



CCWG -New gTLD Auction Proceeds – Legal and Fiduciary Constraints

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The CCWG New gTLD Auction Proceeds

- ⦿ The CCWG New gTLD Auction Proceeds was established to develop principles for the allocation of proceeds from the New gTLD Program.
- ⦿ The CCWG is tasked with developing proposal(s) for consideration by the Chartering Organizations and Board on the allocation of new gTLD Auction Proceeds. As part of this proposal, the CCWG is expected to consider various issues that will impact ICANN's disbursement of these proceeds.
- ⦿ This presentation will explore some of the issues that will impact how ICANN can disburse the New gTLD Auction Proceeds.

ICANN as an 501(c)(3) status organization

- ⦿ 501(c)(3) tax-exempt status
 - ⦿ Granted by the US government
 - ⦿ Revenues generated must be used to support the organization's mission
 - ICANN does not have *shareholders* – it cannot be organized or operated to the benefit of private interests
 - Provides annual reports to the Internal Revenue Service
- ICANN, also has California legal requirements as a Nonprofit Public Benefit Organization

ICANN's Guidelines/Proposed Principles for Consideration

1. Consistency with ICANN's Mission as Set out Bylaws

2. Private Benefit Concerns

3. Must not be used for Political Activity

4. Should not be used for Lobbying Activities

5. Conflict of Interest Considerations

6. Procedural Concerns

7. Financial and Fiduciary Concerns

1. Consistency with ICANN's Mission as Set out Bylaws

- ◉ Due to ICANN's 501(c)(3) tax exempt, public charity status, it must adhere to its Mission and act exclusively in service to its charitable purpose.
- ◉ What does this mean?
 - Money spent by ICANN – including the Auction Proceeds – must be used consistently with the Mission
 - From source (ICANN) to destination (end recipient)
 - Ex: cannot donate to a foundation that then allows the funds to be distributed/used without regard to ICANN's mission
 - Protects the community's resources from being used to defend challenges if ICANN were to authorize expenditures of funds or resources outside of Mission.

1. Consistency with ICANN's Mission as Set out Bylaws

- ◉ What is the Mission?
- ◉ Article 1: <https://www.icann.org/resources/pages/governance/bylaws-en/#article1>

Section 1.1. MISSION

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN:

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("**DNS**") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN's scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect

1. Consistency with ICANN's Mission as Set out Bylaws

- ◎ CCWG Charter states:
 - The CCWG is expected to make recommendations about how to assess the extent to which the proposed use of auction proceeds by applicants is aligned with ICANN's Mission
- The ICANN Board will consider consistency with Mission when considering the recommendations of the CCWG

2. Private Benefit Concerns

- ⦿ As an 501(c)(3) organization, ICANN cannot provide its funds towards the private benefit of individuals.
- ⦿ What this means:
 - There are many issues that the CCWG will have to consider when making recommendations
 - ICANN will have due diligence requirements over any granting of the Auction Proceeds to make sure that funds are not used for private benefit
 - What can the CCWG do?
 - Providing funds to *organizations*, as opposed to *individuals* is recommended
 - But just being an organization is not enough

2. Private Benefit Concerns – as it relates to Organizations

⦿ How do we know if an Organization is OK?

- There are a range of considerations, and the mechanisms chosen for disbursement can make these considerations more or less burdensome and costly
 - Ex: An established foundation experienced in international grantmaking would probably have the due diligence processes in place; starting a new foundation, or a philanthropic giving arm in ICANN would require retention of proper expertise.
 - Cost/burden
- Typically, other 501(c)(3) organizations are presumed to not have private benefit concerns – but what about entities outside of the U.S.?

2. Private Benefit Concerns – as it relates to Organizations (continued)

- ◉ 501(c)(3) status alone does not have to be determinative. Eligibility can be established through other means.
 - Due diligence mechanisms can be put in place to ensure that only incidental private benefits will result (such as payments of reasonable employment salaries).
 - Foreign non-profits or NGOs can obtain affidavits or opinions of counsel that they operates as an equivalent of 501(c)(3) public charity. Such affidavits and/or opinions may be relied upon to demonstrate the public benefit.
 - Other processes can be developed
 - Important to not write too narrowly to allow for impact outside of U.S.

2. Private Benefit Concerns – as it relates to Individuals

- ⦿ Grants/payments of funds directly to individuals raise private benefit concerns
 - ⦿ This does not mean funds cannot be given to organizations that provides direct services to individuals
 - ⦿ Reasonable salaries are not considered private benefit
 - ⦿ CCWG is urged to not make recommendations of direct grants to individuals, in order to preserve ICANN's exempt status

3. Must not be used for Political Activity

- ⦿ 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.
 - Charter includes requirement that proceeds cannot be provided to organizations that intervene in campaigns for candidates (U.S. or outside of U.S.).

4. Should not be used for lobbying activities

- ⦿ ICANN engages in a small amount of activity that is classified as lobbying, which in the U.S. focuses on attempts to influence legislation
 - If ICANN provides funds to another organization that engages in lobbying activities, such activities would be considered ICANN's and could impact ICANN's tax exempt status.
 - Charter includes requirement that proceeds cannot be provided in support of attempts to influence legislation
 - CCWG could impose requirement that all recipients agree to this commitment as part of the grant process.

5. Conflict of Interest Considerations

- ⦿ Taking decisions without conflict of interest is paramount. ICANN is prohibited from benefitting insiders to ICANN.
 - Appropriate limitations include prohibitions auction proceeds being awarded to business that are owned in whole or in part by ICANN board members, executives or staff or their family members.
 - Community conflict of interest concerns should also be taken into account
 - What will the separation be between those making the recommendations and those eligible for award?
 - What segregation of duties, or commitments from participants in the CCWG might be appropriate?
 - Charter requires consideration of comprehensive conflict of interest requirements for disbursement process.

6. Procedural Concerns

- ICANN will always be responsible for making sure that funds are provided to the appropriate organization both in confirmation of mission and in making sure that funds are provided in a manner consistent with ICANN's 501(c)(3) status.
- This is part of the Board fiduciary obligations
- There are a number of things the CCWG can do to help maintain the integrity of this process:
 - Transparent assessment of how the recommendations service ICANN's mission
 - Considerations of use of established mechanisms for disbursement of funds, as opposed to calling for development of untested mechanisms
 - Recommendations that enhance transparency (requiring reliance on documented processes, etc.)

7. Financial and Fiduciary Concerns

- The Board and Officers of ICANN hold fiduciary duties to the organization to make sure that self-dealing does not occur and their private interests are not benefited through ICANN's decision making and actions.
 - The process through which funds will be disbursed must happen as transparently as possible, without conflict, and based on complete information.
 - ICANN will maintain an ongoing audit function over the distribution process; there is an ongoing governance role
 - ICANN's Legal Dept and CFO remain available to the CCWG to discuss these issues

Further Information and Resources

- ⦿ CCWG CHARTER: <https://community.icann.org/display/NGAPDT/Charter>
- ⦿ CCWG Background Information:
<https://community.icann.org/display/CWGONGAP/CCWG+Background+Information>

Engage with ICANN



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