

MECHANISM FOR FOLLOW-UP ON THE  
IMPLEMENTATION OF THE INTER-AMERICAN  
CONVENTION AGAINST CORRUPTION  
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UNITED STATES OF AMERICA

FINAL REPORT

(Adopted at the June 27, 2008 plenary session)

**COMMITTEE OF EXPERTS OF THE MECHANISM FOR FOLLOW-UP ON THE  
IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST  
CORRUPTION**

**REPORT ON IMPLEMENTATION IN THE UNITED STATES OF THE CONVENTION  
PROVISIONS SELECTED FOR REVIEW IN THE SECOND ROUND, AND ON FOLLOW-  
UP TO THE RECOMMENDATIONS FORMULATED TO THAT COUNTRY IN THE  
FIRST ROUND<sup>1</sup>**

**INTRODUCTION**

**1. Contents of the Report**

This report presents, first, a review of implementation in the United States of the provisions of the Inter-American Convention against Corruption selected by the Committee of Experts of the Follow-up Mechanism (MESICIC) for review in the Second Round: Article III, paragraphs 5 and 8, and Article VI.

Second, the report will examine follow-up to the recommendations that were formulated to the United States by the MESICIC Committee of Experts in the First Round, which are contained in the report on that country adopted by the Committee at its Seventh Meeting, and published at the following web page: [http://www.oas.org/juridico/english/mec\\_rep\\_usa.pdf](http://www.oas.org/juridico/english/mec_rep_usa.pdf)

**2. Ratification of the Convention and adherence to the Mechanism**

According to the official registry of the OAS General Secretariat, the United States ratified the Inter-American Convention against Corruption (IACC) on September 15, 2000 and deposited the respective instrument of ratification on September 29, 2000.

Similarly, the United States signed the Declaration on the Mechanism for Follow-Up of Implementation of the IACC on June 4, 2001, during a regular session of the OAS General Assembly held in San José, Costa Rica.

**I. SUMMARY OF THE INFORMATION RECEIVED**

**1. Response of the United States**

The Committee wishes to acknowledge the cooperation that it received throughout the review process from the United States, which was evidenced, *inter-alia*, in the response to the Questionnaire and in the constant willingness to clarify or complete its contents. In its response, the United States noted the electronic addresses where the legal provisions related thereto may be consulted.

For its review, the Committee took into account the information provided by the United States up to November 2, 2007, and that requested by the Secretariat and the members of the review subgroup, to carry out its functions in keeping with its Rules of Procedure and Other Provisions.

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<sup>1</sup> This report was adopted by the Committee in accordance with the provisions of Article 3(g) and 26 of its Rules of Procedure and Other Provisions, at the plenary session held on June 27, 2008, at its Thirteenth meeting, held at OAS Headquarters, June 23-27, 2008.

## **2. Documents received from civil society organizations**

The Committee also received, within the deadline established in the Calendar for the Second Round adopted at its Ninth Meeting,<sup>2</sup> a document from the civil society organization “Transparency International”.<sup>3</sup>

## **II. REVIEW OF IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE SECOND ROUND**

### **A. SCOPE OF THE PRESENT REPORT**

With respect to the review carried out in this report, with respect to the implementation in the United States of the Convention provisions selected for review in the Second Round, the Committee highlights the relevance of the background and considerations formulated in the report adopted with respect to this State in the framework of the First Round.

Similarly, the information received both from the Government of the country under review, as well as from civil society, corresponds to the Federal Government.

Taking the foregoing considerations into account, the review that will be carried out in this report will be limited to the United States Federal Government.<sup>4</sup>

### **B. REVIEW OF IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE SECOND ROUND**

#### **1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)**

##### **1.1. SYSTEMS OF GOVERNMENT HIRING**

###### **1.1.1. Existence of provisions in the legal framework and/or other measures**

The United States has, at the federal level, a set of provisions related to the hiring of public servants, among which the following provisions related to the principal systems should be noted:

- Legal and regulatory provisions, as well as other measures applicable to public servants in the Executive branch, including, among others, the following:

- Title 5 of the United States Code (USC),<sup>5</sup> titled Government Organization and Employees, which provides for the following principal types of service in the Executive branch:

- The Competitive Service, which, pursuant to the definition provided by 5 USC Section 2102, applies to all civil service positions in the Executive branch except the following, which will be discussed below: (1) positions which are specifically excepted from the competitive service by

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<sup>2</sup> This Meeting was held from March 27 to 31, 2006, at OAS Headquarters in Washington D.C., USA.

<sup>3</sup> This document was received in electronic format on November 2, 2007, and may be consulted at the following Internet address: [http://www.oas.org/juridico/english/mesicic2\\_usa\\_inf\\_sc\\_en.doc](http://www.oas.org/juridico/english/mesicic2_usa_inf_sc_en.doc)

<sup>4</sup> See Chapter II, A, “Considerations on the scope of review in the case of the United States”, in the Report adopted with respect to this State in the First Round, which is available at [http://www.oas.org/juridico/english/mec\\_rep\\_usa.pdf](http://www.oas.org/juridico/english/mec_rep_usa.pdf)

<sup>5</sup> See Title 5 of the U.S.C., available at <http://www.access.gpo.gov/uscode/title5/title5.html>.

or under statute; (2) positions which require Senate confirmation; and (3) positions in the Senior Executive Service.

In addition, Section 2102 also provides that the competitive service includes those civil service positions not in the Executive branch which are specifically included in the competitive service by statute, as well as positions in the District of Columbia which are specifically included therein by statute.

- The Excepted Service, which pursuant to 5 USC Section 2103, includes those positions in the civil service which are neither part of the competitive service nor the Senior Executive Service.
- The positions which require Senate confirmation, and which, according to the response of the United States, correspond to “...a relatively small number of non-career public officials who are not selected on a competitive basis. These are primarily those serving in high-level positions of confidence. However, those appointments are still subject to a vetting process. For example, an individual who the President wishes to appoint as a member of his Cabinet must go through a rigorous background check, a financial conflict of interest review, and Senate confirmation.”<sup>6</sup>
- The Senior Executive Service, which is established by Title 5 USC Section 3131. Section 3132 of Title 5 defines Senior Executive Service Positions as those classified above a certain level and which are not required to be filled by appointment by the President by and with the advice of the Senate.<sup>1</sup> Section 3133 provides information on the designation of posts as being Senior Executive Service positions.<sup>7</sup>

- Legal and regulatory provisions as well as other measures regarding governing or administrative authorities of the system, such as the following:

- Legal provisions such as those provided in Chapter 11 of Title 5 of the USC,<sup>8</sup> which contains provisions such as Title 5 USC Section 1101, which creates the Office of Personnel Management (OPM) as an independent body within the Executive branch. Section 1103(a)(5) charges OPM, *inter-alia*, with the execution and administration of the civil service rules and regulations issued by the President and by OPM, and of the laws governing the civil service; and Section 1104(a)(2), which allows the Director of the OPM to delegate any functions vested in or delegated to him, including authority for competitive examinations to the heads of agencies in the Executive branch and other agencies employing persons in the competitive service.
- Legal provisions such as those provided in Chapter 1 of Title 5 of the Code of Federal Regulations (CFR),<sup>9</sup> which contains detailed provisions relating to OPM’s functions vis-à-vis entry into public service, such as 5 CFR Section 2.1, which makes OPM responsible for open competitive examinations for admission to the competitive service; and Section 10.2, which

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<sup>6</sup> See the response of the United States to the questionnaire for the Second Round, at p. 2, available at: [http://www.oas.org/juridico/english/mesicic2\\_usa\\_en.doc](http://www.oas.org/juridico/english/mesicic2_usa_en.doc).

<sup>7</sup> See Sections 3131, 3132 and 3133 of Title 5 U.S.C., at [http://www.access.gpo.gov/uscode/title5/partiii\\_subpartb\\_chapter31\\_subchapterii\\_.html](http://www.access.gpo.gov/uscode/title5/partiii_subpartb_chapter31_subchapterii_.html)

<sup>8</sup> See Chapter 11 of the U.S.C., at [http://www.access.gpo.gov/uscode/title5/partii\\_chapter11\\_.html](http://www.access.gpo.gov/uscode/title5/partii_chapter11_.html)

<sup>9</sup> See Chapter 1 of the C.F.R. at [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=18aa810abd42dd2ae1aa701d092639b0&c=ecfr&tpl=/ecfrbrowse/Title05/5cfrv1\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=18aa810abd42dd2ae1aa701d092639b0&c=ecfr&tpl=/ecfrbrowse/Title05/5cfrv1_02.tpl)

allows the OPM to require agencies, *inter-alia*, to establish and maintain a system of accountability which sets standards for applying the merit system principles.

- Measures such as the Qualification Standards Operating Manual issued by the OPM in fulfillment of its responsibilities regarding execution and administration of the civil service rules and regulations, principally to assist personnel specialists in determining whether applicants meet the minimum requirements for the positions being filled.<sup>10</sup>
- Legal and regulatory provisions applicable to oversight bodies of the public hiring system, among which, the following should be mentioned:
- Title 29 USC Section 1103(a)(8), which charges the Office of Personnel Management with conducting, or otherwise providing for the conduct of, studies and research into methods of assuring improvements in personnel management; Section 1104(b)(2) provides that the OPM shall establish and maintain an oversight program to ensure that activities under delegated authority are in accordance with the merit system principles.
  - Title 29 USC Section 2304, which authorizes the Government Accountability Office, either on its own initiative or upon request from Congress, to conduct audits and reviews to assure compliance with the laws and regulations governing employment in the Executive branch.
  - Title 5 of the CFR, Section 5.2, which authorizes the Director of the OPM to secure effective implementation of the civil service laws, rules, and regulations, *inter-alia*, through investigation, or by directing an agency to investigate and report on apparent violations of those laws, rules and regulations; Section 10.2 authorizes the Director to require agencies to establish and maintain a system of accountability for merit system principles; and Section 10.3 grants OPM the authority to review agency personnel management programs and practices.
- Legal and regulatory provisions, as well as other measures regarding access to public service through a merit-based system, such as the following:
- Legal provisions contained in the USC, such as the following:
    - Title 5 of the U.S. Code, which includes provisions such as Section 2301 of Chapter 23, which establishes the merit system principles on which federal personnel management should be based, and which requires, among others, 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 (Section 2301(b)(1)); and that all employees and applicants for employment receive fair and equitable treatment in all aspects of personnel management. (Section 2301(b)(2)).
    - Section 2302, which sets forth a series of prohibited personnel practices applicable to applicants for federal employment, including, among others, prohibitions addressing discrimination (Section 2302(b)(1)); the granting of any preference or advantage not authorized by law (Section 2302(b)(6)); the appointment or employment of relatives (Section 2302(b)(7)); or the taking or failure to take any personnel action when doing so

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<sup>10</sup> This operating manual is available electronically, at <http://www.opm.gov/qualifications/index.asp>

would violate any law, rule, or regulation related to the merit system principles (Section 2302(b)(12)).<sup>ii</sup>

- Section 3304, which provides authority for the President of the United States to issue rules providing for open, competitive examinations for applicants to the competitive service; Section 3305, which requires the OPM to hold examinations for the competitive service at least twice a year; Section 3313, which requires the names of those applicants who have qualified in examinations for the competitive service to be entered into registers or lists of eligible candidates; Section 3317, which provides for the OPM to provide nominating or appointing authorities with certifications of the top candidates from the appropriate register or list upon request, with respect to vacancies in the competitive service; Section 3318, which authorizes the nominating or appointing authorities to fill vacancies from the certificate provided by the OPM.
- Section 3320, which, with respect to the excepted service, provides that nominating or appointing authorities for this type of service shall fill vacancies therein in the same manner and under the same conditions required for the competitive service, with respect to certain aspects, including, among others, certification from registers (Section 3317) and selection from certificates (Section 3318).
- Legal provisions which prohibit various forms of discrimination related to hiring, including the Civil Rights Act of 1964 (42 USC 2000 *et seq.*), the Americans with Disabilities Act of 1990 (42 USC 12101 *e seq.*), and the Age Discrimination in Employment Act of 1967 (29 USC 621 *et seq.*).
- Regulatory provisions contained in the CFR, such as the following:
  - Part 6 of Title 5 of the CFR, which contains detailed provisions regarding positions in the excepted service, such as Section 6.1, which allows OPM to except certain positions from the competitive service; and Section 6.2, which divides excepted service positions into three schedules: (1) Schedule A positions, which consist of those for which it is not practicable to examine; (2) Schedule B, which includes those positions for which it is not practicable to hold a competitive examinations. These appointments are subject to noncompetitive examination as prescribed by OPM; and (3) Schedule C positions, which are those of a confidential or policy-determining character.<sup>11</sup> OPM also provides implementation guidelines, which are available online, and which are of use by agencies in making excepted service appointments.<sup>12</sup>
  - Section 213.3102(i)(2) of Title 5 of the CFR, which allows agencies to temporarily fill positions for which a critical hiring need exists, including those which must be filled on an interim basis pending completion of a competitive examination. These appointments may be not exceed 30 days, and may only be extended for an additional 30 days; and 5 CFR Section 230.402, which allows agencies to make emergency appointments in the case of a national emergency, such as an attack on the United States.

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<sup>11</sup> OPM publishes an annual consolidated list of all Schedule A, B and C excepted service posts, which is available electronically, at <http://www.opm.gov/fedregis/2005/69-011205-2316-a.htm>

<sup>12</sup> These guidelines may be found at

[https://www.opm.gov/Strategic\\_Management\\_of\\_Human\\_Capital/fhfr/FLX05040.asp#item1](https://www.opm.gov/Strategic_Management_of_Human_Capital/fhfr/FLX05040.asp#item1)

- Section 3131 of Title 5 of the CFR, which provides that the Senior Executive Service shall be administered in such a way as to maintain, *inter-alia*, a merit personnel system free of prohibited personnel practices (S. 3131(9)) and ensure compliance with all applicable civil service laws, rules, and regulations (S. 3131(11)); and Section 3133, which outlines the procedure for the designation of positions as included within the Senior Executive Service.

- Provisions and other measures with respect to the publication of vacancies for the hiring of public servants, such as the following:

- Section 3330 of Title 5 of the USC, which requires the OPM to establish and maintain a comprehensive list of all announcements of vacant positions in the competitive service within each agency to be filled by appointment for more than one year. Section 3330 also lists what information shall be provided in the vacancy announcements (Section 3330(c)) and requires that the list be made available to members of the public (Section 3330(d)).
- The job information system for the Federal Government, known as “USAJOBS”, located at <http://www.usajobs.opm.gov>. As noted in the response of the United States to the questionnaire, USAJOBS “...provides on-line worldwide job vacancy information, employment information fact sheets, job applications, and forms. This site also has résumé development and electronic transmission capabilities so that job seekers can apply for positions online. USAJOBS is updated every business day from a database of more than 25,000 worldwide job opportunities and is available to job seekers in a variety of formats to ensure access for applicants with differing physical and technological capabilities. Additionally the system sends over 260,000 email alerts regarding new postings to registered users each day. It is convenient, user friendly, accessible through a computer or telephone, and available 24 hours a day, 7 days a week.”<sup>13</sup>

- Provisions and other measures in relation to appeal mechanisms for the selection systems, such as the following:

- Section 1212 of Title 5 of the USC, which charges the Office of the Special Counsel with protecting employees, former employees and applicants for employment from prohibited personnel practices and to receive and investigate allegations of such practices. This Section also empowers the Office of the Special Counsel to bring petitions for stays or corrective action, or file a complaint or make recommendations for disciplinary action.
- Section 7703 of Title 5 of the USC, which allows applicants for employment to appeal final orders or decisions taken by the Merit Systems Protection Board to the United States Court of Appeals for the Federal Circuit.
- Section 300.104 of Title 5 of the CFR, which allows candidates for employment to appeal employment practices applied by the OPM to the Merit System Protection Board (S. 300.104(a)), and to submit grievances under the respective agency grievance system in the case of an employment practice administered by the agency (S. 300.104(c)(2)).

