



**FIRST REPORT
ON CORPORATE GOVERNANCE**

**THE INTERNET CORPORATION
FOR ASSIGNED NAMES AND NUMBERS**

**Prepared by
Cooley LLP**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“*ICANN*,” or, the “*Company*”), has asked us to conduct a preliminary review of certain items related to its corporate governance, with a particular focus on mechanisms to mitigate actual and perceived risk from conflicts of interest. First, we were tasked to locate, using ICANN’s website, ICANN’s bylaws, articles, board resolutions and corporate policies related to conflicts of interest and corporate conduct (collectively, the “*Governance Documents*”). Second, we were asked to review, at a high level, certain standardized rules and practices related to corporate governance in the United States and in Europe. And third, we were asked to briefly compare those rules and practices to the Governance Documents. This report summarizes our initial research and preliminary findings and provides the framework for further discussions and recommended modifications ICANN may want to consider to its Governance Documents. It does not take into account recommendations separately made by the Jones Day law firm.¹

We first provide a brief overview of the corporate governance guidelines established by key institutions in the U.S. and in Europe. We then discuss our findings with respect to the Governance Documents and provide our suggestions for initial action items and follow-up research. We look forward to discussing these items with you further.

¹ Available at <http://www.icann.org/en/news/public-comment/board-coi-review-11mar12-en.htm>.

OVERVIEW OF CORPORATE GOVERNANCE SOURCES AND STANDARDS

Sources and Standards Applicable to Companies in the United States

We reviewed basic standards and principles applicable to publicly held companies based in, or whose securities are traded in, the U.S. Many of the standards summarized below emerged in the wake of a series of scandals in the early part of the previous decade. Those scandals were attributed in part to poor corporate governance or lax enforcement of pre-existing guidelines. While the principles below are directly applicable to public companies, they have had a downstream effect on privately-held companies as well, as investors have increasingly demanded that the disclosure obligations and risk mitigation principles applicable to public companies also be adopted by privately held companies.

❖ The United States Securities and Exchange Commission

Certain key rules of the United States Securities and Exchange Commission (“*SEC*”) regarding corporate governance and conflicts of interest came into effect following the implementation of the Sarbanes-Oxley Act of 2002. One such rule pertains to the management and resolution of conflicts of interest at the board level of companies subject to the SEC’s rules. Item 404 of Regulation S-K requires publicly traded companies to disclose any transactions into which they have entered with related persons that exceed \$120,000 in value. Related persons include directors, officers and their family members. In the event any transactions exceed that threshold, companies must disclose base-level information about the transaction, including the names of the parties involved, the amount of the transaction at issue, and a description of the parties involved. The SEC also requires companies to disclose their policies and procedures for the review, approval or ratification of any transaction required to be reported under

Item 404. That disclosure must also identify the persons on the board of directors who are responsible for applying those policies and procedures. This information is included in the Company’s public filings made available to investors through the SEC’s website. Additionally, the SEC, under Item 406 of Regulation S-K, requires companies to disclose whether (and if not, why not) they have adopted a code of ethics applicable to executive officers. Such a code of ethics must put in place written standards to promote honest and ethical conduct, including the handling of actual or apparent conflicts of interest. The code should also state: (i) that the company is committed to providing full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the SEC and in other public communications made by the registrant; (ii) that the company will comply with applicable governmental laws, rules and regulations; (iii) that the company will promptly report violations of its code; and (iv) that the company will adhere to its code. That code of ethics must also be posted on a company’s website.

❖ ***The New York Stock Exchange***

The New York Stock Exchange (“**NYSE**”) lists its corporate governance standards for NYSE-listed companies under Section 303A of its Listed Company Manual (“**Manual**”). Under those standards, a majority of a listed company’s directors must be independent, companies must adopt and disclose corporate governance guidelines and companies must adopt and disclose a code of business conduct and ethics, which must address processes associated with resolving conflicts of interest. These items must be disclosed on the listed company’s website.

