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## **AT-LARGE ADVISORY COMMITTEE**

### **Revisions to Conflicts of Interest Policy and Bylaws to Allow Board to Consider Compensation for Director Services**

#### **Introduction**

By the Staff of ICANN

Cheryl Langdon-Orr, At-Large Advisory Committee (ALAC) member from APRALO and Vice Chair of the ALAC Executive Committee, originally composed this Statement.

On 27 September 2011, a first version of the ALAC Statement on Revisions to Conflicts of Interest Policy and Bylaws to Allow Board to Consider Compensation for Director Services was posted on the At-Large Workspace: <https://community.icann.org/x/tQCpAQ>. On the same day, a call for comments was sent to the ALAC-Announce mailing list.

A second version (the present document) was created after taking into account comments received.

On 3 October 2011, Olivier Crépin-Leblond, Chairman of the ALAC, requested the At-Large Staff to begin a five-day ALAC vote starting 3 October 2011 and closing 7 October 2011.

On 4 October 2011, At-Large Staff confirmed that the vote had reached quorum and passed with ten votes in favor, zero votes against, and zero abstentions. On the same day, the Statement was submitted to the Public Comment forum for the Revisions to Conflicts of Interest Policy and Bylaws to Allow Board to Consider Compensation for Director Services.

You may review the result independently under:

[http://www.bigpulse.com/pollresults?code=2005BU7YAF3Bt\[tn\]JUDJNPd](http://www.bigpulse.com/pollresults?code=2005BU7YAF3Bt[tn]JUDJNPd).

On the same day, this ALAC Statement was transmitted to the public comment process, with a copy to the ICANN staff member responsible for this public comment topic, with a note saying that the document was currently undergoing ALAC ratification, with the vote having already achieved quorum.

[End of Introduction]

The original version of this document is the English text available at <http://www.atlarge.icann.org/correspondence>. Where a difference of interpretation exists or is perceived to exist between a non-English edition of this document and the original text, the original shall prevail.

# ALAC Statement on Revisions to Conflicts of Interest Policy and Bylaws to Allow Board to Consider Compensation for Director Services

*At-Large Advisory Committee (ALAC) Advice to the ICANN Board regarding the proposed revisions to the Conflicts of Interest Policy and Bylaws, set forth in the call for Public Comment here:*

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

**The ALAC advises the ICANN Board to PROCEED with the proposed revisions of the Conflicts of Interest Policy and associated revision(s) of the ICANN Bylaws to facilitate and implement an appropriate compensation scheme for voting Board Directors as outlined in the December 2010 Accountability and Transparency Review Team (ATRT) Recommendation #5.**

“The Board should expeditiously implement the compensation scheme for voting Directors as recommended by the Boston Consulting Group adjusted as necessary to address international payment issues, if any”<sup>1</sup>

Detailed in further discussion in the report on the ATRT's WG #1

“Compensation of directors is an issue closely associated with the theme of developing the ICANN Boards’ experience and collective skill-set and has been the subject of independent review, Board Governance Committee discussion and ongoing Board consideration. To date, only compensation for the Board Chair has been decided. In order to help guide and structure the future process for improving the Board’s operations, it is critical that the matter of remuneration be resolved promptly.”<sup>2</sup>

ALAC also notes that the ATRT-final-recommendations report states that in their public consultations, “Recommendation 5 was also widely supported but this has been slightly reworded to take into account comment received both from Board members and the community.”<sup>3</sup>

And echoes the sentiments outlined in the ATRT's Final Report:

“Compensation of directors is an issue closely associated with the theme of developing the ICANN Boards’ experience and collective skill-set and has been the subject of independent review, Board Governance Committee discussion and ongoing Board consideration. To date, only compensation for the Board Chair has been decided. In order to help guide and structure the future process for improving the Board’s operations, it is critical that the matter of remuneration be resolved promptly.”<sup>4</sup>

We note that these proposed revisions to the Conflicts of Interest Policy and Bylaws (as proposed) is in keeping with the original recommendations made in the independent Review of the ICANN Board in 2008 by the Boston Consulting Group/Colin Carter & Associates in November 2008<sup>5</sup> As well as the final report of the Board review Working Group was released in January 2010.<sup>6</sup> Which

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<sup>1</sup> <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf>, p 20

<sup>2</sup> <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf>, p 18.

<sup>3</sup> <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf>, p 16.

<sup>4</sup> <http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>, p 18.

<sup>5</sup> <http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>

<sup>6</sup> <http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>

states, "The WG acknowledges the general support from independent consultants and the community for the proposal of compensating Directors for their services, with the Chair being compensated at some multiple of the standard Directors' amount."<sup>7</sup>

Further the ALAC urges the ICANN board to address the issue in a manner more comprehensive than the proposed tactical changes for it to adopt broader, but specific, "categorical standards of independence" as a prerequisite to allow compensation for its directors or at the minimum require the Board to commit to such a review in near future.

**The specific areas of our concern include:**

1. Definitions of Conflicts: Article VI Section 6 of the bylaws and the Article VII Section 7.1 (d)(e) of the policy address the definitions of conflict. While the bylaws base its definition on Sections 5233 and 5227 of the California Nonprofit Public Benefit Corporate Law (conditions for directors to be deemed as "interested directors"), the policy considers a director as conflicted when the Board Governance Committee makes such determination following, possibly, a self disclosure. Collectively these definitions appear to be weak and/or ambiguous when compared to firms, albeit for-profit and publicly traded, that operate in multiple jurisdictions and are expected to meet high expectations of its stakeholders. **The ALAC recommends that ICANN, as a representative of global interests and a pioneer of multi-stakeholder governance model, should similarly adopt broader "categorical standards of independence" than what is mandated by State law requirements for its incorporation. Furthermore, the definitions of conflict or independence must be specific, and not general or vague, in stating the (a) exact monetary levels beyond which "self-dealing" transactions may be considered as conflicts, (b) nature of material relationships, including but not limited to commercial, industrial, legal, consulting and familial relationships and (c) other aspects that are appropriate to hold ICANN to higher standards as appropriate.**
2. Detection of conflicts: Article V Section 5.1 and Article VI Section 6.1 of the policy address the annual statements and periodic reviews. However, the stated intent is to avoid any activities that contravene the non-profit status granted by State of California. If ICANN is to adopt broader standards as described above, these disclosures and reviews need to be augmented as well. Additionally, Article II Section 2.1 of the policy requires the covered person to disclose potential conflicts to the Board Governance committee within the scope of a transaction and abstain from voting if the committee recognizes the conflict. **The ALAC recommends that as is customary in public firms the ICANN Board not just to rely on self-disclosures, but also creates venues/mechanisms for employees and public to report any such potential conflicts to the Board.**
3. Implications of conflict: Article II Section 2.2-2.5 of the policy specifies the procedures to determine a conflict and the subsequent actions to be taken regarding the transactions in which a conflict was detected. These procedures appear to assume normal scenario of self-disclosure and the subsequent efforts of the Board Governance Committee to investigate if the transactions had already taken place. As neither the bylaws nor the policy seem to address failure to disclosure conflicts by a director and the subsequent discovery of it by Board Governance Committee. **The ALAC recommends that the policy should be specific in courses of action that will be taken by the board, as it gives the public a clear indication of resoluteness of the Board in holding itself to high standards.**

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<sup>7</sup> <http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>, p 2.