SUMMARY: CONFLICTS OF INTEREST AND ETHICS PRACTICES REVIEW

As a result of heightened attention and scrutiny placed on how the ICANN Board addresses conflicts of interest, and on enhancing ICANN's ethical culture, ICANN performed a comprehensive three-phase review of its Conflicts of Interest (COI) and Ethics practices to improve upon its already robust conflict of interest policy and code of conduct. The goals of the review were to enhance ICANN's COI Policy to more clearly address hard cases and *perceptions* of conflicts, enhance and improve the Code of Conduct, and take steps for ICANN to meet the highest standards of ethical practices. The work was conducted with oversight from the Board of Governance Committee (BGC); all decisions were approved by the full Board.

A detailed discussion of the scope and results of each part of the review process is provided below. Generally, Phase One involved a review and analysis by outside counsel (already familiar with ICANN's of ICANN's current working documents, including the "Conflicts of Interest Policies", "Code of Conduct" and "Employee Handbooks," among other documents, to enhance the focus on best practices for conflicts and ethics. Phase Two concerned a review conducted by a new independent law firm (not involved in ICANN processes) of ICANN's documentation and comparison of ICANN to similarly situated non-profits and making recommendations for enhancements. Phase Three involved a review and recommendations from an international expert group for the enhancement of ICANN's ethical culture, drawing on international sources, including practices in other not-for-profit organizations.

Essentially all of the recommendations received in all three phases of this work have been adopted by ICANN and placed into policies, procedures, guidelines and/or processes, as appropriate, which are now applicable in varying degrees on ICANN Board members, staff members and stakeholders.

I.   PHASE ONE

Phase One of the review process involved working with ICANN outside counsel to review ICANN's corporate governance documents that were in place at the time and to make recommendations as to how these could be improved in light of best practices in corporate governance, while still reflecting the needs of ICANN. In this regard, ICANN engaged outside counsel Jones Day, which is already familiar with ICANN, to perform a holistic review of ICANN's policies and practices. This review produced recommended modifications to the ICANN Board Conflicts of Interest Policy, the Code of Conduct and Expected Standards of Behavior; the modifications were approved by the ICANN Board on 6 May 2012.[1] The Board also approved new Corporate Governance Guidelines, a flexible framework document that collects the sources of corporate governance requirements that ICANN follows. The revised documents were posted for public

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[1] *See* announcement of Board approval of revised documents, posted at http://www.icann.org/en/news/announcements/announcement-2-15may12-en.htm.

comment in March 2012 at http://www.icann.org/en/news/public-comment/board-coi-review-11mar12-en.htm, and are described below.[2]

- ***Corporate Governance Guidelines.*** The proposed Guidelines are intended as a component of the flexible framework within which ICANN's Board of Directors (the "Board"), assisted by its committees, directs the affairs of ICANN. The Guidelines also provide ICANN stakeholders with a source of reference to ICANN's governance policies. Consisting largely of existing ICANN policies and practices that are contained in ICANN's Bylaws and committee charters, the Guidelines consolidate numerous ICANN governance policies and practices, including those related to the role of the Board, structure of the Board, accountability and review, performance evaluations, Board committees and Board compensation. As noted in the Guidelines, the document may address even more issues in the future; the Guidelines will be reviewed periodically by the Board and revised as appropriate to reflect the dynamic and evolving processes relating to the operation of the Board.

- ***Conflicts of Interest Policy.*** ICANN's Board Conflicts of Interest Policy (the "Policy") outlines the procedures for disclosing and addressing conflicts of interests of directors, liaisons, officers and key employees (collectively, "Covered Persons"). The key revisions to the Policy are as follows:

  o Strengthens procedures for disclosing, processing and evaluating actual and potential conflicts of interest. The Policy requires Covered Persons to initially disclose any conflicts of interest to ICANN's General Counsel, who will inform the Board Governance Committee and facilitate the review and evaluation of the conflict by the Board Governance Committee and the Board.

  o Expands on the disclosure requirements of matters that may give rise to Covered Persons being perceived to have conflicts of interest to include policies and programs and other matters.

  o Continues to require that conflicted Covered Persons refrain from using their personal influence (either at or outside a Board meeting) to influence ICANN's handling of a matter that gives rise to the conflict of interest.

  o Reiterates that conflicted directors and liaisons may not participate in Board or committee deliberations concerning the matter giving rise to the conflict of interest, unless either the Board or BGC determines that the conflicted director or liaison should participate in the discussions and in what manner. As always, no conflicted

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[2] A detailed explanation of the how each of these four revised documents apply within ICANN was provided in Memo re Governance Materials posted at http://www.icann.org/en/groups/board/governance/materials-memo-11mar12-en.pdf.

director may vote on a matter for which the director is conflicted.

      o   More strongly emphasizes the consequences for a Covered Person's failure to comply with the Policy. The revised Policy specifically states that if the BGC determines that a director or liaison has intentionally failed to disclose a potential conflict of interest, the BGC will make recommendations to the Board for corrective action, which could include removal of the director or liaison from the Board.

- ***Board Code of Conduct.*** ICANN's Board Code of Conduct provides directors and liaisons with guidance with respect to their responsibilities and duties as Board members. The Board Code of Conduct promotes and supplements the standards of behavior expected of directors and liaisons set forth in ICANN's Expected Standards of Behavior. The goal is to ensure that directors and liaisons strive to foster ICANN's mission and core values in an ethical manner. The revised Board Code of Conduct sets forth additional provisions guiding the expected conduct of directors and liaisons.

- ***Expected Standards of Behavior.*** ICANN's revised Expected Standards of Behavior contain additional principles of expected behavior for all parties involved in ICANN's multi-stakeholder process when participating in ICANN matters.