The NYSE’s test for independence, set forth under Section 303A.02 of the Manual, is two-fold. First, the board of directors must determine affirmatively that the director has “no material relationship with the listed company.” Under the rule, material relationships include, but are not limited to, those that arise in “commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships.” Section 303A.02 also lists the following five additional tests that a director must pass in order to be categorized as independent: (i) whether the director or an immediate family member has been an employee of the company during the last three years; (ii) whether the director or an immediate family member has received during any 12-month period in the preceding three

years compensation from the company in excess of \$120,000; (iii) whether the director is affiliated with the company's auditor; (iv) whether the director has served as an executive officer alongside one of the company's current executive officers while also serving on a compensation committee; or (v) whether the director has a relationship with a third party company that has made or received payments from the company in excess of \$1,000,000 or two percent of such other third party company's gross revenues.

NYSE-listed companies must also adopt corporate governance guidelines, under Section 303A.09 of the Manual. Those guidelines are required to address the following topics: (i) director qualification standards; (ii) director responsibilities; (iii) director access to management; (iv) director compensation; (v) director orientation and continuing education; (vi) management succession; and (vii) annual performance evaluation of the board. As noted previously, this must be posted to the company's website. It also is required to be disclosed in a company's annual proxy statement.

Finally, under Section 303A.10 of the Manual, NYSE-listed companies must adopt and disclose a code of business conduct and ethics. This requirement is flexible because the document must address the specific needs of a given company. However, all listed companies are required to include policies addressing conflicts of interest, corporate opportunities, confidentiality, fair dealing, the protection of company property, compliance with laws and procedures for reporting unethical behavior. Like the corporate governance guidelines, this document must be included in the company's annual proxy statement and must be posted to its website.

❖ *The NASDAQ Stock Market*

The corporate governance requirements mandated by the NASDAQ Stock Market ("*NASDAQ*") for companies listed on its exchange are located within Section 5600 of its listing rules ("*Rules*"). With respect to directors' independence, Rule 5605 establishes standards that are similar to those of the NYSE's Manual. However, the Rules establish different thresholds with respect to the dollars received from a third party with which NASDAQ-listed companies do business. Instead of a \$1,000,000 (or two percent of gross revenues) threshold, as is the case under the Manual, NASDAQ establishes a \$200,000, or five percent

of gross revenues, threshold. Any transaction involving a director and a third party with whom that company's director is involved above that threshold prohibits the company from categorizing the director as disinterested with respect to that transaction.

Similar to the NYSE's requirements, NASDAQ-listed companies are required to maintain a code of conduct, as specified in Rule 5610 of its Equity Rules. That rule requires that listed companies enact a code of ethics in compliance with the Section 406(c) of the Sarbanes-Oxley Act of 2002. That "code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations." Moreover, practically speaking, because the NYSE listed company requirements on corporate governance have emerged as a market norm, many NASDAQ-listed companies also adopt and disclose corporate governance standards that mirror those required under NYSE rules.

However, unlike the NYSE's requirements, NASDAQ's Rules do not require companies to have in place corporate governance guidelines. Nonetheless, commentators note that many NASDAQ-listed companies have adopted and disclosed such guidelines to ensure that they comply with the best practices of corporate governance.

❖ *The United States Internal Revenue Service*

The U.S. Internal Revenue Service ("**IRS**") has rules in place governing interested transactions involving tax-exempt organizations. The goal of these rules is to prevent a fiduciary director of such an organization from using his or her position to obtain personal gain for themselves or others at the organization's expense. As defined by the IRS, an interested person is a director, principal officer or a member of a committee with board-delegated powers who has a direct or indirect financial interest in the transaction at issue. Financial interest is further defined as a situation in which a person has either (i) an investment interest in any entity with which the organization has a transaction or arrangement; (ii) a compensation arrangement with the organization with any individual with which the organization has a transaction or arrangement; or (iii) a potential investment interest in, or compensation arrangement with, any individual with which the organization is negotiating a transaction or arrangement. Not all transactions involving an interested person with a financial interest in a given transaction arise

