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

FINAL REPORT

(Adopted at the March 14, 2019 plenary session)

SUMMARY

This Report contains a comprehensive review of the new developments in the United States with respect to paragraphs 5 and 8 of Article III of the Inter-American Convention against Corruption, which refer, respectively, to systems of government hiring and procurement of goods and services and for the protection of public servants and private citizens who, in good faith, report acts of corruption. Reference is also made, when appropriate, to new developments with respect to the implementation of these provisions.

In addition, the Report includes a comprehensive review of the implementation in the United States of paragraphs 3 and 12 of Article III of the Convention, which refer, respectively, to measures intended to create, maintain and strengthen instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities; and a study of further preventive measures that take into account the relationship between equitable compensation and probity in public service. These provisions were selected by the MESICIC Committee of Experts for the Fifth Round.

The review was conducted in accordance with the Convention, the Report of Buenos Aires, the Committee's Rules of Procedure, and the methodologies it has adopted for conducting on-site visits and for the Fifth Round, including the criteria set out therein for guiding the review based on equal treatment for all states parties, functional equivalence, and the common purpose of both the Convention and the MESICIC of promoting, facilitating, and strengthening cooperation among the states parties in the prevention, detection, punishment, and eradication of corruption.

The review was carried out mainly taking into account Response to the Questionnaire by the United States and information gathered during the on-site visit conducted between October 16 – 17, 2018, by representatives of Costa Rica and Saint Vincent and the Grenadines, with the support of the Technical Secretariat. During that visit, the information furnished by the United States was clarified and supplemented with the opinions of civil society organizations.

Regarding the new developments in the United States with respect to the implementation of the provisions of the Convention selected for the Second Round, the Committee formulated recommendations, such as consider compiling detailed annual statistic on entry into the federal competitive service, such as the number of hiring opportunities or vacancies; the number of competitions carried out; and the number of persons that took part in them; appointing the remaining two members of the Merit Systems Protection Board as soon as possible, so that it can exercise its adjudicatory authorities; consider enacting legislation that protects federal employees of the intelligence community from reprisals for reporting acts of corruption, which takes into account the interests of the government in protecting classified information with the rights of intelligence employees to report suspected abuses without facing retaliation; consider enacting legislation that would provide contractors of the intelligence community similar whistleblower reprisal protections as those afforded to other contractors in the federal government under the National Defense Authorization Act for Fiscal Year 2013; and maintain statistics on the results of investigations and prosecutions carried out by Public Integrity Section, broken down in such a way as to show the number of each type of criminal conduct or offense that led to prosecutions and convictions.

For the review of the first provisions selected for the Fifth Round that refer to instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities, as set out under Article III, paragraph 3 of the Convention, the United States selected the Designated Agency Ethics Officials (DAEOs) and Alternate Designated Agency Ethics Officials (ADAEOs), as they are the principal executive branch employees responsible for the day-to-day administration of the ethics program at each executive branch agency.

This review was focused on determining, with respect to the selected personnel, if the country under review has adopted provisions and/or measures which ensure the proper understanding of their responsibilities and the ethical rules governing their activities; the manner or occasions in which personnel are provided instructions; the programs in place for them; the bodies responsible for them; as well as the objective results obtained on the implementation of said provisions and/or measures, taking into account any difficulties and/or weaknesses to achieve the purpose of this provision of the Convention. At the same time, it took note of any difficulties and/or shortcomings in accomplishing the object of that provision of the Convention.

The recommendation formulated to the United States, for its consideration, with respect to this topic, are noted as follows:

Consider requiring, through the appropriate legislative or regulatory procedures, that newly appointed DEAOs and ADAEOs to receive mandatory training regarding their functions and responsibilities, in order to ensure that they have the adequate knowledge and expertise to carry out an agency's ethics program.

In accordance with the aforementioned methodology, the review of the second provision selected for the Fifth Round, as set out under Article III, paragraph 12 of the Convention, the Committee concluded that the United States has considered and adopted measures intended to establish objective and transparent criteria for determining the compensation of public servants.

Finally, the best practices about which the United States provided information refer, in synthesis, to the Institute for Ethics in Government (IEG) learning portal, which allows the Office of Government Ethics, through the Institute, to effectively leverage resources by producing live video webcasts accessible to anyone with internet access, especially to the more than 7,000 government employees supporting the ethics functions of over 130 agencies in the executive branch of the U.S. government; and the Whistleblower Protection as Criteria in Performance Appraisals, which promotes a culture in which whistleblowing is seen as valuable and cost-effective for the organization and holds managers accountable for ensuring a positive environment and appropriate response.

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

**FINAL REPORT ON FOLLOW-UP ON IMPLEMENTATION IN THE UNITED STATES OF
THE RECOMMENDATIONS FORMULATED AND PROVISIONS REVIEWED IN THE
SECOND ROUND, AND ON THE PROVISIONS OF THE CONVENTION SELECTED FOR
REVIEW IN THE FIFTH ROUND¹**

INTRODUCTION

1. Content of the Report

[1] As agreed upon by the Committee of Experts (hereinafter “the Committee”) of the Follow-Up Mechanism for Implementation of the Inter-American Convention against Corruption (“MESICIC”) at its Twenty-Fourth Meeting,² this report will first refer to follow up on implementation of the recommendations formulated to the United States in the report from the Second Round,³ and which were deemed by the Committee to require additional attention in the report from the Third Round.⁴

[2] Second, where applicable, it will refer to new developments in the United States with regard to the provisions of the Inter-American Convention against Corruption (hereinafter “the Convention”) selected for the Second Round, and regarding such matters as the legal framework, technological developments and results, and, if applicable, appropriate observations and recommendations will be formulated.

[3] Third, it will address implementation of the provisions of the Convention selected by the Committee for the Fifth Round. Those provisions are contained in paragraphs 3 and 12 of Article III regarding, respectively, measures to establish, maintain, and strengthen “*instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities*”, and “*the study of preventive measures that take into account the relationship between equitable compensation and probity in public service.*”

[4] Fourth, it will refer to the best practices, where applicable, that the United States has wished to voluntarily share regarding implementation of the provisions of the Convention selected for the Second and Fifth Rounds.

2. Ratification of the Convention and adherence to the Mechanism

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

[6] In addition, the United States signed the Declaration on the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on June 4, 2001.

I. SUMMARY OF INFORMATION RECEIVED

¹ This Report was adopted by the Committee in accordance with the provisions of Article 3(g) and 25 of its Rules of Procedure and Other Provisions, at the plenary session held on March 14, 2019, at its Thirty-Second meeting, held at OAS Headquarters, March 11 – 14, 2019.

² See the Minutes of the 24th Meeting of the Committee, available at: http://www.oas.org/juridico/docs/XXIV_min.doc

³ Available at: http://www.oas.org/juridico/english/mesicic_II_inf_usa_en.pdf

⁴ Available at: http://www.oas.org/juridico/english/mesicic3_usa_rep.pdf

1. Response of the United States

[7] The Committee wishes to acknowledge the cooperation that it received throughout the review process from the United States, in particular, from the Bureau of International Narcotics and Law Enforcement Affairs of the United States Department of State, which was evidenced, inter alia, in its Response to the Questionnaire, in the constant willingness to clarify or complete its contents, and in the support for the execution of the on-site visit referred to below. Together with its Response, the United States sent the provisions and documents it considered pertinent.⁵

[8] The Committee also notes that the United States gave its consent for the *on-site visit*, in accordance with provision 5 of the *Methodology for Conducting On-site Visits*.⁶ That visit was conducted from October 16 – 17, 2018, by representatives of Costa Rica and Saint Vincent and the Grenadines, in their capacity as members of the review subgroup, with the support of the MESICIC Technical Secretariat. The information obtained during that visit is included in the appropriate sections of this report, and the agenda of meetings is attached hereto, in keeping with provision 34 of the above-mentioned *Methodology*.

[9] For its review, the Committee took into account the information provided by the United States up to October 17, 2018, as well as that furnished and requested by the Technical Secretariat and the members of the review subgroup, to carry out their functions in keeping with the *Rules of Procedure and Other Provisions*;⁷ the *Methodology for follow-up of implementation of the recommendations formulated and provisions reviewed in the Second Round and for the review of the provisions of the Convention selected for the Fifth Round*;⁸ and the *Methodology for Conducting On-site visits*.

2. Documents and information received from civil society organizations and/or, inter alia, private sector organizations, professional associations, academics, and researchers

[10] The Committee did not receive documents from civil society organizations within the time frame established in the schedule for the Fifth Round, as envisaged by Article 34(b) of the Committee's Rules of Procedure.

[11] Nonetheless, during the course of the on-site visit, information was gathered from civil society and private sector organizations; professional associations; and academics invited to participate in meetings to that end, pursuant to Article 27 of the *Methodology for Conducting On-site Visits*. A list of those persons is included in the agenda for the visit, which is appended hereto. Pertinent parts of this information are reflected in the appropriate sections of this report.

II. FOLLOW UP ON IMPLEMENTATION OF THE RECOMMENDATIONS FORMULATED IN THE SECOND ROUND AND NEW DEVELOPMENTS WITH REGARD TO THE CONVENTION PROVISIONS SELECTED FOR REVIEW IN THAT ROUND

[12] First, the Committee will refer to progress made and new information and developments in the United States with respect to the recommendations formulated and measures for their implementation suggested by the Committee in its report from the Second Round,⁹ which the Committee deemed required additional attention in the Third Round Report,¹⁰ and it will proceed to take note of those that have been satisfactorily considered and of those that need further attention, in which case it will refer to the ongoing

⁵ Available at: <http://www.oas.org/en/sla/dlc/mesicic/paises-rondas.html?c=United%20States&r=5>

⁶ Available at: http://www.oas.org/juridico/english/met_onsite.pdf

⁷ Available at: http://www.oas.org/juridico/PDFs/mesicic4_rules_en.pdf

⁸ Available at: http://www.oas.org/juridico/PDFs/mesicic5_metodologia_en.pdf

⁹ Available at: http://www.oas.org/juridico/english/mesicic_II_inf_usa_en.pdf

¹⁰ Available at: http://www.oas.org/juridico/english/mesicic3_usa_rep.pdf

relevance of those recommendations and measures and to their restatement or reformulation, pursuant to Section V of the *Methodology* adopted by the Committee for the Fifth Round.

[13] In this section, the Committee will, where applicable, take note of any difficulties indicated by the country under review with implementing the recommendations and measures alluded to in the foregoing paragraph and of any technical cooperation requested by the State in that connection.

[14] Second, where applicable, it will refer to new developments in the United States in respect of the provisions of the Convention selected for the Second Round regarding such matters as the legal framework, technological developments and results, and will formulate any observations and recommendations that may be applicable.

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. Follow-Up to the Implementation of the Recommendations Formulated in the Second Round

Recommendation 1.1:

Continue strengthening the systems for the hiring of public servants.

Measure:

Continue to give the appropriate consideration to the development [of] 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.

[15] This measure was satisfactorily considered in the Report of the Third Round for the United States and, therefore, does not require additional attention.

1.1.2. New Developments with Respect to the provisions of the Convention on Systems of Government Hiring

1.1.2.1 New Developments with Respect to the Legal Framework

[16] In its Response to the Questionnaire, the country under review made no reference to any new developments in respect to the legal framework in this area.

1.1.2.2 New Developments with Respect to Technology

[17] In its Response to the Questionnaire, the country under review presented the following technological development:¹¹

[18] "Providing leadership to help U.S. Federal entities recruit and hire top talent from across America, the Office of Personnel Management (OPM) recently initiated a "Hiring Excellence" campaign. A crucial component of the campaign is in-person and virtual sessions nationwide for Federal hiring managers and

¹¹ Response to the Questionnaire for the Fifth Round of Review, pg. 43, http://www.oas.org/en/sla/dlc/mesicic/docs/mesicic5_us_response_annex.pdf.

human resource professionals to foster collaboration and strategic use of recruitment and hiring tools. See: <https://www.opm.gov/policy-dataoversight/hiring-information/hiring-excellence-campaign/>"

1.1.3. Results

[19] The country under review, subsequent to the on-site visit, presented the following information, regarding the number of new hires in the federal competitive service:¹²

FY	New Hires
2017	214,885
2016	242,012
2015	233,784
2014	192,474
2013	173,671

[20] The Committee notes that the information provided is similar to that of the Second Round of Review for the United States.¹³ The Committee believes, however, that the country under review may consider maintaining additional information with respect to new hires in the federal competitive service, such as the number of hiring opportunities or vacancies, the number of competitions carried out in a given year for entry into the federal competitive service, and the number of persons that took part in them. The country under review may also consider maintaining results on the number of challenges or appeals were filed against decisions taken with respect to the selection process, and the outcomes of those appeals, in order to identify challenges and recommend corrective measures, where necessary. (See Recommendations 1.1.3.1 and 1.1.3.2 in Section 1.1.3 of Chapter II of this Report)

1.1.4. Recommendations

[21] In light of the observations formulated in section 1.1.3 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendations:

1.1.3.1 Compile detailed annual statistics on entry into the federal competitive service, such as the number of hiring opportunities or vacancies; the number of competitions carried out; and the number of persons that took part in them, in order to identify challenges and recommend corrective measures, where necessary (See paragraph 20 of Section 1.1.3 of Chapter II of this Report).

1.1.3.2 Compile detailed annual statistics on the number of challenges or appeals filed against decisions taken with respect to the selection process, and the outcomes of those appeals, in order to identify challenges and recommend corrective measures, where necessary (See paragraph 20 of Section 1.1.3 of Chapter II of this Report).

1.2. GOVERNMENT SYSTEMS FOR THE PROCUREMENT OF GOODS AND SERVICES

1.2.1 Follow-Up to the Implementation of the Recommendations Formulated in the Second Round

¹² Results: System of Government Hiring and System for Government Procurement of Goods and Services, <http://www.oas.org/en/sla/dlc/mesicic/paises-rondas.html?c=United%20States&r=5>

¹³ Report of the Second Round of Review for the United States, pg. 10, https://www.oas.org/juridico/english/mesicic_II_inf_usa_en.pdf

Recommendation 1.2:

Continue strengthening the systems for government procurement of goods and services.

Measure 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.

[22] This measure was satisfactorily considered in the Report of the Third Round for the United States and, therefore, does not require additional attention.

Measure 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.

[23] This measure was satisfactorily considered in the Report of the Third Round for the United States and, therefore, does not require additional attention.

1.2.2 New Developments with Respect to the provisions of the Convention on Government Systems for the Procurement of Goods and Services

1.2.2.1 New Developments with Respect to the Legal Framework

[24] In its Response to the Questionnaire, the country under review made no reference to any new developments in respect to the legal framework in this area.

1.2.2.2 New Developments with Respect to Technology

[25] In its Response to the Questionnaire, the country under review presented the following technological development:¹⁴

[26] The Federal Acquisition Institute (FAI) conducts a biannual acquisition workforce competency assessment, the results of which are used to develop appropriate training to address the competency gaps. Results from the 2018 survey are currently being analyzed. The United States publicly reports information on contracts awarded by the federal government. Information is available on over 200 different points of data for each procurement and is provided publicly at no cost. The system can be accessed and searched by visiting [acquisition.gov](https://www.fpds.gov) and selecting Federal Procurement Data System from the acquisition systems tab (<https://www.fpds.gov/fpdsng/cms/index.php/en/>).

1.2.2.3 Results

[27] The country under review, subsequent to the on-site visit, presented the following information, regarding the government system for the procurement of goods and services:¹⁵

[28] “[D]etailed standard reports on a variety of metrics (total spending, spending by category, competition, small business participation, etc.) are available at <https://www.fpds.gov>. Additionally, ad hoc

¹⁴Response to the Questionnaire for the Fifth Round of Review, pg. 44, *supra* note 11.

¹⁵Results: System of Government Hiring and System for Government Procurement of Goods and Services, *supra* note 12.

reports based on the attributes recorded for each contract in FPDS are possible, including the solicitation procedures used. Accessing standard reports and the ad hoc reporting tool requires registering (registration is available to the public and free of charge)."

[29] The Committee notes that the information contained in the Federal Procurement Data System is extensive. However, the Committee further notes, that it can be difficult to navigate, and reports are not easily accessed in the system. A user needs to register first to access the system, and then navigate through the menus to determine the correct values to input.

