

Translations: If translations will be provided please indicate the languages below:										

Report of Public Comments

Title:		Revisions to Conflicts of Interest Policy and Bylaws to Allow Board to Consider Compensation for Director Services								
Publication Date:										
Prepared By:		Amy A. Stathos								
Comment Period:					Important Information Links					
Open Date:		2 September 2011			Announcement					
Close Date:		3 October 2011			Public Comment Box					
Time (UTC):		06:59			View Comments Submitted					
Staff Contact:		Amy A. Stathos				Email:		Amy.Stathos@icann.org		
Section I: General Overview and Next Steps										
<p>Review of Potential Revisions to the ICANN Conflicts of Interest (COI) Policy http://www.icann.org/en/general/proposed-revisions-coi-policy-01sep11-en.pdf and ICANN Bylaws http://www.icann.org/en/general/proposed-bylaws-revision-vi-01sep11-en.pdf that are necessary for the Board to consider the question of compensating ICANN voting Directors for their service. The COI Policy revisions are necessary to allow the Board to discuss and consider Board compensation-related issues, and the Bylaws revisions are necessary to allow Directors to receive compensation if recommended.</p> <p>This work is necessary to meet the Accountability and Transparency Review Team's (ATRT) Recommendation No. 5, recommending compensation for ICANN Directors.</p> <p>Posting these documents for public comments are part of a broader process that was approved by the Board on 25 August 2011 regarding the consideration of compensation for Director services.</p> <p><u>Next Steps:</u></p> <p>Review the Independent Valuation Expert's Report, Board to consider posting the Report, and determine next steps in the process for considering Board Remuneration.</p>										
Section II: Contributors										

At the time this report was prepared, a total of seven (7) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Public Interest Registry	David Maher	PIR
American Intellectual Property Law Association; the Coalition for Online Accountability; and International Trademark Association (Joint submission)	Steven J Metalitz	AIPLA, COA and INTA
Association of National Advertisers	Robert D Liodice	ANA
Ministère des Affaires étrangères et européennes (France)	Camille Angué	MAEE
Registry Stakeholder Group	David Maher	RySG
United States Council for International Business	Christopher G. Martin	USCIB
At-Large Advisory Committee	Matt Ashtiani	ALAC

Individuals: None

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

PIR stated its support for: (i) the ATRT recommendations for compensation of ICANN Board Directors; (ii) revision of the COI Policy to allow the Board to consider the issue of compensation; and (iii) revision of the Bylaws to allow the Board to receive compensation if recommended.

In their joint submission, AIPLA, COA and INTA expressed general support for ATRT recommendations but do not take a position on the specific issue of directors' compensation. AIPLA, COA and INTA recommend that no action on the proposed COI Policy changes be taken until the following broader issues are included in changes to the COI Policy: (i) mandating voting abstention as currently exist, but also when the Director's financial interest will not be directly affected by the outcome of a vote (for example when the Director is a consultant for a party that would be affected by the decision, but the Director's compensation does not directly turn on the outcome of the vote); (ii) requiring that Board members employed by, represent, or have other affiliations with ICANN-contracted parties be recused from Board consideration of contract amendments and other decisions that directly affect ICANN-contracted parties, and clarifying when Directors must withdraw from consideration of other

matters before the Board; (iii) stating that whenever COI considerations of a matter require a Director to abstain from voting, the Director also be required to withdraw from Board deliberations or discussions on that matter, except to the extent such discussions are placed on the public record; (iv) divesting other Board members from the responsibility to make final decisions regarding COI questions involving fellow Directors, and using the ICANN Ombudsman or some other independent third party as the decision maker; and (v) imposing reasonable restrictions on post-service employment (or contracting) of ICANN Directors by parties under contract to ICANN, or whose businesses are materially affected by decisions taken by the Board during the Directors' tenure.

In relation to the proposed amendments to the COI Policy and Bylaws, the joint submission expressed the following suggestions: (i) clarify whether compensation will be made on an individual Director basis or uniformly across all Directors; and (ii) consider requiring that any Director compensation only take effect after the expiration of the term of the Director voting upon it – similar to safeguards used in some public administration contexts.

