**Charter Question #3: What safeguards are to be put in place to ensure that the creation of the framework, as well as its execution and operation, respect the legal and fiduciary constraints that have been outlined in this memo[[1]](#footnote-1)?**

ICANN Org will always have the responsibility to make sure that the funds are used in alignment with ICANN’s mission. 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. For example, there will have to be reporting from the recipients on the use of funds and general oversight to guard against misuse.

Processes and procedures will need to be put into place to ensure that legal and fiduciary requirements are met. There will need to be processes of controls on conflict of interest, on consistency with mission, on clarity of project/proposal evaluation results, on decision/approval, on disbursement, and on monitoring after disbursement, including reporting from the recipients on the use of funds and mechanisms to guard against misuse.

For the creation of the framework: For mechanisms A, B, and C the CCWG discussed whether legal and fiduciary safeguards can largely 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.

For mechanism B, it is the assumption that the existing non-profit organization would already have applicable safeguards in place, but these would need to be confirmed as part of the selection process to identify a suitable non-profit organization(s).

In relation to the execution and operation: For mechanisms A, B, and C most phases of the process of disbursement will include mechanisms supporting fiduciary and auditing requirements: solicitation (openness), application evaluation (fairness, completeness, and quality), decision/approval (defined delegation of authority), disbursement (documentation, identification), publication (review/approval/accuracy), monitoring (effectiveness evaluation, documentation, reporting). For mechanism B, these safeguards must be in place at ICANN and the chosen non-profit organization.

If an internal department is created as part of ICANN Org under mechanism A or B, measures will be needed to ensure division and recognition of responsibilities between the department handling funds and the rest of the organization. This division and recognition of responsibilities will be particularly important under mechanism A, where ICANN is handling many aspects of the granting cycle.

For mechanism C, audit requirements will largely correspond to already established ICANN Org procedures. Certain aspects of oversight will have to be established, for example the financial audit. An ICANN Foundation Internal Audit process should be established to ensure that all processes are monitored professionally.

If mechanism C is selected, the following additional issues should be addressed in the implementation phase:

1. ensure that coordination between ICANN Org and the Foundation is smooth and professional.
2. ensure that there is coordination between the ICANN Org Financial Audit and Foundation Financial Audit. This will be particularly important during the first few years of operation. The two entities may want to consider working with two different teams within the same auditing firm to allow for coordination while ensuring professional independence.
3. establish from the beginning an Internal Audit mechanism for the ICANN Foundation.
4. provide the Foundation with a healthy degree of independence to ensure that it can be successful.

Please see responses to charter questions 2 and 9 for additional details and recommendations about specific measures to address ICANN’s legal and fiduciary constraints, as well as operational objectives.

**Guidance for the Implementation Phase in relation to charter question #3**: Due concern needs to be given to ensuring that the required safeguards are in place as outlined in response to this question. Should mechanism B be selected, the additional safeguards outlined in the response to this charter question need to be factored in.

In relation to the Independent Evaluation Panel that is to be established, due care will need to be given to ensure that safeguards are in place to ensure the independence of the members of the panel (see also recommendation #[confirm]. Similarly, to ensure continuity and expertise, a sufficient pool of independent evaluators needs to be identified.

**Charter Question #5: What conflict of interest provisions and procedures need to be put in place as part of this framework for fund allocations?**

The following conflict of interest provisions should be put into place as part of the framework for fund allocations.

* There must be processes of controls on conflict of interest, which should be viewed in the broader context of safeguards designed to address ICANN’s legal and fiduciary obligations and considerations. Each phase of the process of disbursement should include mechanisms supporting fiduciary and auditing requirements.
* A conflicts of interest policy should require those with a conflict to disclose the conflict or potential conflict. The policy should provide clear guidance on what the organization does when a member is in conflict and how conflicts are managed.
* The mechanism must protect against self-dealing and to ensure that decisions are taken without conflict of interest. See the response to charter question 2 for specific restrictions on the use of funds in this regard.
* Individuals and groups supporting fund allocation should commit to transparency and high standards of ethics.
  + Transparency could be supported by making publicly available conflict of interest statements and by making application selection criteria objective and publicly available.

