



Submitted via e-mail

October 2, 2011

Rod Beckstrom
President & CEO
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292-6601

Re: Comments to the Revisions to the Conflicts of Interest Policy and Bylaws to Allow the Board to Consider Compensation for Director Services

Dear Mr. Beckstrom:

By means of this letter, the Association of National Advertisers (“ANA”) responds to the request for comments by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on the above-captioned Conflict of Interest (“COI”) proceeding.¹ Given the facts that have recently come to light regarding ICANN,² ANA welcomes any opportunity to comment on the important issue of impartial Internet governance.

In the past twenty years, the Internet has grown from being used by a limited number of engineering and academic elite to being relied on by over 2 billion people world wide in their daily lives.³ Nearly \$8 trillion are exchanged annually through e-commerce, and Internet penetration is a key metric in United Nations measures to reduce poverty and encourage

¹ See <http://www.icann.org/en/announcements/announcement-01sep11-en.htm>.

² Eric Engleman, “ICANN Departures After Web Suffix Vote Draw Criticism” *The Washington Post*, August 20, 2011, available at: http://www.washingtonpost.com/business/icann-departures-draw-criticism/2011/08/19/gIQAzpeDTJ_story_1.html; Khaled Fattal, “Washington Post: ICANN Departures After Web Suffix Vote Draws Criticism. How Damaged is ICANN?,” *CircleID*, August 23, 2011, available at: http://www.circleid.com/posts/washington_post_icann_departures_after_web_suffix_vote_draws_criticism.

³ McKinsey Global Institute, *Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity*, May 2011, available at: http://www.mckinsey.com/mgi/publications/internet_matters/pdfs/MGI_internet_matters_full_report.pdf.

economic development.⁴ According to ICANN CEO and President, Rod Beckstrom, “[t]he Internet’s mega economic impact, and its potential for greater growth and influence, make ICANN’s role even more relevant. Our collective economic future depends on maintaining a stable domain name system, in order to provide the foundation for continued innovation.”⁵ Because the Internet serves as a recognized catalyst for global economic growth, there is far too much at stake, particularly in the present economic climate, not to assure that ICANN’s conflict of interest policies foster fair and impartial Internet governance.

Juxtapose the importance of impartial Internet governance with concerns regarding ICANN’s most recent vote on the top-level domain (“TLD”) Applicant Guidebook. On June 20, 2011, ICANN’s Board of Directors approved the TLD Applicant Guidebook and also approved moving forward with plans to open the new TLD application window on January 2012, despite widespread concern by the global community of Internet users (comprised of governments, quasi-governmental institutions, for-profit and not-for-profit entities and consumers).⁶

Further complicating the fact that ICANN decided to proceed with its program, deaf to the concerns of the global community, is what occurred shortly after the Board vote. Four days later, Peter Dengate Thrush finished his term as ICANN Chairman and within a month, joined a London company called Top Level Domain Holdings, which plans to buy Web suffixes created by the TLD program and offer Internet registry services – in essence, a company that will directly profit from ICANN’s TLD vote. There is, at a minimum, legitimate reason for concern that the lack of adequate conflict of interest policies have led to the development of a growing perception that Mr. Thrush (and perhaps other senior staff who recently have left ICANN) may have let future career prospects influence their official duties.⁷

Instead of soliciting systematic review of the COI Policy, ICANN seeks comments solely on whether the Board may vote on a new compensation scheme for Directors. Clearly, ICANN has missed the bigger picture. Indeed, this view has been expressed by, among many others, U.S. Senator Ron Wyden, U.S. Department of Commerce Assistance Secretary for Communications and Information, Lawrence E. Strickling and the full European Commission.

In a letter to Acting U.S. Commerce Department Secretary Rebecca Blank and Assistant Secretary Lawrence E. Strickling on September 14th, Senator Wyden called for more stringent

⁴ *Id.*

⁵ Address by ICANN President Rod Beckstrom, 41st ICANN International Meeting, June 20, 2011, *available at* <http://www.icann.org/en/presentations>.

