Dear CCWG,

For your information, please see attached.

The leadership team has reviewed the input received from the ICANN Board (see ICANN Board Liaison Reply to CCWG-AP Request for Input (July-Aug 2019) 29 Sept 2019.pdf) and will now review the input from ICANN Org (see attached) and propose next steps to the CCWG shortly.

Best regards,

Marika

Responses to Questions from the CCWG-AP to ICANN org

Questions posed to Xavier Calvez

<u>Finance Question 1</u>: The CCWG is interested in understanding the relative costs of staffing associated with mechanisms A and C. Noting that new staff members would potentially need to be hired in both scenarios, but that existing ICANN staff would likely be resourced in mechanism A, is it possible to provide a high-level overview of the cost differential highlighting which elements account for this difference? For the sake of discussion, assume that:

- 20 people would be needed to staff either an internal department or a foundation.
- ICANN staff members who want to temporarily work at the Foundation could be outsourced and continue to receive the same compensation.

<u>Response to Finance Question 1:</u> In describing cost differences between the 2 mechanisms, a number of assumptions need to be formulated. Those assumptions are identified below, and can include different scenarios for the same assumptions. Costs that are assumed to be equivalent in either mechanism are not discussed below.

The question suggests to describe differences by assuming that 20 people would be needed in both mechanisms. This is a limiting assumption, as it is expected that the number of people needed is a difference between the 2 mechanisms. As a result, the discussion below will remove this assumption. For clarity, this discussion does not include the differences between the two mechanisms that are not specifically about costs.

Assumption:
In Mechanism C, the Foundation's administration is: shared with ICANN's (Scenario C1) or entirely independent (Scenario C2). Within scenario C1, there could be costs differences between the Foundation's workforce being directly employed by the Foundation or seconded by ICANN. For simplification, such differences are ignored at this stage. The workforce costs, except where identified below, are presumed to be the same across all mechanisms.

Differences driven by the legal structure: Mechanism A does not require a separate legal entity / Mechanism C requires a foundation.

- One-time costs only in Mechanism C:
    - associated with the creation of a Foundation's legal entity, including registration of tax exemption.
    - associated with the creation of a board of directors.
    - Definition and documentation of the relationship between ICANN and Foundation.
    - Definition of accountability mechanisms for the foundation (if any).
    - Payroll registration and set up costs.
    - Additional costs in Scenario C2:
        - Start up costs: hire initial employees, identify offices, establish administrative and infrastructure services (Legal, Accounting, HR, IT, office management, Communications,…)
- On-going costs only in Mechanism C:

- o Board of directors activities and support. Dedicated resources in Scenario C2. Shared between ICANN and Foundation in scenario C1, under which costs are lower.
  - o Independent financial audit's costs (higher than incremental audit costs, if any, driven by the existence of a grant distribution activity within ICANN under Mechanism A).
  - o Tax return and other registration filing costs
  - o Management and support of accountability mechanisms for the foundation (if any).
  - o Costs of the ICANN management and oversight of relationship with foundation.
  - o Additional costs in Scenario C2:
    - ▪ Costs of dedicated administrative services (Legal, Accounting, Payroll, HR, IT, office management, Communications,…)
    - ▪ Costs of dedicated offices
- On-going costs only in Mechanism A:
  - o Management and support of ICANN's accountability mechanisms triggered by the grant distribution activity (if any).

Finance Question 2: Page 7 of the Initial Report includes the following description of Mechanism A: "An internal department dedicated to grant solicitation, implementation and evaluation is created within the ICANN organization. All grants are listed in ICANN's annual tax recordings." Several questions have come up regarding this description:

- • Is it correct that each grant allocated under this mechanism would be individually listed in ICANN's tax filings and if so, is it necessary to include the text "all grants are listed in ICANN's annual tax recordings" in the mechanism description? –

Response to Finance Question 2: Yes. For illustration, refer to page 50 (of 83) of ICANN's latest tax return on ICANN.org [insert link: https://www.icann.org/en/system/files/files/fy18-irs-tax-form-990-return-organization-exempt-income-tax-27may19-en.pdf]. In addition, ICANN would need to evaluate if additional information requirements exist as a result of the grant distribution activity.

