



6 December 2018

RE: Public Comment on Initial Report of the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP)

The ICANN Board welcomes the Initial Report of the CCWG-AP and recognizes the work of the CCWG in reaching this point. The Board thanks the Co-Chairs, Members, and Participants for their diligence in this effort and remains committed to broad and open participation in determining next steps in relation to the eventual disbursement of the New gTLD Auction Proceeds.

The Board appreciates the opportunity to work collaboratively with the CCWG through the Board Liaisons and appreciates the CCWG's efforts to reference and include Board feedback in its report.

We understand that this is an evolving process and welcome the opportunity to participate at this time. On behalf of the Board, we wish to submit the following input in response to the Public Comment period for CCWG's Initial Report.

This review is not exhaustive, but is intended to provide some top-line items for the CCWG's consideration.

We look forward to continued close collaboration and will be available to expand on any of these items during CCWG-AP calls, if needed.

Below please find the Board's input to the public comment period.

Best wishes,

Becky Burr and Maarten Botterman  
Board Liaisons to the CCWG-AP

## ICANN BOARD SUBMISSION TO PUBLIC COMMENT PERIOD ON INITIAL REPORT ON THE CROSS-COMMUNITY WORKING GROUP ON NEW GTLD AUCTION PROCEEDS (CCWG-AP)

The ICANN Board is not providing inputs on all parts of the CCWG-AP's initial report.

### SECTION 1.4 “DELIBERATIONS & RECOMMENDATIONS”

The Board is not prepared to identify a preference regarding the mechanism for administering the auction proceeds program at this stage in the process. As stated by the CCWG-AP, this is an evolving process and the public comments will further shape and define the mechanisms, along with additional work by the CCWG. We remain committed to use of the principles set out in [our letter of 30 May 2018](#) to evaluate the CCWG's eventual recommendations.

### SECTION 2 “OBJECTIVE AND NEXT STEPS”

If the report changes significantly as a result of Public Comment, the Board would encourage a second period of Public Comment to make sure that the community and beyond have opportunities to comment on any material changes to the approach and options set forth in this draft before submission to the Chartering Organizations for adoption.

### SECTION 4.2 “OBJECTIVE OF FUND ALLOCATION”

As mentioned in previous Board and org communications with the CCWG-AP, the use of the New gTLD Auction Proceeds must be consistent with [ICANN's Mission as set out by the ICANN Bylaws](#), that is “to ensure the stable and secure operation of the Internet's unique identifier systems.” The Board welcomes the Initial Report's references to this requirement. Preliminary Recommendation #2 outlines the specific objectives of the allocation. The Board encourages the Working Group to review and potentially strengthen the language regarding use of funds in furtherance/consistent with ICANN's Mission to ensure that it is clearly understood that this is a mandatory and not an aspirational requirement. This also applies to the requirement that the proceeds should not be used for ICANN operational costs (see Charter Question #10 below).

In relation to the specific objectives outlined in Recommendation #2, the Board encourages further refining of the objectives in relation to ICANN's Mission.

The Board refers back to its [communication to the CCWG in January 2018](#) on both the Objectives and Annex C- Guidance for proposal review and selection document (previously “Preamble”). The Board is concerned that the content in Annex C creates potential inconsistencies with the Objectives and ICANN's Mission and therefore could result in confusion during application and selection and may result in challenges against the selection process. For example:

- ⦿ Annex C states that, while the Mission will set the “key parameters” for the application and selection process, the “broader Internet context” should be taken into consideration and that, “in addition” to the ICANN Mission, the proceeds “shall be used to support

projects that are consistent with an ‘open and interoperable Internet’.” As the Board previously noted ([in its January 2018 letter](#)), items that benefit the ‘open and interoperable Internet’ may exceed the scope of the ICANN Mission. The Board encourages the CCWG to review this language and reduce the potential for confusing applicants on how to structure grant requests. As the Board noted in its [September 2017 communication](#), the Board “*is responsible for assuring that the organization stays within mission and does not have the ability to apply the mission in a broader interpretation here than it could for general operations. If the CCWG is dissatisfied with the restrictions that the enumerated mission statement places on the outcomes of the CCWG’s work, that is a fundamental question for the ICANN community to resolve, as the ICANN Board is holding the organization to the mission that the ICANN community developed through the Enhancing ICANN Accountability process.*”

- ⦿ The Board would appreciate further clarity on how the “guidelines for review” in Annex C should be applied and how that guidance interacts with the overall specific objectives laid out in Recommendation #2. Must all guidelines be met for each application? The Board’s [January 2018 letter](#) also asked if “*an applicant (must) meet each of the Proposed Objectives, or any one plus consistency with ICANN’s Mission? Is there any prioritization of the objectives?*”
- ⦿ What are “Projects supportive of ICANN’s communities’ activities” and how is this assessment determined, particularly in relation to regular work of SO/AC/SG/RALOs already covered by ICANN’s operational budget?