In relation to mechanisms A and B and C, the ICANN Organization already has a number of measures in place to support controls on conflict of interest:

* ICANN has experience in segregating funds.
* ICANN has the experience and internal controls to maintain appropriate accounting practices as contemplated.
* ICANN also has related practices, such as its procurement policy and disbursement policy, which introduce controls over proper procurement and budgetary commitments.
* ICANN Org is able to capture financial information by project, which is expected to also contribute to transparency and accountability on the program.

In the case of mechanism B, there will need to be clearly defined roles and responsibilities incumbent upon both ICANN and the other organization, and an agreement in place about how these roles are carried out operationally. The non-profit would need to have appropriate conflict of interest policies and practices in place for the elements of the program it manages. In addition, ICANN will maintain oversight to ensure that legal and fiduciary obligations are met.

In the case of mechanism C, the Foundation, new procedures will have to be established. They can draw on ICANN Org procedures and industry best practices. ICANN will maintain oversight to ensure that legal and fiduciary obligations are met. At the same time, the Foundation must maintain a healthy independence.

**CCWG Recommendation #4**: Robust conflict of interest provisions must be developed and put in place at every phase of the process, regardless of which mechanism is ultimately selected.

**Guidance for the Implementation Phase in relation to charter question #5**: The provisions outlined in response to this charter question should at a minimum be considered for inclusion in the conflict of interest requirements that will apply to all the parties involved (e.g. the Independent Applications Evaluation Panel, the Auction Proceeds Program Review Panel as well as staff supporting the mechanism). These requirements are expected to be developed during the implementation phase. In the case of mechanism B, there will need to be clearly defined roles and responsibilities incumbent upon both ICANN and the other organization, and an agreement in place about how these roles are carried out operationally. The non-profit organization would need to have appropriate conflict of interest policies and practices in place for the elements of the program it manages. In addition, ICANN will maintain oversight to ensure that legal and fiduciary obligations are met.

**Charter Question #10: To what extent (and, if so, how) could ICANN, the Organization or a constituent part thereof, be the beneficiary of some of the auction funds?**

ICANN, the Organization or a constituent part thereof could potentially be a beneficiary in either of two scenarios:

* Funds are used by the ICANN organization distinct from the granting process, for example to replenish the reserve fund[[2]](#footnote-2).
* Funds are allocated through the granting process. 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 application criteria and basic due diligence requirements used in the evaluation of any other applicant. Considerations of self-dealing/private benefit as well as conflict of interest would need to be taken into account in evaluating the application. The applicant would need to demonstrate that the proposed use for funds is separate from work that is already funded as part of ICANN’s daily operations. The CCWG anticipates that allocation of funds in this manner would be the exception rather than the rule.

If ICANN were eligible to apply through the granting process under mechanism A or B or C, particular attention would need to be paid to maintaining division and recognition of responsibilities of staffing, budget, confidential information and operations between the department responsible for proceeds allocation and other parts of the organization that may apply for funds.

From the perspective of mechanism C, ICANN would likely not be able to apply for funds granted through a charitable foundation developed to support ICANN's mission, due to self-dealing concerns in the administration and oversight of foundations. To the extent that ICANN is not an applicant for funds through the foundation, but is instead among the intended beneficiaries of an applicant's use of the applied-for grant, each such situation would need to be investigated on the particular set of facts and circumstances to see if self-dealing or indirect self-dealing concerns arise.

Conflict of interest provisions would also become particularly important. See response to charter question 5 for additional information about conflict of interest provisions.

The CCWG considered [input](https://community.icann.org/download/attachments/64075095/2018-10-05%20Becky%20Burr%20and%20Maarten%20Botterman%20to%20Erika%20Mann%20and%20Ching%20Chiao%20CCWG-AP.pdf?version=1&modificationDate=1538862193593&api=v2) from the ICANN Board in relation to this charter question.

**CCWG Recommendation #5**: The CCWG has decided to not provide any specific recommendation on whether or not ICANN Org or its constituent parts could be a beneficiary of auction proceeds, but it does recommend that for all applications the stipulated conditions and requirements, including legal and fiduciary requirements, need to be met.

1. See also [Note to Auction Proceeds DT re. legal and fiduciary principles](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=1466697425839&api=v2) [↑](#footnote-ref-1)
2. Note that discussions as well as decisions in relation to a possible replenishment of the reserve fund are being dealt with separately and outside of this CCWG. See <https://www.icann.org/public-comments/reserve-fund-replenishment-2018-03-06-en>. [↑](#footnote-ref-2)