A) pay for equipment for any vessel, vehicle, or aircraft available for official use by the United States Coast Guard to enable the vessel, vehicle, or aircraft to assist in law enforcement functions;

(B) pay for equipment for any vessel, vehicle, equipment, or aircraft available for official use by a State or local law enforcement agency to enable the vessel, vehicle, or aircraft to assist in law enforcement functions if the vessel, vehicle, or aircraft will be used in joint law enforcement operations with the United States Coast Guard;

(C) pay for overtime salaries, travel, fuel, training, equipment, and other similar costs of State and local law enforcement officers that are incurred in joint law enforcement operations with the United States Coast Guard;

(D) pay for expenses incurred in bringing vessels into compliance with applicable environmental laws prior to disposal by sinking.

**(d) Deposits and credits**

(1) With respect to fiscal year 1993, there shall be deposited into or credited to the Fund--

(A) all currency forfeited during fiscal year 1993, and all proceeds from forfeitures during fiscal year 1993, under any law enforced or administered by the United States Customs Service or the United States Coast Guard;

(B) all income from investments made under subsection (e); and

(C) all amounts representing the equitable share of the United States Customs Service or the United States Coast Guard from the forfeiture of property under any Federal, State, local, or foreign law.

(2) With respect to fiscal years beginning after fiscal year 1993, there shall be deposited into or credited to the Fund--

(A) all currency forfeited after fiscal year 1993, and all proceeds from forfeitures after fiscal year 1993, under any law (other than sections 7301 and 7302 of the Internal Revenue Code of 1986) enforced or administered by a Department of the Treasury law enforcement organization or the United States Coast Guard;

(B) all income from investments made under subsection (e); and

(C) all amounts representing the equitable share of a Department of the Treasury law enforcement organization or the United States Coast Guard from the forfeiture of property under any Federal, State, local, or foreign law.

**(e) Investments.**--Amounts in the Fund, and in any holding accounts associated with the Fund, which are not currently needed for the purposes of this section may be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

**(f) Reports to Congress.**--The Secretary shall transmit to the Congress, not later than February 1 of each year--

(1) a report on--

(A) the estimated total value of property forfeited with respect to which funds were not deposited in the Fund during the preceding fiscal year--

(i) under any law enforced or administered by the United States Customs Service or the United States Coast Guard, in the case of fiscal year 1993; and

(ii) under any law enforced or administered by the Department of the Treasury law enforcement organizations or the United States Coast Guard, in the case of fiscal years beginning after 1993; and

(B) the estimated total value of all such property transferred to any State or local law enforcement agency; and

(2) a report on--

(A) the balance of the Fund at the beginning of the preceding fiscal year;

(B) liens and mortgages paid and the amount of money shared with Federal, State, local, and foreign law enforcement agencies during the preceding fiscal year;

(C) the net amount realized from the operations of the Fund during the preceding fiscal year, the amount of seized cash being held as evidence, and the amount of money that has been carried over into the current fiscal year;

(D) any defendant's property, not forfeited at the end of the preceding fiscal year, if the equity in such property is valued at \$1,000,000 or more;

(E) the total dollar value of uncontested seizures of monetary instruments having a value of over \$100,000 which, or the proceeds of which, have not been deposited into the Fund pursuant to subsection (d) within 120 days after seizure, as of the end of the preceding fiscal year;

(F) the balance of the Fund at the end of the preceding fiscal year;

(G) the net amount, if any, of the excess unobligated amounts remaining in the Fund at the end of the preceding fiscal year and available to the Secretary for Federal law enforcement related purposes;

(H) a complete set of audited financial statements (including a balance sheet, income statement, and cash flow analysis) prepared in a manner consistent with the requirements of the Chief Financial Officers Act of 1990 (Public Law 101-576); and

(I) an analysis of income and expenses showing the revenue received or lost—

(i) by property category (such as general property, vehicles, vessels, aircraft, cash, and real property); and

(ii) by type of disposition (such as sale, remission, cancellation, placement into official use, sharing with State and local agencies, and destruction).

The Fund shall be subject to annual financial audits as authorized in the Chief Financial Officers Act of 1990 (Public Law 101-576).

