

ICANN Nominating Committee (NomCom) “Unaffiliated” Director Statement

This document provides a proposed statement that could give effect to the principles embodied within Recommendation 27 (on “Unaffiliated” Directors) and the Nominating Committee Review Implementation Working Group (NomComRIWG) efforts towards implementation. The document also includes background on Recommendation 27 from the Independent Examiner performing the Second Organizational Review of the Nominating Committee (NomCom2 Review), as well as the NomComRIWG proposal to implement that recommendation.

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The finding of the Independent Examiner is helpful in guiding the intent of Recommendation 27: “The extent to which NomCom appointees are independent and prioritize the interests of the global Internet community in their decision-making is an area of concern within ICANN.”

If the proposed statement for “Unaffiliated” Directors is appropriate, it will then be presented as part of the package proposed for Public Comment on the implementation of a group of recommendations arising from the NomCom2 Review. The proposed statement would be incorporated into the Nominating Committee (NomCom) Operating Procedures, and once adopted, future changes would be subject to Public Comment and Board approval.

A Proposed Statement on “Unaffiliated” Directors:

The ICANN Nominating Committee (NomCom) serves an important role in assuring that the ICANN Board of Directors remains predominated by persons that meet the U.S. Internal Revenue Service definition of independence, which focuses on specific financial transactions and relationships. This regulatory definition already excludes those:

- Compensated as an officer or employee of ICANN or Public Technical Identifiers (PTI), or compensated by another company for services provided to ICANN or PTI;
- Receiving in excess of US\$10,000 from ICANN or PTI as an independent contractor (amount subject to change);
- Involved, or has a family member involved, in a reportable transaction on ICANN or PTI’s Form 990 (annual U.S. regulatory filing).

The NomCom also serves an important role in bringing a wide range of viewpoints and experience to the ICANN Board, including the nomination of Board Directors who bring inputs and experience from outside of the ICANN Community. The NomCom is expected to bring a balance to the Board when viewed alongside those Directors selected by the ICANN Supporting Organizations and the At-Large community. In this role, the NomCom is empowered to and expected to identify Directors that bring a certain level of separation or independence from those participating within ICANN’s multistakeholder model beyond the financial review to meet the IRS definitions of independence.

To achieve this objective, the NomCom shall assure that a minimum of three of the eight seats on the ICANN Board of Directors that are nominated by the NomCom are filled by persons who have limited or no prior experience or affiliation with ICANN. At all times, those appointed to the ICANN Board of Directors are expected to be competent to serve the role and to meet all qualifications set out at Sections 7.3 and 7.4 of the ICANN Bylaws.

There are certain objective measures that can help demonstrate that a candidate for the Board has limited or no prior affiliation with ICANN. These are provided to inform the NomCom during their selection process when evaluating whether a candidate is able to be appointed as

“Unaffiliated” Directors. Any candidate named to this position shall be able to demonstrate that they:

1. Meet the U.S. IRS definition of independence in force at that time.
2. Have not served within a leadership capacity within, as a councilor/member of the governing or managing body of, or appointed to any liaison or rapporteur (or equivalent role of influence) within an ICANN Supporting Organization (SO), Advisory Committee (AC), Stakeholder Group, Constituency, Cross-Community Working Group (CCWG), Policy Development Process (PDP) Working Group or other community groups, Task Force, or a Regional At-Large Organization (RALO).
3. Have not been nominated or appointed by the ICANN Board of Directors, ICANN SO, AC, Stakeholder Group, Constituency or RALO to serve on a Review Team, Committee or other similar group developed to provide recommendations, advice, or input to ICANN or the ICANN Board¹.
4. Have not been on the board of, employed by, a shareholder of, or served as a contractor to a customer of the Internet Assigned Numbers Authority (IANA) Functions, a Root Server Operator, or entities accredited by ICANN.
5. Have not received payment as a representative, agent, or consultant for any entity for the purpose of participating with ICANN processes.
6. Have not served in any role on the ICANN Nominating Committee (NomCom).
7. Have not served as a liaison to the ICANN Board of Directors.
8. Have not been a candidate to serve as a director on the ICANN Board of Directors through a selection process other than the NomCom selection process.
9. Have not been an employee or contractor of ICANN or PTI.
10. Have not been an employee or contractor of a member of an ICANN SO, AC, Stakeholder Group, Constituency, or RALO.