[30] The Committee notes that in the Report of the Second Round for the United States, the following types of procurement were noted: sealed bidding; competitive proposals also referred to as Negotiated Procurement; commercial items; simplified acquisitions; and exceptions to the use of competitive procedures.¹⁶ The country under review may consider preparing and making easily accessible in the webpage of the Federal Procurement Data System a yearly report, broken down by type the aforementioned procedures, the number and value of the contracts awarded, and the total number of contracts, in order to identify challenges and recommend any applicable corrective measures, where necessary. The Committee will formulate a recommendation. (See sole Recommendation in Section 1.2.3 of Chapter II of this Report)

[31] Moreover, the country under review, provided the following information subsequent to the on-site visit, with respect to results on contractors debarred, suspended or proposed for debarment:¹⁷

[32] *"The Interagency Suspension and Debarment Committee (ISDC) issues reports on Federal Agency Suspension and Debarment Activities, available at <https://www.acquisition.gov/isdc-reporting>. The website reported during the Second Round is no longer operating because the functionalities have been incorporated into the System for Award Management (<https://www.sam.gov>), which provides access to exclusions information through the Data Access tab."*

[33] As noted, the ISDC issues yearly reports on Federal Agency Suspension and Debarment Activities. For example, for the report for fiscal year 2017, agencies reported 604 suspensions, 1613 proposed debarments, and 1423 debarments.¹⁸ Moreover, an Excel file is made available in the website of the System for Award Management, which identifies, among other things, the individual or firm that have been suspended or debarred, as well as the start and termination date of the suspension or debarment, unless it is indefinite.¹⁹

1.2.3 Recommendations

[34] In light of the observations formulated in section 1.2.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendation:

- Prepare and make easily accessible in the webpage of the Federal Procurement Data System a yearly report on the public procurement carried out in a year, broken down by type of procedure, the number and value of the contracts awarded, and the total number of contracts, in order to identify challenges and recommend any applicable corrective measures, where necessary (See paragraph 30 of Section 1.2.2 of Chapter II of this Report).

¹⁶ Report of the Second Round of Review, pgs. 12 – 13, *supra* note 13.

¹⁷ *Ibid.*

¹⁸ FY17 Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities, pg. 2 and Appendix 5,

https://acquisition.gov/sites/default/files/page_file_uploads/Control%20ISDC%20FY%202017%20Report_Final_07_31_2018%20-2.pdf

¹⁹ Extracts and Data Access, <https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf>

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 Follow-Up to the Implementation of the Recommendations Formulated in the Second Round

[35] No recommendations were formulated by the Committee in this Section.

2.2 New Developments with Respect to the Provision of the Convention on Systems for Protecting Public Servants and Private Citizens Who, in Good Faith, Report Acts of Corruption

2.2.1 New Developments with respect to the Legal Framework

a) Scope

[36] The country under review, in its Response to the Questionnaire, presented the following information, regarding new developments with respect to the legal framework in this area:²⁰

[37] – The Whistleblower Protection Enhancement Act (WPEA) of 2012²¹ strengthened whistleblower protections for covered federal workers, by clarifying certain criteria for the protection of disclosures, adding protections for certain employees not previously covered, such as Transportation Security Administration employees; and protecting disclosures by government scientists of scientific censorship, or problems with the scientific process, that would lead to the type of wrongdoing covered under the statute. This Law also provided for additional damages for complainants, such as for emotional pain and suffering, and added a prohibition on written nondisclosure clauses that do not at least notify the employee of their rights to blow the whistle. The WPEA modified the legal burdens the Office of Special Counsel (OSC) must meet to obtain discipline of a subject official who has retaliated against a whistleblower.

[38] – The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017,²² which prohibited access to a whistleblower’s medical records and use it against the whistleblower in furtherance of an act of retaliation. The Act also mandates that agencies, in consultation with their own Offices of Inspectors General and the OSC, provide training to supervisors with regard to responding to whistleblower retaliation complaints, as well as information to employees about their protections, the role of OSC with regard to those protections, and how to make lawful disclosures of classified information. The Act also requires that agencies propose mandatory minimum penalties against supervisors found to have committed retaliation, and requires that where a supervisor is found to have committed a prohibited practice a second time, the agency must propose their removal.

[39] – The OSC Reauthorization Act of 2017,²³ which clarified the OSC’s access to agency documents, including attorney-client communications, specifically communications between agency officials and agency attorneys. To this end, agencies may not withhold information or records from OSC’s requests on the basis of any common law privileges. This Act also adds protections for whistleblowers subject to retaliatory investigations, such that OSC may investigate an agency’s own investigation of a whistleblower, even if there

²⁰ Response to the Questionnaire, pgs. 44 – 45, *supra* note 11.

²¹ Available at <https://www.congress.gov/bill/112th-congress/senate-bill/743>

²² Available at <https://www.congress.gov/bill/115th-congress/senate-bill/585>

²³ This was included in the National Defense Authorization Act for Fiscal Year 2018, available at <https://www.congress.gov/bill/115th-congress/house-bill/2810>

is no resulting personnel action at issue. In the Response to the Questionnaire, the country under review further notes, regarding this Act:²⁴

[40] *“Additionally, it further relaxes requirements with regard to whistleblowers who make disclosures in the normal course of their duties, such that it is more difficult now to preclude such disclosures from protection. The law also ensures protection of disclosures made prior to the whistleblower’s federal employment or application for federal employment. Furthermore, a new provision mandates that agency heads ensure, in consultation with OSC, that supervisors’ job requirements and performance appraisals include criteria concerning how to respond appropriately to whistleblower disclosures, and how to create an environment that makes employees feel secure enough to make disclosures without fear of retribution. The Act also reiterates provisions similar to the Kirkpatrick Act concerning education of federal employees with regard to their whistleblower protections and rights, again in consultation with OSC.*

[41] *Lastly, the Reauthorization Act extends the time from 15 days to 45 days for OSC’s Disclosure Unit to assess disclosures of covered wrongdoing for possible referral to the relevant agency for investigation and report back to OSC.”*

[42] In addition, during the on-site visit, the following pieces of legislation were also cited as new developments:

[43] – The All Circuit Review Act of 2018,²⁵ which allows federal workers to appeal their cases from the Merit Systems Protection Board to any federal court of appeals of competent jurisdiction, regarding a final order or decision of that Board on a claim alleging reprisal for making a protected disclosure (whistleblowing) or for engaging in certain protected activities, for example, refusing to obey an order that requires a violation of law.

[44] – The Whistleblower Protection Coordinators Act,²⁶ which permanently reauthorizes the position of the Whistleblower Protection Coordinator in all federal agencies’ Office of the Inspector General. This Coordinator is responsible for educating federal employees about *“the means by which employees may seek review of any allegation of reprisal, including the roles of the Office of the Inspector General, the Office of Special Counsel, the Merit Systems Protection Board, and any other relevant entities,”* as well as provide *“general information about the timeliness of such cases, the availability of any alternative dispute mechanisms, and avenues for potential relief.”* The Coordinator will also assist the Inspector General in *“promoting the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal,”* and in *“facilitating communication and coordination with the Special Counsel, the Council of the Inspectors General on Integrity and Efficiency, the establishment, Congress, and any other relevant entity regarding the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, rules, and regulations.”* Finally, the Act provides that the Council of the Inspectors General on Integrity and Efficiency is to work with the Coordinators in developing *“best practices for coordination and communication in promoting the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, in accordance with Federal law.”*

[45] The Committee also notes the following new developments:

²⁴ Response to the Questionnaire, *supra* note 11, pg. 45.

²⁵ Available at <https://www.congress.gov/bill/115th-congress/house-bill/2229>

²⁶ Available at <https://www.congress.gov/bill/115th-congress/senate-bill/1869/>

[46] – The Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, which prohibits an FBI employee from taking or failing to take a personnel action²⁷ with respect to an FBI employee or applicant because of a protected disclosure, which is a disclosure of information to an appropriate official which an employee or applicant reasonably believes there is a violation of a law, rule, or regulation; or waste, fraud, or abuse. It also expands the list of appropriate officials who may receive a protected disclosure to include, among others, a supervisor in an employee's direct chain of command.²⁸

[47] – The National Defense Authorization Act (NDAA) for Fiscal Year 2013, under section 828, which introduced a Pilot Program for Enhancement of Contractor Employee Whistleblower Protections to enhance contractor whistleblower protections for employees of contractors, subcontractors, and grantees at certain executive agencies against reprisal.²⁹ This Pilot Program, which became permanent in 2016,³⁰ provides that an employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or discriminated against as a reprisal for disclosing information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract, including the competition for or negotiation of a contract, or grant.³¹ This protection arises when it is disclosed to: a) a Member of Congress or a representative of a committee of Congress; b) an Inspector General; c) the Government Accountability Office; d) a Federal employee responsible for contract or grant oversight or management at the relevant agency; e) an authorized official of the Department of Justice or other law enforcement agency; f) a court or grand jury; or g) a management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

[48] This Law further provides that a person who believes that the person has been subjected to a reprisal may submit a complaint to the Inspector General of the executive agency involved, and the Inspector General is to investigate the complaint and submit a report to the head of agency as well as the person, the contractor or grantee concerned. The head of the agency has 30 days to determine if a reprisal occurred, and either issue an order denying relief, or provide a remedy. The remedies available include an order for the contractor or grantee to take affirmative action to abate the reprisal; order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; and order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

[49] It further provides that if the head of an executive agency issues an order denying a remedy, or has not issued an order within 210 days after the submission of a complaint, a complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available in the appropriate district court of the United States. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

²⁷ A personnel action includes, among other things, an appointment; a disciplinary or corrective action; a detail, transfer, or reassignment; a demotion, suspension, or termination; and any other significant change in duties, responsibilities, or working condition, see Title 5 U.S.C., Chapter 23, Section 2302, available at: <https://www.law.cornell.edu/uscode/text/5/2302>

²⁸ Available at <https://www.congress.gov/114/plaws/publ302/PLAW-114publ302.pdf>

²⁹ Available at <https://www.gpo.gov/fdsys/pkg/PLAW-112publ239/html/PLAW-112publ239.htm>

³⁰ See, <https://www.congress.gov/114/plaws/publ261/PLAW-114publ261.pdf>

³¹ See Title 41 U.S.C, section 4712, <https://www.law.cornell.edu/uscode/text/41/4712>

[50] In addition, any person adversely affected or aggrieved by an order issued by the head of the agency may seek judicial review of that order in the United States court of appeals for a circuit in which the reprisal is alleged to have occurred.

[51] The FISA Amendments Reauthorization Act of 2017, which extended whistleblower protections against adverse personnel action to intelligence community and FBI contractors, subcontractors, grantees, and personal services contractor.³²

[52] With respect to the intelligence community, this includes the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office. An employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of the aforementioned intelligence community, who has authority to take, direct others to take, recommend, or approve any personnel action,³³ may not take a personnel action with respect to any contractor employee as a reprisal for a lawful disclosure of information by the contractor employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence), the Inspector General of the Intelligence Community, the head of the contracting agency (or an employee designated by the head of that agency), the appropriate inspector general of the contracting agency, a congressional intelligence committee, or a member of a congressional intelligence committee, when the contractor employee reasonably believes that there has been a violation of any Federal law, rule, or regulation, including with respect to evidence of another employee or contractor employee accessing or sharing classified information without authorization; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[53] Similarly, with respect to the FBI, an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of the FBI, who has authority to take, direct others to take, recommend, or approve any personnel action,³⁴ may not take a personnel action with respect to any contractor employee as a reprisal for a lawful disclosure of information by the contractor employee to a supervisor in the direct chain of command of the contractor employee; to the Inspector General; to the Office of Professional Responsibility of the Department of Justice; to the Office of Professional Responsibility of the Federal Bureau of Investigation; to the Inspection Division of the Federal Bureau of Investigation; to the Office of Special Counsel; or to an employee designated by any officer, employee, office, or division of the aforementioned entities for receiving these disclosure, when the contractor employee reasonably believes that there has been a violation of any law, rule, or regulation, including with respect to evidence of another employee or contractor employee accessing or sharing classified information without authorization; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[54] The Law also provides that the Attorney General is to prescribe regulations to ensure that a personnel action shall not be taken against a contractor employee of the FBI as a reprisal for the disclosure of information.

[55] – Presidential Policy Directive/PPD-19 of 2012,³⁵ which ensures that employees serving in the Intelligence Community or who are eligible for access to classified information can effectively report waste, fraud, and abuse while protecting classified national security information. It also prohibits retaliation against employees for reporting waste, fraud, and abuse. In this respect, any officer or employee of a Covered

³² Available at: <https://www.congress.gov/115/plaws/publ118/PLAW-115publ118.pdf>

³³ A personnel action includes, among other things, an appointment; a disciplinary or corrective action; a detail, transfer, or reassignment; a demotion, suspension, or termination; and any other significant change in duties, responsibilities, or working condition, see Title 50 U.S.C., Chapter 44, Section 3234, available at: <https://www.law.cornell.edu/uscode/text/50/3234>

³⁴ *Ibid.*

³⁵ Available at: <https://www.dni.gov/ICIG-Whistleblower/resources/PPD-19.pdf>

Agency³⁶ who has authority to take, direct others to take, recommend, or approve any Personnel Action,³⁷ shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a Personnel Action with respect to any employee serving in an Intelligence Community Element as a reprisal for a Protected Disclosure. The head of each Intelligence Community Element is to provide a process for employees to seek review of Personnel Actions they allege to be in violation of the Directive. This review process is to provide for the protection of classified national security information and intelligence sources and methods. In addition, the Inspector General of an agency is to conduct a review to determine whether a Personnel Action violated the Directive and may make recommend that the agency take specific corrective action to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred. The Directive further provides that corrective action may include, but not limited to reinstatement, reassignment, the award of reasonable attorney's fees, other reasonable costs, back pay and related benefits, travel expenses, and compensatory damages. This Directive also creates a similar process to protect employees that have their access to classified information removed, as a reprisal for a Protected Disclosure.

[56] This Directive also provides an external review by a three-member Inspector General panel, known as an External Review Panel, if an employee alleging a reprisal who has exhausted the aforementioned review process. This Panel is to complete a review of the claim within 180 days.

[57] The panel may recommend that the agency head take corrective action and to return the employee, as nearly as practicable and reasonable, to the position such employee would have held had the reprisal not occurred and that the agency head reconsider the employee's eligibility for access to classified information.

[58] An agency head is to carefully consider the recommendation of the External Review Panel and within 90 days, inform the Panel and the Director of National Intelligence of what action has been taken. If the head of any agency fails to inform the Director, the Director is to notify the President of the United States.

b) Observations

[59] First, the Committee would like to acknowledge the new developments in the legal framework of the United States that create, maintain, and strengthen the system for protecting public servants and private citizens who, in good faith, report acts of corruption.

[60] Having said that, the Committee considers it appropriate make certain comments regarding the advisability of strengthening the system in place.

[61] Under the system in place for the country under review, the three-person Merit Systems Protection Board plays an essential role in the system for protecting whistleblowers of acts of corruption. As noted in the report of the Second Round for the United States, this Board is authorized to order agencies to take corrective or disciplinary action, when the Office of Special Counsel (OSC), following an investigation, reports its findings to the Board. For example, the OSC may request this Board to order stays of personnel action for 45 days if the OSC determines that there are reasonable grounds to believe that a prohibited personnel practice,

³⁶ Covered Agency means any agency that has an intelligence community element, meaning that its principal function the conduct of foreign intelligence or counterintelligence activities, including but not limited to the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency, and the National Reconnaissance Office.