The ANA commented that it does not take a position on the proposed COI Policy and Bylaws revisions but requests ICANN to conduct an expanded “systematic review of its entire COI Policy and related Bylaws” rather than focusing on single issue of Board compensation. The ANA makes reference to the Affirmation of Commitments and submits that “strong COI protections keep NTIA’s public interest mandates from being transformed into little more than an administrative charade. NTIA’s words only have meaning if an impartial ICANN Board, fully and without bias, evaluates the public interest, uses substantiated facts to drive its decision making and reaches a conclusion in the public interest.”

The ANA further suggests that the following issues be addressed via public comment: (i) should “Financial Interest” in the COI Policy be expanded to include future employment prospects with companies or organizations impacted by ICANN policy making and persons who are employed by, represent, or have other affiliations with TLD registries or registrars?; (ii) under what circumstances must ICANN’s BGC determine that a conflict exists?; (iii) when a recusal is called for, should the COI Policy require the conflicted Director to withdraw from all deliberations unless such discussions are in or made public?; (iv) under what circumstances should the COI Policy divest other Directors of the responsibility to make final decisions regarding COI questions involving fellow Directors?; (v) should ICANN's COI Policy impose reasonable restrictions on post-service employment or contracting of ICANN Directors with parties under contract to ICANN, or whose businesses are materially affected by any Board decision made during the Director's tenure?; and (vi) should ICANN consider reasonable restrictions or a moratorium on post-service employment or contracting of ICANN staff with parties under contract to ICANN, or whose businesses are materially affected by any decision made by the Board during the staff member's tenure? If so, at what staff levels would any such measures be appropriate?

The MAEE did not express a position on the proposed COI Policy and Bylaws revisions. The MAEE commented on the need for the COI Policy to: (i) prevent a Board member from acting for his or her own financial benefit (or his or her employers) to the detriment of ICANN or the Internet community; and (ii) ICANN taking action contrary to the interests of the Internet community. The MAEE recommended that the Bylaws tasking a Board Committee with the responsibility for reviewing

conflicts be amended to: (i) create an independent committee, representative of the various stakeholders existing within ICANN; and (ii) provide for commercial sanctions against third parties that directly benefit from a conflict generated by a Board member or a prior Board member who has vacated the Board within the previous two years, such that ICANN suspends relations with organizations benefiting from a “strong suspicion” of conflict of interest. The MAEE also provided recommended edits to the COI Policy and Bylaws to reflect its comments.

The RySG stated its support for: (i) the ATRT recommendations for compensation of ICANN Board Directors; (ii) revision of the COI Policy to allow the Board to consider the issue of compensation; and (iii) revision of the Bylaws to allow the Board to receive compensation if recommended. The RySG comments were supported by a supermajority of its members.

The USCIB submitted no formal position on the issue of Board compensation but recognized the legal requirement for the Bylaws revision to allow the Board to consider the issue and supported the proposed revision. The USCIB also expressed its view that ICANN consider developing expanded ethics guidelines and also to specifically develop guidelines for terms of contract for an ICANN director or key employee after leaving ICANN to minimize reputational risk to ICANN.

The ALAC supports the proposed COI Policy and Bylaws amendments. The ALAC further suggested that the Board adopt broader but specific “categorical standards of independence” as a prerequisite to implementing board compensation or at a minimum to commit to such a review in the near future. Specific recommendations include: (i) ICANN should adopt broader “categorical standards of independence” than what is mandated by California and the definitions of conflict or independence must be specific in stating the (a) exact monetary levels beyond which “self-dealing” transactions may be considered as conflicts, (b) nature of material relationships, including but not limited to commercial, industrial, legal, consulting and familial relationships, and (c) other aspects that are appropriate to hold ICANN to higher standards as appropriate; (ii) ICANN Board not solely rely on self disclosure but create avenues/mechanisms for employees and public to report potential conflicts; and (iii) COI policy should be specific in courses of Board action to be taken to give the public clear indication of the Board’s resoluteness to uphold high standards.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

PIR, RySG, USCIB and ALAC expressed support for the proposed COI Policy and Bylaws changes. Only the joint submission by AIPLA, COA and INTA provided comments specific to the proposed COI Policy and Bylaws revision. AIPLA, COA, INTA, ANA and USCIB did not express a formal position as to the issue of compensation in their submissions. AIPLA, COA, INTA, ANA, MAEE, USCIB and ALAC submissions all recommended that a broader review of the COI Policy be undertaken to address other issues in addition to the current proposed revisions regarding Board remuneration.