to the level of a conflict of interest. Instead, the board of directors of an organization must make a determination as to whether such a conflict of interest exists. That procedural determination allows the interested person to first make a presentation to the board, after which the board must vote on the transaction or arrangement without the interested person present. If appropriate, the board may then evaluate alternatives to the proposed transaction and make a determination as to whether the transaction at issue is in the organization's best interest. That determination must be reached by a majority vote of the disinterested directors.

Sources and Standards Applicable to Companies in Europe

A pan-European standard on corporate governance has yet to emerge. Indeed, the European Commission, in a recently-released green paper, noted the presence of many standards across different member countries of the European Union. While there has been some crossover, each individual country market – for linguistic, cultural and political reasons – has largely retained its own standards. Instead of conducting a comprehensive review of these standards at this initial stage, we have instead focused our preliminary review on standards applicable to companies located in the United Kingdom, as that country's standards appear to be one of the models looked to in Europe. Many of the principles applicable to public companies in the U.K. are analogous to rules applicable to their counterparts in the U.S. If additional research on standards applicable to companies located in other markets (in particular, due to their size, France or Germany) would be helpful, we would conduct a broader analysis if requested.

❖ Applicable Rules in the United Kingdom

The Financial Reporting Council, an independent regulator of companies listed in the U.K. and an often-cited source on corporate governance in the U.K., establishes its corporate governance standards through the UK Corporate Governance Code (the "**Code**"). The latest version of the Code, adopted in 2010, was revised in the wake of the 2008-2009 financial crisis. That version is consistent with previous iterations in that its hallmark provision requires companies that fail to adhere to the Code's standards to explain their reasons for departing from the principles it establishes. However, it also contains new provisions designed to remedy perceived weaknesses present in prior versions of the Code. Notably, in Code Provision B.7.1, the FRC requires that all directors of companies listed on the London Stock Exchange be subjected to annual elections

every year. That change was adopted to ensure greater board accountability to corporations' shareholders. Other items related to governance found within the Code refer to the Financial Services Authority's (the "**FSA**") disclosure and transparency rules (the "**DTR**"). DTR 7.2 lists the corporate governance statements with which issuers in the U.K. must comply. That rule requires that companies disclose in their directors' report a corporate governance statement specifying the corporate governance code to which the company is subject or with which the company voluntarily applies.

Statutory rules applicable to companies in the U.K. also provide a source of guidelines for corporate governance principles, notably related to conflicts of interest. The Companies Act 2006 (the "**2006 Act**") is the primary statutory authority for such rules. Chapter 2 of the 2006 Act, revised in 2008, places a duty on directors to avoid direct or indirect, actual or possible, conflicts of interest. Exceptions are permitted if the matter has been authorized by the directors. To authorize such matters, directors must first disclose their interest in a transaction, under Chapter 3 of the 2006 Act. Additionally, direct transactions with directors require the approval of the board, except for such transactions that meet certain exception rules, including a £10,000 threshold. This threshold is more stringent than the level applicable to companies listed on the NASDAQ or the NYSE, which set in place a minimum threshold much higher than this amount.

REVIEW OF DOCUMENTS ON ICANN’S WEBSITE

Ease of Locating the Governance Documents

One of our preliminary tasks was to note the relative ease or difficulty involved in locating the Governance Documents. We were able to quickly locate ICANN’s bylaws, articles and board resolutions within the “Documents” section of its website. That section may be accessed by clicking on the “Documents” tab prominently located within the navigation bar of the website. A screen shot of that section of the website may be found in **EXHIBIT A**.²

The conflicts of interest policy, in contrast to the items listed in the preceding paragraph, was more difficult to locate. After searching several pages of the website, we instead resorted to an external Google search to find the document, which was found on the Board Governance Committee’s page. Locating the section of the website containing a summary of board members’ interests also proved more challenging. That document appears to be listed under the “About” tab. A screen shot of that section of the website may be found in **EXHIBIT B**. This leads to our first recommendation:

Action Item → Consider re-titling “Documents” as “Governance.”