II.   PHASE TWO

Following the adoption of the corporate governance documents from Phase One, ICANN engaged Cooley LLC, a law firm with expertise in corporate governance issues and that is new to ICANN, to perform a review of and provide recommendations for improvements of ICANN's corporate governance practices. Specifically, Cooley was tasked to review, at a high level, certain standardized rules and practices related to corporate governance in the United States and in Europe and briefly compare those rules and practices to ICANN's Governance Documents.

Cooley produced two reports:

- First Report on Corporate Governance (3 October 2011, revised on 27 April 2012) ("First report") and
- Second Report on Corporate Governance (17 April 2012) ("Second Report")

The action items arising out of Cooley's First Report, including compiling ICANN's corporate governance document in one section of the ICANN website and providing dates of amendment for documents such as the Code of Conduct, were adopted and implemented soon after the First Report was issued.

Following the First Report, ICANN asked Cooley to review the corporate governance policies of: (i) leading international corporations, (ii) a leading international institution; and (iii) an international institution experiencing problems stemming from its corporate

governance policies (collectively, the "Comparison Group"), and to compare each of those entities' corporate governance policies to the Governance Documents to identify areas of potential improvement. Cooley conducted a comparative review of ICANN's documentation to the governance documentation of the following leading institutions: (i) International Business Machines Corporation ("IBM"), (ii) the International Finance Corporation ("IFC") and (iii) the Fédération Internationale de Football Association ("FIFA"). In its findings set forth in the Second Report, while Cooley noted that ICANN's policies are aligned with essential governance principles, it also noted that there may be room for improvement. Two specific recommendations for improvement followed: (i) ICANN should consider revising its guidebook for employees to ensure that policies covering unethical behavior and complaints are satisfactorily covered; and (ii) ICANN should consider adopting a policy to deal with repeat offenders of its ethical and governance standards.

In response to the Second Report, ICANN has worked with outside counsel to review and update its employee policies and procedures, including its internal staff conflicts of interest policy in view of Cooley's recommendations. Further, on 18 October 2012, ICANN adopted revised Governance Guidelines (http://www.icann.org/en/about/governance/guidelines) taking recommendations from the Second Report into account, as well as recommendations from Phase Three as explained below.

III.   PHASE III

In Phase Three, ICANN engaged a team of international ethic experts to review and make recommendations regarding ICANN's ethics, conflicts and governance mechanisms, particularly focusing on ICANN's global function and the best practices of other international organizations. The team (the "International Expert Group"), comprised of Jermyn Brooks (former World Chair of Price Waterhouse; currently Board member of Transparency International and Chair of its Business Advisory Board; Chair of the Global Network Initiative), Mervyn King (ex-judge from South Africa, a highly prominent name in corporate governance worldwide, currently honorary chair of the Global Reporting Initiative and Chair of the International Integrated Reporting Council) and Aron Cramer (president and CEO of Business for Social Responsibility, prolific speaker and writer on corporate responsibility and sustainability issues as well as advisor to many companies including the ICT industry).

On 23 June 2012, ICANN posted the Final Report by International Expert Group ("Expert Report") at http://prague44.icann.org/meetings/prague2012/presentation-ethics-coi-final-report-25jun12-en.pdf. The Final Report was posted for public comment in June 2012 at http://www.icann.org/en/news/public-comment/board-coi-review-report-05jun12-en.htm and discussed at a public session on 25 June 2012 at the Prague Meeting.

As noted above, ICANN revised the Corporate Guidelines (http://www.icann.org/en/about/governance/guidelines) to address the recommendations in the Expert Report. Further, with respect to items that are not directly found in the

Governance Guidelines, the Board has undertaken to ensure that additional work is being conducted. For example, the Board now regularly includes in its advice to the Nominating Committee that experience in organizations of similar size, scope and purpose are desired selection criteria for Board members. And in line with a similar recommendation from the first Accountability and Transparency Review Team, the Board is now focused on training, including specific training related to conflicts of interest. To that end, the Board participated in a conflicts of interest training session tailored for ICANN during a workshop in early 2013.

IV.   ON-GOING ACTIVITIES

When adopting the revised Corporate Guidelines to address recommendations from Phase Two and Phase Three referenced above, the Board made clear that "this is not the end; the Board will regularly continue to evaluate both ICANN staff and Board members to ensure that ICANN is operating to the highest ethical standards." (See http://www.icann.org/en/groups/board/documents/resolutions-18oct12-en.htm#1.c.) These ongoing efforts have thus far manifested in various ways including, but not limited to: (i) the specific conflicts of interest training as mentioned above and specific online training programs that are in development; (ii) a review of all of the governance related documents and evaluation of all reported conflicts continues to be part of the Board Governance Committee's (BGC) ongoing and regular work; and (iii) as it relates to the New gTLD Program: (a) the Board Resolution on "Board Member Rules on Conflicts of Interest for new gTLDs" relating to post Board-service conduct (http://www.icann.org/en/groups/board/documents/resolutions-08dec11-en.htm#4)[3]; (b) the Board established the New gTLD Program Committee to make decisions regarding the Program, which consists of all Board members not conflicted (whether actually, potentially, or perceptually) on new gTLD related matters; and (c) the BGC established a sub-committee of non-conflicted members to address any and all reported actual or potential (including perceived) conflicts of interest that might be related to new gTLDs.

These activities are just some that show how the Board continues to be committed to performing under the highest ethical standards.

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[3] Note that no post-service limitation rules can be applied to staff given the legal prohibition to such arrangements. See California Business and Professions Code, section 16600.