

CCWG-AP Questions for ICANN Org 30 July 2018

1. With respect to fiduciary requirements for directors and officers of ICANN, what elements need to be added to the below list, if any?
 - a. Fiduciary requirements for directors and officers of ICANN (included in draft response to charter question 3 for mechanisms 1 & 2):
 - Disbursement of funds must be for projects that are in accordance with ICANN's mission.
 - Disbursements must be made for lawful purposes.
 - *Disbursements must be made in ICANN's best interest.*
 - *Disbursements must be made in accordance to ICANN's policies and procedures. (Oversight and management of the funds, Investment policy, compliance, performance management,...).*

In addition, we remind the CCWG of the note that was provided to on Legal and Fiduciary Requirements, available at

<https://community.icann.org/download/attachments/58730906/May%202016%20-%20Note%20to%20Auction%20Proceeds%20Charter%20DT%20re%20legal%20and%20fiduciary%20principles-UPDATED.doc?version=1&modificationDate=1466697425000&api=v2>, which set out broader legal and fiduciary concerns for ICANN org, including things such as:

- *Protect against self dealing;*
- *Protect against private benefit;*
- *Decisions taken without conflict of interest; and*
- *The broader fiduciary obligation to protect organization.*

These are all items that should be considered.

2. Should the CCWG recommend that ICANN org create a separate department, as outlined in mechanism 1 & 2, how would such a department benefit from services / expertise inside of ICANN org and how are those services / expertise then paid for? Guidance may be informed by the recent creation of PTI and/or the running/management of the new gTLD program. In addition to potentially paying for services / expertise from auction proceeds, what other costs are expected to be borne by auction proceeds for the establishments and running of a separate department?

ICANN currently operates approximately 60 departments. An ICANN department is simply a denomination to which people are attached (with an employee appointed as department head), has a defined role and responsibility, and is associated an allocation of expected expenses (the department budget) corresponding to the estimated amount of expenses required to be incurred to effect the role and responsibilities defined. The members of a department collaborate with other departments to carry out their role. Other departments' activities, including the support/services that would be provided to an "auction proceed" department, are funded according to the budget that they are each separately allocated.

Because the grant-making program is a special-purpose activity and is associated its specific dedicated funding (the auction proceeds), all costs triggered by and resulting from the program would be allocated to the "auction proceeds" department. The internal services that such a department might use can be illustrated in the shared services agreement between PTI and ICANN at https://www.icann.org/iana_pti_docs/153-services-agreement-v-30sep16.

3. The CCWG is expected to define principles to guide the development of safeguards at the project oversight level for each of the mechanisms. Can you provide guidance on where there may be differences in the safeguards needed for each mechanism?

ICANN org refers the CCWG back to the initial memo on legal and fiduciary requirements, where we provided some discussion on what the different safeguards might be for each mechanism. As noted in that memo, ICANN org will always have responsibility to make sure that the funds are used in alignment with ICANN's mission. However, the direct level of safeguards and oversight at the project level will typically always be the same, regardless of who is running the disbursement mechanism. At the project level, there will have to be reporting from the recipients on the use of the funds, and general oversight to guard against misuse.

4. From the ICANN org perspective, are there any considerations the CCWG should keep in mind as it defines principles to guide decisions regarding division of labor between ICANN and any external organization(s) as foreseen in mechanisms 2 and possibly 3 & 4?

As noted during the ICANN62 Auction Proceeds working session, some principles that could be in place to divide the division of labor between ICANN and any external entity/panel could be based upon responsibilities. An example is considering the different needs for initial vetting requirements as opposed to areas requiring substantive and subjective evaluation, and assigning responsibilities based on those differences.