This maneuver would add greater clarity to the section and would bring ICANN’s website in line with other comparable institutions and high-profile companies. Any documents that are not related to governance (e.g. major agreements) could be relocated to another section of the site. Alternatively, consider adding a drop down menu under “Documents” that would include a direct link to a separate “Governance” section or adding a separate “Governance” section at the bottom of the website under the “Documents” section, as seen in **EXHIBIT C**.

Action Item → Consider grouping together all documents related to corporate governance under the “Governance” section.³

² Exhibits A, B, and C are shown as they existed at the initial publication of this report in early October 2011. They have since been updated and continue to be updated as appropriate.

³ Following the delivery of this report, ICANN adopted this recommendation. See <http://www.icann.org/en/about/governance> and the governance tab on ICANN’s website.

Grouping all of the items related to corporate governance in one location would make it easier for those interested in understanding applicable ICANN policies to quickly locate those policies. Additional items that are unrelated to corporate governance, but that appear within the current “Documents” section, may be better positioned under the “About” section of the website.

Initial Review of the Governance Documents

❖ *Articles of Incorporation*

The Company’s Articles of Incorporation (the “*Articles*”) appear to have last been revised in 1998 and are lean. We will defer a review of this document until we receive additional guidance.

❖ *Bylaws*

The Company’s bylaws set forth ICANN’s mission and its core values in Article 1. From a corporate governance and conflicts of interest perspective, that portion of the Bylaws articulates core values encouraging the employment of “open and transparent policy development mechanisms” and the application of “documented policies neutrally and objectively.” Both these core values match in spirit the applicable principles set forth in the NYSE’s Manual and the NASDAQ’s Rules. Article III, which specifies rules regarding transparency, requires the Company to list many of its corporate governance documents on its website for the public to access, which also complies with the NYSE’s Manual and the NASDAQ’s Rules. Moreover, Article VI, Section 6, requires that directors submit annual reports regarding any conflicts, requires the company to institute a conflicts of interest policy and instructs directors to avoid voting on any matters in which they have a conflict of interest. Those items largely comply with the precedent items reviewed. In summary, ICANN’s Bylaws appear to comply in broad degree with the policies reviewed above. Nonetheless, we recommend that the bylaws be compared against peer companies and we recommend that ICANN consider grouping together documents related to corporate governance on its website in one location.

❖ *Code of Conduct*

The Company's Bylaws require its directors to comply with its Code of Conduct.⁴ Unlike the Bylaws, the Code of Conduct does not show on its face when it was adopted. This document requires that directors comply with applicable laws, rules and regulations and that they observe "high ethical standards in the conduct of their duties." Board members are also instructed to act in accordance with the Company's conflicts of interest policy. Though this document is brief, we suggest considering the following change:

Action Item → Provide the date that the Code of Conduct was last amended.

Many of the other documents note this, and it gives credit to the Company for appropriately and prudently updating its corporate governance documents in a timely fashion.

❖ *Conflicts of Interest Policy*

The Company's Conflicts of Interest Policy is posted in draft form on the ICANN website.⁵ The draft presents a robust set of principles and procedures designed to result in the advanced disclosure and effective resolution of any conflicts involving board members. First, directors have an affirmative duty to disclose any conflicts of interest in advance, pursuant to Section 2.1. Once such a disclosure is made, the Governance Committee of the ICANN Board is required to make a determination as to whether such disclosure arises to an actual conflict of interest. That decision is made without the presence of the director who has disclosed the potential conflict. Directors are also required to abstain from voting on any matter in which any director has a material and direct financial interest affected by the outcome of the vote.