**(g) Appropriations**

(1) There are hereby appropriated from the Fund such sums as may be necessary to carry out the purposes described in subsection (a)(1).

(2) There are authorized to be appropriated from the Fund to carry out the purposes set forth in subsections (a)(2) and (c) not to exceed—

(A) \$25,000,000 for fiscal year 1993; and

(B) \$50,000,000 for each fiscal year after fiscal year 1993.

(3)(A) Subject to subparagraphs (B) and (C), at the end of each of fiscal years 1994, 1995, 1996, and 1997, the Secretary shall transfer from the Fund not more than \$100,000,000 to the Special Forfeiture Fund established by section 6073 of the Anti-Drug Abuse Act of 1988.

(B) Transfers pursuant to subparagraph (A) shall be made only from excess unobligated amounts and only to the extent that, as determined by the Secretary, such transfers will not impair the future availability of amounts for the purposes described in subsection (a). Further, transfers under subparagraph (A) may not exceed one-half of the excess unobligated balance for a year. In addition, transfers under subparagraph (A) may be made only to the extent that the sum of the transfers in a fiscal year and one-half of the unobligated balance at the beginning of that fiscal year for the Special Forfeiture Fund does not exceed \$100,000,000.

(C) The Secretary of the Treasury shall reserve an amount not to exceed \$30,000,000 from the unobligated balances remaining in the Customs Forfeiture Fund on September 30, 1992, and such amount shall be transferred to the Fund on October 1,



1992, or, if later, the date that is 15 days after the date of the enactment of this section. Such amount shall be available for any expenses or activities authorized under this section. At the end of fiscal year [FN4] 1993, 1994, 1995, and 1996, the Secretary shall reserve in the Fund an amount not to exceed \$50,000,000 of the unobligated balances in the Fund, or, if the Secretary determines that a greater amount is necessary for asset specific expenses, an amount equal to not more than 10 percent of the total obligations from the Fund in the preceding fiscal year. At the end of fiscal year 1997, and at the end of each fiscal year thereafter, the Secretary shall reserve any amounts that are required to be retained in the Fund to ensure the availability of amounts in the subsequent fiscal year for purposes authorized under subsection (a). Unobligated balances remaining pursuant to section 4(B) of 9703(g) [FN5] shall also be carried forward.

(4)(A) After reserving any amount authorized by paragraph (3)(C), any unobligated balances remaining in the Fund on September 30, 1993, shall be deposited into the general fund of the Treasury of the United States.

(B) After reserving any amount authorized by paragraph (3)(C) and after transferring any amount authorized by paragraph (3)(A), any unobligated balances remaining in the Fund on September 30, 1994, and on September 30 of each fiscal year thereafter, shall be available to the Secretary, without fiscal year limitation, for transfers pursuant to subparagraph (A)(ii) and for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization.

(C) Any obligation or expenditure in excess of \$500,000 with respect to an unobligated balance described in subparagraph (B) may not be made by the Secretary unless the Appropriations Committees of both Houses of Congress are notified at least 15 days in advance of such obligation or expenditure.

**(h) Retention or transfer of property.-**

(1) The Secretary may, with respect to any property forfeited under any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury-

(A) retain any of the property for official use; or

(B) transfer any of the property to-

(i) any other Federal agency; or

(ii) any State or local law enforcement agency that participated directly or indirectly in the seizure or forfeiture of the property.

(2) The Secretary may transfer any forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure of [FN6] forfeiture of the property, if such a transfer-

(A) is one with which the Secretary of State has agreed;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961 (22 U.S.C. 2291(h)).

(3) Nothing in this section shall affect the authority of the Secretary under section 981 of title 18 or section 616 of the Tariff Act of 1930 (19 U.S.C. 1616a).

**(i) Regulations.**--The Secretary may prescribe such rules and regulations as may be necessary to carry out this section.