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<sup>13</sup> See the response of the United States to the questionnaire for the Second Round, at p. 5, *supra* note 6.

- The mechanisms for filing with each respective agency and for challenging agency decisions, when the applicant for employment considers that discriminatory actions have taken place.

In this regard, the response of the United States to the questionnaire notes that “*An applicant who believes that a Federal agency has discriminated against him or her has the right to file a complaint with that agency. If the applicant is not satisfied with the agency investigation and decision, the applicant may appeal the decision to the U.S. Equal Employment Opportunity Commission. If an applicant believes the agency committed a prohibited personnel practice, he or she may also file a complaint with the Office of Special Counsel, another independent agency established by the Civil Service Reform Act.*”<sup>14</sup>

- Legal and regulatory provisions applicable to employees of the Legislative branch, including, among others, the following:

- Title 5 USC Section 2102(a)(2), which includes within the competitive service, those positions that are not within the Executive branch, but which are specifically included in the competitive service by statute.

- Title 5 CFR Section 212(301), which includes within the competitive service, all positions within the legislative branch which are specifically made subject to the civil service laws by statute.

- The Congressional Accountability Act of 1995, contained in Chapter 24 of Title 2 of the U.S. Code, and which applies to applicants for employment and employees in the legislative branch (Section 1301(3) and (4)). 2 USC Section 1302 also applies several of the anti-discrimination laws applicable to the Executive branch to applicants for employment and employees of the legislative branch, such as the Civil Rights Act of 1964 (42 USC 2000 et seq.), the Americans with Disabilities Act of 1990 (42 USC 12101 e seq), and the Age Discrimination in Employment Act of 1967 (29 USC 621 et seq).

In addition, the Act (5 USC Section 1381) establishes the Office of Compliance as an independent office within the legislative branch. This Office is charged with, *inter-alia*, carrying out a program to educate employing authorities of the legislative branch on the laws made applicable to them (Section 1381(h)); review provisions of the Federal law relating to the terms and conditions of employment, including hiring and grievance procedures (Section 1302(b)(1); submit a report every two years on whether and to what extent various laws applicable to the Executive branch are applicable to the legislative branch, and with respect to the provisions that are not applicable, whether they should be made so (Section 1302(b)(2)).

Similarly, Section 1302(b)(3) of Title 5 of the USC requires congressional committees to accompany any bill or joint resolution relating to the terms and conditions of employment, with a report which indicates the manner in which the provisions therein apply to the legislative branch, as well a statement of the reasons that provisions do not apply, as the case may be.

- Legal and regulatory provisions applicable to employees of the Judicial branch, including, among others, the following:

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<sup>14</sup> Ibid. In addition, some of the more pertinent anti-discrimination laws dealt with by the EEOC include: Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I and Title V of the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Civil Rights Act of 1991.



- Title 5 USC Section 2102(a)(2), which includes within the competitive service those positions that are not within the Executive branch, but which are specifically included in the competitive service by statute.

- Title 5 CFR Section 212(301), which includes within the competitive service, all positions within the judicial branch which are specifically made subject to the civil service laws by statute.

- Title 28 USC Chapter 41, which, *inter-alia*, creates the Administrative Office of the United States Courts (Section 601), and charges it with, among other functions, the supervision (under the direction of the Judicial Conference of the United States) of all matters regarding the offices of clerks and other clerical and administrative personnel of the courts.

- Legal provisions of the United States Code which authorize Federal courts to hire clerks of court, who in turn, are authorized, with the approval of the court, to appoint other required court employees.<sup>15</sup>

- The Congressional Accountability Act of 1995,<sup>16</sup> which charged the Judicial Conference of the United States with the preparation of a report for submission to Congress on the applicability to the Judicial branch of the various laws referred to in the Act related to public positions.<sup>17</sup> In furtherance of the requirements of the above-mentioned Act, the Judicial Conference of the United States prepared the December, 1996 "Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995". This study provides important information regarding entry into service in the judicial branch, among which the following information should be noted:

- In recent years, the judiciary has moved to decentralize court budgets and personnel systems, giving individual courts greater flexibility to determine the composition of their workforce and to determine local spending priorities.
  - The day to day responsibility for judicial administration rests at the local level of the judicial governance system. Individual courts and judges are given the responsibility by statute and administrative practice to appoint support staff.
  - Congress has assigned the Judicial Conference of the United States responsibility for various areas of judicial administration, including overseeing the personnel and other administrative policies set by the Administrative Office of the United States Courts
- Legal and regulatory provisions applicable to employees of the Government Accountability Office, including, among others, the following:

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<sup>15</sup> See for example, 28 U.S.C. Sections 671 (Supreme Court), 711 (Courts of Appeals), 751 (District Courts), and 791 (US Court of Federal Claims).

<sup>16</sup> See 2 U.S.C. Section 1434, available at <http://www.gpoaccess.gov/uscode/index.html>.

<sup>17</sup> The laws referenced in the Congressional Accountability Act are as follows: (1) the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.); (2) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); (3) the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.); (4) the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.); (5) the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.); (6) the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); (7) chapter 71 (relating to Federal service labor-management relations) of title 5; (8) the Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.); (9) the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.); (10) the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.); and (11) chapter 43 (relating to veterans' employment and reemployment) of title 38.

- Title 31 of the USC, which provides for the Comptroller General of the GAO, *inter-alia*, to appoint, pay, assign and remove officers and employees of the office (Section 731(a)); and for the Comptroller General to maintain a personnel management system (Section 732(a)). Section 732(b) provides requirements for the GAO personnel management system, and requires, *inter-alia*, that the system include the merit system principles provided for in Title 5 of the USC; that it prohibit the prohibited personnel practices provided for in Title 5 of the USC; and that the system ensure that officers and employees are appointed only on the basis of merit and fitness.

With respect to methods for challenging selection decisions taken in the GAO, Section 753(a) of Title 31 of the USC provides for the GAO Personnel Appeals Board to consider and order corrective or disciplinary action regarding a prohibited personnel practice. In addition, Title 4 CFR Section 28.87(b) allows individuals to seek reconsideration or appeal initial decisions of the Board, while Section 28.90(a) allows final Board decisions to be appealed to the U.S. Court of Appeals for the Federal Circuit.

### **1.1.2. Adequacy of the legal framework and/or other measures**

The legal provisions and measures that refer to the principal systems of government hiring that the Committee has examined, based on the information available to it, constitute, as a whole, a body of measures relevant to promoting the purposes of the Convention.

In this regard, the Committee considers that these provisions and measures make up a broad set of provisions and instruments for the hiring of public servants, which ensure publicity, equity and efficiency, and which, among others, address such areas as access to public service based on merit, advertisement for the selection of public servants, mechanisms for challenging selection decisions, governing or administrative authorities of the system and oversight mechanisms.

In this regard, and as detailed in section 1.1.1, above, the response of the United States notes that *“The principal focus of the U.S. competitive hiring process is the merit of the individual considered for each position. There are nine basic merit principles (in law at 5 USC 2301, attachment 1) that govern Federal personnel management. Two of these principles are directly related to government hiring: (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and 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, and (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights”*.<sup>18</sup>

Additionally, with respect to advertising for the selection process for public positions, the Committee considers it relevant to note the creation and operation of the information on Federal Government employment known as USAJOBS.<sup>19</sup>

Similarly, the Committee highlights the existing mechanisms in the United States for challenging selection decisions, as noted in the section 1.1.1, above.

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<sup>18</sup> See the response of the United States to the questionnaire for the Second Round, at p. 3, *supra* note 6.

<sup>19</sup> *Ibid.*, at p. 4.

The Committee also takes note of the central role exercised by the OPM as the governing authority and with respect to oversight. The importance of this institution is noted in the response of the United States, which expresses that “*The U.S. Office of Personnel Management (OPM) serves as the President’s advisor on federal human capital issues and is the central human resources management agency for the executive branch. OPM develops civil service regulations consistent with the laws passed by Congress and is responsible for ensuring compliance with those laws and regulations. It also delegates to the other executive branch agencies the authority to operate various Human Resources functions, including the authority to competitively examine and hire employees. While OPM has an oversight role with the other executive departments and agencies, it also provides advice and assistance to those organizations. OPM conducts (or oversees) background investigations for security clearances; runs the federal employees health benefits and life insurance programs; operates the federal retirement programs; and issues guidance or provides assistance on a wide range of Human Resources matters from recruitment to employee relations issues. OPM also designs government-wide human capital strategies and collects required data from each agency*”.<sup>20</sup>

### **1.1.3. Results of the legal framework and/or other measures**

Based on the information that has been examined by the Committee, at the federal level, the United States has results related to the provisions and measures referring to the systems under review, among which the following should be highlighted:

- The broad set of statistics that are presented by the Federal Human Resources Data “Fedscope”, which are available on the internet, at [www.fedscope.opm.gov](http://www.fedscope.opm.gov), and which contain detailed employment information relating to the following, among others: employment by agencies, by location, by occupation, salary level, type of appointment, and length of service.
- The following statistics cited by the United States in their response to the questionnaire:

“*Federal competitive service employment levels as of:*

*June, 2007 - 1,283,548*

*December 2006 - 1,285,266*

*December 2005 - 1,289,415*

*December 2004 - 1,302,229*

*Total New Hires:*

*2006: 237,525*

*2005: 247,241*

*2004: 246,086*

*2003: 431,120 (increase due to staffing of new Department of Homeland Security)*

*2002: 290,991”*

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<sup>20</sup> Ibid., at p. 3.

- The results of the follow-up carried out with respect to the implementation of the OPM's "Strategic and Operational Plan 2006-2010",<sup>21</sup> including its Addendum, which includes operational goals, among others, in areas related to the systems for the hiring of government employees.

In this regard, OPM's "Performance and Accountability Report, Fiscal Year 2007",<sup>22</sup> notes, *inter alia*, the following:

- *"FY 2007 was a year of outstanding accomplishment and improved performance at OPM. We successfully completed 122 out of 123 operational goals contained in our Strategic and Operational Plan. Accomplishing these goals resulted in our meeting the targets for 57 of the 69, or 83 percent, performance measures for our programs—an 18 percentage point increase from FY 2006."*<sup>23</sup>
- *"An integral part of this strategy is the USAJOBS website. USAJOBS has been designated by OMB as the Federal Government's best recognized and most effective Presidential Management Initiative. It exceeded all goals and expectations for FY 2007, and the public utilization of the site continued to increase. Out of 133,000 job-application Internet sites worldwide, USAJOBS is number five. In August 2007, USAJOBS set an all-time record with 8.5 million visitors who generated 122 million page hits."*<sup>24</sup> and
- *"Maintaining compliance with the nine Merit System Principles, veterans' preferences, and protecting the Federal workforce against prohibited personnel practices are the most basic aspects of OPM's mission. In FY 2007, OPM continued to implement human capital accountability systems in the PMA agencies and to carry out its statutory oversight responsibility through targeted audits of agency Human Resources operations and delegated examining units, and its classification appeals program. OPM met or exceeded all of the performance targets established for the Compliance Program in FY 2007. Twenty-five of 26 agencies have now implemented a system of internal compliance with Merit System Principles and laws, rules and regulations in accordance with OPM standards, an increase of 25 percent above FY 2006 and twelve-fold the number at the end of FY 2005."*<sup>25</sup>

The Strategic and Operation Plan of the OPM runs through 2010. As a result, it is now being executed and it establishes operational objectives relating to areas under review, such as, for instance, decreasing hiring decision timeframes or improving hiring practices.

In this regard, the Committee highlights the importance of having instruments such as the Strategic and Operational Plan, with goals which allow the measurement of the results over time. For this reason, the Committee encourages the United States to continue utilizing these types of instruments in order to determine and establish measurable goals, advance in their implementation and continuously evaluate the objective results achieved in the fulfillment thereof. The Committee will formulate a recommendation in this regard. (See the recommendation in Section 1 of Chapter III of this report)

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<sup>21</sup> See OPM's Strategic and Operational Plan 2006-2010 and its Addendum, available at: <http://www.opm.gov/strategicplan/>

<sup>22</sup> See the OPM Performance and Accountability Report, Fiscal Year 2007, available at: [http://www.opm.gov/account/gpra/opmgpra/par2007/OPM\\_PAR2007.pdf](http://www.opm.gov/account/gpra/opmgpra/par2007/OPM_PAR2007.pdf)

<sup>23</sup> Ibid, at p. 1.

<sup>24</sup> Ibid, at p. 3.

<sup>25</sup> Ibid, at p. 5.

## **1.2. GOVERNMENT SYSTEMS FOR THE PROCUREMENT OF GOODS AND SERVICES**

### **1.2.1. Existence of provisions in the legal framework and/or other measures**

The United States has, at the Federal level, a set of provisions related to the government systems for the procurement of goods and services, among which the following, related to the principal systems, should be noted:

- Legal provisions and provisions of a varying legal nature, applicable to entities in the Executive branch,<sup>iii</sup> including, among others, the following:

- The Competition in Contracting Act (“CICA”), codified in Titles 10, 31 and 41 of the USC, and which requires procurements to be carried out through full and open competition (Title 41 USC Section 253(a)).

Section 403(6) of Title 41 of the USC defines “full and open competition” as meaning that all responsible sources<sup>iv</sup> are permitted to submit sealed bids or competitive proposals;

- Legal and regulatory provisions which provide for the following types of procurement:

- Sealed Bidding, provided for by Section 6.102(a) of the FAR. In addition, Section 6.401(a) provides that contracting officers shall solicit sealed bids, if: (1) time permits the solicitation, submission, and evaluation of sealed bids; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with the responding offerors about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid.
- Competitive Proposals, also referred to as Negotiated Procurement, provided for by Section 6.102(b) of the FAR. Section 6.401(b) provides that contracting officers may request competitive proposals when the use of sealed bidding is not appropriate for the particular procurement.
- Commercial Items, defined in Part 2.102 of the FAR.<sup>v</sup> Part 12 of the FAR contains detailed requirements for the acquisition of commercial items, including Section 12.207(a), which specifies the type of contracts to be used for these types of acquisitions; Section 12.209, which requires the contracting officer to establish price reasonableness for commercial acquisitions and document the basis of the award;<sup>26</sup> Section 12.301, which establishes detailed provisions and required contract clauses for these types of acquisitions; and Section 12.503, which provides that certain laws are not applicable to contracts for the acquisition of commercial items.<sup>vi</sup>
- GSA Supply Schedule procurement, which, according to Section 8.402 of the FAR, provides agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Under GSA Schedule Procurement, interested vendors submit offers in response to GSA schedule solicitations. Those offers are in turn evaluated and winning bidders are placed on the respective Federal Supply Schedule maintained by GSA.

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<sup>26</sup> See in addition, Part 13 of the FAR, at Section 13.106-3.

