

DEPOSITORY

March 2, 2011

Mr. John O. Jeffrey, Esq.
General Counsel and Secretary
Internet Corporation of Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292 6601

Re: ICANN Accreditation for IP Address Registrars

Dear Mr. Jeffrey:

Depository, Inc. (“Depository”), herewith respectfully submits a proposed policy to the Internet Corporation for Assigned Names and Numbers (“ICANN”) concerning the accreditation of registrars for Internet Protocol (“IP”) numbers.¹ These registrars, once accredited, would be contractually bound to ICANN and would pay fees to ICANN similar to those paid by registrars in the Domain Name System (“DNS”).

This proposed policy, referred to as the Statement of IP Address Registrar Accreditation Policy, is being submitted to you, as General Counsel and Secretary of ICANN, because the policy creates an obvious and direct conflict of interest with the entities that normally consider such proposed policies.²

¹ To initiate the formal process, pursuant to ICANN’s global policy development process, we are simultaneously submitting our proposed policy to Mr. David A. Olive, as Vice President of Policy Development, for distribution to ICANN’s Board of Directors.

² ICANN’s Bylaws assign the responsibility for the development of policies concerning the distribution and registration of IP numbers to an advisory body within the ICANN framework, known as the Address Supporting Organization (“ASO”). (ICANN’s Bylaws, Article VIII, <http://www.icann.org/en/general/bylaws.htm#VIII>.) In July 1999, the three existing regional IP number registries (APNIC, ARIN, and RIPE NCC) submitted a proposal to ICANN to form the ASO and signed a Memorandum of Understanding (“MOU”) in October, 1999. (<http://aso.icann.org/documents/memorandum-of-understanding-1999/>.) A new MOU was signed in October, 2004, replacing the October, 1999, version, but this time it was executed between ICANN and an unincorporated entity which represents those regional IP number registries, known as the Number Resource Organization (“NRO”).

The NRO, “formed by the Regional Internet Registries [“RIRs”] to formalize their cooperative efforts,” consists of the five regional IP number registries. The chief executives of the five regional IP number registries comprise the

ICANN's Bylaws foresee and acknowledge that conflicts of interest may arise and state that "The Board shall adopt policies specifically addressing Director, Officer, and *Supporting Organization conflicts of interest*."³ Further, the ICANN Code of Conduct requires every supporting organization to "adhere to the conflict of interest policy laid out in the Bylaws" and to "exercis[e] independent judgment based solely on what is in the overall best interest of Internet users and the stability and security of the Internet's system of unique identifiers, *irrespective of personal interests and the interests of the entity to which an individual might owe their appointment*."⁴

Additionally, as you are aware, the ICANN Committee of the Board on Conflicts of Interest was dissolved by vote of the Board on February 3, 2009 (Resolution 7) and its responsibilities were moved to the Board Governance Committee ("BGC"). The BGC, however, also includes the former President and Chief Executive Officer of one of the regional Internet registries, who, we respectfully submit, should also recuse himself.

We submit that the conflict of interest presented by the ASO Address Council/NRO Number Council's review of this proposal is obvious because the membership of each group is identical and consists of individuals chosen by organizations (the IP number registries) that have resisted, if not openly opposed, control and accreditation by ICANN. These regional IP number registries have no contract with ICANN or any other U.S. governmental agency or contractor and have not entertained "accreditation" since 1999.⁵

Executive Council ("EC") of the NRO; they also comprise all of the officers of the organization, *i.e.*, chairman, secretary, treasurer, and members. The NRO acts as ICANN's ASO.

In terms of mechanics, an elected/appointed member entity, called the NRO Number Council serves as the ASO's Address Council, overseeing all recommendations of IP number policy. Stated another way, "The ASO Address Council shall consist of the members of the NRO Number Council." (October, 2004, MOU (3)(a).) Thus, a comparison of both Councils (NRO and ASO) finds them to be identical. (Compare <http://aso.icann.org/people/address-council/address-council-members/> and <http://www.nro.net/about-the-nro/the-nro-number-council>.) Each Council is comprised of fifteen persons, three from each of the five regions. The Executive Board of each registry appoints one member directly and two others are selected by each region's "policy forum." Although no member of the Address Council shall receive any compensation for services as a member of the Address Council, they shall, at their request be reimbursed by the NRO. (October, 2004, MOU (3)(e).)

³ ICANN's Bylaws, Article VI, Section 6 (<http://www.icann.org/en/general/bylaws.htm#IV>). (Italics added.)

⁴ (<http://www.icann.org/en/documents/code-of-conduct-10jan08-en.pdf>). (Italics added.)

⁵ As we stated in more detail in our January 27, 2011, letter to President Beckstrom (at p.1, ln. 2), for the first time in the entire 38-year history of IP number distribution and oversight, the entities performing the distribution of IP numbers have no contract with anyone in the U.S. governmental chain of authority, including ICANN. In December, 2007, ICANN sent a letter to then NRO Chairman Ray Plzak (ARIN's CEO and President) "reaffirming" the roles and responsibilities of the ASO/NRO Address Council and other entities described in the MOU. (<http://www.icann.org/en/correspondence/twomey-to-plzak-19dec07.pdf>). That letter welcomed voluntary

Normally, a proposed policy can be submitted either to (a) one of the regional IP number registry's "policy fora" or (b) directly to ICANN's ASO Address Council.⁶ In special circumstances, the ICANN Board, itself, can forward a request to develop a new policy to the ASO Address Council.⁷ Each of these three above-described avenues, however, is eventually controlled by the regional IP number registries through their appointments to the NRO/ASO Council. If our proposed policy for accreditation is submitted to the ASO/NRO Council, its fate is pre-ordained. The proposal, no matter which road it travels, will be dead upon arrival.