**(j) Customs forfeiture fund.**--Notwithstanding any other provision of law--

(1) during any period when forfeited currency and proceeds from forfeitures under any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury or the United States Coast Guard, are required to be deposited in the Fund pursuant to this section--

(A) all moneys required to be deposited in the Customs Forfeiture Fund pursuant to section 613A of the Tariff Act of 1930 (19 U.S.C. 1613b) shall instead be deposited in the Fund; and

(B) no deposits or withdrawals may be made to or from the Customs Forfeiture Fund pursuant to section 613A of the Tariff Act of 1930 (19 U.S.C. 1613b); and

(2) any funds in the Customs Forfeiture Fund and any obligations of the Customs Forfeiture Fund on the effective date of the Treasury Forfeiture Act of 1992, shall be transferred to the Fund and all administrative costs of such transfer shall be paid for out of the Fund.

**(k) Limitation of liability.**--The United States shall not be liable in any action relating to property transferred under this section or under section 616 of the Tariff Act of 1930 (19 U.S.C. 1616a) if such action is based on an act or omission occurring after the transfer.

**(l) Authority to warrant title.**--Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department of the Treasury, the Secretary is authorized, at the Secretary's discretion, to warrant clear title to any subsequent purchaser or transferee of such forfeited property.

**(m) Forfeited property.**--For purposes of this section and notwithstanding section 524(c)(11) of title 28 or any other law--

(1) during fiscal year 1993, property and currency shall be deemed to be forfeited pursuant to a law enforced or administered by the United States Customs Service if it is forfeited pursuant to--

(A) a judicial forfeiture proceeding when the underlying seizure was made by an officer of the United States Customs Service or the property was maintained by the United States Customs Service; or

(B) a civil administrative forfeiture proceeding conducted by the United States Customs Service; and

(2) after fiscal year 1993, property and currency shall be deemed to be forfeited pursuant to a law enforced or administered by a Department of the Treasury law enforcement organization if it is forfeited pursuant to--

(A) a judicial forfeiture proceeding when the underlying seizure was made by an officer of a Department of the Treasury law enforcement organization or the property was maintained by a Department of the Treasury law enforcement organization; or  
(B) a civil administrative forfeiture proceeding conducted by a Department of the Treasury law enforcement organization.

**(n) Transfers to Attorney General and Postmaster General**

(1) The Secretary shall transfer from the Fund to the Attorney General for deposit in the Department of Justice Assets Forfeiture Fund amounts appropriate to reflect the degree of participation of participating Federal agencies in the law enforcement effort resulting in the forfeiture pursuant to laws enforced or administered by a Department of the Treasury law enforcement organization. For purposes of the preceding sentence, a “participating Federal agency” is an agency that participates in the Department of Justice Assets Forfeiture Fund.

(2) The Secretary shall transfer from the Fund to the Postmaster General for deposit in the Postal Service Fund amounts appropriate to reflect the degree of participation of the United States Postal Service in the law enforcement effort resulting in the forfeiture pursuant to laws enforced or administered by a Department of the Treasury law enforcement organization.

**(o) Definitions.--For purposes of this section--**

(1) Department of the Treasury law enforcement organization.--The term “Department of the Treasury law enforcement organization” means the United States Customs Service, the United States Secret Service, the Tax and Trade Bureau, the Internal Revenue Service, the Federal Law Enforcement Training Center, the Financial Crimes Enforcement Network, and any other law enforcement component of the Department of the Treasury so designated by the Secretary.

(2) Secretary.--The term “Secretary” means the Secretary of the Treasury.

**41 U.S.C. § 53.**

“It is prohibited for any person-(1) to provide, attempt to provide, or offer to provide any kickback; (2) to solicit, accept, or attempt to accept any kickback; or (3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.”

**UNITED STATES SENTENCING GUIDELINES**

**U.S.S.G. § 4A1.2(h):**

“Sentences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).”

**U.S.S.G. § 5E1.1:**

“In the case of an identifiable victim, the court shall-(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or (2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.”

**U.S.S.G. § 5K1.1:**

“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”

**U.S.S.G. § 7B1.3: Revocation of Probation or Supervised Release (Policy Statement)**

“(a)(1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.

(2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.

(b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in § 7B1.4 (Term of Imprisonment).

(c) In the case of a Grade B or C violation—

(1) Where the minimum term of imprisonment determined under § 7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by

(A) a sentence of imprisonment; or

(B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term; and

(2) Where the minimum term of imprisonment determined under § 7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

(g)(1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§ 5D1.1-1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. 3583(h).”

**U.S.S.G. § 8C2.5(1):**

“If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points.”