Government agencies can then place orders for supplies and services from the schedule at pre-determined prices.<sup>27</sup>

- Simplified Acquisitions, provided for by Part 13 of the FAR, which exempts certain purchases under the simplified acquisition threshold (\$100,000), from the detailed competition requirements applicable to other forms of procurement. Nonetheless, Section 13.104 requires that competition be promoted to the maximum extent possible; Section 13.106-3(a) requires the proposed price to be fair and reasonable; and Section 13.105 contains publication requirements.
- Exceptions to the use of competitive procedures, as provided for by FAR Subpart 6.3 – Other Than Full and Open Competition and Section 253(c) of Title 41 of the USC (Competition in Contracting Act), in the following situations: (1) the property or services can only be obtained from one responsible source; (2) the need is of an unusual and compelling urgency and the Government would be seriously injured; (3) industrial mobilization requirements; (4) where required by international agreement or treaty; (5) where a statute expressly specifies that a procurement be made from a specified source; (6) reasons of national security; and (7) it is in the public interest to use other procedures.<sup>vii</sup>

- Legal provisions with respect to governing or administrative authorities for the procurement system, such as the following:

- Title 41 USC Section 404, which establishes the Office of Federal Procurement Policy, and charges it, *inter-alia*, with overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies; and for the promotion of economy, efficiency and effectiveness in the procurement of property and services.
- Title 41 USC Section 421, which establishes the Federal Regulatory Council, for the purpose of assisting in the direction and coordination of Government-wide procurement policy and procurement regulatory activities.
- Title 41 USC Section 422, which creates the Cost Accounting Standards Board and grants it the exclusive authority to issue cost accounting standards and interpret them, in order to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.

- Legal provisions regarding oversight bodies for the procurement system, such as the following:

- Title 31 of the USC, which provides, *inter-alia*, for the Comptroller General of the GAO to investigate, all matters related to the disbursement and use of public money (Section 712(1)); analyze expenditures of executive agencies (Section 712(3)); evaluate programs and activities

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<sup>27</sup> As noted on the GSA website, “GSA Schedules offer customers direct delivery of millions of state-of-the-art, high-quality commercial supplies and services at volume discount pricing. The [Schedules & Other Supplies & Services](#) page lists commercial supplies and services available under GSA Schedules and other GSA contracts. All customers, even those in remote locations, can order the latest technology and quality supplies and services, conveniently, and at most-favored customer prices. GSA Schedules also offer the potential benefits of shorter lead-times, lower administrative costs, and reduced inventories. When using GSA Schedules, ordering activities have the opportunity to meet small business goals, while promoting compliance with various environmental and socioeconomic laws and regulations.” See [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW)

of the United States government (Section 717(b)); provide recommendations to Congress regarding greater economy and efficiency in public expenditure (Section 719(b)(2)); provide recommendations to Congress on ways to evaluate a program or activity carried out by the government (Section 717(c)); and report to Congress on expenditures and contracts an agency makes in violation of the law (Section 719(c)(1)).

- Title 41 USC Section 414b, which establishes the Chief Acquisition Officers Council, and charges it, *inter-alia*, with monitoring the performance of acquisition activities and programs, evaluating their performance, and making recommendations on ways to improve the federal acquisition system.
- The Offices of the Inspectors General, which pursuant to Title 5 USC App Section 1 *et seq*, are charged with conducting and supervising audits and investigations of executive branch agencies and departments
- The Acquisitions Advisory Panel, created pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, which, *inter-alia*, charges the Panel with (1) reviewing all federal acquisition laws as well as government-wide acquisition policies; and (2) based on that review, making any modifications of laws, regulations or policies necessary to: (a) protect the best interests of the government, (b) ensure the continuing financial and ethical integrity of acquisitions, (c) amend or eliminate any provision that is unnecessary for effective, fair award of administration of contracts, and (d) issuing a report with a detailed statement of its findings, conclusions and recommendations.

- Legal and regulatory provisions which require publication of opportunities to contract with the government, such as the following:

- Section 416(a)(1)(A) of Title 41 of the USC, which requires publication of a notice of solicitation with respect to invitations for bids or requests for proposals that are expected to exceed \$25,000. Section 416(b) details the information that must be included in notices of solicitation. With respect to procurements over \$10,000 but under \$25,000, Section 416(a)(1)(B) requires posting of a notice of solicitation in a public place at the contracting office issuing the solicitation.
- Section 5.002 of the FAR, which requires contracting officers to publicize contract actions in order to, *inter-alia*, increase competition (Section 5.002(a)) and broaden industry participation in meeting Government requirements (Section 5.002(b)).
- Section 5.101 of the FAR, which requires proposed contract actions expected to exceed \$25,000 to be published on [www.fedbizopps.gov](http://www.fedbizopps.gov), which serves as the “*single government point of entry (GPE) for Federal government procurement over \$25,000. Government buyers are able to publicize their business opportunities by posting information directly to FedBizOpps via the Internet. Through one portal - FedBizOpps (FBO) - commercial vendors seeking Federal markets for their products and services can search, monitor and retrieve opportunities solicited by the entire Federal contracting community.*”<sup>28</sup>

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<sup>28</sup> See [www.fedbizopps.gov](http://www.fedbizopps.gov).

As noted in the response of the United States to the questionnaire, *“All factors and significant sub-factors that will affect contract award, and their relative importance, must be stated clearly in the tendering documentation.”*<sup>29</sup>

- Legal and regulatory provisions related to registries of contractors, such as the following:

- Part 4.1102 of the FAR, which requires contractors to be registered in the Central Contractor Registration database (CCR), prior to award of a contract or agreement.<sup>viii</sup> As noted by the United States, CCR *“is the primary registrant data based for the US Federal Government. CCR collects, validates, stores and disseminates data in support of each agency acquisition missions.”*<sup>30</sup>
- Section 9.404 of the FAR, which requires the General Services Administration to operate and maintain the “Excluded Parties List System” (EPLS), available at [www.wpls.gov](http://www.wpls.gov), which includes information on all contractors that have been debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified. Section 9.405(d)(1) requires contracting officers to review the EPLS after bid opening or the receipt of proposals, and requires any bids or proposals from contractors who are on the EPLS to be rejected.

- Legal and regulatory provisions as well as mechanisms providing for electronic methods and information systems for government procurement, such as the following:

- Title 41 USC Section 426, which requires the head of each executive agency to establish, maintain and use procedures and processes that employ electronic commerce in the conduct and administration of the agency procurement system.
- Part 4.502 of the FAR, which requires the Federal Government to use electronic commerce whenever practicable or cost effective.
- [www.fedbizopps.gov](http://www.fedbizopps.gov), noted above, and which contains information on procurements in excess of \$25,000.
- The Federal Procurement Data System [www.fpds.gov](http://www.fpds.gov), which gathers information and issues reports on spending on contracting by the federal government.<sup>ix</sup>

- Legal and regulatory provisions regarding contracting related to public works, with respect to which the response of the United States to the questionnaire notes *“Public works contracts, also known as construction contracts, are governed, for the most part, by the same set of rules as those established for the procurement of supplies and services. Contracts for the services of architect-engineers must be acquired using a quality based evaluation system as opposed to cost-based systems.”*<sup>31</sup>

In this regard, Part 36 of the FAR contains extensive and detailed provisions related to construction and architect-engineer contracts, including Section 36.103(a), which generally requires construction contracts to be entered into using sealed bidding procedures; and Section 36.103(b), which requires architect-engineer contracts to be entered into using negotiated procurement procedures.

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<sup>29</sup> See the response of the United States to the questionnaire for the Second Round, at p. 9, *supra* note 6.

<sup>30</sup> *Ibid.*, at p. 13.

<sup>31</sup> *Ibid.*, at p. 13.



Section 36.213-2 requires pre-solicitation notices to be issued and publicized via [www.fedbizopps.gov](http://www.fedbizopps.gov), with respect to construction contracts that are expected to exceed \$100,000; and Section 36.601-1 requires publication of the requirements for architect engineer services.

- Legal and regulatory provisions related to mechanisms for appealing procurement decisions, such as Part 33.103 of the FAR, which allows for procurement related protests to be made at the agency level, while Part 33.104 allows formal protests to be made to the Government Accountability Office. Sections 33.103 and 33.104 both provide details on the information that must be included in protests, respectively, as well as procedures and time period for the agency or GAO to resolve the matter.<sup>32</sup>

With respect to protests to the GAO, Title 4 CFR Part 21 contains the GAO Bid Protest Regulations, which provide additional details on the GAO bid protest procedure, including Section 21.14, which allows for reconsideration of bid protests decisions made by the GAO.

Pursuant to Section 1491 of Title 28 of the USC, the U.S. Court of Federal Claims has the jurisdiction to hear and resolve cases, *inter-alia*, regarding objections to a “...solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”<sup>33</sup>

In addition to the foregoing protest mechanisms, 31 USC Section 3729 *et seq*, the False Claims Act, allows the Government to recover triple damages from any contractor who submits a false claim to a federal agency.

Furthermore, the False Claims Act also allows any person to file a legal action, known as a “Qui Tam” action, in the appropriate District Court against government contractors on the basis that the contractor has committed a fraud against the government. Section 3730(d) provides that in such cases, the person bringing the action is entitled to recover a portion of the proceeds of the action.

- Legal and regulatory provisions applicable to entities of the Legislative branch, among which, the following are highlighted:

- The Guidelines for Procurement of Goods and Services for the House of Representatives,<sup>34</sup> issued by the Committee on House Administration, and dated May 31, 2007. Among the provisions contained in the Guidelines, the following should be noted:

- Article I, which requires, *inter-alia*, that all acquisitions of goods and services by the House shall utilize the maximum possible competition and provides that inconsistent practices, such as unreasonable qualifications, unreasonably short time frames to submit bids, unnecessary expenses, excessive bonding, or arbitrary actions, shall not be utilized. Article 1 also provides that contracts will be awarded to a responsible bidder whose offer conforms to the solicitation and is the most advantageous to the House.
- Article I(A), which provides that the Chief Administrative Officer (CAO) is responsible for House procurement activity and for ensuring that awards are only made to responsible

<sup>32</sup> See also, <http://www.gao.gov/legal/bidprotest.html>, which contains information on filing bid protests with the GAO, and which allows bid protests to be filed electronically.

<sup>33</sup> See 28 U.S.C. Section 1491(b)(1).

<sup>34</sup> The Guidelines for Procurement of Goods and Services for the House of Representatives are available at <http://www.house.gov/cao-opp/guidelines.pdf>

contractors with demonstrable ability to successfully perform the contract. Article I(A) also requires the CAO to maintain records detailing, at a minimum, the significant history of a procurement, including the solicitation, bids or proposals received, and applicable documentation regarding the evaluation process, the contract award, and any modifications thereto.

- Article I(C), which requires the CAO to ensure that solicitations, *inter-alia*: (1) present a clear and accurate description of the good or service to be procured, do not contain features which unduly restrict competition; and (2) identify all requirements that offerors must fulfill as well as the factors to be used in evaluating bids or proposals.
- Article III, which provides for the following forms of House procurement:
  - (A) Federal Supply Schedule and Other Government Sources, in accordance with the Federal Supply Schedules directed and managed by the General Services Administration for the Executive Branch, and making use of the procedures laid out in the GSA Supply Catalog, or under terms or conditions more favorable to the House of Representatives.
  - (B) Guidelines for the Purchase of Equipment, Software and Related Services by Offices of the House;
  - (C) Small Purchases and Other Simplified Purchase Procedures, which are limited to a maximum of \$50,000 per year. If in excess of \$2,500, purchases of this nature must be made after obtaining more than one quote. In addition, Article III(C)(1) prohibits orders from being split so as to make use of this procurement method for purchases in excess of the maximum dollar limit;
  - (D) Sealed Bidding. Article III(D) details the selection process for this type of procurement;
  - (E) Competitive Proposals (Negotiated Contracts), which, according to subparagraph E, must be entered into making use of the procedures necessary so as to ensure fair and impartial evaluation of the offers. Article III(E) also includes procedures and guidelines for the use of this type of contracting, including a requirement that the CAO carry out cost or price evaluations, and include a written determination in the contract file on the manner in which the winning offer was selected;
  - (F) Other Procedures. Subparagraph F allows the CAO to contract without utilizing the maximum possible competition when the other procedures are not feasible, and under any of the following circumstances: (1) the item is available only from a single source and no other supplies or services will satisfy the requirements; (2) the public exigency will not permit a delay resulting from competitive solicitation; (3) after solicitation of a number of sources, competition is determined inadequate; or (4) it is in the public interest, none of the preceding exceptions apply, and Committee approval has been obtained.
- Article I(B), which makes the CAO responsible for settling contractual and administrative issues related to procurements and for developing procedures to handle and resolve disputes related thereto.

- With respect to oversight mechanisms or bodies for House Procurement, the Guidelines require all contracts in excess of one year (Article V) or contracts over \$250,000 (Article VI), to be approved by the Committee on House Administration. Similarly, Article VII requires the CAO to report monthly to the Committee on “...all acquisitions exceeding the Small Purchase Threshold. The CAO shall also make available to the Committee any additional information as may be requested regarding procurement and competitive process for all acquisitions.”
- With respect to the publication of procurement solicitations, opportunities to contract with the House are published on the website of the House, at [www.house.gov/cao-opp/currentsol.htm](http://www.house.gov/cao-opp/currentsol.htm). In addition, House procurement opportunities are also published on [www.fedbizopps.gov](http://www.fedbizopps.gov)

- The Senate Procurement Regulations, issued by the Senate Committee on Rules and Administration on September 13, 1999. Among the provisions contained in the Regulations, the following should be noted:

- Section 2.1(1), which requires purchases and contracts to be made on a competitive basis to the maximum extent practicable, and for acquisition planning and appropriate market research to be conducted with respect to Senate procurement; and Section 2.1(2), which requires procurements to be structured to as to provide an equitable opportunity to prospective contractors, and provides that specifications should be performance-based and in most cases, should not include features or requirements that can only be met by one potential contractor.
- Provisions which allow for various forms of contracting including:
  - Section 2.2, which addresses Small and Simplified Purchases, and which provides that procurements of \$25,000 or less shall be considered competitive if it is determined that the price is reasonable (Section 2.2(1)); and procurements between \$5,000 and \$100,000 to be conducted according to the small and simplified purchase regulations.
  - Section 2.3(1), which requires procurements of \$100,000 or more to be conducted competitively to the maximum extent practicable, and which allows the Sergeant at Arms to use the competitive procedure that is most appropriate for the circumstances.
  - Section 2.3(3), which provides procedures for the acquisition of Commercial Items.
  - Section 2.3(4) through 2.3(6), which provide for Negotiated Procurement, and outline procedures for requests for information from, as well as discussions with potential contractors.
- Section 2.3(7), which requires the Sergeant at Arms to promptly notify unsuccessful offerors that their proposals or bids were not accepted. In addition, upon request, the Sergeant at Arms is required to inform offerors of the reasons why they were not awarded the contract.
- Section 2.3(2), which requires the Sergeant at Arms to publish synopses of all new competitive Senate procurements of \$100,000 or more. This Section also specifies the Department of Commerce “Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards”, also known as Commerce Business Daily, as the preferred place of publication.<sup>35</sup>

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<sup>35</sup> Commerce Business Daily is available at <http://cbdnet.gpo.gov>.

- Section 3.1(2), which allows protests to be made with respect to contracts of \$100,000 or more. Section 3 also contains provisions addressing the timeline and procedures for resolving protests (Sections 3.2.1, 3.2.2, and 3.2.3); provisions which require an award not to be made until the resolution of the protest (Section 3.2.4); and timelines for resolution of protests (Section 3.3) In addition, Sections 3.4 and 3.5 allow, respectively, appeals of protest decisions to be submitted to the Chairman of the Committee on Rules and Administration, and for the Chairman to resolve appeals and to request advisory opinions from the Comptroller General.