### SECTION 4.3 “CRITERIA”

The Board would like clarity on how the CCWG-AP is recommending these criteria be used in evaluation purposes.

In relation to the “cost-effective” considerations – also mentioned in Section 4.5 “Ranking Mechanisms” as one of the CCWG’s most important criteria – the Board would like to offer the following input for consideration:

At the [CCWG’s ICANN63 session](#), one participant in the session asked the following question:

*“It’s just one question but I’m hoping that the group [has considered] which one of these models would keep the grant making process out of the realm of request for reconsideration when a grant is made, independent review panel when a grant is made based on - in other words when a grant is made just making sure that it sticks and is not disputed by every other party in ICANN who was looking for those same moneys. I’d like to know which one of these models avoids that problem.”*

[As noted in Barcelona](#), the Board believes that the ICANN accountability mechanisms (including the Ombuds, Reconsideration, and Independent Review), which are designed to ensure that ICANN remains accountable to its Articles of Incorporation and Bylaws, should not, as a general rule, be used as appeals mechanisms for individual unsuccessful applicants for auction proceeds. We note, however, that many grant-making processes do have specific and efficient appeals process available to applicants in the event that they wish to challenge an individual

decision on a grant. We strongly encourage the CCWG-AP to consider recommending that a specific application appeals process be built into the eventual application review mechanism. As with other grant making programs, the appeals program could be limited in scope to abuses of the process only and timebound.<sup>1</sup> This would give applicants an opportunity to challenge for procedural faults without implicating ICANN's Reconsideration or Independent Review Process – neither of which are purpose built, and each of which can be costly and time consuming for all involved. Further, the Board would welcome a recommendation from the CCWG on a Bylaws change specifically carving out individual funding decisions from the Bylaws provided accountability mechanisms of Reconsideration and Independent Review, similar to other existing exclusions.<sup>2</sup>

This is not to suggest that the entire auction proceeds program should be exempt from broader potential accountability challenges. The ICANN Board is committed to and accepts that it is important for ICANN to remain accountable to its Bylaws and Articles. In approving any mechanism for evaluating grant applications (e.g., an independent panel) or administering the program, and whatever level of oversight ICANN will retain over such mechanisms, ICANN will have taken several acts that could give rise to uses of ICANN's established accountability mechanisms, from the initial selection of the model, to the oversight of the annual funding of tranches. If mismanagement occurs (or is alleged to occur) within the mechanism, that too could give rise to the use of an accountability mechanism for ICANN's failure to exercise proper oversight. Indeed, these are the type of disputes that we should want to bring through ICANN's existing accountability mechanisms.

This ties to the Board's principle on the "Preservation of Resources..." and "Effective and Efficient Process..." as communicated in the Board's [30 May 2018](#) letter which outlined defined principles the Board will use in evaluating eventual recommendations.

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<sup>1</sup> See <https://www.hrb.ie/funding/funding-schemes/before-you-apply/all-grant-policies/hrb-policy-on-appealing-funding-decisions/> for an example of an appeal process.

<sup>2</sup> Both the Reconsideration Process and the IRP already contain exclusions for certain types of disputes.

Reconsideration, at Section 4.2 of the Bylaws, states:

- (d) Notwithstanding any other provision in this [Section 4.2](#), the scope of reconsideration shall exclude the following:
- (i) Disputes relating to country code top-level domain ("**ccTLD**") delegations and re-delegations;
  - (ii) Disputes relating to Internet numbering resources; and
  - (iii) Disputes relating to protocol parameters.

The IRP, at Section 4.3 of the Bylaws, has the following exclusions:

- (c) Notwithstanding any other provision in this [Section 4.3](#), the IRP's scope shall exclude all of the following:
- (i) EC challenges to the result(s) of a PDP, unless the Supporting Organization(s) that approved the PDP supports the EC bringing such a challenge;
  - (ii) Claims relating to ccTLD delegations and re-delegations;
  - (iii) Claims relating to Internet numbering resources, and
  - (iv) Claims relating to protocol parameters.