³⁷ Personnel Action is defined under this Presidential Policy Directive as an appointment, promotion, detail, transfer, reassignment, demotion, suspension, termination, reinstatement, restoration, reemployment, or performance evaluation; a decision concerning pay, benefits, or awards; a decision concerning education or training if the education or training may reasonably be expected to lead to an appointment, reassignment, promotion, or performance evaluation; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.

such as a reprisal, has taken place.³⁸ Moreover, the OSC may also petition the Board for corrective action for any employee who OSC finds has been subjected to a prohibited personnel practice. The 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. Another piece of legislation signed into law, the Follow the Rules Act of 2017, strengthened protections for federal employees who refuse to follow orders that would violate a law, rule, or regulation.³⁹

[62] Importantly, there are two manners that a whistleblower may appeal directly to the Board, as set out in the Board's FY 2017 Annual Performance Report:⁴⁰

[63] *“There generally are two types of appeals that can involve claims of reprisal under sections 2302(b)(8) and (b)(9). An otherwise appealable action (OAA) appeal involves an adverse action that is directly appealable to the Board, such as a removal, demotion, or suspension of more than 14 days. In such an appeal, MSPB will review both the appealable action and the claim of reprisal for engaging in protected activity as an affirmative defense. In an individual right of action (IRA) appeal, the individual is subject to a personnel action and claims that the action was taken in reprisal for engaging in protected activity, but the personnel action itself is not one that is directly appealable to the Board (e.g., a reassignment with no reduction in pay or grade). In this kind of case, the individual can appeal the claim of reprisal to the Board only if he or she files a complaint with the Office of Special Counsel (OSC) first, and OSC does not seek corrective action on the individual's behalf.”*

[64] The Committee notes, however, that this Board has not been operating with three full members, since March 2015, and without a Chairman since January 2017. Currently, the Vice Chairman has assumed the functions vested in the Chairman, and this lack of quorum prevents the Board from issuing petitions for review, such as the OAA and IRA appeals, as explained in the previous paragraph.⁴¹ During this time, the Board continues to receive and review these appeals, and the Acting Chairman has drafted proposed decisions in these cases, which await for the arrival of the new Board members.⁴²

[65] The Committee observes that this lack of quorum significantly curtails an important avenue for whistleblower protection for federal employees. For the 2017 fiscal year, the Board received 72 OAA petitions, and 147 IRA petitions, that sit unresolved.⁴³ These petitions represent 218 instances that a

³⁸ Five of the fourteen statutory prohibited personnel practices over which OSC has jurisdiction set out that employees shall not take, or influence others to take, personnel actions that: a) coerce political activity or take action in reprisal for refusal to engage in political activity; b) are in retaliation or reprisal for whistleblowing the lawful disclosure of violation of law, rule, regulation, gross mismanagement or waste of funds, abuse of authority, or danger to public health or safety; c) are in retaliation or reprisal for an employee's exercise of his or her rights and legal protections; d) implement or enforce a nondisclosure policy, form, or agreement, which does not include a specific statement that its provisions are consistent with and do not supersede applicable statutory whistleblower protections; or e) access a medical record as a part of, or otherwise in furtherance of, any conduct described above, Title 5 U.S.C., Section 2302(b), <https://www.law.cornell.edu/uscode/text/5/2302>. See also U.S. Merit Systems Protection Board: Strategic Plan for FY 2018 – 2022, pg. 6, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1488552&version=1494133&application=ACROBAT>
³⁹ <https://www.congress.gov/bill/115th-congress/house-bill/657>

⁴⁰ US Merit Systems Protection Board, FY 2017 Annual Performance Report (APR) and Annual Performance Plan (APP) for FY 2018 (Final) and FY 2019 (Proposed), pg. 53, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1488551&version=1494132&application=ACROBAT>

⁴¹ See U.S. Merit Systems Protection Board: Frequently Asked Questions about the Lack of Board Quorum, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1520581&version=1526211&application=ACROBAT>. In this document, it is noted that Board members are nominated by the President and confirmed by the Senate. The Chairman is separately nominated by the President and confirmed by the Senate, while the Vice Chairman is designated by the President. The Board currently consists of Mark A. Robbins whom President Donald Trump designated as Vice Chairman on January 23, 2017, and that the Board has operated without a Chairman since January 7, 2017, while the third Board member position has been vacant since March 2015.

⁴² *Ibid.*, pgs. 1 and 57.

⁴³ *Ibid.*, pg. 58.

whistleblower may be adversely affected, without a resolution in sight, and these petitions will represent a massive backlog once the Board does have quorum.

[66] Moreover, since the Board does not have a quorum, it also cannot promulgate new regulations in response to Congressional changes in its jurisdiction or processes, as noted in its FY 2017 Annual Report:

[67] *“In 2017, Congress enacted the Department of Veterans’ Affairs Accountability and Whistleblower Protection Act of 2017, amended the WPEA by the “Follow the Rules Act,” and authorized that when MSPB lacks a quorum, a single Board member can extend Office of Special Counsel (OSC) stay requests. Because the Board lacks a quorum, it has not been able to promulgate necessary regulations to implement these new authorities.”*

[68] Given the foregoing, the Committee believes that the country under review should consider appointing, the other two members of the Merit Systems Protection Board as soon as possible. The Committee will formulate a recommendation. (See Recommendation 2.3.1 in in Section 2.3 of Chapter II of this Report)

[69] In this respect, the issue of lack of quorum of this Board was also raised during the meeting with the representatives of civil society during the on-site visit.

[70] The Committee also notes that the system for protecting federal employees of the intelligence community did not come into place through legislation, but rather under a Presidential Directive, as these employees are excluded from the jurisdiction of the Whistleblower Protection Act. Presidential Directives remain effective and do not automatically lapse upon a change of administration, unless otherwise specified. As such, they remain in effect until subsequent presidential action is taken.⁴⁴

[71] The Committee further notes that the only law in place that provides whistleblower protection for federal employees of the intelligence community that report acts of corruption, are virtually identical as to that of contractor employee of the intelligence community, namely, no employee may take or fail to take a personnel action with respect to any employee of a covered intelligence community element as a reprisal for a lawful disclosure of information by the contractor employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence), the Inspector General of the Intelligence Community, the head of the employing agency (or an employee designated by the head of that agency), the appropriate inspector general of the employing agency, a congressional intelligence committee, or a member of a congressional intelligence committee, when the employee reasonably believes that there has been a violation of any Federal law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.⁴⁵ Moreover, the Committee could not find regulations in the Code of Federal Regulations (CFR) that would complement the provisions found in the law.

[72] Given the foregoing, the country under review should consider adopting legislation that establishes a mechanism for protecting federal employees of the intelligence community who report acts of corruption that takes into account the interests of the government in protecting classified information with the rights of intelligence employees to report suspected abuses without facing retaliation. This legislation should include elements, such as: a body that can receive and investigate protected disclosures; remedies or corrective actions for successfully challenging a reprisal action, such as the ones set out in the aforementioned Presidential Directive; the opportunity for judicial review of an order to deny a claim; as well as providing temporary relief against retaliation, such as a request to stay a personnel action allegedly based on whistleblowing, which are similarly received by the Merit Systems Protection Board. In this respect, the

⁴⁴ See Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order,

<https://www.justice.gov/olc/opinion/legal-effectiveness-presidential-directive-compared-executive-order>

⁴⁵ See Title 50 U.S.C., Chapter 44, Section 3234, available at: <https://www.law.cornell.edu/uscode/text/50/3234>

Committee notes that to non-intelligence community contractors have stronger whistleblower protection than those provided to federal employees of the intelligence community. The Committee will formulate a recommendation. (See Recommendation 2.3.2 in in Section 2.3 of Chapter II of this Report)

[73] In addition, the Committee notes that the whistleblower protection provided to contractor employees of the intelligence community are limited to the one provided in the FISA Amendments Reauthorization Act of 2017. In this regard, it only provides that reprisal actions cannot be taken against these contractors for reporting an act of corruption. The Committee also notes that Presidential Policy Directive/PPD-19 of 2012 does not apply to contractors. As a result, there is no whistleblower protection mechanism in place to provide these contractors protection for reporting an act of corruption. As such, the law in place does not provide a body that can receive and investigate protected disclosures; provide access to remedies or corrective actions for a reprisal action; or provide the opportunity for judicial review of an intelligence agency decision. Additionally, there is no authorization in the law that allows for back pay, lost wages, compensatory damages, or reinstatement for the whistleblower. Given the foregoing, the country under review may wish to consider enacting legislation that would provide these contractors similar protections as those afforded to other contractors in the federal government, that takes into account the interests of the government in protecting classified information with the rights of intelligence contractor employees to report suspected abuses without facing retaliation. The Committee will formulate a recommendation. (See Recommendation 2.3.3 in in Section 2.3 of Chapter II of this Report)

[74] The Committee further observes that the whistleblower protection afforded to the employees of the FBI are narrower in scope, in comparison to the ones afforded to federal employees subject to the Whistleblower Protection Act. The Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, expanded the list of appropriate officials who may receive a protected disclosure to include, among others, a supervisor in an employee's direct chain of command. However, the list of prohibited personnel actions⁴⁶ with respect to an FBI employee or applicant, does not include the implementation or enforcement of any nondisclosure policy, form, or agreement; or significant change in duties, responsibilities, or working conditions, which are provided to executive branch employees subject to the Whistleblower Protection Act. The Committee believes that the country under review should consider expanding the list prohibited personnel actions for employees and applicants to the FBI. The Committee will formulate a recommendation. (See Recommendation 2.3.4 in in Section 2.3 of Chapter II of this Report)

[75] The Committee further notes that an FBI employee may report a reprisal complaint to either the Inspector General or the Office of Professional Responsibility of the Department of Justice.⁴⁷ If either of these bodies decides to terminate an investigation, a complainant may file a request for corrective action with the Office of Attorney Recruitment and Management of the Department of Justice within 60 days of receipt of notification of termination of an investigation by the conducting office, or at any time beyond 120 days after filing a complaint with the either the Inspector General or the Office of Professional Responsibility (OARM), if that office has not notified the complainant that it will seek corrective action.⁴⁸ Within 30 days of a final determination or corrective action order by OARM, either party may request review by the Deputy Attorney General, who may set aside or modify OARM's actions, findings, or conclusions. If the Deputy Attorney General upholds a finding that there has been a reprisal, then an appropriate corrective action must be ordered by the Deputy Attorney General.⁴⁹ The Committee notes that the entire investigation and adjudication process

⁴⁶ A personnel action includes, among other things, an appointment; a disciplinary or corrective action; a detail, transfer, or reassignment; and a demotion, suspension, or termination; see Title 5 U.S.C., Chapter 23, Section 2303(2)(B), available at: <https://www.law.cornell.edu/uscode/text/5/2303>

⁴⁷ See 28 CFR 27.3 - Investigations: The Department of Justice's Office of Professional Responsibility and Office of the Inspector General, <https://www.law.cornell.edu/cfr/text/28/27.3>

⁴⁸ Corrective Action may include: placing the complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

⁴⁹ See 28 CFR 27.5 – Review, <https://www.law.cornell.edu/cfr/text/28/27.5>

occurs entirely within the Department of Justice, with no opportunity for independent judicial review, as in the case for those subject to the Whistleblower Protection Act. The Committee believes that the country under review should consider enacting legislation that allows for judicial review of whistleblower cases in the FBI, which could assist, for example, in providing case law or jurisprudence so that future potential whistleblowers will be informed of the best manner to present a strong whistleblower complaint. The Committee will formulate a recommendation. (See Recommendation 2.3.5 in in Section 2.3 of Chapter II of this Report)

[76] The Committee also notes, that as in the case with contractors of the intelligence community, there appears to be no mechanisms in place to protect contractors in the FBI, other than the prohibition on taking reprisal actions for reporting an act of corruption. The Committee observes that the country under review should consider adopting legislation that provides further protection for these contractors, much like the protections afforded to contractors working in federal agencies. The Committee will formulate a recommendation. (See Recommendation 2.3.6 in in Section 2.3 of Chapter II of this Report)

[77] The Committee notes that during the on-site visit, the civil society representatives referred to the lack of protections afforded to intelligence community federal whistleblowers, as well as that of the FBI, referring to them as some of the weakest whistleblower protections in place, and that intelligence community contractor employees have virtually no protections.⁵⁰

[78] Finally, the Committee notes that under the Whistleblower Protection Coordinators Act, the Council of the Inspectors General on Integrity and Efficiency is to work with the Whistleblower Protection Coordinators throughout the federal agencies, in developing “*best practices for coordination and communication in promoting the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, in accordance with Federal law.*” To this end, the Committee believes that the country under review should consider publicizing and disseminating these best practices as soon as they are developed, which can serve as guidelines for other areas of the executive branch, in particular for those that do not have a robust system in place, such as the intelligence community and the FBI, to strengthen their whistleblower protection mechanisms. The Committee will formulate a recommendation. (See Recommendation 2.3.7 in in Section 2.3 of Chapter II of this Report)

2.2.2 New Developments with Respect to Technology

[79] The country under review, in its Response to the Questionnaire, presented the following information, regarding new developments with respect to technology in this area:⁵¹

[80] “*OSC has made important technological improvements. The agency has upgraded its computer systems and provided faster laptops assigned to attorneys and investigators. It has also implemented a new phone system, including the Skype for Business application, which makes it easier for attorneys and investigators to conduct clear conference calls, as well as interview witnesses and subject officials through videoconference where would not be feasible to travel to the pertinent site. OSC plans to update its filing forms to a dynamic, fillable form to ease the filing of multiple claims, and is exploring upgrades to its case management systems. OSC will be prioritizing needed improvements to its information security program. A Committee on IT was established in 2017 to help receive end user guidance in terms of program needs and requirements, as well as to provide feedback to the IT team.*”

2.2.3 Results

⁵⁰ See also the document received subsequent to the on-site visit from the civil society organization, Public Citizen, Federal Whistleblower Protections OAS Meeting,

http://www.oas.org/en/sla/dlc/mesicic/docs/mesicic5_us_publiccitizenfederalwhistleblower_annex3.pdf

⁵¹ Response to the Questionnaire, pg. 46, *supra* note 11.

[81] The country under review, in its Response to the Questionnaire, presented the following information:⁵²

[82] *“Over FY 2016-17, OSC obtained favorable results in 451 whistleblower retaliation actions, which is also triple the rate of an average two-year span. Further, OSC achieved a record 47 systemic corrective actions in FY 2017, which will result in significant policy changes or larger training efforts aimed at proactively preventing future violations at all of the agencies involved.*

[83] *OSC also achieved great success in correcting government wrongdoing, with agencies substantiating more than 75 percent of whistleblower disclosures referred by OSC in FY 2017. This resulted in improved public safety, the prevention of fraud and abuse, and recouping significant funds to the U.S. Treasury. In particular, OSC’s work with whistleblowers to identify quality of care issues and improper scheduling practices at VA health facilities is helping our government fulfill its solemn commitment to veterans. OSC also represents service members and reservists securing reemployment upon return to civilian life, achieving significant favorable results under USERRA. Equally important, OSC dramatically increased its training of the federal community to prevent problems from occurring in the first place. OSC conducted 148 outreach events at federal agencies during FY 2017, and also certified 43 agencies under its Section 2302(c) Certification Program, which requires agencies to take specific steps to inform their managers and employees about whistleblower protections and PPPs.*

[84] *OSC’s current training and outreach programs also emphasize the important role that federal employees can play in reporting government waste, fraud, and abuse. If there are developments in the federal employee whistleblower laws, OSC will consider appropriate changes to its 2302(c) Certification Program. Finally, while OSC’s training and outreach programs offer in-depth and interactive exercises to agencies, OSC looks forward to receiving ongoing feedback from stakeholders to evaluate and improve these efforts. (OSC Performance and Accountability Report FY 2017).”*

[85] The Committee also notes that in the OSC Annual Report to Congress for Fiscal Year 2017, the following information is provided for the fiscal years 2013 to 2017, regarding all favorable actions obtained in connection with the OSC’s processing of whistleblower reprisal complaints:⁵³

Summary of All Favorable Actions - Prohibited Personnel Practice Complaints						
		FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Favorable actions obtained (reprisal for whistleblowing)	# of actions	104	138	233	218	241
	# of matters	91	112	175	174	207

[86] Moreover, the following is provided in this same Report, setting out comparative data on the receipt and disposition of whistleblower disclosure cases:⁵⁴

⁵² *Ibid.*

⁵³ OSC Annual Report to Congress for Fiscal Year 2017, pg. 18, <https://osc.gov/Resources/FY%202017%20Annual%20Report.pdf>

⁵⁴ *Ibid.*, pg. 31.