- Legal and regulatory provisions applicable to the Judicial branch, among which, the following are highlighted:

- Provisions of the USC, including Title 28 USC Section 604(a)(10A), which makes the Director of the Administrative Office of U.S. Courts responsible for procurement in the Judicial Branch; and Section 602(d), which allows the Director to delegate those functions.

- The Judiciary Procurement Program Procedures (JP3),<sup>36</sup> issued pursuant to the authority granted to the Director of the Administrative Office of U.S. Courts. Section 1.1.1 provides that the JP3 is an operations manual which contains a fully integrated set of specific and detailed procedures to be used as a reference document by judiciary procurement personnel. Among the provisions of the JP3, the following should be mentioned:

- Section 1.2.2, which makes the Procurement Executive in the Procurement Management Division responsible for judicial procurement policy.<sup>37</sup>
- Provisions which provide for the following types of procurement:
  - Standard Competitive Contracting, provided for by Section 3.5.1, and which includes procurements made under procedures other than those applicable to small purchase procedures. Section 3.5.9 contains provisions pertaining to the evaluation of both offers and contractors; Sections 3.5.10 through 3.5.19 contain provisions regarding the selection process; Section 3.8 contains provisions related to price negotiation for competitive procurements; and Section 3.5.20 allows unsuccessful offerors to request an award debriefing.
  - Other than Full and Open Competition, provided for by Section 3.6.1, which requires all reasonable steps to be taken to avoid contracting without providing for full and open competition (Section 3.6.1(a)).

Section 3.6.1(b) states that contracting without providing for full and open competition cannot be justified on the basis of time constraints resulting from (1) a lack of advance planning; or (2) concerns related to the amount of, or expiration of funds.

Section 3.6.2 allows contracting without full and open competition when: (1) public exigencies require immediate delivery or performance due to unusual compelling urgency; (2) only one responsible source is available; (3) the services required are

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<sup>36</sup> The Judiciary Procurement Program Procedures is available at <http://www.uscourts.gov/procurement/clauses.htm>

<sup>37</sup> The full text of Section 1.2.2 provides that “The director of the Administrative Office of the U.S. Courts has delegated the responsibility for procurement policy to the Assistance Director for the Office of Internal Services (OIS), who has re-delegated it to the Procurement Executive (PE), Procurement Management Division (PMD).”

technical or professional or will be performed under supervision of the judiciary and are paid for on a time basis; and (4) when an unsolicited offer meets certain criteria set out in the Judicial Procurement Program Procedures. Section 3.6.3 requires all four exceptions to be justified in writing as well as the written concurrence of the Procurement Executive within the Procurement Management Division.

- Small Purchases, provided for by Section 3.4, which are allowed for purchases up to \$25,000 (Section 3.4.1). Section 3.4.2 requires small purchases over \$5,000 to be procured after obtaining competitive quotations.
- Section 2.1.7(c) and (d), which provide, respectively, for the following methods of evaluating offers: technically acceptable lowest price; and best value purchases, which are used when the quality of performance above the minimum acceptable level will enhance mission accomplishment.
- Section 3.2.1, which requires publication of open market procurements<sup>38</sup> (Section 3.2.1(a)), and which requires certain information to be included in publications, such as a clear and concise description of the products or services, which is not overly restrictive of competition (Section 3.2.1(b)). Section 3.2.1(c) makes the following types of procurements exempt from this publication requirement: (1) when the cost estimate is under \$25,000; (2) when public exigencies require the immediate delivery or performance; (3) when only one source is available; or (4) when the services are required to be performed by the contractor in person and are: either technical or professional in nature, or under supervision and paid for on a time basis. Section 3.2.2 specifies various methods of publicizing procurement notices, including, among other methods, on [www.fedbizopps.gov](http://www.fedbizopps.gov), and electronically. In addition, Section 3.5.1((b)(4) requires requests for proposals with respect to standard competitive contracting, to be publicized in accordance with Section 3.2.2.
- Section 3.3.3, which prohibits contracting with any contractor who is on the Excluded Parties List System ([www.epls.gov](http://www.epls.gov)) maintained by the GSA, and requires the GSA to be notified of any decision taken to debar or suspend a contractor from contracting with the judiciary, in order for the contractor to be included on the EPLS.
- Section 3.9.1, which allows interested parties to submit protests with respect to solicitations or requests for offers, awards or proposed awards, or a cancellation or a solicitation or a request. Section 3.9.2 sets out the requirements for protests, and provides for the Program Executive within the Procurement Management Division, in consultation with the Office of the General Counsel, to be responsible for making final decisions regarding protests.

### **1.2.2. Adequacy of the legal framework and/or other measures**

The provisions and measures which refer to the principal government systems for the procurement of goods and services by the United States that the Committee has examined, based on the information made available to it, constitute a set of relevant measures for the promotion of the purposes of the Convention.

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<sup>38</sup> Section 3.1.7 defines open market procurements as those which “*are made directly from commercial sources using competitive procedures where applicable.*”

In this regard, the document submitted by Transparency International-USA, notes that *“The U.S. government is the largest purchaser of goods and services in the world. Its total annual budget for the procurement of goods and services is approximately \$400 billion (and growing), and the number of separate contract actions exceeds 8 million per year.<sup>39</sup> Given the sheer numbers, the opportunities for corruption are, in theory, substantial. The reality is that the vast majority of those contract actions are performed lawfully and in full compliance with all applicable laws and regulations. Notwithstanding the high-profile corruption cases referred to below, lawyers practicing in the area find that the very small number of prosecutions compared to the enormous number of contract actions testifies to the adequacy of the legal framework and the overall integrity of the process.*

*As the following description illustrates, there is considerable transparency in the process. The U.S. has a comprehensive system of laws and regulations governing procurement. The principal statutory provisions are set forth at Title 41 of the U.S. Code, and the principal implementing regulations are set forth at Title 48 of the Code of Federal Regulations (referred to here as the “FAR”). These statutes and regulations apply throughout the government<sup>40</sup> and address all aspects of procurement, including bids and solicitations; qualification of bidders and offerors; evaluation of proposals; types of contracts; awards; performance; cost and pricing considerations; modifications during performance; and termination...”*

*Where government procurement officials engage in misconduct such as bribery or self-dealing, they are prosecuted, as demonstrated by several recent high-profile cases...While the number of such prosecutions is very small in comparison to the number of procurements conducted each year by the U.S. government, the consensus of lawyers in the industry is that the small numbers reflect a system that works well.”<sup>41</sup>*

Notwithstanding the foregoing, Transparency International-USA also states that *“Yet, as in any system, there is room for improvement...”<sup>42</sup>*, and notes the acquisition workforce as an area of particular concern. As the basis for its comments, TI USA points to a recent report issued by the Acquisition Advisory Panel, as well as to the results of a recent survey on the skills of the acquisition workforce, carried out by the Office of Federal Procurement Policy and the Federal Acquisition Institute.<sup>43</sup>

The January 2007 Report of this Panel to the Office of the Federal Procurement Policy and the United States Congress,<sup>44</sup> notes, *inter-alia*, the following findings:

- *“The federal acquisition workforce is an essential key to success in achieving the government’s missions. Procurement is an increasingly central part of the government’s activities. Without a workforce that is qualitatively and quantitatively adequate and adapted to its mission, the procurement reforms of the last decade cannot achieve their potential, and successful federal procurement cannot be achieved.”*

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<sup>39</sup> See <https://www.fpds.gov>. The “trending analysis” on this website shows that in FY 2006, the United States spent more than \$415 billion on procurement.

<sup>40</sup> Two executive branch agencies – the Federal Aviation Administration and the Transportation Security Administration within the Department of Homeland Security -- are exempted from the FAR and from certain acquisition statutes. In each case, however, they have developed parallel acquisition regulations that reflect most of the underlying principles and requirements of the FAR.

<sup>41</sup> See the report presented by Transparency International-USA, at pp. 3-5, available at [http://www.oas.org/juridico/english/mesicic2\\_usa\\_inf\\_sc\\_en.doc](http://www.oas.org/juridico/english/mesicic2_usa_inf_sc_en.doc)

<sup>42</sup> Ibid., at p. 5.

<sup>43</sup> Ibid., at p. 6.

<sup>44</sup> This report is available at [http://www.acquisition.gov/comp/aap/24102\\_GSA.pdf](http://www.acquisition.gov/comp/aap/24102_GSA.pdf).

- *“Demands on the federal acquisition workforce has grown substantially.”*

- *“The pace of acquisition reform initiatives has outstripped the ability of the federal acquisition workforce to assimilate and master their requirements so as to implement these initiatives in an optimal fashion. An important objective of Acquisition Workforce initiatives should be to allow the Workforce to catch up with the last twelve years of acquisition reform, as well as to meet additional demands that will be imposed by the recommendations of this Panel on non-workforce topics*

In this regard, Transparency International – USA notes that *“...a recent survey of the skills of the acquisition workforce conducted by the Office of Federal Procurement Policy and the Federal Acquisition Institute, indicates clearly that the existing workforce would prefer to have more and better training in specific areas relating to contract management and administration, negotiation skills, use of performance metrics, and performance-based acquisition.”*<sup>45</sup>

The foregoing indicates that the United States would benefit from continuing to give appropriate consideration to the measures relevant to improve its acquisition workforce, taking into account the results of studies such as that carried out by the Acquisition Advisory Panel and the survey performed by the Office of Federal Procurement Policy and the Federal Acquisition Institute. In this regard, the Committee will formulate a recommendation. (See the recommendation in paragraph (a) in Section 1.2 of Chapter III of this report)

### **1.2.3. Results of the legal framework and/or other measures**

Based on the information that has been reviewed by the Committee in this area, the United States has results, at the federal level, with respect to the provisions and measures related to the systems under review. In this regard, the response of the United States notes as follows:

*“The result of the array of laws and regulations is that the U.S. Government has a procurement system that (1) delivers on a timely basis the best value or service to the government; (2) minimizes administrative operating costs; (3) conducts business with integrity, fairness and openness; and (4) fulfills public policy objectives.”*

*“The U.S. maintains an extensive data base on government procurements in the Federal procurement Data System. See <http://www.fpds.gov>. As an example of available data, in FY 2006 the U.S. government awarded contracts valued at more than \$300 billion. Of these awards, more than 60 percent were awarded based on full and open competition.”*

*“With regard to sanctions, contractors may be debarred or suspended based on an indictment or conviction of a fraud or criminal offense, violation of antitrust laws, commission of embezzlement, theft, forgery, bribery, falsification, or commission of any offense indicating a lack of business integrity that seriously and directly affects the ability of the contractor to perform the contract. Federal agencies may not solicit offers from or award contracts to contractors who have been debarred or suspended or proposed for debarment or suspension from government contracting. The U.S. General Services Administration operates the web-based Excluded Parties List of contractors debarred, suspended, or proposed for debarment. See <http://www.epls.gov>.”*<sup>46</sup>

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<sup>45</sup> See Federal Acquisition Institute, “2007 Contracting Workforce Competencies Survey – General Analysis,” Oct. 2007, available at [http://www.whitehouse.gov/omb/procurement/workforce/workforce\\_comp\\_survey\\_101707.pdf](http://www.whitehouse.gov/omb/procurement/workforce/workforce_comp_survey_101707.pdf).

<sup>46</sup> See the response of the United States to the questionnaire for the Second Round, at p. 14, *supra* note 6.



In addition to the foregoing results, a search of the Excluded Parties List System<sup>47</sup> provides the following statistical information:

- 154 contractors currently debarred from procuring with the government for reasons directly related to procurement violations.
- 8477 contractors currently debarred from procuring with the government for violations of non-procurement laws.

Without prejudice to the foregoing, the Committee notes that the Acquisition Advisory Panel referred to above, expresses that “*Additionally, despite some frustration, the Panel recognizes that the FPDS-NG system was newly implemented in 2004, achieving a remarkable migration of 10 million transactions from the legacy system, and, as such, should not be subject to blanket criticism*”.<sup>48</sup>

The report further notes that “*FPDS has collected a significant amount of data over the years. The Federal Procurement Reports, which have been published each year for a quarter of a century provide tremendous insight into the changing nature of federal procurement. And the government and public thirst for more data has resulted in an increase from collecting information on 27 data elements for each award in excess of \$10,000 in 1979 to collecting information on 150 data elements for each award over \$3,000 today*”<sup>49</sup> (...) “*In general, it seems that FPDS-NG data at the highest level provides significant insight. However, the reliability of that data, especially on these new reporting elements, begins to degrade at the more granular level due to data specificity on elements for which those reporting may have less familiarity and training*”.<sup>50</sup>

The foregoing indicates that the United States would benefit by continuing to give the appropriate consideration to the measures relevant to improving the Federal Procurement Data System (FPDS), considering that it is the only government-wide system that carries out follow-up with regard to spending on federal acquisitions, and taking into account, among others, the evaluations and recommendations made by the Acquisition Advisory Panel noted above. The Committee will formulate a recommendation in this regard. (See the recommendation in paragraph (b) in Section 1.2 of Chapter III of this report)

## **2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)**

### **2.1. Existence of provisions in the legal framework and/or other measures**

The United States has, at the federal level, a set of legal, regulatory and other mechanisms and measures related to the above-mentioned systems, among which the following should be noted:

With respect to Whistleblower Protections:

- Title 5 USC Section 1212, which makes the U.S. Office of the Special Counsel responsible for, *inter-alia*, (1) protecting employees, former employees and applicants for employment from twelve

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<sup>47</sup> This information is available at <http://www.epls.gov/>

<sup>48</sup> See p. 429 of this report, available at: [http://www.acquisition.gov/comp/aap/24102\\_GSA.pdf](http://www.acquisition.gov/comp/aap/24102_GSA.pdf).

<sup>49</sup> *Ibid.*, at p. 438.

<sup>50</sup> *Ibid.*, at p. 439.



statutory prohibited personnel practices; and (2) receiving, investigating, and litigating allegations of prohibited personnel practices.

- Title 5 USC Section 1213, which provides for OSC to receive and evaluate disclosures regarding federal executive branch agencies in order to determine whether there is a substantial likelihood of a violation of law, rule or regulation or gross mismanagement, gross waste of funds, abuse of authority, or a specific danger to public health or safety (Section 1213(b)). Upon such a finding, Section 1213 requires OSC to require the agency in question to conduct an investigation and submit a written report to OSC. The written report is submitted to the President of the United States and also to any congressional committees with oversight authority over the agency in question.

- OSC has jurisdiction over violations involving employees or applicants in most agencies, as well as the Government Printing Office; the government corporations listed at 31 USC Section 9101; and the Transportation Security Administration (TSA).<sup>51</sup> Exceptions to OSC jurisdiction include employees of the US Postal Service and the Postal Rate Commission; the Government Accountability Office; the FBI; CIA, Defense Intelligence Agency, NSA, and certain other intelligence agencies excluded by the President; members of the United States armed forces, state employees operating under federal grants, and employees of federal contractors.<sup>52</sup>

- Title 5 CFR Section 1800.1(d), which requires anyone alleging a prohibited personnel practice to submit it using OSC Form 11, which can be submitted through OSC's website or by mail or facsimile.<sup>53</sup>

- The Disclosure Unit within the Office of the Special Counsel, which, as noted in the response of the United States "...serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former employees, and applicants for federal employment."<sup>54</sup>

- Title 5 USC Section 1213(h), which provides that the identity of any individual who makes a disclosure 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.