As an initial principle, ICANN's directors and officers will need to ensure that their fiduciary duties are carried out, no matter which organization is participating at which point of the process. To the extent there are additional entities involved in disbursement, each of those entities will need to make sure that they are acting in fiduciarily appropriate manners as well. With that overarching requirement in mind, it could be appropriate to have ICANN org responsible for a first compliance check over applications, to consider such items as whether the proposed use of funds is in mission, whether the applicant can appropriately receive funds from ICANN, and to identify if any particular private benefit or lobbying issues are posed by the proposed uses stated in the application. Once the application passes a compliance check, then whichever structure is responsible for substantive evaluation of the applications (i.e., identification of those that will be funded) will then be responsible for applying their judgment based on the guidance as developed through the CCWG. ICANN would still have an audit/oversight requirement in making sure the funds were disbursed appropriately, no matter which entity performs disbursement.

5. Can legal and fiduciary requirements be met through existing safeguards that ICANN org has already in place, such as internal controls, contracting and disbursement guidelines, corporate compliance effort, and review by the Board? Is the answer the same for all mechanisms? If not, what are the differences? What are some examples of these safeguards?

Please refer to the response to Question 3.

As noted in the question, ICANN has significant internal controls in place to guide its activities, and that instills a culture of corporate compliance. Of course, ICANN does not have safeguards or internal controls in place that are specific to a grant distribution program, though ICANN has developed programs that are somewhat similar. For example, we build a New gTLD Program process through which we received and evaluated applications, and we have the ability to build appropriate

controls and processes in order to take on new areas of work. For grant distribution work, ICANN needs to carefully consider, in line with best practices at other grant-making organizations, what specific controls or guidelines might need to be put in place.

6. Can you provide input on how conflict of interest requirements may differ for different elements of the process and program: setting up of mechanism, running of mechanism, project evaluation, project application & implementation?

In the initial memo on legal and fiduciary duties, ICANN provided substantive conversation on potential conflict of interest considerations and how they might be considered at the different stages of the process. ICANN org wrote:

ICANN is prohibited from benefitting insiders to ICANN. In terms of guidance to the drafting team, 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.

Because of the special community nature of this work, we recommend that the charter include safeguards and requirements for segregation of duties amongst those who develop the requirements and those who assist in the identification of potential recipients. Moreover, an important safeguard against the possibility of self-dealing or private benefit could be 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.

7. From the ICANN org perspective, do you have any guidance on how the governance framework requirements may differ between the different mechanisms?

From the ICANN org perspective, the differences between the mechanisms do not drive potential differences for the governance frameworks needed. Within whichever mechanism that is selected, ICANN will have governance requirements that require it to uphold its fiduciary duties in running the program and to meet the goals stated by the CCWG. If other entities are involved, as envisioned in some of the mechanisms, the other entity or entities will also need to meet its own fiduciary responsibilities. Then, as between ICANN and the other entity/ies, there will likely be some form of contract between the two that outlines roles and responsibilities in how the program will operate.

8. Do you have any initial thoughts on how governance committees, steering committees, oversight councils, and/or advisory boards may play into each of the models? Is an advisory board needed to handle potential conflicts (SO/AC/Board/ICANN org members)?

As ICANN noted in response to Question 7, the mechanism itself does not drive the governance needs. Instead, each mechanism needs to be designed as appropriate to meet the fiduciary duties of

the entities involved, as well as to serve the goals set out by the CCWG. ICANN org recommends that the principle of simplicity should guide design; governance should be kept as simple as possible to have only the necessary body or bodies involved in governance. This will avoid complexity of process, reduce the potential for conflict of interest, and will streamline the path to making distributions. The fewer groups that are developed for involvement in the process, the lower the overhead will also be in running the program as a whole.

9. For mechanisms where some portion of the work is carried out by a third party, how closely would ICANN need to be involved in elements of the governance framework? Which elements can be delegated? Is there a need to define 'supervision' from ICANN org further at this stage or what principles need to be considered as part of the potential implementation of such a mechanism?

