

Frequently Asked Questions – Legal and Fiduciary Requirements (source: <https://community.icann.org/x/CbDRAw>)

Why must auction proceeds be spent consistent with ICANN's mission?

Due to its 501(c)(3) tax exempt, public charity status, ICANN must act exclusively in service to its charitable purpose, and as limited by its Mission. Maintaining adherence to Mission is important from source (ICANN) to destination (end recipient), no matter what type of tool (foundation, committee, etc.) is used to make decisions on providing a portion of the proceeds to end recipients.

Requiring alignment to ICANN's Mission also protects the community's resources from being used to defend against independent reviews or other challenges that could come if ICANN were to authorize expenditures of funds or resources outside of Mission.

Why can auction proceeds not be spent towards the private benefit of individuals?

One of the main restrictions for 501(c)(3) organizations is that it cannot provide its funds towards the private benefit of individuals.¹ For example, that is why ICANN does not have shareholders to which it provides dividends; instead, ICANN is obligated to use its funds in service of its mission. The concerns surrounding private benefit must guide the CCWG's decisions on allocation. Private benefit concerns exists whether the proceeds are eventually distributed to organizations or to individuals. However, there are certain considerations that can reduce those concerns.

As part of making its recommendations, the CCWG will have to consider the extent of administrative burden in defining and evaluating the eligibility of the candidates who will be the end recipients, and the extent to which ICANN's continued involvement or oversight might be required in order to make sure that ICANN's legal obligations are met.

The prohibition on private benefit typically results in an exclusion of grants/payment of funds directly to individuals, because there is little possibility of performing the proper review over the use of those funds to make sure that they went towards service of ICANN's charitable purpose, as opposed to enriching the individual. This does not mean that the funds cannot be provided to an organization that provides direct services to individuals, but for the purposes of developing eligibility criteria, we recommend that a restriction be included that prohibits ICANN from providing individual grants.

Can organizations that do not have 501(c)(3) status apply for auction proceeds?

To the extent that the auction proceeds are requested to financially support an organization that does not have 501(c)(3) status, due diligence to ensure that only incidental private benefits

¹ Payment of salaries that meet defined tests of reasonableness is not an example of private benefit.

will result (such as payment of reasonable employment salaries) will be required prior to providing that support. That due diligence could include, for example, seeking a clear description of the public benefits that will be generated by the activity, and the circumstances and means through which those benefits are expected to be achieved. It could include seeking of financial data or other information that is appropriate in the circumstance.

There are other ways to establish eligibility as well. Foreign non-profits or NGOs are eligible to obtain affidavits or opinions of counsel that they operate as an equivalent of a 501(c)(3) public charity. With the proper documentation, ICANN may rely on that affidavit or opinion to demonstrate the public benefit and lack of private benefit, therefore not needing to engage in detailed due diligence.

Can auction proceeds be used to fund political activities?

ICANN is barred from engaging in any activity that intervenes in a political campaign for a candidate for public office. This includes not providing funds to a separate organization that intervenes in a campaign. As a result, it is recommended that the CCWG prohibit the use of the funds to support political campaign activity that is prohibited under section 501(c)(3). For those not familiar with U.S campaign activity:

“Political campaign activity is activity that supports or opposes one or more candidates for public office. Political campaign activity includes, but is not limited to, making partisan statements of candidate or political party preference and projects designed or targeted to influence voter acceptance or rejection of a candidate. Coordinating activities with a candidate’s campaign or a political party is also political campaign activity. Political campaign activity does not include nonpartisan activities that do not attempt to influence an election by supporting or opposing a candidate, such as voter registration drives or production of neutral voter guides.”

Can auction proceeds be used for lobbying activities?

Lobbying is an attempt to influence specific legislation by communicating views to legislators or asking people to contact their legislators. This includes legislation actually introduced in a legislative body, under discussion, or merely being proposed. Lobbying does not include public education about issues, advocacy with respect to matters that are not specific legislation or legislative proposals, regulatory work, litigation, and work before administrative bodies.