⁶ *See e.g.*, Paul McGrady, “ICANN Board: You Got It Right. Then You Got It Wrong. Now, Get It Right Again.”, *CircleID*, March 1, 2011, *available at*: http://www.circleid.com/posts/20110301_icann_board_you_got_it_right_then_got_it_wrong_now_get_it_right/; “ICANN/GAC Session Marred by Name Calling & Disagreement,” *The Domains*, June 19, 2011, *available at*: <http://www.thedomains.com/2011/06/19/icann-gac-session-marred-by-name-calling-disagreement/> and Thomas Claburn, “ICANN’s Domain Name Plan Could Spell Trouble,” *Information Week*, June 20, 2011, *available at*: <http://www.informationweek.com/news/internet/policy/231000014>.

⁷ Phillip S. Corwin, “ICANN and Ethics,” *CircleID*, September 19, 2011, *available at*: http://www.circleid.com/posts/icann_and_ethics/.

ethics rules to be applied to ICANN or whatever entity becomes the service provider under the next version of the Internet Assigned Numbers Authority (IANA) contract.⁸ Senator Wyden forcefully stated that “[T]he growth of the domain name industry and the increasing importance of the decisions made by the IANA have led to an increasingly large, sophisticated and expensive agency in ICANN. With the growth in importance of this authority, it is important to ensure that decisions are made impartially.”⁹

On September 21, 2011, Assistant Secretary Strickling responded to Senator Wyden, agreeing with his comments. “Let me assure you that I share your views that any party or organization contracted to serve as the IANA functions operator must have a clear and enforced ethics and conflict of interest policy. The National Telecommunications and Information Administration (NTIA) is actively exploring how best to meet this requirement in the next IANA contract.”¹⁰

Likewise, the full European Commission has welcomed a constructive debate on how to reform ICANN in a series of Internet Governance papers available on its website.¹¹ The Commission noted the following, among many other ICANN critiques:

*there are legitimate concerns related to the current [ICANN] situation which is characterised by a lack of independence of the Board since its members can include employees of organisations that a) are contractually involved with ICANN already and b) stand to gain significantly in a financial sense depending on which decisions ICANN take[s] on particular issues (especially as these same stakeholders are also the major source of ICANN funding through registry and registrar fees).*¹²

Because of this recent wellspring of wide-ranging concern, ANA takes no position on the highly limited and isolated recommendation to revise its COI Policy and Bylaws to permit the Board to vote on the specific issue of directors’ compensation. Instead, we respectfully request that ICANN expand its ethical inquiry into a systematic review of its entire COI Policy and related Bylaws. Otherwise, the piecemeal approach put forward by ICANN will likely prove ineffective and may mislead some into believing that ICANN’s problems have been resolved, even though the serious concerns about ICANN’s ‘revolving door’ and the inadequacy of its COI policies were left wholly unaddressed. We can liken ICANN’s present inquiry to that of a homeowner deciding to add a second deadbolt on the front door for added security. But, how effective would such a security measure be, without also examining whether the back door and windows of the house remain open?

⁸ See <http://wyden.senate.gov/download/?id=4600be91-bfc6-4494-8c54-f23c1157dd50>.

⁹ *Id.*

¹⁰ See <http://www.thedomains.com/wp-content/ICANN-NTIA-Letter-to-Sen.-Wyden-9-21-11.pdf>.

¹¹ See http://ec.europa.eu/information_society/policy/internet_gov/index_en.htm.

¹² See http://ec.europa.eu/information_society/policy/internet_gov/docs/fiches/corp_gov.pdf.

Self Interested Dealing Violates ICANN's Mandate

On September 30, 2009, ICANN and the NTIA entered into an Affirmation of Commitments, which require ICANN to act in the public interest, to benefit the public and to promote consumer trust.¹³ The very text of the Affirmation reflects NTIA's concern that ICANN may *not* always act in the public interest and may instead choose to do what is in the best interest of, and of the greatest benefit to, the closely-knit ICANN family. To guard against such preferential treatment, NTIA requires ICANN to report on the effects of its decisions on the public. See, for example, Section 4 of the Affirmation which states, in relevant part:

ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

What good, though, is this protection if the community at large knows that the public interest analysis will be produced by potentially self interested actors? Strong COI protections keep NTIA's public interest mandates from being transformed into little more than an administrative charade. NTIA's words only have meaning if an impartial ICANN board, fully and without bias, evaluates the public interest, uses substantiated facts to drive its decision making and reaches a conclusion in the public interest. For example, when ICANN chooses to review the Dengate Thrush potential conflict, the criteria for evaluating whether or not an impropriety occurred shouldn't be whether narrow technical definitions in the existing inadequate COI policy were followed, but rather whether Dengate Thrush's potential conflict (and the conflicts of any other ICANN Board members or staffers) might have led the organization to reach a decision which is not in the public interest.

