



Reply Comments of the GNSO Intellectual Property Constituency (IPC) on the  
"ICANN Board Conflicts of Interest Review - Final Report  
by International Expert Group"  
July 28, 2012

The GNSO Intellectual Property Constituency (IPC) is pleased to provide the following comments during the Reply Period on "ICANN Board Conflicts of Interest Review - Final Report by International Expert Group". See <http://www.icann.org/en/news/public-comment/board-coi-review-report-05jun12-en.htm>.

These comments are being submitted as Reply Comments primarily because ICANN failed to provide the community with sufficient time for the public to review the report in the initial comment round. The report was posted during ICANN's paper storm of documents for review immediately prior to its public meeting in Prague. Subtracting the duration of the public meeting – a policy that should be standard practice within ICANN for setting the length of public comment periods – the initial round for comment lasted barely 24 days. We have stated on several occasions our strong concern that reducing the length of initial public comment periods demonstrates the opposite of a commitment to accountability and transparency, and that in fact this practice has become a pattern by which ICANN has limited the public's ability to substantively review issues, further reducing institutional accountability.<sup>1</sup> This practice also appears to be in direct conflict with ICANN's "commitment to enhancing its overall culture of promoting superior ethics, integrity and transparency" as stated at the beginning of Section 1 of the "Final Report by International Expert Group."

Since these are reply comments, we take this opportunity to express our endorsement of the following statement made by the Registries Stakeholder Group in its comment filed July 3 (see <http://forum.icann.org/lists/board-coi-review-report/msg00001.html>):

"The RySG strongly urges the Board to consider that a one hour session three times a year involving the Board and major stakeholder groups at ICANN

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<sup>1</sup> See, e.g., [http://ipconstituency.org/PDFs/Final\\_IPC\\_Comments\\_Conflicts\\_4-24-12.pdf](http://ipconstituency.org/PDFs/Final_IPC_Comments_Conflicts_4-24-12.pdf).

international public meetings is terribly insufficient as an outreach program. It does not come close to meeting the essential goal of establishing trust and confidence.”

We would only add to this that our constituency must share its one-hour, thrice-yearly session with the Board with two other constituencies in the Commercial Stakeholder Group. While we appreciate the opportunity to collaborate with these two constituencies, one result is to further reduce any “outreach” opportunity between our constituency itself and the ICANN Board.

The "Final Report by International Expert Group" (at <http://prague44.icann.org/meetings/prague2012/presentation-ethics-coi-final-report-25jun12-en.pdf>) consists of a Power Point presentation of 22 slides. This document states a number of conclusions but contains very little analysis.

The report states initially that there already exist a large number of detailed codes and guidelines for ICANN Board Members, including the organization’s Bylaws, Board Conflict of Interest Policy, Code of Conduct for the Board, Corporate Governance Guidelines, Confidentiality Guidelines, and Code of Ethics (directed to ICANN Staff). We agree with this statement. The concerns of the public on this issue do not arise from a lack of established guidelines for running an organization and Board with integrity, but the actual adherence to those guidelines. Since there is a plethora of guidance available to ICANN Board members, the retained experts advise against a gap analysis or benchmarking exercise against international best practice standards. However, the experts state, "These codes have been subjected to extensive review by outside lawyers and are comprehensive although repetitive and not easy for directors to use as guidelines" (emphasis added).

What is missing, the experts inform us, is a "qualitative approach." They suggest a Board Charter to be approved by the Board in clarifying ICANN's purpose, its value drivers, and strategic stakeholders. While this seems reasonable on its face, it is confusing as a solution for an entity that has been administering the DNS for over a decade. Adding a Charter might help clarify what the ethical best practices are in serving the Internet community, and help illuminate the issues to those Board members who do not understand their own guidelines. But adding a Charter does not seem to deal with the real-time issue of current and former ICANN Board Members profiting from their recent voting decisions. It seems to suggest adding more paper and process to the existing paper and process.

Additionally, the experts identify that the mandate currently in place for post-Board conflict avoidance is that the Board member should avoid conflicts of

interest or the appearance of conflicts for 12 months after Board activity in relation to new gTLD decisions on which the Board member voted. The experts caution that expanding the prohibition period, as is the trend for organizations in a public regulatory role, would only create more detailed rules that they feel will not solve this problem. They urge that the directors focus on adhering to their duty of loyalty and good faith towards ICANN.

This seems simplistic, counter-intuitive, and ineffectual.

Extending the time period in terms of when a Board member can profit or otherwise benefit from a voting decision that person made while on the ICANN Board, particularly as it relates to the new gTLDs, is not only sensible, it is in harmony with other public regulatory entities (as the experts indicate). It also seems necessary given the failures that have occurred at every stage of the process of bringing the new gTLDs to market. That the experts bring up the need to counter a perception that Board members might be profiting unethically and in conflict to their roles as directors highlights the need for taking effective action in extending the time restrictions of the current mandate.

The remainder of the report includes some remedial measures but will not likely be sufficient to address the problem fully. It suggests defining the role of an ICANN Board Member, defining/redefining the selection process, establishing a training program, establishing a Board Charter with discussions and buy-in by community stakeholders, ICANN management and the Board. IPC supports mandatory initial training (and periodic training updates) for all board members and officers on their ethical obligations. Perhaps this would help make the flood of paper “eas[ier] for directors to use as guidelines.”

Of all of these recommendations, we believe “attention to the selection process” is especially important. Obtaining a proper mix of commercial and non-commercial Board members, as well as directors with skills in governance and Board issues (in addition to directors with expert technical skills) is an excellent recommendation. We believe using outside recruiting firms to identify Board candidates would also provide benefits.

In most corporations, assisting Board members to recognize conflicts and to adhere to conflicts of interest policies would be an element of the job description of the General Counsel, and would be included in that officer’s performance evaluation criteria. It is peculiar that the report does not mention any role for the General Counsel in this regard.

The last section of the experts' report deals with sanctions. The experts recommend a graded sanction system which allows a Board member multiple violations/warnings before expulsion from the Board. This seems reasonable in a general sense, but represents a softening of the current approach, and not the right message to those who have witnessed departing ICANN Board Members being hired immediately in positions with companies who will profit from that director's voting decisions. There need to be real, concrete and decisive sanctions for a director not fulfilling the duty of loyalty and good faith towards ICANN and the community at large. Identifying potential conflicts during the selection process of Board members, restricting voting on issues where there are conflicts and then monitoring violations both by Board member and former Board members—all recommended in conclusion by the experts—are all necessary and sensible recommendations that can be supported by the community and public.

Thank you for considering our views on this important topic.

Respectfully submitted,

GNSO Intellectual Property Constituency  
Submitted by Steve Metalitz, IPC president