We have only two recommendations with respect to the Conflicts of Interest Policy:

⁴ Since the delivery of this report, ICANN's Code of Conduct has been made much easier to locate on its website, <http://www.icann.org/en/groups/board/governance/bod-code-of-conduct-21apr11-en.htm>.

⁵ The Conflicts of Interest policy was later revised in December 2011.

Action Item → Confirm that the Conflicts of Interest Policy is in final form; if so, consider dating the policy to reflect the date of its adoption by the Company.

Action Item → Consider revising Section 2.1(b) to correct a typographical error at the end of the second sentence.

We noted that there is also a summary of individual board member and board liaison statements of interest posted to the ICANN website. That document contains several grammatical and typographical errors which, at a minimum, we suggest correcting. Those errors include: grammatical errors in Section 4, Section 9, and Section 13. There are also inconsistencies in the presentation of information and Mr. Mohan's conflicts are summarized in more than one location.

SUGGESTIONS FOR FURTHER RESEARCH

From our initial review, it appears that the Company's policies are in line with many of the standardized principles set forth in leading corporate governance authorities. We nevertheless suggest comparing the Governance Documents to leading institutions to ensure their compliance with best practices.

We appreciate the opportunity to be of service to ICANN and we welcome the opportunity to discuss any questions or comments you may have.

For further information, contact:
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EXHIBIT A

SCREEN SHOT OF “DOCUMENTS” SECTION OF ICANN’S WEBSITE

Site Map | Site Index | Quick Links | Select a link below: Search

Internet Corporation for Assigned Names and Numbers

Home About News Policy In Focus Meetings Resources **Documents** Press Room Careers Contact

Documents

Documents

New Generic Top-Level Domains
ICANN's Major Agreements and Related Reports.

Internationalized Domain Names
An overview of ICANN's Accountability and Transparency.

Affirmation of Commitments
A document constituting an Affirmation of Commitments by the U.S. Department of Commerce and ICANN. This is in recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system, globally by a private sector led organization.

Annual Report
The ICANN Annual Report.

Articles of Incorporation
Articles of Incorporation for ICANN.

Board Meeting Transcripts, Minutes & Resolutions
ICANN Board of Directors' meeting dates, notes and minutes.

Budget (can now be found under Financial Information)

Bylaws and Bylaws Archives
The bylaws outlining ICANN's powers and responsibilities, and previous versions of the ICANN bylaws.

Code of Conduct [PDF, 106 KB]
ICANN's expected standards of behavior.

Corporate Documents
Articles of Incorporation and ICANN's Bylaws.

Correspondence
Letters to and from ICANN staff.