Those seeking appointment as an Unaffiliated Director shall attest to the NomCom that, upon review of the ICANN Conflicts of Interests Policy in force at the time of their candidacy, they have a good faith belief that they would not be identified as having an actual or perceived conflict of interest for matters that routinely come before the Board.

A candidate’s ability to serve as an Unaffiliated Director shall be assessed for the start of the candidate’s initial appointment to the Board, and upon the start of each subsequent term for which the Unaffiliated Director seeks to serve. For avoidance of doubt, service on the Board as an Unaffiliated Director shall not impact that Director’s ability to serve as an Unaffiliated Director for any successive subsequent terms. Similarly, election to receive compensation for service on the ICANN Board of Directors shall not disqualify an Unaffiliated Director from being reappointed as an Unaffiliated Director for any successive subsequent terms.

The highest priority for the NomCom shall always be to fill the ICANN Board with competent Directors. The concept of an Unaffiliated Director brings with it a preference that a certain

¹ Across RALOs, there are differing titles and definitions of leadership roles. For clarity, service in any RALO leadership role is indicative of prior affiliation.

amount of seats on the ICANN Board should be reserved for those with no prior experience or affiliation with ICANN.² This preference might not always be possible to meet.

In any cycle for which the NomCom is required to select an Unaffiliated Director to the ICANN Board, if after a full search no competent candidate can be located the meets the Unaffiliated Director requirement, the NomCom may select an otherwise qualified candidate for the seat that has met all of the objective measures specified above for a period of at least two years prior to the start of the Board term for which the NomCom is making its selections. When exercising this exception, the NomCom is encouraged to select the candidate with the longest time period away from ICANN. This exception should be used sparingly, and the exception shall not be exercised if there are already three Unaffiliated Directors serving on the ICANN Board.

There may be times where a Director selected as an Unaffiliated Director has a changed circumstance (employment, financial relationship, etc.) during their term. If appropriate, such Director may complete their term on the ICANN Board and the NomCom will not have an immediate obligation to appoint a new Unaffiliated Director during the pendency of the term. However, when the seat occupied by such Director comes up for selection, even if such Director is eligible for another term on the ICANN Board, such Director shall not be eligible for selection to a subsequent term as an Unaffiliated Director.³

All Directors, whether or not appointed under this heightened standard, are required to comply with the ICANN Board Conflicts of Interest Policy, including provision of Annual Statements and providing updates in the event of changed circumstances.

Putting the Statement into Practice

The statement is currently envisioned to be approved alongside amendments to ICANN's Bylaws that incorporate that the NomCom will impose heightened requirements on some nominees.

A proposed path to transition could be included in a transition article such as: "Upon the Bylaws going into effect reflecting the Nominating Committee's obligation to appoint three directors meeting the Unaffiliated Director standard, the Nominating Committee shall make a selection for [1] seat within each annual appointment cycle assigned to meet this heightened standard.

² To establish the degree of independence and ability to prioritize the interests of the global Internet community, previously serving in various capacities in ICANN org, Board, and community would preclude one from being considered "Unaffiliated." For example, a Board member who served a term during the inception of ICANN, even though they have not been active in ICANN since that time (ex. 20 years ago), would still have deep knowledge of ICANN processes. Similarly, an ICANN community member who has since left the community, or an ICANN org employee who has since left the organization.

³ To provide the NomCom with flexibility in meeting the requirement to select Unaffiliated Directors to the ICANN Board, there are no assigned Seats from among the Seats 1-8 that the NomCom selects that are reserved to Unaffiliated Directors. As an example, if the Director serving in Seat 7 is eligible for re-appointment to the Board but no longer is eligible to serve as an Unaffiliated Director, such Director could, in the NomCom's discretion, be re-appointed to serve in Seat 7 and then the NomCom could select a new Unaffiliated Director to serve in Seat 8. This also allows the NomCom the discretion to identify more than one Unaffiliated Director within a single selection cycle, and assuming that there are already at least three Unaffiliated Directors on the Board, the NomCom could have a selection cycle where it determines to not seat any Unaffiliated Directors.

Nothing precludes the Nominating Committee from using the Unaffiliated Director standards in selecting additional directors.”

Transition considerations, such as potential impact to sitting directors, may need to be addressed.