SUMMARY OF WHISTLEBLOWER DISCLOSURE ACTIVITY – RECEIPTS AND DISPOSITIONS		FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Pending disclosures carried over from prior fiscal year		225	193	433	449	498
New disclosures received		1129	1554	1965	1717	1780
Total disclosures		1354	1747	2398	2166	2278
Disclosures referred to agency heads for investigation and report		51	92	62	40	59
Referrals to agency Inspector Generals		2	0	0	0	1
Agency head reports sent to President and Congress		54	26	72	78	66
Results of agency investigations and reports	Disclosures substantiated in whole or in part	49	25	63	61	50
	Disclosures unsubstantiated	5	1	9	17	15
Disclosure processing times	Within 15 days	575	731	830	654	733
	Over 15 days	585	584	1117	1015	1060
Percentage of disclosures processed within 15 days		49%	55%	42%	39%	40%
Disclosures processed and closed		1160	1315	1947	1669	1793

[87] The tables highlight the overall increase in favorable actions and matters with respect to reprisals for whistleblowing, as well as the increase in whistleblower disclosures. During the on-site visit, the representatives of the OSC noted that there had been a 25% increase in complaints since the passage of the Whistleblower Protection Enhancement Act of 2012.

[88] Regarding the resources at hand to undertake the increase in whistleblower reprisal complaints, the Committee notes that in the Report of the Fourth Round for the United States, a recommendation was made to ensure that the Disclosure Unit of the Office of the Special Counsel, which is responsible for receiving and reviewing disclosures of wrongdoing from Federal whistleblowers, is provided with sufficient human and financial resources in order for it to fully execute its legally assigned responsibilities, within available resources.⁵⁵ The Committee notes that adequate resources for the Office of Special Counsel, continues to be an issue. During the on-site visit, the representatives of the OSC noted that increased resources are needed, in terms of staff and budget. Reference to resources was also made in the Response to the Questionnaire,⁵⁶ as well as in the OSC Performance and Accountability Report for 2017, where the following is noted regarding Management Challenges:⁵⁷

[89] *“OSC is experiencing sustained demand for its services. In FY 2017, OSC again received nearly 6,000 new matters. To put this in perspective, case volumes OSC has seen in the past three years are 50 percent higher than the levels just five years prior, and double the cases levels of a decade ago. This surging demand demonstrates the rising confidence federal employees have in our agency to deliver favorable results. While*

⁵⁵ Report of the Fourth Round for the United States, pgs. 13 – 15, 17, https://www.oas.org/en/sla/dlc/mesicic/docs/mesicic4_usa_en_final.pdf

⁵⁶ See Response to the Questionnaire, pg. 41, *supra* note 11, where the following is noted: *“OSC is an effective investment of taxpayer’s money, returning substantial sums to the federal government by pressing for corrective actions to remedy waste and fraud. By providing a safe channel for whistleblowers and their disclosures, OSC can prevent wasteful practices and disasters from ever occurring. Over the last few years, the agency has handled record numbers of disclosures from federal whistleblowers. OSC received nearly 3,500 whistleblower disclosures in FY 2016 and FY 2017 combined. In FY 2017, specifically, OSC sent 66 whistleblower disclosure reports to the President and Congress. In 50 of those cases, agencies substantiated wrongdoing referred by OSC. Continued increases in whistleblower disclosures will require OSC to balance its allocation of resources to achieve its strategic goals in all areas.*

⁵⁷ OSC Performance and Accountability Report for 2017, pg. 31, <https://osc.gov/Resources/Fiscal%20Year%202017%20Performance%20and%20Accountability%20Report.pdf>

OSC receives cases from across the federal government, the primary driver for our high caseload continues to be VA [Veteran Affairs] cases focused on improving quality care for veterans and assisting doctors and other health care providers facing retaliation.

[90] As in years past, the primary challenge OSC faces is successfully processing the high volume of cases while judiciously using agency resources. In some sense, OSC is a victim of its own success: as the agency's reputation for delivering results grows, so too does its caseload. While Congress has modestly increased OSC's appropriation, the demand for our services continues to outpace the growth in our resources. Receiving up to 6,000 new cases per year has become the agency's new normal, and OSC is struggling to keep pace with demand. Despite reaching record efficiencies, OSC is now facing its largest case backlog ever. We are at the limit in our capacity, and need resources commensurate with the growing demand in order to prevent the backlog of cases from increasing substantially in coming years.

[91] In FY 2017, OSC's case backlog reached a new record level of nearly 2,600 cases. Whistleblower disclosures in particular have increased significantly, with OSC receiving 1,780 in FY 2017, the second highest level in agency history. OSC recognizes that as our case backlog continues to rise, it may further increase case processing times and in turn discourage whistleblowers and complainants from coming forward. We believe the taxpayer will lose if government inefficiencies go unchecked because federal workers stop coming to OSC with their disclosures."

[92] Given the foregoing, the Committee believes that the country under review should consider ensuring that the Office of Special Counsel, is provided with sufficient human and financial resources in order for the OSC to fully execute its legally assigned responsibilities, within available resources, with respect to receiving and reviewing disclosures of wrongdoing from Federal whistleblowers. This should also include other areas that handle allegations of whistleblower disclosures and retaliations.⁵⁸ The Committee will formulate a recommendation. (See Recommendation 2.3.8 in in Section 2.3 of Chapter II of this Report)

2.3 Recommendations

[93] In light of the observations formulated in section 2.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendations:

2.3.1 Appoint, as soon as possible, the remaining two members of the Merit Systems Protection Board, so that it can exercise its adjudicatory authorities (See paragraph 68 of Section 2.2 of Chapter II of this Report).

2.3.2 Consider enacting legislation that protects federal employees of the intelligence community from reprisals for reporting acts of corruption, which takes into account the interests of the government in protecting classified information with the rights of intelligence employees to report suspected abuses without facing retaliation. This legislation should include elements, such as: a body that can receive and investigate protected disclosures; provide remedies or corrective actions for successfully challenging a reprisal action; the opportunity for judicial review of an order to deny a reprisal claim; as well as providing temporary relief against retaliation, such as a request to stay a personnel action allegedly based on whistleblowing (See paragraph 72 of Section 2.2 of Chapter II of this Report).

⁵⁸The OSC also has a Retaliation and Disclosure Unit that is responsible for handling hybrid cases in which a single complainant alleges both a whistleblower disclosure and retaliation, including referring these whistleblower disclosures to agencies and the investigation and prosecution of related retaliation claims, where appropriate. See OSC Annual Report to Congress for Fiscal Year 2017, pgs. 10 – 11, *supra* note 53.

- 2.3.3 Consider enacting legislation that would provide contractors of the intelligence community similar whistleblower reprisal protections as those afforded to other contractors in the federal government under the National Defense Authorization Act for Fiscal Year 2013, while taking into account the interests of the government in protecting classified information with the rights of intelligence contractor employees to report suspected abuses without facing retaliation (See paragraph 73 of Section 2.2 of Chapter II of this Report).
- 2.3.4 Consider enacting legislation that expands the list of prohibited personnel actions to protect employees and applicants to the Federal Bureau of Investigation, so that it includes the implementation or enforcement of any nondisclosure policy, form, or agreement; or significant change in duties, responsibilities, or working conditions (See paragraph 74 of Section 2.2 of Chapter II of this Report).
- 2.3.5 Consider enacting legislation that allows for judicial review of reprisal whistleblower cases for the employees and applicants of the Federal Bureau of Investigation (See paragraph 75 of Section 2.2 of Chapter II of this Report).
- 2.3.6 Consider enacting legislation that would provide contractors of the Federal Bureau of Investigation similar whistleblower reprisal protections as those afforded to other contractors in the federal government under the National Defense Authorization Act for Fiscal Year 2013 (See paragraph 76 of Section 2.2 of Chapter II of this Report).
- 2.3.7 Publicize and disseminate the best practices developed by the Council of the Inspectors General on Integrity and Efficiency with respect to whistleblower protection (See paragraph 78 of Section 2.2 of Chapter II of this Report).
- 2.3.8 Ensure that the Office of Special Counsel, is provided with sufficient human and financial resources in order for it to fully execute its legally assigned responsibilities with respect to receiving and reviewing disclosures of wrongdoing from Federal whistleblowers, within available resources (See paragraph 92 of Section 2.2 of Chapter II of this Report).

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

3.1. Follow-up on implementation of the recommendations made at the Second Round

[94] No recommendations were formulated by the Committee in this Section.

3.2. New developments in respect of the Convention provision on Acts of Corruption

3.2.1. New developments in the legal framework

[95] The country under review, in its Response to the Questionnaire, noted that it had not adopted any new legal provisions or measures related to the criminalization of the acts of corruption provided for in Article VI(1) of the Convention.⁵⁹ The country under review did observe, however, that the United States Supreme

⁵⁹ Response to the Questionnaire, pg. 47, *supra* note 11.

Court, which has ultimate authority for interpreting all of the laws of the United States, has issued two decisions directly impacting relevant corruption provisions, as follows:⁶⁰

[96] *“In Skilling v. United States, 561 U.S. 352 (2010), the Supreme Court held that for purposes of honest services mail and wire fraud, codified in 18 U.S.C. § 1346, the government must prove that a public official, or private party serving as a fiduciary, was offered or received, solicited, or agreed to receive a bribe or kickback. The defendant, Skilling, while serving as the Chief Executive Officer of Enron had misrepresented the company’s financial health to increase his personal profit. The Court held that cases of undisclosed self-dealing and conflicts of interest do not fall within the definition of honest services fraud in 18 U.S.C. § 1346. Specifically, the corrupting influence cannot be the fraudulent individual’s own financial interests but rather must be a thing of value supplied by a third party seeking favorable action. The Court reasoned that this narrow construction of the statute ensured that it was not unconstitutionally vague.*

[97] *In McDonnell v. United States, 579 U.S. , 136 S. Ct. 2355 (2016), the Supreme Court narrowed the definition of “official act” found in the bribery statute 18 U.S.C. § 201(a)(3). The defendant Robert McDonnell, the former governor of the State of Virginia, had accepted loans, gifts, and other things of value from a businessman who sought McDonnell’s assistance in commissioning research studies on a tobacco-based nutritional supplement being developed by his company. McDonnell arranged meetings, hosted an event, and contacted other government officials regarding the studies. The Court established two requirements for the definition of the term “official act.” First, there must be a question, matter, cause, suit, proceeding, or controversy which is specific, focused, and pending and involves a formal exercise of government power. And second, the official must make a decision or take action on that question. The Court held that setting up a meeting, talking to another official, organizing an event, or merely expressing support do not, without more, constitute official acts. The bribed official can take official action by exerting pressure on another official or by advising another official, knowing or intending that such advice will form the basis for an official act by another official. The Supreme Court concluded that this narrowed definition of “official act” was necessary to ensure that 18 U.S.C. § 201 and related bribery provisions were not unconstitutionally vague and did not chill protected political activity.”*

3.2.2. New developments with respect to technology

[98] The country under review made no mention of new developments with respect to technology in this area.

3.2.3. Results

[99] In its Response to the Questionnaire, the country under review noted the following regarding acts of corruption:⁶¹

[100] *“As previously provided in the Second Round Report, “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*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, pg. 48.

operations and activities of the Public Integrity Section. 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 Public Integrity Section and the United States Attorney's Offices across the country drawn from the Public Integrity Section's 2013 through 2016 annual reports."

[101] The country under review also provided the following table in its Response to the Questionnaire, containing updated information provided during the on-site visit for 2017, breaking down the number of individuals indicted or charged, and convicted for corruption offenses, as well as number of defendants waiting trial, by federal officials, state officials, local officials, and other individuals, being private citizens involved in corruption offenses.⁶²

Defendants Charged

	Federal Officials	State Officials	Local Officials	Other Individuals	TOTAL
2013	337	133	334	330	1,134
2014	364	80	231	241	916
2015	458	123	259	262	1,102
2016	354	139	234	255	982
2017	383	63	223	194	863

Defendants Convicted

	Federal Officials	State Officials	Local Officials	Other Individuals	TOTAL
2013	315	119	303	300	1,037
2014	364	109	252	264	989
2015	402	97	200	205	904
2016	326	125	213	222	886
2017	334	68	208	227	837

Defendants Awaiting Trial

	Federal Officials	State Officials	Local Officials	Other Individuals	TOTAL
2013	113	68	149	169	499
2014	111	33	100	106	350
2015	153	66	135	150	504
2016	170	74	148	177	569
2017	169	53	150	149	521

[102] The Committee takes note of the statistical data compiled presented by the country under review, similar to what was presented in the Report of the Second Round for the United States.⁶³ The Committee does note, however, that in the Report of the Fourth Round for the United States, the Public Integrity Section of the United States Department of Justice was reviewed as an oversight body. To that end, the following observation was made, with respect to the results provided at that time, which were similar to the ones provided for this review.⁶⁴

⁶² *Ibid.*, pgs. 48 – 49. See also Report to Congress on the Activities and Operations of the Public Integrity Section for 2017, pgs. 23 – 25, <https://www.justice.gov/criminal/file/1096306/download>

⁶³ See Report of the Second Round, pgs. 40 – 42, *supra* note 13.

⁶⁴ See Report of the Fourth Round, pg. 35, *supra* note 55.

[103] “With respect to the above statistics on nation-wide prosecutions provided during the on-site visit and contained in the PIN Annual Reports, the Committee notes that during the on-site visit, information was requested regarding the specific offenses that led to the prosecutions and convictions indicated above, in order to analyze the result of prosecutions of specific acts of corruption. In this regard, PIN representatives informed that the various US Attorneys Offices and PIN use different databases to track cases. Similarly, subsequent to the on-site visit, PIN representatives also explained that the database used by PIN to track ongoing criminal cases does not allow for an easy search by type of offense.”

[104] As a result of that observation, it was recommended that the Public Integrity Section (PIN) maintain statistics on the results of investigations and prosecutions carried out by that entity, broken down in such a way as to show the number of each type of criminal conduct or offense that led to prosecutions and convictions, in order to identify challenges and recommend corrective action. The Committee reiterates this recommendation. (See sole Recommendation in Section 3.3 of Chapter II of this Report)

3.3. Recommendations

[105] In light of the observations formulated in section 3.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendation:

- Maintain statistics on the results of investigations and prosecutions carried out by Public Integrity Section, broken down in such a way as to show the number of each type of criminal conduct or offense that led to prosecutions and convictions, in order to identify challenges and recommend corrective action (See paragraph 104 of Section 3.2 of Chapter II of this Report)

4. GENERAL RECOMMENDATIONS

Recommendation 4.1 suggested by the Committee that requires additional attention within the Framework of the Third Round:

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.

[106] In its Response to the Questionnaire,⁶⁵ with respect to the systems for protecting public servants and private citizens who, in good faith, report acts of corruption, the country under review notes, among other things, the favorable results that the Office of Special Counsel has obtained in 451 whistleblower retaliation actions, for the FY 2016-17, which is also triple the rate of an average two-year span, as well as recording 47 systemic corrective actions in FY 2017, which the country under review believes will result in significant policy changes or larger training efforts aimed at proactively preventing future violations at all of the agencies involved.

[107] It further observes that the OSC has achieved great success in correcting government wrongdoing, with agencies substantiating more than 75 percent of whistleblower disclosures referred by OSC in FY 2017, which resulted in improved public safety, the prevention of fraud and abuse, and recouping significant funds to the U.S. Treasury. It also highlights the OSC’s work with whistleblowers to identify quality of care issues and improper scheduling practices at the health facilities of Veteran Affairs and conducted 148 outreach events at federal agencies during FY 2017, and certified 43 agencies under its Section 2302(c) Certification Program, which requires agencies to take specific steps to inform their managers and employees about whistleblower protections and Prohibited Personnel Practices.

⁶⁵ Response to the Questionnaire, pgs. 36 – 41, *supra* note 11.

[108] With respect to current training and outreach programs, the country under review notes that the OSC's emphasizes the important role that federal employees can play in reporting government waste, fraud, and abuse. This training is offered to federal agencies and non-Federal organizations in the various areas within OSC's jurisdiction, as well as a certification program for agencies, which includes, among other things, prohibited personnel practices, including reprisal for whistleblowing, and whistleblower disclosures filed with OSC's Disclosure Unit.