## SECTION 4.4 “INPUT PROVIDED BY THE ICANN BOARD”

The Board appreciates the inclusion of the principles in the CCWG-AP’s report.

## SECTION 4.5 “RANKING MECHANISMS”

See above Section 4.3 for related commentary.

## SECTION 5 “PRELIMINARY RECOMMENDATIONS & RESPONSES TO THE CHARTER QUESTIONS”

The Board will not be making determinations on preferences with respect to mechanism(s) for evaluating grant applications (e.g., an independent panel) and/or administering the program at this time; however, [echoing the discussion at the ICANN62 session](#) with the community, the Board would like to highlight its previous communications on the use of an independent panel as a means of best practices for evaluating applications:

30 May 2018:

*“We also suggest that the CCWG-AP might wish to consider the importance of independence in evaluations, such as through the use of an independent panel.”*

5 October 2018:

*“Regarding the evaluation of the applications, the Board notes that an independent panel is an important aspect that should be considered in the CCWG’s recommendations. This panel should be independent and should have appropriate conflict of interest protections built in, in support of the fiduciary duties of ICANN’s directors and officers. The independent panel would assess applications and decide which applications will be successful in securing funding for that year’s tranche. The independent character of the panel would need to be defined and proper controls will need to be put in place to guide the work of the panel (see below for some considerations). The panel’s recommendations would be provided to the ICANN Board for approval of the slate of successful applicants for that year, and the approved slate would then be provided to the persons/entity responsible for distribution. As previously communicated, the Board will not be taking decisions on individual applications but will instead focus its consideration of the slate on whether the rules of the process were followed by the independent panel. The principles supporting the independent panel should also include consistency over time (i.e., the composition of the panel should always include some panelists of the previous year to build on their experience); and cost-effectiveness (i.e., to focus on the use of auction proceeds to support desired activities and goals, as opposed to administrative costs).”*

## SECTION 5.2 “SAFEGUARDS AND GOVERNANCE”

Charter Question #2 (Preliminary Recommendation #2)

Echoing feedback for Section 4.2, Preliminary Recommendation #2 outlines the specific objectives of the allocation; however, language states that the allocation is “expected” to be consistent with the Mission. The Board would encourage the review of this particular language to ensure that this is understood to be a mandatory – and not merely aspirational – requirement.

When it comes to the CCWG-AP’s development of specific recommendations for how the legal and fiduciary constraints should be implemented, the eventual mechanism(s) used for evaluating grant applications (and/or administering the program) cannot be limited by the CCWG-AP’s interpretation of how some of these regulatory requirements can be met. For example, the mechanism must be able to introduce proper controls even if such controls go beyond the recommended implementation steps, such as the ability to make sure that the recipient organization may properly receive funds under the regulatory framework; or referring to best practices in identifying self-dealing or private benefit concerns that are broader than what the CCWG-AP envisioned. There may also be different tests for political or lobbying activities that are more appropriate to be followed, though the CCWG-AP’s recognition of these important limitations is welcomed.

#### Charter Question #3 and related implementation guidance

The Board welcomes the listing of safeguard considerations and also recommends the inclusion of the Board’s language from previous CCWG meetings and its letter of [5 October 2018](#) as an important step in the Board’s fiduciary duties:

*“As previously communicated, the Board will not be taking decisions on individual applications but will instead focus its consideration of the slate on whether the rules of the process were followed by the independent panel.”*

#### Charter Question #5

The Board recognizes the efforts of the CCWG-AP to address conflict of interest concerns in an eventual mechanism(s) for evaluating grant applications and/or administering the program. The Board emphasizes that all decisions relating to the use of auction proceeds must be undertaken with a transparent understanding of the motivations of those participating in the recommendations. The ICANN Board thanks the CCWG-AP for its attention to disclosure of interests of those participating in the process and encourages all participants to maintain up-to-date disclosures. We thank the CCWG-AP for highlighting the conflict of interest concerns and recognizing the need to address these issues at every step in the process. The mechanism should aspire to uphold avoidance of conflict of interest at every phase as one of its primary principles.

#### Charter Question #9

In relation to mechanism(s) for evaluating grant applications and/or administering the program, the Board welcomes the reference made to fiduciary requirements. It may be useful to note that the audit requirements described in the initial report, which are a useful information added to the recommendations, do not apply specifically to the disbursement of auction proceeds on a

standalone basis, but apply to all ICANN's activities, including the disbursement of auction proceeds if and when it occurs. As such, the disbursement of auction proceeds needs, like all ICANN's activities, to meet the requirements that any independent financial audit evaluates to ensure that:

- activities are carried out in pursuit of the organization's mission;
- activities are lawful;
- activities are documented, recorded, and reported as per regulatory and bylaw requirements.