BACKGROUND

Recommendation 27:

Recommendation 27 from the NomCom2 Review states:

Provide clarity on desire for independent directors and designate three specific seats for “Independent Directors.”

Our recommendation recognizes the challenges inherent in identifying and selecting fully independent directors. There is also some ambiguity among NomCom members in regards to selecting individuals with limited or no prior experience with ICANN. **We suggest that Independent Directors are those with limited prior ICANN experience, for the purpose being 1) to find highly strategic directors that bring an outside perspective to ICANN, and 2) to provide a duty of loyalty to ICANN overall versus the perception of duty to an ICANN constituency.** [emphasis added]

We recommend that **three seats** [emphasis added] be designated for Independent Directors, with three year terms so that one seat is considered each year. We do not suggest that all eight NomCom directors be independent. Our recommendation for designating three seats is an acknowledgement that it could be difficult to find completely unaffiliated directors and that appointing people to the ICANN Board with previous experience at ICANN (who otherwise meet the NomCom’s goal of finding people who act in the best interests of the global Internet community) can be a benefit. Of course, the NomCom would be free to fill other Board seats with individuals that meet this definition of independent. ([NomCom2 Review Final Report](#), p. 45)

The Independent Examiner provided additional detail to guide implementation of the recommendation:

The implementation process should start by clearly defining the term ‘independent’ in the context of ‘independent directors’. In doing so, the following IPT suggestion shall be taken into consideration:

- . IPT’s guidance for definition of “independent”:
 1. Corporate boards/corporate governance guidelines
 1. Not a customer, supplier, or shareholder to the entity
 2. No financial interest
 2. Applicable ICANN community guidelines/definitions
 3. ICANN Legal department
 4. California law, although the definition is very narrow
- a. Definition should state the difference between an independent director and a representational director, i.e. a SO/AC appointed director who is generally a (current or former) member of the appointing SO/AC.

- b. Independent directors should have appropriate governance experience/knowledge and bring a fresh, outside perspective.
- c. Definition should address desired candidates' prior activity level in ICANN's policy development, membership in a constituency, relationship with the ICANN org structure, and/or a certain number of ICANN meetings attended.

NomComRIWG Implementation Efforts:

In 2021, the NomComRIWG produced a proposed definition of this "independence" using the word "Unaffiliated" to replace the word "independent" from Recommendation 27. The NomComRIWG was concerned about causing confusion with IRS definitions of independence. The NomComRIWG also proposed that instead of three directors, all eight directors appointed by the NomCom should be disqualified from eligibility from NomCom appointment processes if any of the following apply:

- A current contract or employment or any sort of compensation received from any body in the ICANN community that appoints to the ICANN Board disqualifies a candidate from being eligible for a NomCom-appointed ICANN Board position.
- In addition, any actual or perceived conflict of interest that is likely to occur due to serving in any leadership role, decision-making capacity or receiving reimbursement from a part of the ICANN community or ICANN org also disqualifies a candidate for a NomCom-appointed Board position.
- If an applicant was previously disqualified from serving on the ICANN Board based on the above definition, there must be a minimum of a two year gap before they would be considered eligible to serve on the ICANN Board.
- If the candidate is not disqualified based on the above definition, they may be identified as an "Unaffiliated" applicant for the ICANN Board.
- Re-applying Board candidates are not considered ineligible due to their Board membership.

ICANN org Involvement:

Upon review of the NomComRIWG's proposed disqualification bases, ICANN org identified that these would need to be refined in order to better track to the intent of Recommendation 27 and be sufficiently clear for enforcement. As a result, ICANN org, together with the NomComRIWG, distilled Recommendation 27 and the NomComRIWG efforts to some core principles that could be achieved in order to implement Recommendation 27.

Principles:

- Bring people to the Board that are not likely to carry conflicts into their service.
- Goal of maintaining those available to vote on potential high conflict issues.
- Goal of bringing other views/experience to the Board.
- Keep in mind a view of past participation in the ICANN community.
- Maintains the NomCom as its own path to the Board, as opposed to an alternative path for those who might be available for selection to the Board through other processes.
- Support the IRS definition of independence that focuses on financial relationships/predominance of independence.
- Maintain acknowledgement that familiarity with ICANN is also a valued perspective.

DRAFT FOR PUBLIC COMMENT, APRIL 2023

After agreement on these principles, ICANN org drafted the Proposed Statement.