While ICANN does engage in a small amount of activity that is classified as lobbying (as reported on ICANN’s annual tax filings), this lobbying activity has limitations, and must be an “insubstantial” part of ICANN’s activities. However, if ICANN were to provide funds to another organization that engages in lobbying activities, those activities would be considered ICANN’s, and could impact ICANN’s tax exempt status. As a result, it is recommended that the CCWG

requires that proceeds cannot be provided in support of lobbying activities, and that requirement be an express commitment as part of a grant process.²

What about conflict of interest requirements?

ICANN is prohibited from benefitting insiders to ICANN. The CCWG should be encouraged to consider a limitation that any design of a proceed allocation program include a prohibition on auction proceeds being awarded to businesses that are owned in whole or in part by ICANN board members, executives or staff or their family members and awards that may be used to pay compensation to ICANN board members, executives or staff or their family members. This is an appropriate limitation when ICANN itself is responsible for decision making over the expenditure of funds.

Moreover, an important safeguard against the possibility of self-dealing or private benefit could be to prohibit the CCWG from recommending awards of assistance to businesses owned in whole or in part by the CCWG members (participating in any phase of the CCWG process), their family members, and awards that would be used to pay compensation to CCWG members or their family members. Similarly, a commitment from those who participated in the designing of the process to refrain from applying for an award could be a limitation that the CCWG imposes on its membership. If any CCWG members are participating on behalf of an organization, it might be appropriate to include a prohibition on awards further, to include considerations of board members, executives, staff or family members for those participating organizations.

In any event, the CCWG should include recommendations in relation to a conflict of interest requirement for the completion and maintenance of up-to-date statements of interests, as well as adherence to a conflict of interest policy similar to that used at the Board level.

If the CCWG recommends that a foundation is to be created, does that mean there is more independence?

ICANN will always be responsible for making sure that funds are provided to appropriate organizations both in confirmation of mission and in making sure that funds are provided in a manner consistent with maintaining ICANN's 501(c)(3) status. In maintaining the Board's fiduciary duty, the Board cannot cede this responsibility to the community. This is an important limitation, which does not go away even if, for example, the proceeds are initially provided to a foundation, which then in turn administers a process for identifying appropriate recipients. In a foundation scenario, ICANN would likely have a lot less direct involvement in decisions on individual awards, when compared to ICANN directly administering a program to make awards. However, in the foundation scenario, ICANN would still have to make sure that the rules for the foundation are set up in a way that the processes are reliable, verifiable and auditable, and there would still be a need to for ICANN to measure (through reports or otherwise) that the grants to end recipients were in alignment with the requirements.

² Connected to this lobbying prohibition, we recommend a prohibition on providing funds to labor unions.

Any other financial and fiduciary concerns the CCWG should take into account?

The auction fund pool is currently over US\$100M, effectively a bit less than a full year's operating budget within ICANN. The Board and Officers of ICANN hold fiduciary duties to the organization to make sure that self-dealing does not occur and that private interests are not benefited through ICANN's decision making and actions. While this obligation exists at all times, the process through which funds will be disbursed must happen as transparently as possible, without conflict, and based on complete information. As discussed above, it is not just ICANN Board or staff who should be without conflict, but also those participating in the decision making.

Depending on the outcomes of the CCWG, ICANN might be put into longstanding audit compliance efforts to assure that the funds disbursed are being used in appropriate ways. For example, would the CCWG recommend a single entity receiving a grant of a sufficiently large size that it would make sense for ICANN to take on a role in the governance of how that money is spent? What reporting requirements will be needed to satisfy ICANN's auditing requirements? Will a separate trust or foundation need to be established to oversee this work? The answers to many of these questions depend on the actual form of the recommendations, the CCWG will have to consider issues of administration, such as complexity and duration of future oversight as part of the development of their recommendations, and to require consultation with ICANN's CFO on those matters.