[109] Additional actions taken by the OSC include hosting a Whistleblower Retaliation Roundtable attended by the Departments of Labor, Equal Opportunity Employment Commission (EEOC), and several agency Offices of Inspectors General (OIGs), where attendees discussed how to better balance protecting whistleblowers with ensuring government accountability, ways to evaluate allegations of retaliatory investigations by agencies, and methods for ombudsmen at agencies to enhance coordination efforts for systemic improvements to the federal workplace. The country under review also notes that the OSC continues to receive historically high numbers of new disclosures, continuing its commitment to providing a safe, confidential channel for federal employees to report evidence of fraud, waste, abuse, or threats to public safety. The OSC is also in the process of developing a new electronic filing form that is designed to improve convenience and enhance the whistleblower reporting experience.

[110] The OSC has boosted efforts to increase education and outreach to the federal community with the goal of preventing and deterring violations of civil service laws in the first instance. Most significantly, OSC recently reinvigorated a Certification Program, which agencies may use to provide statutorily-mandated training on whistleblower rights and remedies to their employees.

[111] Finally, the country under review also notes that work of the OSC to modernize the laws it enforces, allowing OSC to be more effective in its role as a watchdog and guardian of employee rights, citing for example the Whistleblower Protection Enhancement Act of 2012, which overturned several legal precedents that had narrowed protections for federal whistleblowers, provided whistleblower protections to employees who were not previously covered, and restored OSC's ability to seek disciplinary actions against agency officials who retaliate against whistleblowers. Furthermore, recent legislation enacted in 2017 requires agency heads to educate their employees, in consultation with OSC, about their whistleblower rights and protections, and requires agencies to include whistleblower protection as a component in supervisors' job requirements and performance appraisals.

[112] Given the foregoing, and that in sections 1, 2 and 3 of Chapter II of this Report provides an updated and detailed follow-up of the recommendations formulated to the United States in the Second Round of Review, as well as the systems, standards, measures and mechanisms that the suggested recommendations concern, the Committee believes that this recommendation is redundant.

Recommendation 4.2 suggested by the Committee that requires additional attention within the Framework of the Third Round:

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.

[113] In its Response to the Questionnaire,⁶⁶ with respect to the systems for protecting public servants and private citizens who, in good faith, report acts of corruption, the country under review notes that the OSC has developed a new Strategic Plan, which became effective in FY 2017, that identified three overarching strategic goals: (1) protect and promote the integrity and fairness of the federal workplace; (2) ensure government accountability; and (3) achieve organizational excellence. In Fiscal Year 2017, OSC

⁶⁶Response to the Questionnaire, pgs. 36 – 41, *supra* note 11.

successfully met or partially met 77 percent of its goals. Given that the OSC has continued to see high levels of new cases in FY 2017, the OSC considers the 2017 percentage to be successful performance in the face of difficult resource allocation decisions to achieve the goals.

[114] The country under review also notes that the OSC recognizes that systemic improvements to the federal workplace may be achieved by collaboration with other federal agencies. Toward that end, in Fiscal Year 2017, OSC engaged in 10 inter-agency efforts involving systemic improvements to the federal workplace.

[115] Furthermore, the country under review makes reference to the list of certified and registered agencies maintained by the OSC. The law requiring certification has been strengthened, and deadlines modified. In addition, reference is made to the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and the OSC Reauthorization Act of 2017. These statutes reemphasize the importance of the OSC's Certification Program to agencies' obligations to meet the new statutory requirements. OSC's Diversity, Outreach, and Training Unit facilitates coordination with and assistance to agencies in meeting the statutory mandate of 5 U.S.C., section 2302(c), which requires that agencies inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act. To that end, OSC administers the Section 2302(c) Certification Program, and provides related training and outreach government-wide, and that unit also helps develop and implement diversity and training programs for OSC's internal staff, in order to meet compliance requirements.

[116] Given the foregoing, and that in sections 1, 2 and 3 of Chapter II of this Report provides an updated and detailed follow-up of the recommendations formulated to the United States in the Second Round of Review, as well as the systems, standards, measures and mechanisms that the suggested recommendations concern, the Committee believes that this recommendation is redundant.

III. REVIEW, CONCLUSIONS AND RECOMMENDATIONS ON IMPLEMENTATION BY THE UNITED STATES OF THE CONVENTION PROVISIONS SELECTED FOR THE FIFTH ROUND

1. INSTRUCTIONS TO GOVERNMENT PERSONNEL TO ENSURE PROPER UNDERSTANDING OF THEIR RESPONSIBILITIES AND THE ETHICAL RULES GOVERNING THEIR ACTIVITIES (ARTICLE III, PARAGRAPH 3 OF THE CONVENTION)

[117] In accordance with the Methodology adopted by the Committee for the Fifth Round regarding the implementation of Article III, paragraph 3 of the Convention, which refer to measures that intended to establish, maintain and strengthen "*instruction[s] to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities,*" the country under review selected the Designated Agency Ethics Officials (DAEOs) and Alternate Designated Agency Ethics Officials (ADAEOs), as they are the principal executive branch employees responsible for the day-to-day administration of the ethics program at each executive branch agency.

[118] DAEOs and ADAEOs, are also expected to have both a strong knowledge of the executive branch ethics program and responsibility for generating support for building and sustaining an ethical culture in their respective organization.

118.1. Existence of a legal framework and/or other measures

[119] The United States has a set of provisions and/or measures that provide instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities, among which the following are highlighted:

[120] Regarding provisions and/or measures for providing instructions to DAEOs and ADAEOs to ensure proper understanding of their responsibilities, the country under review observes that the necessary qualifications, functions and responsibilities of these posts are set forth in regulations promulgated by the Office of Government Ethics (OGE).⁶⁷

[121] To this end, Chapter XVI of Title 5 of the Code of Federal Regulations (CFR), section 2638.104 provides that each agency head must appoint a DAEO, whose primary responsibility is directing the daily activities of the agency's ethics program and coordinating with the Office of Government Ethics.⁶⁸ This section also sets out the necessary qualifications for an agency's DAEO, which include: 1) being an employee at an appropriate level in the organization, such that the DAEO is able to coordinate effectively with officials in relevant agency components and gain access to the agency head when necessary to discuss important matters related to the agency's ethics program; 2) the DAEO must be an employee who has demonstrated the knowledge, skills, and abilities necessary to manage a significant agency program, to understand and apply complex legal requirements, and to generate support for building and sustaining an ethical culture in the organization; 3) the DAEO must demonstrate the capacity to serve as an effective advocate for the executive branch ethics program, show support for the mission of the executive branch ethics program, prove responsive to the Director's requests for documents and information related to the ethics program, and serve as an effective liaison with the Office of Government Ethics; and 4) in any agency with 1,000 or more employees, any DAEO must be an employee at the senior executive level or higher, unless the agency has fewer than 10 positions at that level. The Office of Government Ethics has also set forth specific responsibilities of DAEOS, which include the requirement to run an effective, efficient ethics program; providing timely advice and counsel to employees; conducting financial disclosure reviews; and assigning additional ethics officials to assist in the operation of an agency's ethics program.⁶⁹

[122] This section of the CFR further provides that the responsibilities of the DAEO include, among other things: 1) serving as an effective liaison to the Office of Government Ethics; 2) maintaining records of agency ethics program activities; 3) promptly and timely furnishing the Office of Government Ethics with all requested or required documents and information for the executive ethics branch program; 4) providing advice and counseling to prospective and current employees regarding government ethics laws and regulations, and providing former employees with advice and counseling regarding post-employment restrictions applicable to them; 5) carrying out an effective government ethics education program; 6) taking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means; and 7) carrying out an effective financial disclosure program.

[123] Section 2638.104(d) also provides that each agency head must also appoint an ADAEO, who serves as the primary deputy to the DAEO in the administration of the agency's ethics program. Both the DAEO and ADAEO direct the daily activities of the agency's ethics program and coordinate with the Office of Government Ethics. The ADAEO is a person who has demonstrated the skills necessary to assist the DAEO in the administration of the agency's ethics program. In its Response to the Questionnaire, the country under review further notes that as a matter of practice, ADAEOs are generally involved in the production and presentation of initial and annual ethics training for other executive branch employees.⁷⁰

⁶⁷ Response to the Questionnaire, pg. 15, *supra* note 11. See pgs. 37 – 48 of the Report of the Fourth Round for the United States, which sets out in detail the functions of the Office of Government Ethics, as an oversight body selected for review during that Round, *supra* note 55.

⁶⁸ 5 CFR Section 2638.104, <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=aac8fe5dcb19138cda1b82424bcee13a&mc=true&n=sp5.3.2638.a&r=SUBPART&ty=HTML>

⁶⁹ Response to the Questionnaire, pg. 16, *supra* note 11.

⁷⁰ *Ibid.*, pg. 13.

[124] Regarding the provisions and/or measure in the country under review for providing instructions that ensure proper understanding of their ethical rules governing their activities, the country under review notes that all executive branch employees are required to receive ethics education, not only DAEOs and ADAEOs, but also the highest-level officials, who are Presidentially appointed and Senate confirmed.⁷¹ Moreover, the regulations found in the Code of Federal Regulations require that each executive branch agency maintain a program of ethics training consisting of, at a minimum, initial ethics orientation training for all employees and annual ethics training for specified categories of employees occupying sensitive positions.⁷² The country under review further notes that all executive branch agencies are to ensure that all of their employees review Executive Order 12674, which established the fourteen general principles of ethical conduct for government officers and employees, and regulations promulgated thereunder, including the Standards of Ethical Conduct for Employees of the Executive Branch, known as the Standards of Conduct.⁷³

[125] To that end, Section 2638.301 of Chapter XVI, Title 5 of the CFR provides that every agency must carry out a government ethics program to teach employees how to identify potential conflicts of interest, as well as government ethics issues, and obtain assistance in complying with government ethics laws and regulations.⁷⁴

[126] The country under review further notes that an initial ethics training must take place for new employees, including DAEOs and ADAEOs, within three months from the time an employee begins work for a federal agency, in accordance with section 2638.304 of Chapter XVI, Title 5 of the CFR.⁷⁵ To this end, the content of this training includes a training presentation that focuses on government ethics laws and regulations, and addresses subjects such as financial conflicts of interest; impartiality; misuse of position; and gifts. Written materials are also provided, which provide a summary of the Standards of Conduct; provisions of any supplemental regulations that the DAEO deems relevant; and instructions for contacting the agency's ethics office. Each agency must establish written procedures, which the DAEO reviews each year, for the tracking of initial ethics training.

[127] DAEOs and ADAEOs, as filers of public financial disclosure reports, are also subject to additional training requirements. This training is provided on an annual basis and includes presentations on financial conflicts of interest; impartiality; misuse of position; and gifts. As with the initial ethics training, written materials are also provided, which provide a summary of the Standards of Conduct; provisions of any supplemental regulations that the DAEO deems relevant; and instructions for contacting the agency's ethics office. Each employee subject to this additional training is to confirm in writing that they have completed this training must comply with any additional procedures established by a DAEO.⁷⁶

[128] Regarding the manner in which the DAEOs and ADAEOs are informed of their responsibilities and functions, indicating whether this is done verbally or in writing, and whether records are kept of those instructions, the country under review notes that the regulations of the Office of Government Ethics, as set out under Chapter XVI of Title 5 of the CFR, set out in detail the responsibilities and functions of DAEOs and ADAEOs.⁷⁷ In addition, once a new DAEO and ADAEO are designated by an agency, the OGE will determine their level of experience and provide a number of services to assist them in

⁷¹ *Ibid.*, pg. 4.

⁷² *Ibid.*

⁷³ *Ibid.* See also Executive Order 12674 of April 12, 1989,

[https://www.oge.gov/Web/OGEnsf/Executive%20Orders/FA480E559E89F43A85257E96006A90F0/\\$FILE/2cffba1932d54681af32485c48d855282.pdf?open](https://www.oge.gov/Web/OGEnsf/Executive%20Orders/FA480E559E89F43A85257E96006A90F0/$FILE/2cffba1932d54681af32485c48d855282.pdf?open)

⁷⁴ See Response to the Questionnaire, pg. 5, *supra* note 11.

⁷⁵ *Ibid.*, pg. 6.

⁷⁶ *Ibid.*, pgs. 10 – 11. See also Section 2638.308 of the CFR, <https://www.ecfr.gov/cgi-bin/text-idx?SID=ff5f4097c59f482de47573f1ae193529&mc=true&node=pt5.3.2638&rgn=div5>

⁷⁷ *Ibid.*

understanding their responsibilities and functions, based on their level of experience with the ethics program. This may include in-person or telephonic meetings, the provision of relevant training resources and guidance, and enrollment in the Institute for Ethics in Government (IEG) of the Office of Government Ethics, in courses specifically established for new DAEOs and ADAEOs.⁷⁸

[129] As regards the occasion(s) when DAEOs and ADAEOs are informed of their responsibilities or functions, indicating whether this is when they begin performing them or at some later point; when said functions change; or when functions change due to a change of duties, the country under review notes that DAEOs and ADAEOs are notified of their responsibilities and functions through posted notices of a vacancy required of them.⁷⁹ Moreover, as noted above, the regulations of the Office of Government Ethics, as set out under Chapter XVI of Title 5 of the CFR, set out in detail the responsibilities and functions of DAEOs and ADAEOs.⁸⁰

[130] As to the existence of induction, training, or instruction programs and courses for personnel on the proper performance of their responsibilities and functions, and, in particular, to make them aware of the inherent corruption risks in their performance, the country under review, in its Response to the Questionnaire, notes that through the IEG, the Office of Government Ethics provides training resources to the DAEOs and ADAEOs in the performance of their ethics program duties.⁸¹ The country under review further notes that these are an intensive and comprehensive curriculum of courses, which include: the New Ethics Official Certificate Program; Introduction to Conflicts of Interest; Public Financial Disclosure Review; Gifts from Outside Sources; and Conflict-Free Post-Employment Activities. Participants meet one day per week for eight weeks and are assessed at the close of each unit, and upon successful completion of all units, the Office of Government Ethics provides a “Certificate of Accomplishment” from the IEG to the participants. In addition, the IEG provides a number of live, instructor-led courses, and prior to and during the financial disclosure filing seasons, the IEG offers a limited number of workshops and seminars for confidential and public financial disclosure reviewer, which are filled on a first-come, first-served basis.

[131] The country under review also notes that it offers quarterly one-day orientation sessions to newly appointed DAEOs and ADAEOs. The objectives of these orientation sessions are: to familiarize them with the government ethics program leadership and management responsibilities they have; to communicate OGE’s expectations regarding the roles and responsibilities of the DAEO and ADAEO; and to discuss best practices and available resources.⁸²

[132] In addition, the country under review reports that the Office of Government Ethics maintains a growing library of on-demand training courses covering topics such as the ethics laws and regulations, ethics program management, enterprise risk management, and behavioral insights for DAEOs and ADAEOs, which is made available to agency ethics officials at no cost through its online IEG portal.⁸³ The country under review also notes that the IEG Portal, in addition to offering materials that include practical job aids and reference guides, among other products, to assist agency ethics officials in the day-to-day operations of their programs, is also a place where members of the ethics community can share similar products that they have created, including materials to assist with annual employee ethics training.⁸⁴

⁷⁸ *Ibid.*, pg. 19.

⁷⁹ *Ibid.*, pg. 18.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ See the portal of the Institute for Ethics in Government, available at: <http://www.oge.gov/IEGApp>

⁸⁴ Response to the Questionnaire, pg. 20, *supra* note 11.