Finance Question 2.a: If it is important to keep this text, should "tax recordings" be changed to "tax filings" or "tax return"?

Response to Finance Question 2.a: Change to "tax return"

Finance Question 2.b:Are ICANN's tax returns publicly available?

 Response to Finance Question 2.b: Yes. All ICANN's tax returns since its creation are available on ICANN.org, and on the publication service used by the IRS (GuideStar).

Finance Question 2.c:If tax returns are not public, do they need to be made available upon request?

Response to Finance Question 2.c: Not applicable, as they are already available.

Questions posed to Samantha Eisner:

Legal Question 1: The CCWG is considering whether it would be beneficial to recommend that auction proceeds are divided into segments and distributed to grant recipients in a series of "baskets," each with a different programmatic focus. For example, the CCWG could recommend that a segment of funds could be devoted to supporting least developed countries and then describe a set of goals associated with that basket. The advantage of such a 'basket' approach is that a certain amount is pre-allocated and other projects would not get overshadowed by specific requests. There is no need to segment the total funding amount into baskets but one could - and probably should - do this only for very few specific goals. Many funds are practicing such an approach. Do you think such an approach would be beneficial? Do you see any risks? Do you have any suggestions about how the CCWG should approach this work?

Response to Legal Question 1: As the ICANN Board indicated in its response, there are concerns with moving to a "basketing" approach at this stage. The risks identified by the Board in its response, such as creating artificial limitations upon the first applications, are similar to those that we'd highlight from an org perspective. The Board's suggestion of deferral of this concept for consideration as an outcome of a review seems appropriate.

Legal Question 2: Under Mechanism C, a new foundation would be established with a new Board that would have a narrowly-defined scope focused specifically on the foundation goals. Is ICANN Legal comfortable with such a separate role for the newly created foundation Board? And, if yes, what kind of safeguards would the Board want to put in place to ensure legal and fiduciary obligations of the ICANN Board will not be challenged in potential future conflicts?

Response to Legal Question 2: This question was posed to the ICANN Board in nearly the same form, and in its answer the Board responded, in part:

> As previously indicated, ICANN's Board and its Officers have specific fiduciary obligations with respect to the distribution of auction proceeds, no matter which mechanism is selected. Creation of a separate foundation would not modify or eliminate those obligations, nor would it eliminate potential challenges with respect to those obligations. To the extent the CCWG contemplates creation of a foundation in which ICANN is not involved - particularly, but not exclusively including decisions as to whether an application furthers ICANN's mission - that raises concerns similar to concerns raised with the prior Mechanism D, which envisioned the handing of proceeds over to a separate entity to be solely responsible for all parts of the evaluation and distribution. We have heard suggestion during the CCWG's deliberations that the renewed interest in a foundation is for the purposes of independence from ICANN Board and Org. However, the use of a foundation in this instance would be a mechanism that would require a separate entity, but would necessarily still be related to ICANN for the purposes of governance.

> The creation of a foundation to administer the grant program should be evaluated against the efficiency and effectiveness principle cited above and, if a foundation is the recommended mechanism, it should be developed in accordance with best practices from related foundations designed to further a parent or supported entity's charitable mission. Any recommendation for a foundation should also provide details on what the foundation and its board are anticipated to do other than to administer the grant program in accordance with the principles and guidelines that the CCWG-AP is recommending. Is the foundation expected to have a differing strategic

initiative other than to deliver the program as recommended by the CCWG-AP and approved by the ICANN Board?

From the ICANN org standpoint, we concur with the Board's inputs. From the org standpoint, it is important to understand the specifics of the foundation set-up that the CCWG is envisaging. If the renewed interest in a foundation is based in a goal of achieving independence between a foundation and ICANN, then any resulting foundation is likely to resemble Mechanism D, and will raise legal and fiduciary concerns. The Board's focus on best practices for relationships between a parent organization and a foundation established to further a charitable mission would allow ICANN org to address legal and fiduciary concerns arising out of the development of such a foundation.