The above applies also to Mechanism C, should it be considered, since the disbursement of the auction proceeds to a foundation is a "transaction" or "activity" that is, in itself, subject to the same governance requirements.

The Board welcomes the inclusion of consideration for risks in the proposal, as this is an integral part of the fiduciary duties of the Board (specifically the "duty of care"). The evaluation of risks associated with applications and grants is helpful. The Board would strongly suggest, as it will itself need to do, to also include explicitly the consideration of the risks associated with the mechanism(s) selected for evaluating grant applications and/or administering the program itself, such as the risk that decisions to allocate or not grants to applicants are challenged, or the risk that funds allocated to applicants are misused. Mitigation considerations could also feature in guidance to the implementation team.

#### Charter Question #10

The Board recognizes that the CCWG did not have time to review the Board's [5 October 2018 letter](#) ahead of its report in response to the CCWG's request for input and hopes it is useful for editing the next iteration of the report.

In CCWG mailing list discussions and at ICANN63, Members asked for clarification on the Board's October 2018 letter referenced in the CCWG's Initial Report. Becky Burr provided additional information at ICANN63, noting that:

- ⦿ The Board and org do not currently foresee a situation where it would need to apply for the proceeds. That being said, it is important to note that ICANN maintains legal and fiduciary responsibility over the funds. ICANN's directors and officers have a duty to protect the organization ensure that it meets its legal obligations, including through the use of available resources.
- ⦿ In the event of an unavoidable need, the Board and the org would have a fiduciary obligation to use available resources to meet the org's obligations and this could include – depending on the situation – the auction proceeds.
- ⦿ Regarding SO/AC's applying for proceeds: SO/AC structures that are not legal entities in their own right, independent of the multistakeholder ICANN structure, would be unable to apply for proceeds as they likely do not meet due diligence requirements. This was identified early on in the Drafting Team's work by the [Legal and Financial Considerations Memo \(June 2016\)](#).

- ⦿ This would not preclude consideration of applications from SO/AC structures that are also established legal entities outside the multistakeholder model provided that: the request does not include an activity or project that is or should be covered by ICANN's operational budget; conflict of interest considerations are met, including but not limited to ensuring that those applying are not part of the evaluation process; and all other application criteria are met.

We hope that this information in relation to the Board letter is useful but are happy to provide more information through the Board Liaisons during the CCWG's future work, if needed.

### **SECTION 5.3 "OPERATIONS"**

The Board welcomes Preliminary Recommendation #6 and #7 on effective and judicious implementation and distribution of proceeds in tranches.

#### Charter Question #6 (diversity items)

The CCWG may wish to consider adding language for the implementation team on examining how best to support applications from diverse backgrounds.

#### Charter Question #8 (overhead)

The Board welcomes the CCWG's recommendations on cost-effective use of resources, best practices, and simplicity, and refers to the input above in Section 4.3 on Accountability Mechanism considerations in support of this.

### **SECTION 5.4 "REVIEW"**

The Board is supportive of the importance the CCWG has placed on reviewing the mechanism(s) for evaluating grant applications and/or administering the program, the program overall, and the impact. The Board notes that if a review indicates a need for fundamental changes to the mechanism or the purposes of the use of funds, those would be significant changes for which additional community input would be required.

### **ANNEX C- "GUIDANCE FOR PROPOSAL REVIEW AND SELECTION"**

In addition to the previously mentioned feedback above, particularly on the limitation of the funds to support ICANN's Mission, the Board would like to offer the following considerations:

The Board notes that there are two guidelines offered in Annex C that have the ability to be interpreted as directing the use of the Auction Proceeds funds for ICANN's ongoing operations. Those are:

- #4: "Projects addressing diversity, participation and inclusion should strive to deepen informed engagement and participation from developing countries, under-represented communities and all stakeholders."; and
- #5: "Projects supportive of ICANN's communities' activities are encouraged."

The Board asks for clarification on whether these guidelines are intended to modify the principle that the auction proceeds should not be used to contribute to ICANN's ordinary operations. The current formulation of these guidelines could leave open the possibility that applications support such on-going operations as they relate to engagement and participation in ICANN's policy development process.