- Title 5 CFR Section 1800.2(b), which requires whistleblower disclosures to be presented in writing; and Section 1800(b)(1), which encourages the use of OSC Form No. 12,<sup>55</sup> Disclosure of Information, for this purpose, although use of Form 12 is not mandatory.<sup>56</sup>

- The 64 Inspectors General in the various agencies and departments of the executive branch, which are charged, *inter-alia*, with the prevention and detection of fraud, waste and abuse.<sup>57</sup> Each Inspector

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<sup>51</sup> See <http://www.osc.gov/ppp.htm>.

<sup>52</sup> See the response of the United States to the questionnaire, at p. 15, and <http://www.osc.gov/ppp.htm>. In addition, the response further notes at p. 16, that "In agencies that are not within OSC's jurisdiction employees file PPP complaints either with their agency's Office of Inspector General, through internal agency grievance procedures, or through their union if they are covered by a collective bargaining agreement."

<sup>53</sup> This form is available at <http://www.osc.gov/documents/forms/osc11.pdf>.

<sup>54</sup> See the Office of the Special Counsel website, at <http://www.osc.gov/wbdisc.htm>

<sup>55</sup> OSC Form No. 12 is available at <http://www.osc.gov/forms.htm#index>.

<sup>56</sup> With respect to whistleblower reporting, the OSC website notes that "OSC will generally not consider anonymous disclosures. If a disclosure is filed by an anonymous source, the disclosure will be referred to the [Office of Inspector General](#) in the appropriate agency. OSC will take no further action on the disclosure." See <http://www.osc.gov/wbdisc.htm>.

<sup>57</sup> See <http://www.ignet.gov/>.

General Office maintains a telephone “hotline” to facilitate the reporting of allegations of fraud, waste, abuse, mismanagement of programs or operations, or violations of law, rules or regulations by employees or program participants.

- With respect to mechanisms for reporting threats or reprisals, Title 5 USC Section 2302(b)(8) and (b)(9), are together entitled, the Whistleblower Protection Act (WPA). These statutory provisions are two of the twelve prohibited personnel practices over which OSC has jurisdiction. Section 2302(b)(8) prohibits taking personnel actions (or not taking action), with respect to an employee or applicant for employment, as a result of, *inter-alia*, any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: violation of law, rule or regulation or gross mismanagement, gross waste of funds, abuse of authority, or a specific danger to public health or safety. Section 2302(b)(9) prohibits taking personnel actions (or not taking action), 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 OSC or and Inspector General.

- Title 5 USC Section 1212, which grants the OSC jurisdiction with respect to violations of the Whistleblower Protection Act, including allegations of retaliation.

In addition, OSC has created Form OSC-49,<sup>58</sup> which explains that OSC’s policy regarding prohibited personnel practices is generally not to reveal the identity of the complainant. This form also contains three consent statements, one of which is to be signed by anyone disclosing alleged prohibited personnel practices. Pursuant to Form OSC-49, complainants are asked to indicate either (1) consent to disclosure of their identity for investigative purposes; (2) consent to disclosure of certain relevant information for investigative purposes, but not their identity; and (3) no consent to disclosure of their identity or of communication between OSC and the agency involved.

- OSC’s Complaints Examining Unit, which receives complaints alleging prohibited personnel practices or of other activities prohibited by civil service law, rule or regulation.<sup>59</sup> This unit screens complaints to determine if a full investigation is warranted.

- OSC’s Investigation and Prosecution Division, which reviews complaints alleging reprisal or retaliation for whistleblowing. In this regard, the OSC website notes, “*IPD...conducts investigations to review pertinent records, and to interview complainants and witnesses with knowledge of the matters alleged. Matters not resolved during the investigative phase will undergo legal review and analysis to determine whether the IPD inquiry has established a violation of law, rule or regulation, and whether the matter warrants corrective action, disciplinary action, or both. Complainants will continue to receive 60-day status notices while matters are pending in the IPD.*”<sup>60</sup>

- Title 5 USC Section 1214, which contains detailed provisions on corrective action that may be taken by OSC following an investigation, including, *inter-alia*, Section 1214(b)(2)(B), which requires the OSC to report the findings of its investigation, as well as any recommendations for corrective action to the Merit Systems Protection Board, to the agency involved, and to OPM; and Section 1214 (b)(1)(A)(i), which authorizes the OSC to request the Merit Systems Protection Board to order stays of personnel actions for 45 days if the OSC determines that there are reasonable grounds to believe that a prohibited personnel practice has taken place. In addition 5 USC Section 1214 authorizes OSC

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<sup>58</sup> Form OSC-29 is available at <http://www.osc.gov/documents/pubs/osc49.pdf>

<sup>59</sup> See <http://www.osc.gov/ppp.htm>.

<sup>60</sup> Ibid.

to petition the Merit Systems Protection Board for corrective action for any employee who OSC reasonably believes has been subjected to a prohibited personnel practice. OSC may also petition the Merit Systems Protection Board for disciplinary action against an agency official who OSC believes has committed a prohibited personnel practice. The Merit Systems Protection Board is authorized to order agencies to take corrective or disciplinary action.

- Section 1214(d)(1), which requires the OSC, in the event that it determines that a criminal offense may have taken place, to report the matter to the Attorney General and to the head of the agency involved; and Section 1215, which authorizes the OSC to recommend disciplinary action when appropriate.

- 5 USC Section 1221, which provides current and former employees, as well as applicants for employment, with an “individual right of action” (IRA), with respect to personnel actions taken or proposed to be taken as a result of a prohibited personnel practice. Complainants, after seeking corrective action with the OSC, may file an IRA with the Merit Systems Protection Board, either after OSC has closed the matter in which reprisal for whistleblowing has been alleged, or if the complainant has not been notified by OSC that it will seek corrective action within 120 days after receiving an allegation of whistleblower reprisal.<sup>61</sup>

- Title 5 USC Section 1214(f) provides that once an investigation has been commenced, no disciplinary action shall be taken against any employee for any alleged prohibited activity or for any related activity, without approval from the OSC.

- Title 5 CFR, Section 5.4, which provides that when required by OSC, federal executive branch agencies are required to provide OSC with all information, testimony, documents, and material in regard to the investigation of prohibited personnel practices, as long as that the information is not otherwise prohibited by law.

- OSC Directive No. 57, which establishes procedures governing, inter-alia, the filing of prohibited employment practices and whistleblower disclosures by OSC employees. The Directive provides for an alternative initial review procedure for prohibited personnel practice complaints presented by OSC employees against personnel of the Complaints Examining Unit (Section V.B.1); the Deputy Special Counsel (Section V.B.2); or the Special Counsel (Section V.B.3). In the event that the Deputy Special Counsel is the subject of a complaint, Section V.B.2 makes the Special Counsel or a designee responsible for the investigation. Similarly, Section V.D. of the Guidelines provides that when the Special Counsel is the subject of a complaint, the Deputy Special Counsel is responsible for the investigation, and must submit to the Office of the White House Counsel, a plan for conducting the investigation, and subsequently, a copy of the investigation report.

In addition, Section VIII of the Guidelines provides similar alternative procedures for whistleblower disclosures made by OSC employees against Disclosure Unit personnel (Section VII.B.1); the Deputy Special Counsel (Section VII.B.2); or the Special Counsel (V.B.3).

- With respect to mechanisms for protecting private citizens who report acts of corruption, the Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745, which at 18 USC Section 1514A, provides whistleblower protection to employees of publicly traded companies.

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<sup>61</sup> See the response of the United States to the questionnaire for the Second Round, at p. 18, *supra* note 6.

With respect to Witness Protection:

- The Organized Crime Control Act of 1970, (Pub.L. 91-452, 84 Stat. 922 October 15, 1970), which created the Federal Witness Security Program.
- Title 18 USC Section 3521, et seq., the Witness Security Reform Act of 1984, which is the current legislation under which the Federal Witness Security Program operates.
- Title 18 USC Section 3521(d)(3), pursuant to which, the Office of Enforcement (OEO) of the Criminal Division of the Department of Justice, has been delegated the authority for oversight of the Program by the Attorney General. In this regard, OEO “*authorizes or denies the entry of all applicants into the federal Witness Security Program (WSP), coordinates and administers matters relating to all aspects of the WSP among all Program components, and approves or denies requests by federal agencies to utilize federal prisoners for investigative purposes.*”<sup>62</sup>
- Chapter 9-21.000 of the U.S. Attorneys Manual, which contains regulations and provides general information about the Witness Security Program, as well as detailed procedures regarding the operation of the Program.<sup>63</sup> In this regard, Section 9-21.000 provides that witnesses in the following types of cases, *inter-alia*, are eligible for admission into the Program, provided that the witness may be subject to retaliation or threats of violence: offenses defined in title 18 USC Section 1961(1) (organized crime and racketeering); any drug trafficking offense described in title 21 USC; and other serious Federal felonies.

According to the response of the United States to the questionnaire, “*There are two aspects to the traditional Program. One involves the permanent relocation of witnesses from their danger areas (area of cooperation) to another part of the United States and a permanent change of their identity. The United States Marshals Service (“USMS”) administers the day-to-day operations of the Program for witnesses relocated in the community, and provides for safe and secure transportation to and from any necessary court appearances. The other aspect of the Program is the protection of “prisoner-witnesses” who are serving sentences and assigned to the custody of the Program for Federal Bureau of Prisons (“BOP”). BOP administers the day-to-day operation of the Program for these prisoner-witnesses. Upon their release from prison a separate evaluation will be made to determine if permanent relocation and an identity change is necessary for their protection.*”<sup>64</sup>

In addition, the response of the United States to the questionnaire notes two additional witness protection programs, namely “*For the District of Columbia only, which is geographically the smallest federal prosecutorial district, a short term relocation program was created, which is a limited security program for witnesses who are not expected to need permanent services, typically for more than a few months before or after trial, and may be able to return to their original homes and jobs. In addition, for foreign nationals who are not eligible for a visa to stay in the United States, the Special Limited Services Program allows witnesses who are subject to deportation, and are only in danger if returned to their native countries, to remain in the United States based upon their agreement to testify as witnesses. No Program services from the USMS such as relocation, change of*

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<sup>62</sup> See <http://www.usdoj.gov/criminal/oeo/>.

<sup>63</sup> Chapter 9-21.000 of the Manual is available at:

[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/21mcrm.htm#9-21.010](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/21mcrm.htm#9-21.010)

<sup>64</sup> See the response of the United States to the questionnaire for the Second Round, at p. 20, *supra* note 6.

identity, funding or employment assistance are needed or provided in the Special Limited Services Program. Consequently, only immigration documents and assistance is provided.”<sup>65</sup>

## 2.2. Adequacy of the legal framework and/or other measures.

The provisions, measures and mechanisms which refer to the principal systems for the protection of public servants and private citizens who, in good faith, report acts of corruption in the United States, that the Committee has examined, based on the information made available to it, constitute a set of relevant measures for the promotion of the purposes of the Convention.

In this regard, Transparency International – U.S.A notes that “*The U.S. has an extensive system of statutory protection, including the Civil Service Reform Act (“CSRA”) and the Whistleblower Protection Act (“WPA”), for federal government employees who report allegations of fraud and corruption. The Sarbanes-Oxley Act of 2002 expanded significantly protection for private sector whistleblowers. These laws protect those who might otherwise face retaliation.*”<sup>66</sup>

## 2.3. Results of the legal framework and/or other measures

Based on the information that has been reviewed by the Committee in this area, the United States has results, at the federal level, with respect to the provisions and measures related to the systems under review.

In this regard, the response of the United States to the questionnaire notes as follows:

### “Whistleblower Protection

OSC’s Annual Report to Congress provides five years’ worth of data at <http://www.osc.gov/documents/reports/ar-2006.pdf>. Statistics for 2006 are as follows:

- i. reporting, protection of identity reporting – for 2006:

Pending disclosures carried over from previous fiscal year:	110
New disclosures received:	435
Total disclosures:	545
Disclosures referred to agency heads for investigation and report:	24
Referrals to Agency IGs	10
Agency head reports sent to President and Congress:	24
Results of Agency investigations and reports –	
-- disclosures substantiated in whole or in part:	21
-- disclosures unsubstantiated:	3
- ii. Mechanisms for reporting threats or reprisals – for 2006 as “Prohibited Personnel Practice (PPP) Matters Activity – Favorable Actions”:

Total favorable actions obtained (all PPP):	52
Favorable actions obtained (reprisal for whistleblowing)	40
Stays negotiated with agencies (included in totals above):	8
Stays obtained from Merit Systems Protection Board (included in totals above):	1”

<sup>65</sup> Ibid.

<sup>66</sup> See the report presented by Transparency International-USA, at p. 8, *supra* note 46.

In addition, OSC's 2006 Annual Report to Congress contains the following table on results corresponding to fiscal years 2002 through 2006:

Summary of Prohibited Personnel Practice Matters Activity-Favorable Actions							
		FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	
Favorable actions obtained (reprisal for whistleblowing)	# of actions	98	75	57	37	40	
	# of matters	83	75	49	37	37	

*\*The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome)*

With respect to the results of the witness protection programs, the response of the United States to the questionnaire notes as follows:

*“Witness Protection Mechanisms*

*The Program is primarily used to facilitate prosecution of persons and groups involved in organized criminal activity that are not easily infiltrated. More than 8,000 protected witnesses during the past 36 years have contributed to the conviction of members of many major organized criminal groups. The Witness Security and Special Operations Unit (“WSSOU”) within OEO is responsible for managing a wide variety of operational aspects of the Program. The WSSOU receives an average of 230 applications for witnesses to be admitted into the Program each year and accepts approximately 160. Over 95 percent of the witnesses authorized into this Program are trusted criminal associates of major criminal offenders. Consequently, the witnesses or targets of these protected witnesses tend not to be politicians or civil servants. We do not have statistics which readily identify exactly how many Program witnesses have testified in cases involving allegations of official bribery or corruption. However, a cursory review of 854 cases handled by the Program in the period between 1987 to 2001 indicates that approximately 44 cases, or 5 percent, involved bribery or corruption. Since the Program has very rarely protected a public servant, we believe that the witnesses protected in these cases would have been the criminal offering the bribe or one of that criminal’s close associates. We are also not aware of any Program participant who has followed the Program’s rules that has been killed as a result of his or her cooperation.”<sup>67</sup>*

**3. ACTS OF CORRUPTION (ARTICLE VI OF THE CONVENTION)**

**3.1. Existence of provisions in the legal framework and/or other measures**

The United States has, at the federal level, a set of provisions related to the criminalization of the acts of corruption provided for in Article VI(1) of the Convention, among which the following should be noted:

<sup>67</sup> See the response of the United States to the questionnaire for the Second Round, at p. 21, available at [http://www.oas.org/juridico/english/mesicic2\\_usa\\_en.doc](http://www.oas.org/juridico/english/mesicic2_usa_en.doc)

▪ With respect to paragraph (a) of Article VI(1):

- Title 18 USC, Section 201(b)(2), entitled “Bribery of Public Officials and Witnesses”, which provides, *inter-alia*, that:

“(b) Whoever—(2) being a public official<sup>x</sup> or person selected to be a public official,<sup>xi</sup> directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value<sup>68</sup> personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;<sup>xii</sup>

(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;

*[s]hall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States”*

- Title 18 USC, Section 201(c)(1)(B), entitled “Bribery of Public Officials and Witnesses”, which provides, *inter-alia*, that:

“(c) Whoever— (1) otherwise than as provided by law for the proper discharge of official duty—

(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;

*[s]hall be fined under this title or imprisoned for not more than two years, or both.”*

- In addition to the foregoing provisions which apply to federal officials, Title 18 USC, Section 666(a)(1)(B),<sup>69</sup> entitled “Theft or Bribery Concerning Programs Receiving Federal Funds”, applies, among others, to state and local officials, and provides, in pertinent part, that:

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<sup>68</sup> In its response to the questionnaire (p. 22), the United States notes as follows with respect to the phrase “anything of value”, as used in the various acts of corruption cited in this section of the report: *“In the case of either a bribe or illegal gratuity, the “thing of value” has been interpreted by federal courts to be anything -- whether it be a good, service, or opportunity -- that has value to the recipient. This could include money and other tangible objects, but also services or favorable terms on a loan, an offer of employment, etc. It is not necessary that the public official actually receive the thing of value or undertake the official act; a mere agreement or promise is sufficient for criminal liability to attach. Finally, with respect to bribery, the thing of value can either directly or indirectly benefit the public official and includes, for example, a payment of money to a third party on the official’s behalf. The maximum penalties for bribery and illegal gratuities are 15 years and two years imprisonment, respectively.”*

<sup>69</sup> With respect to the offenses criminalized under Section 666 of Title 18 of the U.S.C., at the June 27, 2008 plenary session of the Committee of Experts, the United States notified the Committee that *“Although Section 666 does not include the phrase ‘directly or indirectly’, there is no legal significance to the exclusion of this language and courts have construed the statute to criminalize the full scope of conduct described in Article VI(1)(a) of the Convention.”* See in addition, U.S. v. Thompson, 484 F. 3d 877, 881 (7<sup>th</sup> Cir. 2007)

“(a) Whoever, if the circumstance described in subsection (b) of this section exists— (1) being an agent <sup>xiii</sup> of an organization, or of a State, local, or Indian tribal government, or any agency <sup>xiv</sup> thereof—

(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 any thing of value of \$5,000 or more;

[s]hall 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.”