Establish Policies & Procedures to Stop ICANN's 'Revolving Door'

ANA strongly urges ICANN to conduct proceedings (that would be open for detailed public comment) systematically and adequately to answer the questions and address the uncertainties outlined below:

¹³ See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. (In relevant part,

- Section 3(a) requires ICANN to "ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent";
- Section 3(c) requires ICANN to "promote . . . consumer trust . . . in the DNS marketplace" and
- Section 8(c) commits ICANN to operating "as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.").

- Should the definition of “Financial Interest” in the COI Policy be expanded to include future employment prospects with those companies or organizations impacted by ICANN policy making?
- Should the definition of “Financial Interest” under the COI Policy be expanded to include those who are employed by, represent, or have other affiliations with TLD registries or accredited registrars?
- Under what circumstances must ICANN’s Board Governance Committee (established under the COI Policy) determine that a “Conflict of Interest” exists?
- When a recusal must occur due to a conflict regarding a particular matter, should the COI Policy require the conflicted Director to withdraw from all deliberations or discussions on that matter, unless such discussions take place in a public forum, or are recorded, transcribed and promptly made public (with the conflict disclosed immediately before the conflicted director speaks)?
- Under what circumstances should ICANN's COI Policy divest peers of an Interested Director sitting on the Board Governance Committee of the responsibility to make final decisions regarding COI questions involving fellow Directors, instead of requiring a more neutral party?
- Should ICANN's COI Policy impose reasonable restrictions on post-service employment of ICANN directors by, or the contracting of such directors with, parties under contract to ICANN, or whose businesses are materially affected by any decision made by the Board during the Director's tenure?
- Beyond the COI Policy, should ICANN consider reasonable restrictions or a moratorium on post-service employment of ICANN staff by, or the contracting of such staff members with, parties under contract to ICANN, or whose businesses are materially affected by any decision made by the Board during the staff member's tenure? If so, at what staff levels would any such measures be appropriate?

Reclaim ICANN’s Internet Governance Legitimacy Through a Proactive Ethics Review of the TLD Program and Existing Policies

Rather than focusing on the narrow compensation issue, ICANN’s Board should take a fresh and comprehensive look at the TLD program and all aspects of policy regarding ethics matters generally. This fresh look should permit ICANN sufficient time to ensure that data and the public interest are the driving forces behind its decisions going forward – not what is in the best interest of, and of the greatest benefit to, the closely-knit ICANN family. Failure to carry out this thorough, rigorous and proactive review followed by timely comprehensive action to close

the numerous loopholes in the ICANN conflict of Interest policies, would raise the most profound questions as to the ability of ICANN to represent the public interest. These broader conflict of interest issues cannot and must not be delayed as fundamental issues of major economic consequence are before ICANN, the Department of Commerce and the Internet community.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Liodice". The signature is fluid and cursive, with the first name "R." and the last name "Liodice" clearly distinguishable.

Robert D. Liodice
President and Chief Executive Officer
Association of National Advertisers

cc: Ms. Victoria Espinel, U.S. Intellectual Property Rights Enforcement Coordinator, The White House
The Honorable Rebecca M. Blank, Acting U.S. Secretary of Commerce
Mr. Lawrence E. Strickling, Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce
Ms. Suzanne Radell, Senior Policy Adviser, NTIA, U.S. Department of Commerce
Ms. Fiona M. Alexander, Associate Administrator, Office of International Affairs, National Telecommunications and Information Administration
The Honorable Patrick Leahy, Chairman, Senate Judiciary Committee
The Honorable Charles E. Grassley, Ranking Member, Senate Judiciary Committee
The Honorable Ronald Wyden, Chairman of the Senate Finance Committee Subcommittee on International Trade, Customs and Global Competitiveness
The Honorable Albert Franken, Chairman Senate Judiciary Subcommittee on Privacy, Technology and the Law
The Honorable Robert W. Goodlatte, Chairman House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet
The Honorable Melvin L. Watt, Ranking Member House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet