

- *To:* <bcoc@icann.org>
- *Subject:* Comment of Coalition for Online Accountability
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This submission on behalf of the Coalition for Online Accountability (COA) responds to the request for public comment on the draft ICANN Board of Directors' Code of Conduct. See <http://www.icann.org/en/public-comment/#boc>. For information about COA, see below.

The stated goals of promulgating the Code of Conduct include to “focus Board members of areas of ethical risk, provide guidance to help them recognize and deal with ethical issues, [and] provide mechanisms to report unethical conduct.” In general, COA is unable to comment on whether this 2-page draft Code will advance these goals, especially considering that most of the draft Code is extremely general in its phrasing. In particular, we do not see any provision of the draft Code that “provide[s] mechanisms to report unethical conduct.”

With regard to focusing on areas of ethical risk, one such area has been the subject of recurrent discussion in the community virtually throughout the history of ICANN: conflicts of interest. In particular, many questions have been raised about the role that ICANN Board members who are employed by, represent, or have other affiliations with ICANN contracted parties (gTLD registries or accredited registrars) should play in the Board's consideration of contract amendments and other decisions that directly affect ICANN contracted parties.

The draft Code of Conduct has very little to say about this topic, although certainly it is relevant to some of the points which are touched upon, such as the duty of loyalty. The draft simply states that “Board members should act in accordance with the existing Conflicts of Interest policy.”

This policy (<http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm>) was adopted in March 1999, and is now almost ten years old. There is no indication that it has been reviewed since that date. COA submits that a review of this policy, including the opportunity for public comments on it, should be at least as high a priority for ICANN as the promulgation of a Board Code of Conduct, particularly a Code that sheds no new light on conflicts issues.

As examples of issues within the existing conflicts policy that would benefit from review and clarification, COA notes that Section 4.1 of the policy dictates that “No Director shall vote on any matter in which he or she has a material and direct financial interest that will be affected by the outcome of the vote.” However, with respect to “any proposed transaction, contract or arrangement in which a Director ... has a material financial interest,” Section 7 of the policy sets forth a procedure under which, unless the matter has been referred to the Conflicts Committee,

an “Interested Director” must “abstain from participation in the Board’s consideration” of the matter. Thus, whether a director with a financial arrangement with a contracted party must simply abstain from voting on matters affecting that party, or whether the director must also abstain from participation in the Board’s consideration, is unclear.

Section 9 of the conflicts policy also refers to various matters that should appear in the minutes of the Conflicts Committee. When the Board approved the conflicts policy it also concluded that “the minutes of the Conflicts Committee should not include the personal financial information contained in the disclosure statements of Directors and Officers.” See <http://www.icann.org/en/minutes/minutes-04mar99.htm>. However, what is not clearly spelled out is whether the minutes of the Conflicts Committee should be made public. It does not appear that any such minutes are available on the ICANN website. In the interest of transparency and accountability, more information should be made available about the activities of the Conflicts Committee.

Apart from these specific issues, it seems incongruous that ICANN, an organization which has made self-examination and review a key feature of its corporate DNA, has not publicly reviewed its conflicts policy in nearly ten years, a period during which the organization has undergone dramatic growth, and in which the composition, method of selection, and operation of its Board of Directors has seen dramatic change as well. COA urges that this long-overdue task be undertaken before action is completed on the Code of Conduct.

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA is a member of the Intellectual Property Constituency of ICANN’s Generic Names Supporting Organization (GNSO). COA and its participants have engaged actively in many aspects of ICANN’s work since the inception of the organization.

Respectfully submitted,

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