- Title 41 USC, Section 54, which provides that “Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, or both.”

The conduct prohibited by section 53 includes, *inter-alia*, the solicitation, acceptance, or attempted acceptance of any kickback.<sup>xv</sup>

▪ With respect to paragraph (b) of Article VI(1):

- Title 18 USC, Section 201(b)(1), entitled “Bribery of Public Officials and Witnesses”, which provides, *inter-alia*, that:

“(b) Whoever—(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official<sup>xvi</sup> or person who has been selected to be a public official,<sup>xvii</sup> 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;<sup>xviii</sup> 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;

[s]hall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States”



- Title 18 USC, Section 201(c)(1)(A), entitled “Bribery of Public Officials and Witnesses”, which provides, *inter-alia*, that:

*“(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 public official, former public official, or person selected to be a public official;*

*[s]hall be fined under this title or imprisoned for not more than two years, or both.”*

- Title 18 USC, Section 666(a)(2),<sup>70</sup> entitled “Theft or Bribery Concerning Programs Receiving Federal Funds”, which provides, *inter-alia*, that:

*“(a) Whoever, if the circumstance described in subsection (b) of this section exists— (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent<sup>xix</sup> of an organization or of a State, local or Indian tribal government, or any agency<sup>xx</sup> 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;*

*[s]hall 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.”*

- Title 41 USC, Section 54, which provides that “Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, or both.”

The conduct prohibited by section 53 includes, *inter-alia*, the provision, attempted provision, or offer of any kickback,<sup>xxi</sup> as well as the inclusion, directly or indirectly, of the amount of any kickback 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.

▪ With respect to paragraph (c) of Article VI(1):

- Title 18 USC, Section 1951(a), entitled “Interference with commerce by threats or violence”, which provides that “Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce<sup>xxii</sup>, by robbery or extortion<sup>xxiii</sup> 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.”

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<sup>70</sup> See Footnote 69, *supra*.

- Title 18 USC, Section 872, entitled “Extortion by officers or employees of the United States”, which provides that “*Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.*”

- Title 18 USC, Section 1341, entitled “Frauds and swindles”, which provides that “*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 affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.*”

- Title 18 USC, Section 1343, entitled “Fraud by wire, radio, or television”, which provides that “*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 affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.*”

- Title 18 USC, Section 1346, which provides that “*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.*”

- Title 18 USC, Section 201(b), entitled “Bribery of public officials and witnesses,” which provides that “*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;*

*(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; in violation of the official duty of such official or person;*

*shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.”*

Title 18 USC, Section 201(c), entitled “Bribery of public officials and witnesses,” which provides that “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 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;*

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

- Title 18 USC, Section 208(a), entitled “Acts affecting a personal financial interest,” which provides that “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.”

- Title 18 USC, Section 641, entitled “Embezzlement and Theft, Public money, property or records,” which provides that “*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.*”

- Title 18 USC, Section 666, entitled “Theft or bribery concerning programs receiving Federal funds,” which provides that “*Whoever . . .*

*(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 any thing 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.”*

▪ With respect to paragraph (d) of Article VI(1):

- Title 18 USC, Section 1956(a)(1), entitled “Laundering of monetary instruments”, which provides, *inter-alia*, that:

*“(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—<sup>71, xxiv</sup>*

*(A)*

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<sup>71</sup> The phrase “specified unlawful activity, as used in Sections 1956(a)(1), 1956(a)(2), 1956(a)(3), and 1957 of Title 18 of the U.S.C., covers, *inter-alia*, all of the offenses previously identified herein.

*(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.”*

- Title 18 USC, Section 1956(a)(2), entitled “Laundering of monetary instruments”, which provides, *inter-alia*, that:

*“(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.”*

- Title 18 USC, Section 1956(a)(3), entitled “Laundering of monetary instruments”, which provides, *inter-alia*, that:

*“(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.”*

- Title 18 USC, Section 1957, entitled “Engaging in monetary transactions in property derived from specified unlawful activity”, which provides, *inter-alia*, that:

*“(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction<sup>xxv</sup> in criminally derived property<sup>xxvi</sup> of a value greater than \$10,000 and is derived from specified unlawful activity,<sup>xxvii</sup> 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.”*

- Title 18 USC, Section 1952(a), entitled “Interstate and foreign travel or transportation in aid of racketeering enterprises”, which provides that:

*“(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<sup>xxviii</sup>; 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.”*

- Title 18 USC, Section 880, entitled “Receiving the proceeds of extortion”, which provides that “A person who receives, possesses, conceals, or disposes of any money or other property which was obtained from the commission of any offense under this chapter that is punishable by imprisonment for more than 1 year, knowing the same to have been unlawfully obtained, shall be imprisoned not more than 3 years, fined under this title, or both.”

- With respect to paragraph (e) of Article VI(1):

- Title 18 USC, Section 2, entitled “Principals”, which provides that:

*“(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.*

*“(b) 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.”*

- Title 18 USC, Section 3, entitled “Accessory after the fact”, which provides that:

*“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.”*

- Title 18 USC, Section 4, entitled “Misprision of felony”, which provides that *“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.”*

While there is no “Attempt” provision of general application, each chapter or Section in Title 18 of the U.S. Code includes its own “Attempt” provision. Thus attempts apply to all of the foregoing offenses listed in this section.

- Title 18 USC, Section 371, entitled “Conspiracy to commit offense or to defraud United States”, which provides that *“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.”*

- Title 18 USC, Section 1349, entitled “Attempt and Conspiracy”, which provides: *“Any person who attempts or conspires to commit any offense under this chapter [Chapter 63 – Mail Fraud] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”*

- Title 18 USC, Section 1956(h), entitled “Laundering of monetary instruments”, which provides: *“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.”*

### **3.2. Adequacy of the legal framework and/or other measures**

With respect to provisions related to the criminalization of the acts of corruption provided for in 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.

### **3.3. Results of the legal framework and/or other measures**

In its response to the questionnaire,<sup>72</sup> the United States includes the following information in its response regarding the results obtained in enforcing the provisions described in section 3.1.:

*“The Public Integrity Section is a specialized office within the U.S. Department of Justice’s Criminal Division that oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government. The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also monitors the investigation and prosecution of election and conflict of interest crimes. Section attorneys prosecute selected cases against federal, state, and local officials, and are available as a source of advice and expertise to other prosecutors and investigators. Since 1978, the Section has supervised the administration of the Independent Counsel provisions of the Ethics in Government Act. Section 603 of the Ethics in Government Act of 1978 requires that the Attorney General report annually to Congress on the operations and activities of the Public Integrity Section. A portion of this annual report contains current and historical statistics on the nationwide federal effort against public corruption. Apart from the Public Integrity Section, prosecutions are undertaken at the federal level by individual United States Attorney’s Offices, each of which is assigned a jurisdiction within the U.S. and which in total cover the entire country. Following is a summary of the statistics relating to public corruptions prosecutions by the United States Attorney’s Offices across the country drawn from the Public Integrity Section’s 2001 through 2005 annual reports, supplemented with statistics compiled within the Public Integrity Section relating to its own prosecutions during that same timeframe.”*

#### **2001**

*“During 2001, the United States Attorney’s Offices across the country indicted 1,087 individuals for corruption offenses, of whom 502 were federal officials, 95 were state officials, 224 were local officials, and 266 were other individuals. In addition, the United States Attorney’s Offices obtained 920 convictions in 2001, whether by guilty plea or following trial. Of the convicted defendants, 414 were federal officials, 61 were state officials, 184 were local officials, and 261 were other individuals. An additional 437 individuals were awaiting trial on corruption offenses at the close of the year. During this same timeframe, the Public Integrity Section charged 57 defendants with corruption offenses and obtained 36 convictions, whether by guilty plea or trial.”*

#### **2002**

*“During 2002, the United States Attorney’s Office across the country indicted 1,136 individuals for corruption offenses, of whom 478 were federal officials, 110 were state officials, 299 were local*

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<sup>72</sup> See the response of the United States to the questionnaire for the Second Round, at pp. 32-34, *supra* note 6.



officials, and 249 were other individuals. In addition, the United States Attorney's Offices obtained 1,011 convictions in 2002, whether by guilty plea or following trial. Of the convicted defendants, 429 were federal officials, 132 were state officials, 262 were local officials, and 188 were other individuals. An additional 413 individuals were awaiting trial on corruption offenses at the close of the year. During this same timeframe, the Public Integrity Section charged 37 defendants with corruption offenses and obtained 45 convictions, whether by guilty plea or trial."

**2003**

"During 2003, the United States Attorney's Office across the country indicted 1,150 individuals, for corruption offenses, of whom 479 were federal officials, 94 were state officials, 259 were local officials, and 318 were other individuals. In addition, the United States Attorney's Offices obtained 868 convictions in 2003, whether by guilty plea or following trial, of whom 421 were federal officials, 87 were state officials, 119 were local officials, and 241 were other individuals. An additional 412 individuals were awaiting trial on corruption offenses at the close of the year. During this same timeframe, the Public Integrity Section charged 85 defendants with corruption offenses and obtained 61 convictions, whether by guilty plea or trial."

**2004**

"During 2004, the United States Attorney's Office across the country indicted 1,213 individuals, for corruption offenses, of whom 424 were federal officials, 111 were state officials, 268 were local officials, and 410 were other individuals. In addition, the United States Attorney's Offices obtained 1,020 convictions in 2003, whether by guilty plea or following trial. Of the convicted defendants, 381 were federal officials, 81 were state officials, 252 were local officials, and 306 were other individuals. An additional 419 individuals were awaiting trial on corruption offenses at the close of the year. During this same timeframe, the Public Integrity Section charged 48 defendants with corruption offenses and obtained 43 convictions, whether by guilty plea or trial."

**2005**

"During 2005, the United States Attorney's Office across the country indicted 1,163 individuals, for corruption offenses, of whom 445 were federal officials, 96 were state officials, 309 were local officials, and 313 were other individuals. In addition, the United States Attorney's Offices obtained 1,027 convictions in 2005, whether by guilty plea or following trial. Of the convicted defendants, 390 were federal officials, 94 were state officials, 232 were local officials, and 311 were other individuals. An additional 451 individuals were awaiting trial on corruption offenses at the close of the year. During this same timeframe, the Public Integrity Section charged 95 defendants with corruption offenses and obtained 84 convictions, whether by guilty plea or trial."

"These statistics are summarized in the charts below. Additional details regarding the cases and results are available in the Public Integrity Section's annual reports."

**Defendants Charged**

	U.S. Attorney's Offices					Public Integrity Section	GRAND TOTAL
	Federal Officials	State Officials	Local Officials	Other Individuals	TOTAL		
<b>2001</b>	502	95	224	266	1,087	57	<b>1,144</b>

<b>2002</b>	478	110	299	249	1,136	37	<b>1,173</b>
<b>2003</b>	479	94	259	318	1,150	85	<b>1,235</b>
<b>2004</b>	424	111	268	410	1,213	48	<b>1,268</b>
<b>2005</b>	445	96	309	313	1,163	95	<b>1,258”</b>

**“Defendants Convicted**

	<b><i>U.S. Attorney’s Offices</i></b>					<b><i>Public Integrity Section</i></b>	<b><i>GRAND TOTAL</i></b>
	<b><i>Federal Officials</i></b>	<b><i>State Officials</i></b>	<b><i>Local Officials</i></b>	<b><i>Other Individuals</i></b>	<b><i>TOTAL</i></b>		
<b>2001</b>	414	61	184	261	920	36	<b>956</b>
<b>2002</b>	429	132	262	188	1,011	45	<b>1,056</b>
<b>2003</b>	421	87	119	241	868	61	<b>929</b>
<b>2004</b>	381	81	252	306	1,020	43	<b>1,063</b>
<b>2005</b>	390	94	232	311	1,027	84	<b>1,111”</b>

In addition, the document presented by Transparency International-USA notes that “*U.S. laws, in combination with: (a) well-defined liability for legal persons, including corporations; (b) comprehensive asset seizure and forfeiture law; (c) the capacity to conduct undercover operations; and (d) the use of plea bargaining and voluntary disclosure mechanisms make the U.S. system of anticorruption enforcement highly effective, and the U.S. has become more aggressive in recent years. Many U.S. prosecutions, such as the recent investigation into lobbying abuses and subsequent indictments, are open and actively followed by the media and the public. Over the five-year period from 2001 to 2005, the DOJ charged 5,749 individuals with public corruption offenses nationwide and obtained 4,846 convictions.*”<sup>73</sup>

With respect to the foregoing information, the Committee considers that it serves to demonstrate that criminal investigations and sentences have been carried out with respect to the acts of corruption provided for by Article VI(1) of the Convention.

**III. CONCLUSIONS AND RECOMMENDATIONS IN RELATION TO THE IMPLEMENTATION OF THE PROVISIONS SELECTED IN THE FRAMEWORK OF THE SECOND ROUND**

Based on the review conducted in Chapter II of this report, the Committee formulates the following conclusions and recommendations with respect to the implementation, in the United States, of the provisions contained in Articles III(5) (systems of government hiring and for the procurement of goods and services); III(8) (systems for protecting public servants and private citizens who, in good faith, report acts of corruption); and VI (acts of corruption) of the Convention, which were selected for review within the framework of the second round.

<sup>73</sup> See the report presented by Transparency International-USA, at p. 11, *supra* note 46.