[133] The OGE also shares model practices for ethics officials' engagement with agency leaders, program managers, and staff. To this end, the country under review, in its Response to the Questionnaire, notes:⁸⁵

[134] *“For example, OGE supports agency ethics programs’ efforts to assist with agency risk management, performance planning, and measurement. OGE has also recently established a research blog aimed at informing ethics officials of studies in “behavioral ethics,” which reflects insights from research in behavioral economics, cognitive science, and organizational psychology aimed at identifying the drivers of ethical and unethical behavior within organizations. OGE’s goal in the blog is to share with the ethics community summaries and links to this research and the insights they contain, so that DAEOs and ADAEOs will be able to apply those insights to agency ethics programs to help foster a strong and resilient ethical culture within executive branch agencies.”*

[135] The country under review further reports that the OGE also organizes numerous meetings, conference calls, focus groups, and webinars to inform and collaborate with DAEOs and ADAEOs on OGE’s initiatives. As an example, the OGE’s Director holds live quarterly meetings for senior agency ethics officials, followed by telephone sessions to recap subjects covered during the meetings for those who could not attend in person. At these meetings, OGE’s senior leaders share information critical to managing an effective ethics program, encourage discussion of current ethics issues facing the executive branch, and consult with DAEOs and ADAEOs regarding contemplated changes in OGE’s policies and regulations.⁸⁶

[136] As to the use of modern communication technologies to apprise DAEOs and ADAEOs of their responsibilities or functions and to provide guidance on how to perform them properly, the country under review, in its Response to the Questionnaire, indicates that it utilizes a number of tools to inform DAEOs and ADAEOs of their responsibilities and functions, including e-mail, teleconferences, webinars, OGE’s public facing website, and a government-only accessible website that permits DAEOs and ADAEOs to share information on ethics program management with each other and with OGE.⁸⁷ Moreover, the OGE uses its social media accounts and a “listserv” electronic mailing list to disseminate new information on program management and legal interpretations to the broader ethics community including DAEOs and ADAEOs.

[137] As to the existence of bodies to which DAEOs and ADAEOs can resort to obtain information or resolve doubts about how to perform their responsibilities and functions properly, the country under review notes that the OGE provides DAEOs and ADAEOs advice on how to perform their responsibilities and functions.⁸⁸ The OGE also provides ad hoc support to DAEOs and ADAEOs through its advice and guidance function while OGE Desk Officers provide agencies with a dedicated point of contact for overall ethics program support, including with understanding the responsibilities and functions of the DAEO and ADAEO positions.

[138] In terms of the existence of a governing organ, authority or body responsible for defining, steering, advising, or supporting the manner in which the DAEOs and ADAEOs are to be informed of their responsibilities and functions, the country under review notes that it is the OGE that oversees the executive branch ethics program and works with the community of ethics practitioners in the federal agencies to implement that program.⁸⁹ OGE provides expert guidance and support to DAEOs and ADAEOs, as well as agency ethics programs in general; strengthening the expertise of officials who are integral to the executive branch ethics program; and continuously refining ethics policy and issuing interpretive guidance.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, pgs. 20 – 21.

⁸⁷ *Ibid.*, pg. 21.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, pgs. 27 – 28.

[139] As to the manner in which DAEOs and ADAEOs are informed of the ethical rules governing their activities, indicating whether this is done verbally or in writing and whether records are kept of those instructions, the country under review notes, that there are a number of ways this is carried out.⁹⁰ To this end, the country under review notes that all prospective employees must be alerted that they will be subject to the Standards of Conduct and the criminal conflict of interest laws, as well as their agency's commitment to ethics.⁹¹ All agencies must issue notices to prospective employees in written offers of employment regarding all applicable ethical requirements. This is also set out in the CFR, whereby under Section 2638.303 of Chapter XVI of Title 5 of these Regulations note that written offers of employment for positions covered by the Standards of Conduct must include a statement of the agency's commitment to ethics; notice that the individual will be subject to the Standards of Conduct and the criminal conflict of interest statutes as an employee; the contact information for the agency's ethics office or an explanation on how to obtain additional information on applicable ethics requirements; notice of the timeframe for completing initial ethics training; and, if applicable, a statement regarding financial disclosure requirements, and an explanation that this must be filed within 30 days of an appointment. Moreover, this section of the CFR provides that each agency must establish written procedures for issuing this notice, and the DAEO must review these procedures each year in order to ensure that the agency is carrying out this requirement.⁹²

[140] The country under review also notes that the United States requires by law (5 USC 2302(c)) that each new Federal executive branch employee be notified of their protections as whistleblowers within 180 days of their appointment. Under the same law, each executive branch agency is also required to make information regarding whistleblower protections applicable to employees available on the agency's public website and any online portal that is available to only employees of the agency. As noted by the Committee, under the system for the protecting public servants who report acts of corruption, the Office of Special Counsel, the agency responsible for assisting agencies comply with the 5 U.S.C. 2302 requirements, rather than the OGE. As a matter of practice, OGE has included basic information regarding the reporting of misconduct in its model initial and annual ethics training materials. OGE has also prominently provided on its webpage information regarding where employees should report misconduct.

[141] Moreover, as set out above, that an initial ethics training must take place for new employees, including DAEOs and ADAEOs, within three months from the time an employee begins work for a federal agency, in accordance with section 2638.304 of Chapter XVI, Title 5 of the CFR.⁹³ This training must be interactive and can be accomplished through a mixture of written, oral and electronic means.⁹⁴ Agencies are also required to track all employees, including DAEOs and ADAEOs, on whether they have received this training within the required time period.⁹⁵

[142] In addition, as set out above, DAEOs and ADAEOs are also subject to additional training regarding the filing of public financial disclosure reports. This training is provided on an annual basis and includes presentations on financial conflicts of interest; impartiality; misuse of position; and gifts. As with the initial ethics training, written materials are also provided, which provides a summary of the Standards of Conduct; provisions of any supplemental regulations that the DAEO deems relevant; and instructions for contacting the agency's ethics office. Each employee subject to this additional training is to confirm in writing that they have completed this training and must comply with any additional procedures established by a DAEO.⁹⁶

⁹⁰ *Ibid.*, pg. 23.

⁹¹ *Ibid.*, pg. 5.

⁹² *Ibid.*, pg. 23.

⁹³ *Ibid.*, pg. 6.

⁹⁴ *Ibid.*, pg. 23.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, pgs. 10 – 11. See also Section 2638.308 of the CFR, *supra* note 76.

[143] Regarding the occasion(s) when DAEOs and ADAEOs are informed of ethical rules governing their activities, indicating whether this is done when they begin performing them or at some later point; when a change in their functions entails a different set of applicable ethical rules; or when changes are made to those rules, in its Response to the Questionnaire, the country under review notes, as set out above, that all prospective employees must be alerted that they will be subject to the Standards of Conduct and the criminal conflict of interest laws, as well as their agency's commitment to ethics.⁹⁷ Moreover, as noted above, this requirement is set out in Section 2638.303 of Chapter XVI of Title 5 of these Regulations. The country under review also reiterates that all employees, including DAEOs and ADAEOs are required to receive initial ethics orientation training within three months of appointment.⁹⁸

[144] As regards the existence of introductory, training or instructional programs and courses for DAEOs and ADAEOs on the ethical rules governing their activities, the country under review notes each executive branch agency is required by law to provide for initial ethics incoming employees, including DAEOs and ADAEOs, within three months of appointment.⁹⁹ The training covers the following: financial conflicts of interest, impartiality, misuse of position, and gifts. All employees are also provided with written summaries or copies of the Standards of Conduct, as well as copies of any supplemental agency ethics regulations and any other written materials that the agency deems appropriate.

[145] The country under review further notes that although each agency is responsible for preparing training materials appropriate and tailored to its employees, OGE also develops various educational tools that agencies can use in advising incoming officials.¹⁰⁰ The country under review observes that OGE has recently developed four booklets that agencies can use as part of their initial ethics training: Ethical Service, Fourteen General Principles, Standards of Ethical Conduct, and Conflict of Interest Laws, which are available in electronic form at no charge on OGE's website, and provide plain language summaries of important ethics concepts as well as examples of those concepts.¹⁰¹ The country under review, in its Response to the Questionnaire, and during the on-site visit, noted that these booklets are modifiable by agency ethics officials to accommodate for specific agency risks and programs.¹⁰²

[146] Additionally, the country under review observes that the OGE has established a kit for agency ethics officials to use for annual training, which includes a training booklet, a library of annual ethics training scenarios, and a "how to" series of videos designed to prepare agency ethics officials to present the training scenarios.¹⁰³ Moreover, the IEG also maintains a library of ethics training scenarios that ethics officials can use during their in-person ethics briefings to help employees navigate common ethical dilemmas, which include training on frequently occurring activities that raise the risk for conflicts of interest, such as when an employee receives an invitation to an event or is contacted by a former colleague.

[147] As to the use of modern communication technologies to apprise DAEOs and ADAEOs of the ethical rules governing their activities, the country under review, in its Response to the Questionnaire, notes that it uses a variety of modern communications tools, as well as in-person, interactive and traditional tools.¹⁰⁴ To this end, the initial training orientation must, generally, be interactive, meaning, a training presentation is considered interactive if an employee is required to take action with regard to the subject of the training.¹⁰⁵

⁹⁷ *Ibid.*, pg. 5.

⁹⁸ *Ibid.* pg. 22.

⁹⁹ *Ibid.*, pg. 23.

¹⁰⁰ *Ibid.*, pg. 24.

¹⁰¹ Available at: <https://www.oge.gov/web/oge.nsf/Resources/Ethics+Training+Tools+and+Templates>

¹⁰² Response to the Questionnaire, pg. 24, *supra* note 11.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* pgs. 24 – 25.

¹⁰⁵ *Ibid.*, pg. 25. See also Section 2638.302 of Chapter XVI of Title 5 of the CFR, <https://www.ecfr.gov/cgi-bin/text-id.x?SID=ff5f4097c59f482de47573f1ae193529&mc=true&node=pt5.3.2638&rgn=div5>

This can be carried out through interactive electronic program that prompts employees to answer questions and provides feedback on whether an answer is correct or not. The country under review further notes that training agencies use traditional and modern tools for educating employees, such as self-paced web-based initial ethics orientation programs, video and satellite broadcast, or videoconference programs.¹⁰⁶

[148] The country under review further observes that the OGE uses a variety of modern communications technologies to provide training and educational courses for DAEOs, ADAEOs, ethics officials, and employees. These courses are facilitated through the IEG, which hosts both an internal and an external website. Visitors to this website are able to download government ethics educational products and job aids; share products between DAEOs, ADAEOs, and others in the government ethics community; enroll to attend live or on-demand distance learning courses; enroll to attend in-person course offerings; apply to participate in a program for new ethics officials assigned to critical roles; apply for OGE’s Agency Instructor Development Program; and learn about opportunities to host or participate in semi-annual ethics symposia.¹⁰⁷

[149] Moreover, the IEG generally offers two distance learning opportunities per month, which are conducted using web-conferencing software and telephone conferencing.¹⁰⁸ The IEG also maintains a growing library of on-demand courses dealing with all aspects of leading an ethics program. The IEG website contains an education library of over 80 training videos and training aids, which are categorized by the series, for example, fundamental series or advanced practitioner series, the topic, the type of training or aid, and the skill level of the anticipated audience.¹⁰⁹ IEG also shares these videos through the OGE YouTube page.¹¹⁰

[150] Furthermore, the country under review notes that approximately every other year, the OGE hosts a “National Government Ethics Summit” and has social media, video sharing websites, and live-streaming technology to ensure the widest possible dissemination of Summit presentations. For example, over half of all presentations provided in the 2016 Summit were live-streamed and the videos of those presentations are maintained on OGE’s YouTube webpage.¹¹¹ Moreover, the country under review notes that the OGE shares all legal and program management advisories that it issues through its public-facing website at the time they are published.

[151] Finally, the country under review observes the following, regarding the use of modern technologies:¹¹²

[152] “Although OGE and ethics officials leverage modern technologies to assist in the process of informing employees of the ethics laws and regulations, it is also recognized that traditional in-person and one-on-one briefings continue to provide significant advantages that cannot yet be replicated fully by modern technologies. This is particularly true for the training of high-level officials such as PAS [Presidentially appointed and Senate confirmed], DAEOs, and ADAEOs. OGE has, in fact, highlighted the importance of interaction between those receiving information and those conducting training in its regulations by limiting the occasions in which training can be a one-way knowledge transfer. Rather, under OGE regulations, training must be either interactive or live in most instances. This allows for more robust and responsive training, encourages discourse and questions, and establishes interpersonal relationships between agency ethics officials and employees receiving training, which may result in greater coordination in the future. As a result, many agencies continue to perform initial and annual

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, pgs. 25 – 26.

¹⁰⁸ *Ibid.*, pg. 26.

¹⁰⁹ Available at www.oge.gov/IEGApp.

¹¹⁰ Available at <https://www.youtube.com/user/OGEInstitute>.

¹¹¹ Response to the Questionnaire, pg. 26, *supra* note 11.

¹¹² *Ibid.*, pgs. 26 – 27.

ethics training through in-person classroom instruction and one-on-one briefings.”

[153] As to the existence of bodies to which personnel can resort to obtain information or resolve doubts about the scope or interpretation of the ethical rules governing their activities, the country under review, in its Response to the Questionnaire, notes the following:¹¹³

[154] “Agencies are required to establish ethics programs, run by DAEOs and ADAEOs that, among other things, must provide advice and counsel to prospective, current, and former employees on the scope and application of the ethical rules governing their activities. Agency ethics offices provide oral and written guidance to all employees. To ensure impartiality, DAEOs and ADAEOs who have questions about their own compliance with the ethics laws and regulations, can ask another agency ethics official within their agency for advice. They can also seek assistance from OGE.

[155] In addition to advisory services provided directly by DAEOs, ADAEOs, and agency ethics officials, OGE provides assistance to agency ethics officials in understanding the scope and interpretation of the ethics laws and regulations that apply to employees who have questions about the application of the laws to their specific factual circumstances.”

[156] In terms of the existence of a governing organ, authority or body responsible for defining, steering, giving guidance on, or supporting the manner in which DAEOs and ADAEOs are to be informed of the ethical rules governing their activities, the country under review explained that the OGE is the principal body for this purpose. It carries out this role by the issuance of uniform ethics education requirements in its regulations and oversight through an Annual Questionnaire presented to agencies and agency program reviews. It also reviews and updates the uniform ethics education requirements on a periodic basis, based on changes to international and domestic norms, feedback from the ethics community, and research insights, and supports agencies through the issuance of a number of products, and training courses.

[157] In addition, the country under review observes that the OGE provides expert guidance and support to DAEOs and ADAEOs. It also seeks to strengthen the expertise of officials who are integral to the executive branch ethics program; and continuously refine ethics policy and issue interpretive guidance.¹¹⁴

1.2 Adequacy of the legal framework and/or other measures

[158] With respect to the statutory and other legal provisions reviewed by the Committee on the measures intended to provide instructions to the government personnel selected by the country under review that ensure proper understanding of their responsibilities and the ethical rules governing their activities, the Committee notes that they are relevant for promoting the purposes of the Convention.

[159] Nevertheless, the Committee considers it appropriate to set forth some observations with respect to these provisions and/or other measures.

[160] The Committee notes that the DAEOs and ADAEOs play a pivotal role, coordinating and managing an agency’s ethics program and to serve as a liaison between the agency and OGE with regard to all aspects of the ethics program. These officials also implement policies and provide agency training and advice, consult with OGE on programs and laws, ensure that the ethics program is effective, and that OGE recommendations are implemented.¹¹⁵

¹¹³ *Ibid.*, pg. 27.

¹¹⁴ *Ibid.*, pg. 28.

¹¹⁵ See Presentation by OGE: Preventing Conflicts of Interest in the Executive Branch, pg. 3, <http://www.oas.org/en/sla/dlc/mesicic/paises-rondas.html?c=United%20States&r=5>

[161] The person occupying the post of DAEO, in particular, as set out in the previous section, is someone that is able to direct the daily activities of the agency's ethics program; has the knowledge, skills, and abilities necessary to manage a significant agency program, to understand and apply complex legal requirements, and to generate support for building and sustaining an ethical culture in the organization; has demonstrated the capacity to serve as an effective advocate for the executive branch ethics program, show support for the mission of the executive branch ethics program, and serve as an effective liaison with the OGE. This person is also required to run an effective, efficient ethics program; provide timely advice and counsel to employees; conduct financial disclosure reviews; and assign additional ethics officials to assist in the operation of an agency's ethics program.

[162] Importantly, the DAEO is to provide advice and counseling to prospective and current employees regarding government ethics laws and regulations, and provide former employees with advice and counseling regarding post-employment restrictions applicable to them; take appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means; and carry out an effective financial disclosure program.