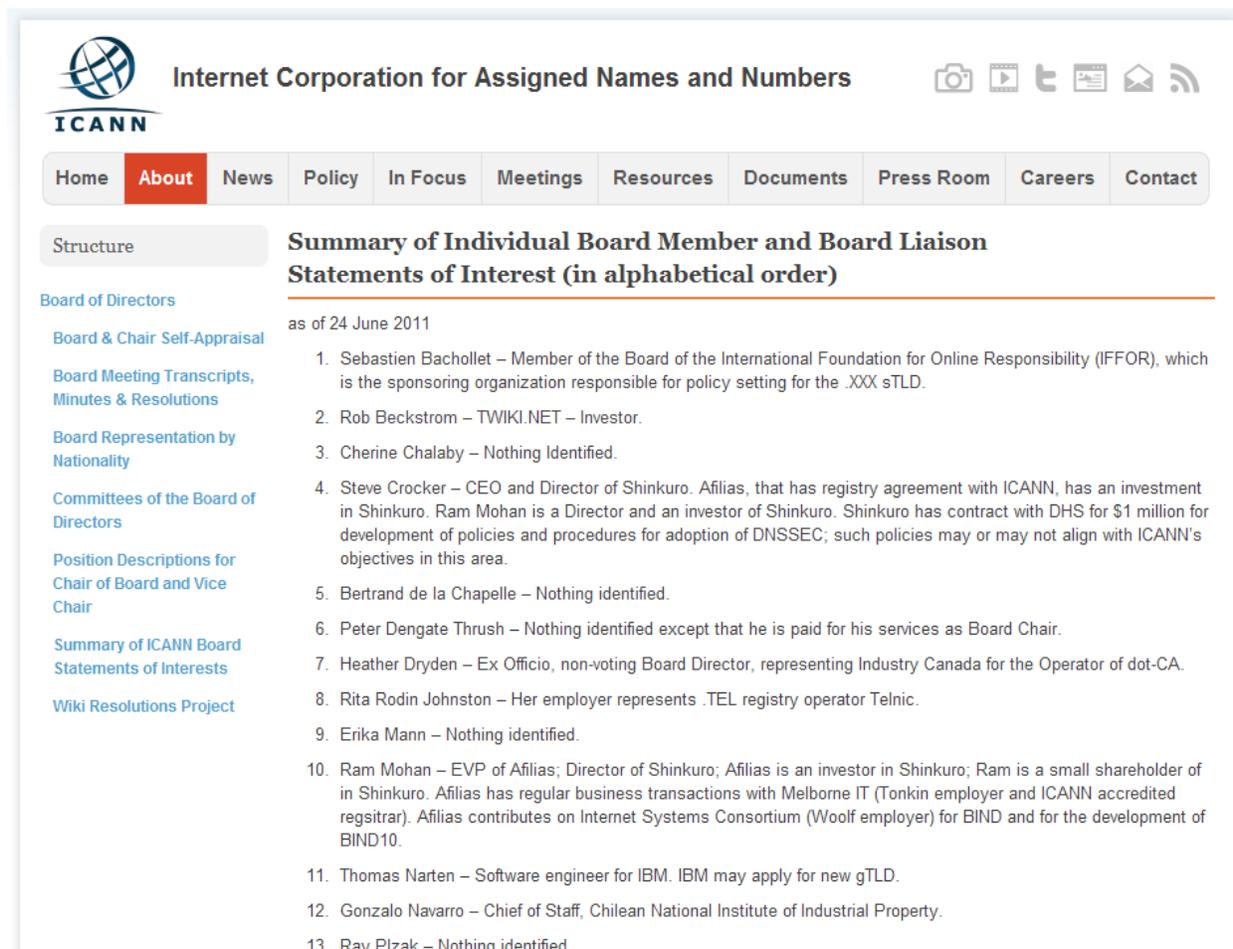
Financial Information
Budget documents, financial reports, tax statements and schedules, payment information and other related information.

Dakar SENEGAL
19-23 - 28 October 2011

Singapore 41
18-24 June 2011

EXHIBIT B

SCREEN SHOT OF CONFLICTS SUMMARY SECTION OF ICANN'S WEBSITE



The screenshot shows the ICANN website's navigation menu with 'About' highlighted. The main content area displays the title 'Summary of Individual Board Member and Board Liaison Statements of Interest (in alphabetical order)' and a list of 13 board members with their respective conflicts of interest.

ICANN Internet Corporation for Assigned Names and Numbers

Home **About** News Policy In Focus Meetings Resources Documents Press Room Careers Contact

Structure

Board of Directors

- Board & Chair Self-Appraisal
- Board Meeting Transcripts, Minutes & Resolutions
- Board Representation by Nationality
- Committees of the Board of Directors
- Position Descriptions for Chair of Board and Vice Chair
- Summary of ICANN Board Statements of Interests
- Wiki Resolutions Project