## **1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)**

### **1.1. Systems of Government Hiring**

**The United States has considered and adopted measures intended to establish, maintain and strengthen the systems of government hiring, as discussed in Section 1.1 of Chapter II of this report.**

In light of the comments made in the above-noted section, the Committee makes the following recommendation to the United States:

- Continue strengthening the systems for the hiring of public servants. To comply with this recommendation, the United States could take the following measure into account:
  - Continue to give the appropriate consideration to the development instruments, such as OPM's Strategic and Operational Plan 2006-2010, in order to determine and establish measurable goals, advance in their implementation and continuously evaluate the objective results achieved in their fulfillment, with respect to the systems for the hiring of public servants. (See Section 1.1.3 of Chapter II of this report)

### **1.2. Government Systems for the Procurement of Goods and Services**

**The United States has considered and adopted measures intended to establish, maintain and strengthen the systems for government procurement of goods and services, as discussed in Section 1.2 of Chapter II of this report.**

In light of the comments made in the above-noted section, the Committee makes the following recommendation to the United States:

- Continue strengthening the systems for government procurement of goods and services. To comply with this recommendation, the United States could take the following measures into account:
  - (a) Continue to give the appropriate consideration to the relevant measures to improve the acquisition workforce, taking into account the results of studies such as the study by the Advisory Acquisitions Panel and the survey performed Office of Federal Procurement Policy and the Federal Acquisition Institute. (See Section 1.2.2 of Chapter II of this report)
  - (b) Continue to give the appropriate consideration to the relevant measures to implement the Federal Procurement Data System – Next Generation, given that it is the only government-wide system that tracks federal procurement spending. (See Section 1.2.3 of Chapter II of this report)

## **2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO IN GOOD FAITH REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)**

**The United States has considered and adopted certain measures intended to establish, maintain and strengthen systems for protecting public servants and private citizens who in good faith report acts of corruption, as discussed in Section 2 of Chapter II of this report.**

No recommendations were formulated by the Committee in this Section.

## **3. ACTS OF CORRUPTION (ARTICLE VI(1) OF THE CONVENTION)**

**The United States has adopted measures which criminalize the acts of corruption provided for by Article VI(1) of the Convention, as discussed in Section 3 of Chapter II of this report.**

No recommendations were formulated by the Committee in this Section.

## **4. GENERAL RECOMMENDATIONS**

Based on the review and comments made throughout this report, the Committee suggests that the United States consider the following recommendations:

- 4.1 Design and implement, when appropriate, training programs for public servants responsible for implementing the systems, provisions, measures, and mechanisms considered in this report, for the purpose of ensuring that they are adequately known, managed, and implemented.
- 4.2. Select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the results of the systems, provisions, measures, and mechanisms considered in this report, and to verify follow-up on the recommendations made herein.

## **5. FOLLOW-UP**

The Committee will consider the periodic update Reports submitted by the United States on its progress in implementing previous recommendations, within the framework of the plenary meetings of the Committee and in accordance with Article 31 of the Rules of Procedure and Other Provisions.

Similarly, the Committee will review the progress of the United States in implementing the recommendations made in this Report, in accordance with Article 29 of the Rules of Procedure and Other Provisions.

## **IV. OBSERVATIONS IN RELATION TO THE PROGRESS IN THE IMPLEMENTATION OF THE RECOMMENDATIONS FORMULATED IN THE REPORT FROM THE FIRST ROUND**

Based on the information made available to the Committee on the implementation of the recommendations formulated for the United States in the Report in the First Round of Review, the Committee observes the following:

## CONCLUSIONS AND RECOMMENDATIONS AT THE FEDERAL LEVEL

### 1. STANDARDS OF CONDUCT AND MECHANISMS TO ENFORCE COMPLIANCE (ARTICLE III, PARAGRAPHS 1 AND 2 OF THE CONVENTION)

#### 1.1. Standards of conduct intended to prevent conflicts of interest and enforcement mechanisms

##### Recommendation:

*Continue to improve the provisions, measures and mechanisms for enforcement relating to conflicts of interest.*

##### Measures suggested by the Committee:

- a) *Continue the process of periodic review and appropriate updating of the provisions, measures and mechanisms for enforcement related to conflicts of interest.*
- b) *Continue to carry out periodic evaluations, by means such as the surveys conducted by OGE, or by other means that are considered appropriate, with respect to the effectiveness of the provisions, measures and enforcement mechanisms related to conflicts of interest; and continue to promote or adopt appropriate decisions based on the results of evaluations designed to improve those provisions, measures and mechanisms.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The review carried out by the Office of Government Ethics of the five criminal conflict of interest statutes applicable to executive branch officials, and the report on that review submitted to the President and to the Congress, which contains a discussion of OGE's view of the limitations and anomalies of the legislation reviewed.<sup>74, 75</sup>
- The passage of the Honest Leadership and Open Government Act (Pub.L 110-81) which, as noted by the United States, "*enhances the post employment conflict of interest statute (18 USC 207) and increases the penalties for knowing and willful falsification of or failure to report information on a public financial disclosure report.*"<sup>76</sup>
- Revisions to OGE explanatory regulations on the post-employment restrictions of Title 18 USC Section 207, which are awaiting concurrence from the Department of Justice.<sup>77</sup>
- Review by the OGE of the Standards of Conduct for Employees of the Executive Branch, the results of which are being evaluated in order to determine if any modifications are warranted.<sup>78</sup>

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<sup>74</sup> See the response of the United States to the questionnaire for the Second Round, at p. 36, *supra* note 6.

<sup>75</sup> See [www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/reports\\_plans/rpt\\_title18.pdf](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf).

<sup>76</sup> See the response of the United States to the questionnaire for the Second Round, at p. 37, *supra* note 6.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

- The amendments to the House Rules dealing with the conduct of Members and staff, and addressing “...gifts from lobbyists, agents of foreign principals, and certain organizations that employ lobbyists or foreign agents and requirements concerning the acceptance of travel expenses for “officially connected” travel by Members and staff from outside private sources.”<sup>79</sup>
- The amendments to the Senate Rules dealing with the conduct of Senators and staff, and addressing “...accepting gifts, meals or trips from lobbyists or the organizations that employ them.”<sup>80</sup>
- The new training course introduced by OGE for ethics officials on conflicts of interest, which instructs ethics officials on how to determine whether a fundamental financial conflict of interest exists, how to assess impartiality issues, and to analyze job-hunting conflicts, as well as appropriate remedies.<sup>81</sup>
- The educational brochures being published by OGE, on topics including, government procurement, blind trusts, seeking employment and contractor employee ethics issues;<sup>82</sup> as well as the revision by OGE of existing brochures, in the area of post government employment and general ethics rules for senior employees.<sup>83</sup>
- The various surveys administered by OGE, to evaluate agency ethics programs and to establish baseline data for the OGE strategic plan. These surveys measure employees’ perceptions of their agencies’ ethical culture and ethics program; and assess the effectiveness of the services and support provided by OGE.<sup>84</sup>
- The participation by OGE on panels at the 15<sup>th</sup> National Government Ethics Conference and at a meeting of the Interagency Ethics Council, discussing agency use of self-assessment tools, as well as OGE’s encouragement for agencies to use and assist OGE in the development of self-assessment tools to evaluate employee perception of agency ethical culture and ethics program.<sup>85</sup>
- The assessment by OGE of enforcement activity at executive branch agencies during the course of ethics program reviews; and the employee ethics survey administered prior to conducting a program review, which asks employees their perception of the agencies’ willingness to take corrective action when employees have violated the ethics rules.<sup>86</sup>
- The electronic reporting system created by OGE for OGE Form 202, Notification of Conflict of Interest, which assists agencies in notifying OGE of referrals they make to the Department of Justice concerning potential violations of the criminal conflict of interest statutes.<sup>87</sup>
- OGE’s continued publication of annual Department of Justice conflict of interest prosecution surveys of U.S. Attorneys’ Offices, and dissemination of the summaries of those prosecutions to executive branch ethics officials.<sup>88</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., at p. 38.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

**1.2. Standards of conduct to ensure the proper conservation and use of resources entrusted to government officials in the performance of their functions and enforcement mechanisms**

Recommendation:

*Continue to strengthen the implementation of the standards of conduct in order to ensure the conservation and proper use of the resources entrusted to public officials in the performance of their functions.*

In its response the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The continued strengthening of “...*the implementation of the extensive network of laws and regulations designed to minimize the potential for waste, fraud, and mismanagement and to ensure that Federal Government resources are used efficiently and effectively to achieve intended program results.*”<sup>89</sup>

- The continued monitoring and review by OGE of the implementation of the standards of conduct and the criminal conflict of interest statutes, including provisions on the proper use of government resources; and development by OGE of a new training course for executive branch employees on misuse of their official positions, including a section on misuse of government resources.<sup>90</sup>

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

**1.3. Standards of conduct and mechanisms concerning measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware**

Recommendation:

*Continue to strengthen the mechanisms related to the existing measures and systems requiring public officials to report acts of corruption in the performance of public functions of which they are aware to the appropriate authorities.*

Measures suggested by the Committee:

- a) *Continue to implement measures that allow timely consideration by the U.S. Special Counsel’s Office of those cases related to protecting employees, ex-employees, and those seeking Federal employment (“whistleblowers), as provided for by law, and thus, inter alia, facilitate compliance with the requirement that officers and employees report acts of*

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<sup>89</sup> Ibid., at p. 39.

<sup>90</sup> Ibid.

*corruption in the performance of public functions of which they are aware to the appropriate authorities.*

In its response the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The use of technology by OSC to reduce travel time; the settlement of appropriate cases; and the reduction of internal paperwork and levels of review.<sup>91</sup>
- The collaboration between OSC and other federal agencies in order to determine best practices regarding investigation and prosecution of cases, as well as monitoring of the timeliness of case resolution in order to prevent backlogs.<sup>92</sup>

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

## **2. SYSTEMS FOR REGISTRATION OF INCOME, ASSETS, AND LIABILITIES (ARTICLE III, PARAGRAPH 4, OF THE CONVENTION)**

### Recommendation:

*Continue to strengthen the systems for registering income, assets and liabilities.*

### Measures suggested by the Committee:

- a) *Continue the process of periodic review and appropriate updating of the system of financial disclosure.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- OGE's continued review, evaluation and updating of the financial disclosure systems for government officials.<sup>93</sup>
- OGE publication of a revised confidential financial disclosure regulation and reporting form. OGE developed an online training course and a frequently-asked-questions guide regarding the new regulation and form and has made them available to ethics officials and filers on the OGE website.<sup>94</sup>
- OGE review of executive branch agencies that have adopted non-standard pay systems and how those agencies are determining what positions in these systems are required to file a public financial

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., at p. 40.

<sup>94</sup> Ibid.



disclosure report; and issuance by OGE of guidelines to help ethics officials properly identify positions subject to the public financial disclosure filing requirement.<sup>95</sup>

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

### **3. OVERSIGHT BODIES FOR THE SELECTED PROVISIONS (ARTICLE III, PARAGRAPHS 1, 2, 4 AND 11, OF THE CONVENTION)**

#### Recommendation:

*Consider strengthening the cooperation and coordination relationships among the federal oversight bodies regarding the functions they carry out with respect to the provisions of paragraphs 1, 2, 4, and 11 of the Convention.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The September 8, 2005 establishment of the U.S. Department of Justice Katrina Fraud Task Force, which is composed of representatives from the U.S. DOJ as well as several other federal agencies.<sup>96</sup> The mission of the Task Force is to deter, detect and prosecute fraud related to the Hurricane Katrina Disaster, as well as investigate and prosecute allegations of bribery, extortion involving public officials associated with disaster relief or recovery efforts.<sup>97</sup>
- The October 10, 2006 creation of the U.S. Department of Justice National Procurement Fraud Task Force, which is composed of representatives from the U.S. DOJ as well as other federal agencies.<sup>98</sup> The purpose of the Task Force is to promote the prevention, early detection and prosecution of procurement fraud.<sup>99</sup>
- The October, 2006 establishment of the International Contract Corruption Task Force, which, as noted in the response of the United States, “...*deploys criminal investigative and intelligence assets world wide to detect and investigate corruption and contract fraud resulting primarily from the global war on terror.*”<sup>100</sup>

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

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<sup>95</sup> Ibid..

<sup>96</sup> Ibid., at pp. 40-41.

<sup>97</sup> Pages 41 to 44 of the response of the United States to the questionnaire for the Second Round provide a detailed description of the U.S. Department of Justice Katrina Fraud Task Force, as well as the results that have been achieved by the Task Force.

<sup>98</sup> Ibid., at p. 41.

<sup>99</sup> Pages 44 to 46 of the response of the United States to the questionnaire for the Second Round provide a detailed description of the U.S. Department of Justice National Procurement Fraud Task Force, as well as the results that have been achieved by the Task Force.

<sup>100</sup> Ibid., at p. 46.

#### **4. MECHANISMS TO PROMOTE THE PARTICIPATION BY CIVIL SOCIETY AND NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11 OF THE CONVENTION)**

##### **4.1. General participation mechanisms**

The Committee did not formulate any recommendations in this section.

##### **4.2. Mechanisms for access to information**

###### Recommendation:

*Continue to strengthen the mechanisms for access to public information.*

###### Measures suggested by the Committee:

- a) *Continue the process of evaluating and perfecting implementation of the Freedom of Information Act, as amended by the 1996 Electronic Freedom of Information Act Amendments.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The December 14, 2005 issuance of Executive Order 13,392,<sup>101</sup> entitled, Improving Agency Disclosure of Information, which, as noted by the United States, “...contains several statements of government-wide FOIA policy, as well as many specific requirements in the areas of customer service, planning, and reporting that affect all federal agencies in their administration of the Act.”<sup>102</sup>
- The Implementation Guidance for Executive Order 13,392, issued by the U.S. Department of Justice on April 27, 2006, intended to assist federal agencies in the implementation of the Presidential initiative, and which addresses a wide range of points and considerations that agencies should keep in mind when implementing the Executive Order.<sup>103, 104</sup>

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

##### **4.3. Mechanisms for consultation**

###### Recommendation:

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<sup>101</sup> Executive Order 13,392 is available at <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>

<sup>102</sup> See the response of the United States to the questionnaire for the Second Round, at p. 48, available at [http://www.oas.org/juridico/english/mesicic2\\_usa\\_en.doc](http://www.oas.org/juridico/english/mesicic2_usa_en.doc). In addition, pp. 48 to 49 provide further details on the requirements contained in Executive Order 13, 392.

<sup>103</sup> The Implementation Guidance for Executive Order 13,392 is available at <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>

<sup>104</sup> See the response of the United States to the questionnaire for the Second Round, at p. 49, *supra* note 6.

*Complementing existing mechanisms of consultation, establishing procedures, when appropriate, so as to allow for making public consultations prior to designing public policies and prior to the final adoption of legal provisions.*

Measures suggested by the Committee:

- a) *Continue the periodic evaluation of the functioning of the Advisory Committees, and taking into account the results thereof, adopt the pertinent measures to ensure the fulfillment of the objectives of the mechanisms, and inter alia, contribute to the fulfillment of the purposes of the Convention.*
- b) *Consider, where appropriate, the creation and use of advisory committees by agencies which do not currently utilize them.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken, described by the country under review as follows:

*“The Committee Management Secretariat of the General Services Administration is charged with a number of responsibilities designed to improve the management and accountability of advisory committees. These responsibilities include: conducting an annual comprehensive review covering the performance of, and need for, existing advisory committees; issuing regulations, guidelines, and management controls of government-wide applicability; and assuring that advisory committees are established in accordance with the Federal Advisory Committee Act’s requirements. The Secretariat also maintains data on advisory committees and confirms that the committees are fulfilling the purpose for which they were established. Today, advisory committees are used by over 60 agencies to address issues that reflect the complex mandates undertaken by the Government. During fiscal year 2006, over 65,000 committee members served on 1,000 committees and provided advice and recommendations on such matters as the safety of the nation’s blood supply, steps needed to address the management of natural resources, and the country’s national defense strategies.”<sup>105</sup>*

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendation, through compliance with measures (a) and (b) thereof, without prejudice to the fact, that because it is of a continuous nature, it should continue to be developed.