Specifically, the AIPLA, COA, INTA suggested: (i) clarification of whether the “all relevant factors” consideration in the proposed Bylaws Article VI, Section 22.3 means the basis of compensation will be uniform across all directors or on an individual director by director basis; and (ii) consideration requiring that any increase in director compensation only take effect after expiration of the director’s term.

After hearing from the community, and understanding the Independent Valuation Expert Report, ICANN will consider all comments provided and make a determination at that time with respect to Board remuneration, while ensuring compliance with all applicable, laws, rules and regulations.

Requests regarding broader COI Policy review and other issues to be considered

Several submissions recommended a broader COI policy review, and the perceived concern of post-service activity by directors or ICANN staff was the most common theme raised. Many commenters suggest consideration of measures to restrict post tenure contact, employment or contracting by Directors or certain ICANN staff. Others suggest replacing the BGC as the group responsible for reviewing conflicts with another structure such as the Ombudsman, an independent third party, a committee of stakeholder representatives with investigative powers, or some other neutral party.

Commenters also ask: (i) how and when does the BGC determine existence of a conflict; (ii) should the definition of “Financial Interest” be expanded; (iii) should certain provisions of COI Policy be deleted; and (iv) should ICANN adopt a broader view of independence than required under California law? In addition, the ALAC suggests that the definitions of conflict or independence be specific as to: (i) exact monetary levels beyond which “self-dealing” transactions may be considered as conflicts; (ii) the nature of material relationships, including but not limited to commercial, industrial, legal, consulting and familial relationships; and (iii) other aspects as appropriate to hold ICANN to higher standards.

One commenter suggests applying commercial sanctions (such as refusal to do business) against third parties that directly benefit from a conflict of interests. Others suggest more transparency around the processes of Board action on disclosed and identified conflicts of interest.

Some have identified a specific manner of dealing with Board voting and participation in discussions when conflicts have been identified. Some suggest that a Director must abstain even if his or her financial interest will not be directly affected by the outcome of a vote. Others suggest that Board members employed by, represent, or who are affiliated with ICANN-contracted registries or registrars be recused from Board consideration of contract amendments and other decisions that directly affect ICANN’s contracted parties. Still others suggest that when COI considerations require a Director to abstain from voting, the Director should also withdraw from Board deliberations unless the discussions are placed on the public record.

One group suggests that the Board not solely rely on self-disclosure, but create avenues/mechanisms for employees and public to report potential conflicts.

ICANN welcomes and appreciates all or the comments above relating to a broad review of its conflicts of interest identification and processes. To that end, during its 15 September 2011 meeting,

The BGC approved a motion leading to the following actions:

- Actions:
 - The CEO and the General Counsel are to review and propose revisions to the Conflicts of Interest Policy to clarify issues, including disclosure and abstention requirements, surrounding future interests or potential future interests.
 - The CEO and the General Counsel are to engage an external firm with expertise in advising on ethical issues, to advise and help develop an ICANN Ethics Regime or set of Guidelines for the Board, the staff and the community.
 - A work party of Cherine Chalaby, Bill Graham and Ray Plzak as current members of the BGC to review and guide staff efforts to revise the Conflicts of Interest Policy and development of the Ethics Regime or set of Guidelines.
 - Staff to provide BGC with progress report, and BGC to further discuss process and timeline in Dakar.

Each of these actions is underway and a report will be provided to the community on the status during the public session on Thursday, 27 October 2011 in Dakar. ICANN looks forward to any additional comments the community may have on these topics.