Summary of Individual Board Member and Board Liaison Statements of Interest (in alphabetical order)

as of 24 June 2011

1. Sebastien Bachollet – Member of the Board of the International Foundation for Online Responsibility (IFFOR), which is the sponsoring organization responsible for policy setting for the .XXX sTLD.
2. Rob Beckstrom – TWIKI.NET – Investor.
3. Cherine Chalaby – Nothing Identified.
4. Steve Crocker – CEO and Director of Shinkuro. Afilias, that has registry agreement with ICANN, has an investment in Shinkuro. Ram Mohan is a Director and an investor of Shinkuro. Shinkuro has contract with DHS for \$1 million for development of policies and procedures for adoption of DNSSEC; such policies may or may not align with ICANN's objectives in this area.
5. Bertrand de la Chapelle – Nothing identified.
6. Peter Dengate Thrush – Nothing identified except that he is paid for his services as Board Chair.
7. Heather Dryden – Ex Officio, non-voting Board Director, representing Industry Canada for the Operator of dot-CA.
8. Rita Rodin Johnston – Her employer represents .TEL registry operator Telnic.
9. Erika Mann – Nothing identified.
10. Ram Mohan – EVP of Afilias; Director of Shinkuro; Afilias is an investor in Shinkuro; Ram is a small shareholder of in Shinkuro. Afilias has regular business transactions with Melbourne IT (Tonkin employer and ICANN accredited registrar). Afilias contributes on Internet Systems Consortium (Woolf employer) for BIND and for the development of BIND10.
11. Thomas Narten – Software engineer for IBM. IBM may apply for new gTLD.
12. Gonzalo Navarro – Chief of Staff, Chilean National Institute of Industrial Property.
13. Ray Plzak – Nothing identified.

EXHIBIT C

“DOCUMENTS” SECTION AT THE BOTTOM OF THE ICANN WEBSITE

<u>About</u>	<u>News</u>	<u>Policy</u>	<u>In Focus</u>	<u>Resources</u>	<u>Documents</u>	<u>Meetings</u>
Bylaws	Announcements	Policy Update	Affirmation of Commitments	Accredited Registrars	Major Agreements	
FAQs	Blog	At-Large	Contractual Compliance	Dispute Resolution Options	Annual Report	Press Room
IANA	Newsletter	ASO	DNSSEC	E-Learning	Articles of Incorporation	
Mission	News Releases	ccNSO	Fellowship Program	Photos	Correspondence	Careers
Structure	RSS Feeds	GAC	Internationalized Domain Names (IDNs)	Videos	Financial Information	
		GNSO	IDN ccTLD Fast Track Process	Speeches and Presentations	Strategic & Operating Plan	Contact
		RSSAC	IPv6	Whois Search		
		SSAC	New gTLD Program			


ICANN



EXHIBIT D

ARTICLES OF INCORPORATION

[HTTP://WWW.ICANN.ORG/EN/ABOUT/GOVERNANCE/ARTICLES](http://www.icann.org/en/about/governance/articles)

EXHIBIT E

BYLAWS

[HTTP://WWW.ICANN.ORG/EN/ABOUT/GOVERNANCE/BYLAWS](http://www.icann.org/en/about/governance/bylaws)



EXHIBIT F

ICANN BOARD OF DIRECTORS' CODE OF CONDUCT

[HTTP://WWW.ICANN.ORG/EN/GROUPS/BOARD/GOVERNANCE/BOD-CODE-OF-CONDUCT-21APR11-EN.HTM](http://www.icann.org/en/groups/board/governance/bod-code-of-conduct-21apr11-en.htm)

EXHIBIT G

ICANN CONFLICTS OF INTEREST POLICY

[HTTP://WWW.ICANN.ORG/EN/GROUPS/BOARD/GOVERNANCE/COI](http://www.icann.org/en/groups/board/governance/coi)



EXHIBIT H

SUMMARY OF INDIVIDUAL BOARD MEMBER AND BOARD LIAISON STATEMENTS OF INTEREST

[HTTP://WWW.ICANN.ORG/EN/GROUPS/BOARD/SOIS](http://www.icann.org/en/groups/board/sois)