Across the spectrum of possibilities of mechanisms, there will be various degrees of outsourcing or reliance on third parties. We have some examples of how that could work in response to question 4. The exact details of what should be delegated and how that delegated work should be overseen are areas for implementation. When the implementation stage is reached, the considerations and principles that will guide such decisions include:

- (1) Obtaining the proper expertise for each stage of work;*
- (2) Making sure the design is simple and cost effective;*
- (3) For those areas that require more significant measures of independence, the need for outsourcing might be stronger;*
- (4) Confirming that there is clear definition of, as well as documentation of, the roles and responsibilities within the process;*
- (5) Proper controls need to be put in place to ensure that each participating entity can meet its own fiduciary requirements as well as serve the goals developed through the CCWG.*

10. Are there any legal or fiduciary requirements and/or COI requirements that need specific consideration in relation to the question of whether ICANN, the organization or a constituent part thereof, such as an SO or AC can be an applicant under any circumstances?

While ICANN is not intending to use the funds for its every day operations, the CCWG must bear in mind that the funds are held by ICANN, and ICANN technically does not need to apply to access the funds. The ICANN Board and officers must also uphold their fiduciary duties to the organization when considering the disposition of any funds under its management.

In order for an SO/AC (or subpart thereof) to be able to apply for auction proceeds, it would have to meet all of the basic due diligence requirements to which we would hold any other applicant, including being formally established legally, and documenting compliance with the purposes of the program as recommended through the CCWG. As with all other applications, considerations of self-dealing/private benefit as well as conflict of interest would be considered when evaluating such an application. Unless SOs and ACs take on significant activities outside of ICANN, they might have a difficult time in demonstrating that their proposed use for funds is separate from those things that are already funded as part of ICANN's daily operations, which is another limitation that we expect to have placed on the funds. As it relates to the conflict of interest discussion, the discussion set out in response to Question 6 should also be considered.

11. What is the expected impact of the different mechanisms on ICANN's tax reporting as well as possible auditing by tax authorities? Do these differ depending on the mechanism chosen?

Any mechanism that includes the creation of a separate legal entity to ICANN triggers separate tax reporting for that entity. In such a case, both ICANN and the separate legal entity will produce tax reporting (mainly an IRS form 990, along with any relevant state-required forms) which will include the disclosures required by the respective contributions to the grant-making program. Tax reporting includes the disclosure of the individual grants and recipients within the form filed by the entity that issued the grant (which could be ICANN or the separate entity, dependent upon the mechanism). Upon implementation, ICANN will evaluate if any additional tax reporting is required for grant-making activities, in addition to those that already exist in the IRS form 990 that ICANN files.

12. Under mechanisms 1 & 2, would new staff be brought into ICANN to support grant making and management/evaluation and if so would they have to be brought in as contract staff, with time specific contracts? If not, how would ICANN handle sunsetting of staff?

This is an implementation design issue, and there could be skills required to be added to the existing staff. No matter which mechanism is selected, there will be operational impacts on ICANN org that will need to be resourced. A broader program run by ICANN, such as what is envisioned in mechanisms 1 and 2, could require a resource to design the program, as well as resources to run the program and staffing to support the level of effort required. The skill sets already available within ICANN, the duration of the program and the ability to operate in the most cost-effective manner will determine how the program is resourced. In addition, while the reliance on ICANN's existing support infrastructure would be maximized in any mechanism with beneficial costs synergies, it is possible that additional support resources may be needed.

13. What expertise/competency is the ICANN Board expected to have to engage in grant making/grant review/etc under mechanisms 1 & 2?

The ICANN Board does not expect to be engaged in grant making or reviews, as those are operational and not oversight activities.

14. What would the additional time for existing Board members be to take on internal review of grants/review/management?

As noted in response to Question 13, the ICANN Board will not be involved in the operational level of a grant-making program. Oversight does not mean that the Board will be doing full reviews of grants, the review process or management. Instead, the Board can expect briefings on implementation and ongoing reporting, similar to the other operational activities for which ICANN org already reports on to the Board. For an auction proceeds program, there might initially be additional briefings required to provide the Board or committees thereof with the appropriate level of information to oversee management in its design and progress. However, there will not be a need to develop grant-making, review and fund management skills at the Board level in order for ICANN org to perform any of the potential roles that the CCWG is considering. With that, there is no expectation that those on the ICANN Board will need to take on additional duties or time as a result of the development of ICANN's work in grant-making (see also answer to Question 16). Ultimately, we can anticipate that there might be some additional instances of ICANN's accountability mechanisms being utilized as a result of Board or org actions as it relates to the auction processes, which take Board time in consideration, but those are part of the regular work of the Board and cannot be quantified at this time.