[163] These tasks and responsibilities are key for the operation of an effective executive branch ethics program for the country under review, especially a decentralized one, as each agency is responsible for its own ethics program.¹¹⁶ To this end, the Committee notes that the Institute for Ethics in Government twice annually offers intensive and comprehensive curriculum of courses to DAEO's and ADAEOs and other supervisory ethics officials comprising intensive four to six half day workshops that address the primary ethics laws and regulations, quarterly one-day orientation sessions for newly appointed DAEOs and ADAEOs, and provides tools to them to support ethical culture within their agencies through publications, distance learning events, in-person workshops and symposia.

[164] The Committee further notes that there is a requirement in regulation that ethics officials have the necessary knowledge, skill and abilities to perform their function. In addition, the agency is responsible for ensuring that these employees have the skills and expertise needed to perform their assigned duties related to the ethics program and must provide appropriate training to them for this purpose. The Committee notes, however, that in the Response to the Questionnaire, and during the on-site visit, it was observed that these professional training opportunities are not mandatory for newly appointed DEAOs and ADAEOs, nor for ethics officials in general.¹¹⁷ While all new employees are to receive an initial ethics training within 3 months of appointment, and DAEOs and ADAEOs are required to receive annual training, as filers of financial disclosure reports, the courses and guidance offered by OGE and through the IEG, are not mandatory for newly appointed DEAOs and ADAEOs.

[165] In this regard, the Committee notes that receiving ethics training on the ethical system in place, is different in scope and nature from training on the responsibilities and functions that is inherent in a post of DAEO and ADAEO. The Committee further observes that it is essential that the persons occupying these posts are able to manage and carry out an effective ethics program, and the country under review should consider making mandatory that newly appointed DEAOs and ADAEOs are required to receive training regarding their functions and responsibilities, ensuring that they have the adequate knowledge and expertise to carry out an agency's ethics program, as well as for providing advice and counseling to prospective and current employees regarding government ethics laws and regulations, among other important duties. Moreover, given the important role played by DAEOs and ADAEOs in detecting and resolving potential conflicts of interest on the part of executive branch employees, it is important for the country under review to consider ways to ensure that all ethics officials are adequately trained. Such a

¹¹⁶ See, in general, Presentation by OGE, *ibid*.

¹¹⁷ Response to the Questionnaire, pg. 11, *supra* note 11.

requirement would also assist OGE in promoting uniformity in the application of the ethics system in executive branch agencies.¹¹⁸

[166] The Committee further notes that this is especially pertinent, given that, as noted in the Response to the Questionnaire, and during the on-site visit, the majority of DAEOs and ADAEOs performed their government ethics program responsibilities, in addition to other duties.¹¹⁹ As the majority of the persons in these posts are also engaged in other duties, and a not insignificant number of DAEOs and ADAEOs are appointed each year, it is important that they have a fundamental basis and understanding of their responsibilities, and that these functions are being carried out effectively, through required training, especially in light of competing duties.¹²⁰ To this end, the country under review, in its Response, noted the following:¹²¹

[167] *“The majority of DAEOs and ADAEOs perform their government ethics program responsibilities in addition to other duties. For example, DAEOs often also serve as the chief legal advisor for their agency, and therefore, may personally spend only a fraction of time on ethics matters. In 2017, 87% of DAEOs identified that they spent less than 51% of their time on ethics related matters, and 68% of ADAEOs identified that they spent less than 51% of their time on ethics related matters. That being said, approximately 100 agencies have identified ethics duties as specific and distinct elements of DAEO and ADAEOs performance standards in 2017. This is in addition to the responsibilities of DAEOs and ADAEOs are set forth specifically in OGE’s detailed regulations.”*

[168] Given the foregoing, the Committee will formulate a recommendation. (See sole Recommendation in Section 1.4 of Chapter III of this Report)

[169] The Committee also notes that the OGE was one of four oversight bodies that were comprehensively reviewed in the framework of the Fourth Round of Review of the MESICIC.¹²² In that review, OGE received various recommendations in order to strengthen its legal and institutional framework, which the Committee would like to highlight some of them, as they are pertinent and applicable for the review for this provision of the Inter-American Convention against Corruption, especially in the OGE’s role as a governing body responsible for defining, steering, advising, or supporting the manner in which the DAEOs and ADAEOs are to be informed of their responsibilities and functions and ethical duties.

[170] In the first instance, the following observation was made:¹²³

[171] *“[T]he Committee observes that the OGE website indicates that OGE holds quarterly meetings with the executive branch DAEOs to share information relevant to managing an effective ethics program, discuss current ethics issues facing the executive branch, and receive agency input. The Committee believes that it is important for OGE to continue to promote periodic meetings with DAEOs and that these meetings, when feasible, should also include ADAEOs, who perform similar roles as their respective principals.”*

¹¹⁸ See a similar observation made regarding professional training provided in general to all ethics officials, and recommendation, in the Report of the Fourth Round of the United States, pgs. 44 and 47, *supra* note 55.

¹¹⁹ Response to the Questionnaire, pg. 18, *supra* note 11.

¹²⁰ On a yearly basis, approximately 16% of DAEOs and ADAEOs of the 136 government agencies, have less than one year experience in this post, see generally pgs. 8 and 9 of the CY17 Annual Agency Ethics Program Questionnaire: A Snapshot of the Executive Branch Ethics Program, [https://www.oge.gov/web/oge.nsf/All%20Documents/93DEBA661B94E127852582A30051F4F3/\\$FILE/2017%20AQ%20summary%20FINAL%20\(rev.8.10.18\).pdf?open](https://www.oge.gov/web/oge.nsf/All%20Documents/93DEBA661B94E127852582A30051F4F3/$FILE/2017%20AQ%20summary%20FINAL%20(rev.8.10.18).pdf?open), and pgs. 5 – 6 of CY16 Annual Agency Ethics Program Questionnaire: A Snapshot of the Executive Branch Ethics Program, [https://www.oge.gov/web/oge.nsf/All%20Documents/61C5BF236F3D6950852581560054C326/\\$FILE/CY%202016%20Annual%20Questionnaire%20Summary.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Documents/61C5BF236F3D6950852581560054C326/$FILE/CY%202016%20Annual%20Questionnaire%20Summary.pdf?open)

¹²¹ Response to the Questionnaire, pgs. 18 – 19, *supra* note 11.

¹²² See Report of the Fourth Round, pgs. 37 – 48, *supra* note 55.

¹²³ *Ibid.*, pgs. 44 and 47.

[172] To that end, it was recommended that country under review consider promoting periodic meetings between OGE and DAEOs, and, when feasible, include ADAEOs in those periodic meetings, in the event that they are not already included, given that they perform similar functions as the DAEO.

[173] Secondly, the following pertinent observation from the Report of the Fourth Round was made:¹²⁴

[174] “[W]ithin the framework of the on-site visit, OGE representatives explained that they considered that a review of OGE regulations would be useful, in order to determine whether there are any rules, such as those related standards of conduct, or ethics program requirements, such as agency training requirements, that could be made more effective. On this point, OGE representatives further noted that making targeted revisions to existing ethics regulations would ensure their continued effectiveness and applicability. The Committee agrees that such a revision would assist in ensuring the effectiveness of existing regulations, and that in addition, it might also contribute to further strengthening of the executive branch ethics system.”

[175] In this respect, it was recommended that the country under review consider conducting a review of OGE regulations in order to identify any rules, such as those related to standards of conduct, or ethics program requirements, such as agency ethics training requirements, that could be made more effective.

[176] Finally, the following pertinent observation was made from the Report of the Fourth Round:¹²⁵

[177] “OGE has noted that “The Ethics in Government Act (EIGA) has been in effect for over 30 years. It has worked well, but as with any statute it needs to evolve to ensure its continued effectiveness in light of practical experiences and application.” During the framework of the onsite visit, a link was provided to OGE legislative proposals corresponding to the Proposed Ethics in Government Act Amendments of 2003 and 2008, respectively.

[178] *The Committee believes that it would be useful for the country under review to give due consideration to making any necessary changes to the Ethics in Government Act in order to ensure its continued effectiveness in light of OGE and other oversight bodies’ practical experience in its application.”*

[179] The recommendation formulated as a result of this observation was for the country under review to consider making any necessary changes to the Ethics in Government Act in order to ensure its continued effectiveness in light of OGE and other oversight bodies’ practical experience in its application.

[180] The Committee highlights these observation and recommendations, as they are pertinent for the review of the Fifth Round, given the important role of the OGE, in the duties carried out by DAEOs and ADAEOs, and the ethics programs they carry out within their agencies. To that end, the Committee looks forward to the country under review in meeting these recommendations from the Fourth Round of Review.

[181] In this regard, the Committee would also like to note that in the meeting with civil society, it was noted, in particular by the representatives of Citizens for Responsibility in Ethics in Washington, the need to strengthen the role of the OGE, which included protecting its independence, and enhancing ethics enforcement.

1.3 Results

[182] In its Response to the Questionnaire, the country under review described the following results from the application of the provisions and/or measures relating to instruction given to DAEOs and ADAEOs in order to ensure proper understanding of their responsibilities and the ethical rules governing their activities.

¹²⁴ *Ibid.*, pgs. 45 and 47.

¹²⁵ *Ibid.*, pgs. 45 and 48.

[183] With respect to the instructions provided to ensure proper understanding of their responsibilities, the country under review notes that it offers intensive and comprehensive curriculum of courses to DAEO's and ADAEOs, as well as other new ethics officials in supervisory roles.¹²⁶ It offers quarterly one-day orientation sessions for newly appointed DAEOs and ADAEOs, as well as an extensive variety of introductory and/or instructional training programs that provide them with a comprehensive understanding of their responsibilities and functions. Moreover, it provides tools to them to support ethical culture within their agencies through publications, distance learning events, in-person workshops and symposia.

[184] The country under review further notes that the comprehensive curriculum for DAEOs and ADAEOs as well as other new ethics officials in supervisory roles comprises four to six intensive half day workshops that address the primary ethics laws and regulations. For 2018, up to the date the country under review submitted its Response to the Questionnaire, the United States reports that OGE has hosted 23 DAEOs and ADAEOs for the one-day orientation and has hosted 13 new DAEOs and ADAEOs for the intensive curriculum on ethics.¹²⁷

[185] With respect to the Institute for Ethics in Government, the country under review also provides results regarding the number of persons registering for in-person and online courses for ethics officials:¹²⁸

Year	FY2014	FY2015	FY2016	FY2017
IEG Training Registrations	4172	7527	6519	6062

[186] The Committee notes that this Institute provides intensive and comprehensive curriculum of courses to the DAEOs and ADAEOs, which include: the New Ethics Official Certificate Program; Introduction to Conflicts of Interest; Public Financial Disclosure Review; Gifts from Outside Sources; and Conflict-Free Post-Employment Activities. Participants meet one day per week for eight weeks and are assessed at the close of each unit, and upon successful completion of all units, the Office of Government Ethics provides a "Certificate of Accomplishment" from the IEG to the participants.¹²⁹

[187] In this respect, the country under review notes that it maintains data on the number of ethics officials who take courses through the Institute for Ethics in Government and the number of DAEOs and ADAEOs who attend orientation sessions. In Fiscal Year 2018, the Country under review noted that courses offered through OGE's Institute for Ethics in Government garnered 1011 registrations by ethics officials seeking training. In addition, in Fiscal Year 2018, OGE's orientation sessions for new DAEOs and ADAEOs were attended by 41 officials new to those roles.

[188] The country under review also provided information on the number of employees who are required to receive initial and annual ethics training.¹³⁰ In this respect, the country under review notes that the number of persons required to take these training programs is consistently in the hundreds of thousands, and provides the following observation:¹³¹

[189] "As reflected in responses to data requests over the past 10 years, the number of employees (including, but not limited to, PAS, DAEOs, and ADAEOs) who are required to receive initial and annual

¹²⁶ Response to the Questionnaire, pgs. 28 – 29, *supra* note 11.

¹²⁷ *Ibid.*, pg. 29.

¹²⁸ *Ibid.*, pg. 26.

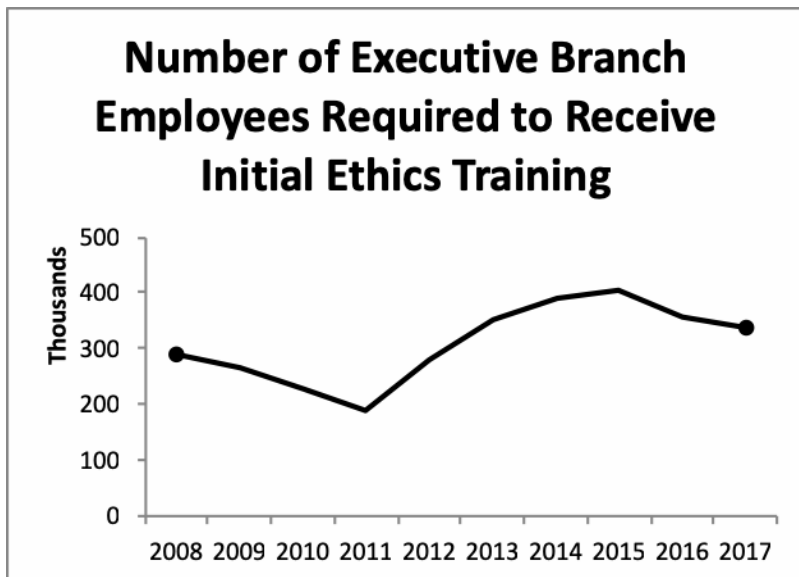
¹²⁹ *Ibid.* pg. 18.

¹³⁰ *Ibid.*, pgs. 29 – 30.

¹³¹ *Ibid.*, pg. 29.

ethics training is consistently in the hundreds of thousands. Fluctuations in the number of incoming employees results in year-over-year differences in the number of total employees required to receive ethics training, with there being an approximate average of slightly less than 310,000 officials requiring initial ethics training per year between 2008 and 2017. OGE has maintained reliable data for the number of employees who have timely received initial ethics training since 2014. This data is from agency reporting through the Annual Questionnaire. On average since 2014, 90% of incoming officials (including PAS, DAEOs, and ADAEOs) timely received initial ethics training within the three month requirement. In 2017, 91% (305,408 out of 336,699) of new employees required to receive initial ethics training did so within the required three months. In addition, 95% (522) of new Senate-confirmed Presidential appointees received their initial ethics briefing within the 15-day requirement.”¹³²

[190] The country under review also provides the following tables and charts, with respect to the number of executive branch employees required to receive initial ethics training:¹³³



Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Number of Employees Required to Receive Initial Ethics Training (in thousands) ¹³⁴	289	267	229	189	278	353	390	404	356	337

¹³² These Annual Questionnaires are found at the following link: <https://www.oge.gov/web/oge.nsf/Annual+Agency+Ethics+Program+Questionnaire>

¹³³ Response to the Questionnaire, pg. 30, *supra* note 11.

¹³⁴ Numbers rounded to closest 1,000.

[191] Regarding the number of officials required to receive annual ethics training due to their filing a confidential financial disclosure, the country under review notes that this number tends to be more static, than officials requiring initial ethics training:¹³⁵

[192] “Between 2008 and 2017, there was an average of slightly less than 483,000 officials (including PAS and DAEOs) required to receive annual ethics training per year. Since 2013, the yearly average of employees required to receive annual ethics training and who did receive that training was 98.6%. In 2017, agencies had a 97% (460,501 out of 475,970) compliance rate for annual ethics training. Importantly, 96% (131 of 136) of agency heads (who are PAS) completed either initial ethics training or annual ethics training or were not required to receive such training. Agencies also went above and beyond minimally required training. In 2017, 76% of agencies provided annual training to persons not required by the regulation to receive training.”

[193] The country under review also provides the following tables and charts, with respect to the number of executive branch employees required to receive annual ethics training:¹³⁶



Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Number of Employees Required to Receive Annual Ethics Training (in thousands) ¹³⁷	437	515	574	564	430	432	462	463	475	476

[194] The country under review also reports that one of the manners the OGE periodically conducts assessments of the ethics programs run by DAEOs and ADAEOs through an Annual Agency Ethics

¹³⁵ Response to the Questionnaire, pgs. 30 – 31, *supra* note 11.

¹³⁶ *Ibid.*, pg. 31.

¹³⁷ Numbers rounded to closest 1,000.

Program Questionnaire.¹³⁸ OGE reviews the results of this Questionnaire and works with agencies that have identified compliance issues, either in untimely training or missed training, to ensure that the agencies take corrective action to remediate any systemic issues and ensure greater compliance with the training requirements. This information may form the basis of an OGE program review or may result in issuance of program management advisories or legal advisories.