**4.4. Mechanisms to encourage participation in public administration**

Recommendation:

*Continue to strengthen the mechanisms to encourage civil society and nongovernmental organizations in public administration.*

Measures suggested by the Committee:

- a) *Perform periodic evaluations of the existing mechanisms to encourage civil society and nongovernmental participation in public administration, in order to, inter alia, determine the strengths of the mechanisms and identify those areas where improvements are needed, and based on the results of those evaluations, adopt the pertinent measures to ensure the*

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<sup>105</sup> Ibid., at p. 50.

*fulfillment of the objectives of the mechanisms and inter alia, contribute to the fulfillment of the purposes of the Convention.*

In its response, the United States presents the following information with respect to the foregoing recommendation:

*“The Executive Branch consistently explores new mechanisms to facilitate participation in public administration. In order to promote public participation in U.S. Government decision-making process, the National Archives has developed two websites with links to all federal agency public comment websites. (See [www.archives.gov/federal-register/public-participation/rulemaking-sites.html](http://www.archives.gov/federal-register/public-participation/rulemaking-sites.html) and [www.regulations.gov/fdmspublic/component/main](http://www.regulations.gov/fdmspublic/component/main)) These websites provide the text of proposed rules and regulations, opportunities for filing comments electronically, and updates on the status of rules once public comment periods have closed. These websites provide an easy method for all members of the public to submit comments to government agencies as they develop new rules and regulations.”<sup>106</sup>*

The Committee takes note of the steps undertaken by the United States towards implementation of the foregoing recommendation, which, given its very nature, requires ongoing attention.

#### **4.5. Mechanisms for participation in the follow-up of public administration**

##### Recommendation:

*Continue to strengthen the mechanisms for participation in the follow-up of public administration.*

##### Measures suggested by the Committee:

- a) Perform periodic evaluations of the existing mechanisms to encourage civil society and nongovernmental participation in the follow-up of public administration, in order to, inter alia, determine the strengths of the mechanisms and identify those areas where improvements are needed, and based on the results of those evaluations, adopt the pertinent measures to ensure the fulfillment of the objectives of the mechanisms and inter alia, contribute to the fulfillment of the purposes of the Convention.*

In its response, the United States presents the following information with respect to the foregoing recommendation:

*“The Websites mentioned above also give citizens the opportunity to follow up the decision-making processes.”<sup>107</sup>*

The Committee takes note of the steps undertaken by the United States towards implementation of the foregoing recommendation, which, given its very nature, requires ongoing attention.

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid., at p. 51.

## 5. ASSISTANCE AND COOPERATION (ARTICLE XIV OF THE CONVENTION)

### Recommendations:

- a) *Continue to consider offering the technical cooperation requested by other States Parties, in order to support implementation of the Convention and of the recommendations made to that effect by the Committee in the respective country reports.*
- b) *Continue to consider participating in and supporting mutual technical cooperation initiatives, through the exchange of information within the framework of the networks of competent government authorities, in areas related to the Convention.*
- c) *Consider entering into mutual legal assistance treaties with OAS Member States with which the US does not have an existing Mutual Legal Assistance Treaty in the areas covered under the Convention.*

In its response, the United States presents information with respect to the foregoing recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The regular consultations made to OAS Member States that have mutual assistance treaties with the USA, by the U.S. Department of Justice's Office of International Affairs ("OIA"), as well as the frequent discussion of cases, and the provision of information and templates for requesting assistance from the United States.<sup>108</sup>

- The assistance given to Panamanian as well as other officials in the region, by the U.S. Department of Justice's Asset Forfeiture and Money Laundering Section in the Criminal Division and by several U.S. Attorney Offices, with respect to the recovery of assets stolen by former heads of State and government officials.<sup>109</sup>

- The U.S. Prosecutors from the U.S. Department of Justice Office of Overseas Prosecutorial Development, Assistance, and Training ("OPDAT"), that are currently serving as Resident Legal Advisors in Colombia, Mexico and Paraguay, as well as the Resident Legal Advisor scheduled to begin working in Brazil in December, 2007.<sup>110</sup>

- The May, 2006 seminar on the recovery of the proceeds of acts of corruption, held by the U.S. Department of Justice's Asset Forfeiture and Money Laundering Section, the U.S. Department of Justice's OPDAT, the International Narcotics and Law Enforcement Affairs Bureau of the U.S. Department of State, and the General Secretariat of the Organization of American States, which brought together 90 participants, including prosecutors, investigators, judges, and attorneys general, from 30 OAS and G-8 nations.<sup>111</sup>

- The activities carried out by the United States Agency for International Development (USAID), which, according to the report of the United States, "...includes anticorruption efforts a central part of its foreign assistance strategy and takes a broad approach to assisting partner countries to strengthen their systems to resist corruption. USAID's anticorruption programs are designed to help

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid., at pp. 51 and 52.

<sup>111</sup> Ibid., at p. 52.

*reduce opportunities and incentives for corruption; support stronger and more independent judiciaries, legislatures, and oversight bodies; and promote independent media, civil society, and public education.”<sup>112</sup>*

In addition, in its June 5 responses to the review subgroup, the United States noted as follows with respect to measure “c” of this recommendation: *“The US has considered expanding its number of mutual legal assistance treaties with OAS member states. Treaty negotiations and subsequent ratifications are very time consuming, however, and are undertaken only where there is a specific need for a treaty. That need has been minimized with our OAS partners due to a number of factors, all of which give the US a sound legal basis for full cooperation with OAS states without bilateral treaties. First, The Department of Justice can provide legal assistance even without a treaty through the use of letters rogatory. Second, we are parties to the Inter-American Convention on Mutual Assistance in Criminal Matters, which is a treaty of general application that can be used for all kinds of criminal cases. Third, the US is a party to both the United Nations Convention against Corruption and the Transnational Organized Crime Convention. Both of these are very useful instruments and can be used with any other party to provide a full array of cooperation in corruption cases. Most OAS member states are party to one, if not both, of these UN treaties.”*

The Committee takes note of the satisfactory consideration by the United States of the foregoing recommendations, without prejudice to the fact, that because they are of a continuous nature, they should continue to be developed.

## **6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)**

No recommendations were formulated by the Committee in this section.

## **7. GENERAL RECOMMENDATIONS**

### Recommendation 7.1:

*Design and implement, when appropriate, training programs for public servants in charge of applying the systems, standards, measures and mechanisms considered in this report, with the objective of assuring adequate knowledge, handling, and implantation of the above.*

### Recommendation 7.2:

*Select and develop procedures and indicators, as appropriate, that enable verification of the follow-up to the recommendations contained in this report, and communicate the results of this follow-up to the Committee through the Technical Secretariat. With this in mind, it may take into account the list of more general indicators applicable within the Inter-American system that were available for the selection indicated by the State under review and posted on the OAS website by the Technical Secretariat of the Committee; as well, consider information derived from the review of the mechanisms developed in accordance with recommendation 7.3 below.*

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<sup>112</sup> Ibid.

Recommendation 7.3:

*Develop, as appropriate and where they do not yet exist, procedures designed to analyze the mechanisms mentioned in this report, and the recommendations contained in it.*

In its response, the United States notes as follows with respect to the foregoing recommendation:

*“These recommendations are considered above, within the relevant item.”<sup>113</sup>*

The Committee notes that the response of the United States does not specifically refer to any steps taken with respect to the implementation of the three foregoing recommendations. Nonetheless, the Committee notes that the United States has reported on training activities that have been developed in respect of recommendations issued in the First Round, as noted in their response to the questionnaire. In light of this fact, the Committee takes note of the satisfactory consideration of recommendation 7.1, as well as of the need for the United States to give further attention to the implementation of recommendations 7.2 and 7.3, without prejudice to the fact, that because they are all of a continuous nature, they should continue to be developed.

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<sup>113</sup> Ibid.

## ENDNOTES

<sup>i</sup> The full text of 5 USC Section 3132(a)(2) provides:

(a) For the purpose of this subchapter--

(2) ``Senior Executive Service position" means any position in an agency which is classified above GS-15 pursuant to section 5108 or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee--

(A) directs the work of an organizational unit;

(B) is held accountable for the success of one or more specific programs or projects;

(C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;

(D) supervises the work of employees other than personal assistants; or

(E) otherwise exercises important policy-making, policy-determining, or other Executive functions;”

<sup>ii</sup> With respect to the definition of the phrase “personnel action”, 5 USC Section 2302(a)(2), provides:

(2) For the purpose of this section--

(A) ``personnel action" means--

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; and

(xi) any other significant change in duties, responsibilities, or working conditions;

<sup>iii</sup> With respect to the phrase “Executive Branch”, Title 5 USC, Section 105 provides that “For the purposes of this title, “Executive agency means an Executive department, a Government corporation, and an independent establishment.”

In addition, title 41 USC, Section 403 provides:

“(1) The term “executive agency” means—

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.”

Similarly, Part 2 of the FAR provides that the term “‘Executive agency’ means an executive department, a military department, or any independent establishment within the meaning of 5 USC 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 USC 9101.”

Finally, A complete list of Executive Agencies can be found at:

<http://www.usa.gov/Agencies/Federal/Executive.shtml>

<sup>iv</sup> With respect to the term “responsible source”, Title 41 USC Section 403(7) provides that:

“(7) The term “responsible source” means a prospective contractor who—

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;



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(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.”

Additionally, with respect to the term “responsible” Part 2 of the FAR, at Section 9.104-1 provides:

*General standards.*

*To be determined responsible, a prospective contractor must—*

(a) *Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));*

(b) *Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;*

(c) *Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;*

(d) *Have a satisfactory record of integrity and business ethics.*

(e) *Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)*

(f) *Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and*

(g) *Be otherwise qualified and eligible to receive an award under applicable laws and regulations.*

<sup>v</sup> Section 2.101 of the FAR defines “commercial acquisition” as:

“(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) *Has been sold, leased, or licensed to the general public; or*

(ii) *Has been offered for sale, lease, or license to the general public;*

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) *Modifications of a type customarily available in the commercial marketplace; or*

(ii) *Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;*

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) *Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and*

(ii) *The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;*

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) *“Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection*

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by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments."

<sup>vi</sup> Section 12.503 provides that the following laws are not applicable to Executive agency contracts for the acquisition of commercial items:

"(a) The following laws are not applicable to Executive agency contracts for the acquisition of commercial items:

(1) [41 USC 43](#), Walsh-Healey Act (see [Subpart 22.6](#)).

(2) [41 USC 254\(a\)](#) and [10 USC 2306\(b\)](#), Contingent Fees (see [3.404](#)).

(3) [41 USC 416\(a\)\(6\)](#), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see [5.203](#)).

(4) [41 USC 701](#), et seq., Drug-Free Workplace Act of 1988 (see [23.501](#)).

(5) [31 USC 1354\(a\)](#), Limitation on use of appropriated funds for contracts with entities not meeting veterans' employment reporting requirements (see [22.1302](#)).

(6) [31 USC 6101](#) note, Pub. L. 109-282, Federal Funding Accountability and Transparency Act of 2006, requirement to report subcontract data.

(b) Certain requirements of the following laws are not applicable to executive agency contracts for the acquisition of commercial items:

(1) [40 USC 3701](#) et seq., Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see [22.305](#)).

(2) [41 USC 57\(a\)](#) and (b), and 58, Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986 (see [3.502](#)).

(3) [49 USC 40118](#), Requirement for a clause under the Fly American provisions (see [47.405](#)).

(c) The applicability of the following laws have been modified in regards to Executive agency contracts for the acquisition of commercial items:

(1) [41 USC 253g](#) and [10 USC 2402](#), Prohibition on Limiting Subcontractor Direct Sales to the United States (see [3.503](#)).

(2) [41 USC 254\(d\)](#) and [10 USC 2306a](#), Truth in Negotiations Act (see [15.403](#)).

(3) [41 USC 422](#), Cost Accounting Standards (48 C.F.R. Chapter 99) (see [12.214](#))."

<sup>vii</sup> The full text of Section 253 (c) reads as follows: "(c) Use of noncompetitive procedures  
An executive agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to

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*procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;*

*(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;*

*(5) subject to subsection (h) \I\ of this section, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;*

*(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or*

*(7) the head of the executive agency--(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.”*

<sup>viii</sup> Section 4.1102 of the FAR provides various exceptions wherein contractors need not be registered in the CCR, as follows:

*“(a) Prospective contractors shall be registered in the CCR database prior to award of a contract or agreement, except for—*

*(1) Purchases that use a Governmentwide commercial purchase card as both the purchasing and payment mechanism, as opposed to using the purchase card only as a payment method;*

*(2) Classified contracts (see [2.101](#)) when registration in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security;*

*(3) Contracts awarded by—*

*(i) Deployed contracting officers in the course of military operations, including, but not limited to, contingency operations as defined in [10 USC 101\(a\)\(13\)](#) or humanitarian or peacekeeping operations as defined in [10 USC 2302\(7\)](#); or*

*(ii) Contracting officers in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, e.g., Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 USC 5121](#));*

*(4) Contracts to support unusual or compelling needs (see [6.302-2](#));*

*(5) Awards made to foreign vendors for work performed outside the United States, if it is impractical to obtain CCR registration; and*

*(6) Micro-purchases that do not use the electronic funds transfer (EFT) method for payment and are not required to be reported (see [Subpart 4.6](#)).”*

<sup>ix</sup> A list of the agencies who submit data to FPDS is available here:

[http://www.fpdsng.com/downloads/agency\\_data\\_submit\\_list.htm](http://www.fpdsng.com/downloads/agency_data_submit_list.htm)

<sup>x</sup> Pursuant to Title 18 USC, Section 201(a)(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.

<sup>xi</sup> Pursuant to Title 18 USC, Section 201(a)(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.

<sup>xii</sup> Pursuant to Title 18 USC, Section 201(a)(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.

<sup>xiii</sup> Pursuant to Title 18 USC, Section 666(d)(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.

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<sup>xiv</sup> Pursuant to Title 18 USC, Section 666(d)(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.

<sup>xv</sup> Pursuant to Title 41 USC, Section 52(2), the term “kickback” means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

<sup>xvi</sup> See Endnote i

<sup>xvii</sup> See Endnote ii

<sup>xviii</sup> See Endnote iii

<sup>xix</sup> See Endnote iv

<sup>xx</sup> See Endnote v

<sup>xxi</sup> See Endnote vi

<sup>xxii</sup> Pursuant to Title 18 USC, Section 1951(b)(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.

<sup>xxiii</sup> Pursuant to Title 18 USC, Section 1951(b)(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.

<sup>xxiv</sup> Pursuant to Title 18 USC, Section 1956(c)(7)(B)(iv), the term “specified unlawful activity” means, *inter-alia*, an offense involving bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.

<sup>xxv</sup> Pursuant to Title 18 USC, Section 1957(f), 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 title 18 USC) by, through, or to a financial institution (as defined in section 1956 of title 18 USC), including any transaction that would be a financial transaction under section 1956 (c)(4)(B) of title 18 USC, 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.

<sup>xxvi</sup> Pursuant to Title 18 USC, Section 1957(f), the term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense.

<sup>xxvii</sup> See Endnote xv

<sup>xxviii</sup> Pursuant to Title 18 USC, Section 1952(b), “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 title 18 USC.