15. Taking into account the role the Board may need to play in the different mechanisms to ensure oversight, do you expect that this would require additional expertise from Board

members? Is there a bigger risk compared from one to another mechanism that this role could impact the Board's responsibilities in relation to ICANN's mission and core responsibilities?

Please refer to the answer to Question 14. We do not anticipate a measurable difference across mechanisms as it relates to the role of or time necessary from the Board to perform its appropriate oversight work.

16. What do you anticipate the time requirements for Board members be to take on the oversight role anticipated in relation to the different mechanisms?

Please refer to the answer to Question 14. We anticipate that the time requirements for the Board will be incrementally increased when this new operational activity rolls out.

17. Based on conversations so far within ICANN org, do you have any input on whether the human rights impact of the chosen mechanism and related activities will be evaluated? What might this look like in practice, noting that ICANN will have an operative Bylaw regarding human rights that could require a certain level of diligence? Would it be helpful for the CCWG to provide guidance on certain aspects of this issue to support future implementation work? If so, which aspects?

ICANN org is concluding its first Human Rights Impact Assessment (HRIA), and it will be interesting to see what recommendations might come out of there on how ICANN could should integrate Human Rights concerns into its procurement processes, and to see how those can be integrated into the grant-making sphere and applicant selection. ICANN org, of course, also follows human rights-related laws, and would expect any entity with which it has a relationship to do the same. It could be very helpful if the CCWG has guidance on the areas of human rights concerns that the auction proceeds program should preserve or support.

18. From the ICANN org perspective, is 'in service of ICANN' sufficiently clear and does it provide sufficient guidance for future evaluators? If not, how can it be clarified? (Question may require Board input). Note that the CCWG has produced the Preamble to provide guidance on this issue.

The "in service of ICANN" language, while not necessarily clear, cannot be read to be any broader than the ICANN mission. The phrase does not change the mission or authorize anything that is currently understood to be outside of the mission to be included in the mission. The key guidance that needs to be provided to evaluators is the limitation inherent in ICANN's mission, as opposed to language in a preamble or potential interpretation of the "in service of ICANN" language. If the CCWG is offering this language in an attempt to provide guidance to evaluators that the mission should be seen in a more expanded context than is currently understood, that is not appropriate and would not be possible to incorporate into implementation.

19. The CCWG is expected to define principles to minimize risk to ICANN org. Do you have any input on principles related to minimizing risk for the organization?

The most important principles to reduce risk are:

- *Do not try to engineer case-specific rules or rules to support specific potential applicants or projects;*

- *Produce recommendations that call for reliance on best practices (such as requiring measurable uses and outcomes of the grants, transparency on use of the grants, progressive disbursements,...);*
- *Consider the guidance we've given on abiding by the laws and legal frameworks that already bind ICANN and other future entities;*
- *Keep governance processes simple and lean; and*
- *Avoid building in processes that could increase potential for conflicts of interest.*

When building out recommendations, principles can be defined that exclude potential applicants that could be more complicated and risky to evaluate (such as individuals). Consider the types of reasonable limitations that can be built in to help avoid undesirable outcomes. In the end, the CCWG has the choice to produce recommendations that introduce more risk or that reduce risk, but those are choices about what the CCWG wishes to see happen with the auction proceeds. We ask that you consider the guidance and inputs we have provided to date in making these decisions.

At the time of implementation of the CCWG's recommendations, ICANN org and the Board will ensure that processes and procedures maximize risk mitigation within the limits of adhering to the CCWG recommendations. Should the recommendations lead to implementation requirements that exceed the risk appetite of ICANN org and the Board (defined on the basis of ICANN's mission and the fiduciary duties), ICANN org will be required to evaluate alternative solutions, in collaboration with the community.