[195] Given the foregoing, the Committee acknowledges the efforts undertaken by the country under review to maintain results.

1.4 Conclusions and recommendations

[196] Based on the review conducted regarding the implementation by the United States of Article III, paragraph 3 of the Convention, the Committee offers the following conclusions and recommendations:

[197] The United States has considered and adopted measures intended to establish, maintain and strengthen the instructions provided to government personnel by the bodies selected that ensure proper understanding of their responsibilities and the ethical rules governing their activities, as described in Chapter III, Section 1 of this Report.

[198] In light of the comments made in the above-noted section, the Committee suggests that the country under review consider the following recommendation:

- Consider requiring, through the appropriate legislative or regulatory procedures, that newly appointed DEAOs and ADAEOs receive mandatory training regarding their functions and responsibilities, in order to ensure that they have the adequate knowledge and expertise to carry out an agency's ethics program (See paragraph 168 of Section 1.2 of Chapter III of this Report).

2. THE STUDY OF PREVENTIVE MEASURES THAT TAKE INTO ACCOUNT THE RELATIONSHIP BETWEEN EQUITABLE COMPENSATION AND PROBITY IN PUBLIC SERVICE (ARTICLE III, PARAGRAPH 12 OF THE CONVENTION)

2.1 STUDY OF PREVENTIVE MEASURES THAT TAKE INTO ACCOUNT THE RELATIONSHIP BETWEEN EQUITABLE COMPENSATION AND PROBITY IN PUBLIC SERVICE

[199] In its Response to the Questionnaire, the country under review notes that appointments at all level are required to adhere to the standards of conduct, and accordingly, the General Schedule scale and any other pay systems that the Office of Personnel Management is in charge of are independent from the consideration raised in the questionnaire.¹³⁹

2.2 ESTABLISHMENT OF OBJECTIVE AND TRANSPARENT CRITERIA FOR DETERMINING THE COMPENSATION OF PUBLIC SERVANTS

2.2.1 Existence of a legal framework and/or other measures

[200] In its Response to the Questionnaire, the country under review notes that it has established objective and transparent criteria for determining the compensation of public servants. In this respect, it notes that it has established a General Schedule (GS) classification and pay system that covers the majority of civilian white-collar federal employees, of approximately 1.5 million, in professional, technical, administrative, and clerical positions. The Office of Personnel Management (OPM) administers, on a government wide basis,

¹³⁸ Response to the Questionnaire, pgs. 21 and 30, *supra* note 11.

¹³⁹ *Ibid.*

the GS classification standards, qualifications, pay structure, and related human resources policies, such as general staffing and pay administration policies.¹⁴⁰ Each agency classifies its GS positions and appoints and pays its GS employees filling those positions following statutory and OPM guidelines.¹⁴¹

[201] With respect to the General Schedule, which is found in the website of the OPM, it contains 15 grades, GS-1 being the lowest, and GS-15 the highest.¹⁴² Agencies establish the grade of each job based on the level of difficulty, responsibility, and qualifications required. Individual with a high school diploma and no additional experience typically qualify for GS-2 positions; those with a Bachelor's degree for GS-5 positions; and those with a Master's degree for GS-9 positions.¹⁴³

[202] There are 10 steps within each grade, with each worth approximately 3 percent of the employee's salary. In this respect, the country under review notes the following:¹⁴⁴

[203] *“Within-grade step increases are based on an acceptable level of performance and longevity (waiting periods of 1 year at steps 1-3, 2 years at steps 4-6, and 3 years at steps 7-9). It normally takes 18 years to advance from step 1 to step 10 within a single GS grade if an employee remains in that single grade. However, employees with outstanding (or equivalent) performance ratings may be considered for additional, quality step increases (maximum of one per year).”*

[204] *A new GS employee is usually hired at step one of the applicable GS grade. However, in special circumstances, agencies may authorize a higher step rate for a newly-appointed Federal employee based on a special need of the agency or superior qualifications of the prospective employee, subject to established procedures. Current Federal employees who move to a GS position and are not considered newly appointed may have pay set above step 1 based only on a previous Federal civilian rate of pay (i.e., maximum payable rate rule) under the gaining agency's policies.”*

[205] The country under review further notes that the GS base pay schedule is usually adjusted annually each January with an across-the-board pay increase based on nationwide changes in the cost of wages and salaries of private industry workers. In addition, the country under review reports that most GS employees are also entitled to locality pay, which is a geographic-based percentage rate that reflects pay levels for non-Federal workers in certain geographic areas as determined by surveys conducted by the U.S. Bureau of Labor Statistics.¹⁴⁵ Moreover, OPM may approve special rates which are higher than the normal GS rates, because of serious difficulties in staffing certain occupations at GS grade levels in certain geographic areas.

[206] Finally, the country under review notes the following:¹⁴⁶

[207] *“OPM recently published guidance reminding Federal entities that they have considerable discretionary authority to provide additional compensation and leave benefits to support their employee*

¹⁴⁰ See OPM Pay & Leave Policies: <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/>

¹⁴¹ Response to the Questionnaire, pg. 32, *supra* note 11. See also OPM Classification Standards, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/>

¹⁴² See the OPM website, Pay & Leave: Salaries & Wages, for the GS for 2018, and year past, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/>

¹⁴³ Response to the Questionnaire, pg. 32, *supra* note 11.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, pg. 33. In this regard, the country under review notes, in its Response to the Questionnaire: *“There are currently 47 locality pay areas, which cover the lower 48 States and Washington, DC, plus Alaska, Hawaii, and the U.S. territories and possessions. Forty-four of the locality pay areas cover large metropolitan areas (e.g., Los Angeles, New York, Washington, DC), two cover entire States—Alaska and Hawaii, and the remainder of the United States and its territories and possessions are included in the catch-all Rest of U.S. (RUS) locality pay area. GS employees in foreign areas are not eligible for locality pay. The President and Congress may make changes in the otherwise applicable across-the-board and locality pay adjustments.”*

¹⁴⁶ *Ibid.*

recruitment, relocation and retention efforts. The programs highlighted in this guidance include: Special Rates, Critical Position Pay, Superior Qualifications and Special Needs Pay-Setting Authority, Maximum Payable Rate Rule, Recruitment Incentive, Relocation Incentive, Retention Incentive—Individual Employees, Retention Incentive—Groups of Employees, Federal Student Loan Repayment Program, Creditable Service for Annual Leave Accrual for Non-Federal Work Experience and Experience in the Uniformed Service, Extension of the Higher Annual Leave Accrual Rate to SES and SL/ST Equivalent Pay Systems, Telework and Alternative Work Schedules. See <https://www.opm.gov/policy-data-oversight/pay-leave/pay-and-leave-flexibilities-for-recruitment-and-retention/>.”

[208] The Committee also notes that section 356 of Title 2 Chapter 11 of the United States Code establishes a Citizens’ Commission on Public Service and Compensation, which for each fiscal year, reviews the rate of pay for, among other things: a) the Vice President of the United States, Senators and Members of the House of Representatives; b) offices and positions in the legislative branch; and c) justices, judges, and other personnel in the judicial branch, including the judges of the Supreme Court.¹⁴⁷ This review is to determine the appropriate pay levels and relationships between and among the respective offices and positions covered by the review; and the appropriate pay relationships between these offices and positions and the offices and positions subject to the General Schedule pay rates. This Commission is to determine and consider the appropriateness of the executive levels of these offices and positions.

[209] The Commission is to submit to the President a report of the results of each review with respect to rates of pay for the offices and positions subject to its review, together with its recommendations. This report is not to be submitted no later than December 15 next following the close of the fiscal year in which the review is conducted by the Commission.

[210] The President of the United States considers the recommendations contained in the report and transmit his recommendations with respect to the exact rates of pay, for the offices and positions subject to the review of the Commission, which the President considers to be fair and reasonable in light of the Commission’s report and recommendations, the prevailing market value of the services rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government.

2.2.2. Adequacy of the legal framework and/or other measures

[211] With respect to the provisions that refer to the establishment of objective and transparent criteria for determining the compensation of public servants, the Committee notes there is a comprehensive system establishing objective and transparent criteria for determining the remuneration of public servants.

2.2.3. Conclusions and Recommendations

[212] Based on the review conducted in the above sections regarding the implementation by the United States of Article III, paragraph 12 of the Convention, the Committee offers the following conclusion:

[213] The United States has considered and adopted measures intended to establish objective and transparent criteria for determining the compensation of public servants, as described in Chapter III, Section 2 of this Report.

¹⁴⁷ See <https://www.law.cornell.edu/uscode/text/2/chapter-11>. This Commission is composed of 11 members, who shall be appointed from private life as follows: a) 2 appointed by the President of the United States; b) 1 appointed by the President pro tempore of the Senate, upon the recommendation of the majority and minority leaders of the Senate; c) 1 appointed by the Speaker of the House of Representatives; d) 2 appointed by the Chief Justice of the United States; and e) 5 appointed by the Administrator of General Services in accordance. The Law further states that, among other things, no officer or employee of the Federal Government can serve as a member of the Commission, registered (or required to register) under the Federal Regulation of Lobbying Act.

IV. BEST PRACTICES

[214] In keeping with section VI of the Methodology for follow-up of implementation of the recommendations formulated and provisions reviewed in the Second Round and for the review of the provisions of the Convention selected for the Fifth Round, the following describes the best practices identified by the country under review that it has wished to share with the other member countries of the MESICIC in the belief that they could be of benefit to them.

[215] – **The Institute for Ethics in Government (IEG) learning portal.**¹⁴⁸ The IEG provides educational opportunities to government ethics practitioners and makes these opportunities available through the IEG learning portal. On this portal, the OGE announces courses for ethics officials, makes available a library of more than 80 on-demand learning tools, and shares research findings that can help ethics officials perform their duties more effectively. The resources of the IEG are readily accessible to all ethics officials and the public, and it is accessible through the OGE’s public website.

[216] It is considered a best practice as it allows the OGE, through the IEG, to effectively leverage resources by producing live video webcasts accessible to anyone with internet access, especially to the more than 7,000 government employees supporting the ethics functions of over 130 agencies in the executive branch of the U.S. government.

[217] These employees are located across the United States and around the globe, and given that the OGE has a limited number of fulltime staff dedicated to the development and delivery of education and training for ethics practitioners, these webcasts provide training to these practitioners who otherwise would not be able to access OGE’s training. These training resources cover the panoply of ethics laws and regulations, as well as program management, and are maintained in a library for on-demand use by ethics officials. Instructor-led in-person training to ethics officials in very senior and critical roles are also made available.

[218] – **Whistleblower Protection as Criteria in Performance Appraisals.**¹⁴⁹ In 2017, newly enacted legislation directed agencies, in consultation with OSC and OPM, to develop performance evaluation criteria that are intended to foster whistleblower protection. In this respect, the country under review notes the following:¹⁵⁰

[219] *“The inclusion of an additional performance element for leaders and managers encourages managers to foster an environment that promotes the disclosures of wrongdoing without fear of retaliation. It also ensures that managers respond appropriately to disclosures, and maintain clear and open communication with employees who make disclosures.”*

[220] It is considered a best practice as it promotes a culture in which whistleblowing is seen as valuable and cost-effective for the organization and holds managers accountable for ensuring a positive environment and appropriate response.

¹⁴⁸ See Response to the Questionnaire, pgs. 52 – 53, *supra* note 11.

¹⁴⁹ *Ibid*, pgs. 54 – 56.

¹⁵⁰ *Ibid*.

ANNEX
AGENDA FOR THE ON-SITE VISIT TO THE UNITED STATES

<u>Tuesday, October 16, 2018</u>	
10:00 hrs. – 11:00 hrs. <i>OAS, Gabriela Mistral Room, 1889 F Street</i>	Coordination meeting between the representatives of the member states of the subgroup and the Technical Secretariat
11:00 hrs. – 12:00 hrs. <i>OAS, Gabriela Mistral Room, 1889 F Street</i>	Coordination meeting between the representatives of the country under review, the member states of the subgroup and the Technical Secretariat
12:00 hrs. – 14:00 hrs.	Lunch
14:00 hrs. – 16:30 hrs. <i>OAS, Gabriela Mistral Room, 1889 F Street</i>	Meetings with civil society organizations and/or, <i>inter alia</i>, private sector organizations, professional organizations, academics or researchers
	<p><u>Session:</u></p> <p>Follow-Up of the Recommendations of the Second Round and Topics of the Fifth Round</p> <p>Topics:</p> <ul style="list-style-type: none"> • <i>Challenges to the protection for whistleblowers of acts of corruption</i> • <i>Challenges to the investigation and prosecution of public corruption</i> • <i>Challenges to the Office of Government Ethics</i>

	<p><u>Participants:</u></p> <p><i>Citizens for Responsibility and Ethics in Washington</i> Noah Bookbinder, Executive Director Virginia Canter, Chief Ethics Counsel Walter Shaub, Senior Advisor</p> <p><i>Government Accountability Project</i> Samantha Feinstein, Senior Legal and International Analyst</p> <p><i>Public Citizen</i> Shanna Devine, Worker Health and Safety Advocate Susan Harley, Deputy Director for Congress Watch</p>
16:30 hrs. – 17:00 hrs.	Informal meeting between the representatives of the member states of the subgroup and the Technical Secretariat
<u>Wednesday, October 17, 2018</u>	
9:30 hrs. – 12:30 hrs. <i>State Department</i>	Follow Up to the Recommendations of the Second Round
9:30 hrs. – 11:30 hrs.	<p>Panel 1: Systems for Protecting Public Servants and Private Citizens who in Good Faith, Report Acts of Corruption</p> <ul style="list-style-type: none"> • New Developments ❖ Whistleblower Protection Enhancement Act (WPEA) ❖ Dr. Chris Kirkpatrick Whistleblower Protection Act ❖ OSC Reauthorization Act of 2017 • Results, Resources
	<p><u>Participants:</u></p> <p><i>U.S. Office of Special Counsel</i> Karen Gorman, Chief of Retaliation and Disclosure Unit Christopher Leo, Staff Attorney</p>
11:30 hrs. – 12:30 hrs.	<p>Panel 2: Acts of Corruption</p> <ul style="list-style-type: none"> • New Developments • Skilling v. United States; McDonnell v. United States
	<p><u>Participants:</u></p> <p><i>Department of Justice</i></p>

	<p>AnnaLou Tirol, Acting Chief, Public Integrity Section</p> <p>Jennifer Clarke, Trial Attorney</p> <p>Victor Salgado, Trial Attorney</p>
12:30 hrs. – 14:00 hrs.	Lunch
14:00 hrs. – 16:00 hrs. <i>State Department</i>	Provisions selected for the Fifth Round of Review
	<p>Panel 3: Designated Agency Ethics Officials and Alternate Designated Agency Ethics Officials</p> <ul style="list-style-type: none"> • Provisions and/or measures for providing instructions to selected government personnel which ensure proper understanding of their responsibilities • Provisions and/or measures for providing instructions to selected government personnel which ensure proper understanding of their ethical rules
	<p><u>Participants:</u></p> <p><i>Office of Government Ethics</i></p> <p>Nicole Stein, Chief, Agency Assistance Branch</p> <p>Patrick Shepherd, Lead Instructor, Legal, External Affairs, and Performance Branch</p> <p>Christopher Swartz, Associate Counsel & Team Leader, International Assistance and Outreach Program</p>
16:00 hrs. – 16:30 hrs.	Informal meeting between the representatives of the member states of the subgroup and the Technical Secretariat.
16:30 hrs.	Final meeting between the representatives of the country under review, the member states of the subgroup and the Technical Secretariat.

CONTACT AUTHORITY FROM THE COUNTRY UNDER REVIEW FOR COORDINATION OF THE ON-SITE VISIT, AND REPRESENTATIVES OF THE MEMBER STATES OF THE PRELIMINARY REVIEW SUBGROUP AND THE TECHNICAL SECRETARIAT OF THE MESICIC

COUNTRY UNDER REVIEW:

UNITED STATES

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Bureau of International Narcotics and Law Enforcement Affairs
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Public Ethics Prosecutor, Attorney General's Office

SAINT VINCENT AND THE GRENADINES

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