Our proposed policy presents a direct conflict of interest because it challenges the closed system of regional IP number registries. These IP number registries actually perform registration functions similar, if not identical, to DNS *registrars*. Some of the IP registries expressly charge for these services and some perform these functions on a "volunteer" basis.⁸ None of these registries, however, welcome competition. Competition is a direct financial threat to their regional monopolies. The fundamental concept in a conflict of interest situation is that the decision-maker cannot truly evaluate and rule on the

contributions from the regional IP registries and acknowledged that they "derive their authority" not from ICANN, but rather "from the members and other stakeholders in their geographic area..." The letter then states that "...[W]e wish and will seek to establish an appropriate legal arrangement within one (1) year from the date of the letter." To the best of our knowledge, no appropriate legal arrangement has developed in the intervening three-year period. We genuinely believe that the absence of a central policy organization for IP numbers, with direct control and influence over the IP number registry functions, which are so essential to Internet operations, is long overdue.

⁶ The "Global Policy Development Process" is detailed in Attachment A to the MOU, as amended, between ICANN and the five regional IP number registries. (<http://www.icann.org/en/aso/aso-mou-attachmentA-29oct04.htm>.) To the best of our research, over the last fourteen years, only five two-page policies have ever successfully run the gauntlet (two of which cover the same topic, one updated and one obsolete): Policy For Allocation of IPv4 Blocks to Regional Internet Registries (April, 2005) (<http://www.icann.org/en/general/allocation-IPv4-rirs.html>), Global Policy for the Allocation of the Remaining IPv4 Address Space (March, 2009) (<http://www.icann.org/en/general/allocation-remaining-ipv4-space.htm>); Global Policy for Allocation of IPv6 Address Space (September, 2006) (<http://www.icann.org/en/general/allocation-IPv6-rirs.htm>); and Internet Assigned Numbers Authority (IANA) Policy for Allocation of ASN Blocks to Regional Internet Registries (September, 2010) (<http://www.icann.org/en/general/global-policy-asn-blocks-21sep10-en.htm>); which replaced the Global Policy for Allocation of ASN Blocks to Regional Internet Registries (July, 2008) (<http://www.icann.org/en/general/global-policy-asn-blocks-31jul08-en.htm>). None of these policies dealt with IP number registration services.

⁷ Under the 1999 ASO MOU, Section 4(b), the ICANN Board was permitted to forward requests to develop new policies to the Address Council. Under the 2004 ASO MOU, Attachment A, Section 16, "Through the provisions of an agreement to be executed between the RIRs and ICANN, it is recognized that the ICANN Board has the ability to request that the ASO Address Council initiate a policy development process through the RIRs..." Our research has found no such executed agreement; however, it appears that the intent of this language is to maintain this alternative route to policy development.

⁸ None of the regional IP registries specifically identify or quantify the fee charged for IP number registration, maintenance of that registration in a database, or propagation to the Internet Routing Registry (*i.e.*, Merit, Inc.). (See <http://www.ripe.net/ripe/docs/ripe-499> and <http://www.apnic.net/publications/media-library/documents/membership/member-fee-schedule>).

merits of a proposal which directly and negatively affects his or her interests in either a personal or representative capacity. Judgment is clouded by self-interest. In the words of ICANN's Code of Conduct, these supporting organizations are supposed to exercise "independent judgment, irrespective of personal interests and the interests of the entity to which [they] owe their appointment."⁹ It is not a question of the ethical position of the decision-maker; it is the inherent nature of the situation.

To avoid placing these individuals in this situation, we ask that you consider submission of our proposed policy to a more open forum,¹⁰ overseen by a neutral director or the U.S. Department of Commerce's National Telecommunications and Information Administration ("NTIA"). NTIA has played this role before concerning the DNS.

For your review and consideration, we therefore submit four documents to facilitate and expedite the review process:

1. Statement of Registrar Accreditation Policy: This is the unedited, unaltered Accreditation Policy for the .com, .org and .net top-level domains which was adopted by the ICANN Board of Directors in 1999. This accreditation policy was thoroughly vetted, approved by the ICANN Board of Directors and has been in use for more than a decade. This accreditation policy serves as the template for Depository's proposed policy.
2. Statement of Registrar Accreditation Policy (Redline): This is the same document as submission #1, with deletions of specific top-level domain terminology that would not be applicable to IP number registration services. No other requirements for qualification or disqualification were changed. No new terms have been added.
3. Statement of IP Address Registrar Accreditation Policy (Redline): This is the same document as submission #2, with the redline insertion of IP address registrar specific terminology.
4. Statement of IP Address Registrar Accreditation Policy: This is the final proposed policy submitted for ICANN consideration.

⁹ (<http://www.icann.org/en/documents/code-of-conduct-10jan08-en.pdf>.)

¹⁰ As Vint Cerf has stated in his October, 2007, letter to ICANN, entitled, Looking Towards the Future: "Because of the potential impact of decisions made through the ICANN policy process, it is important to put into place checks and balances that serve to make all aspect of ICANN's operation accountable and transparent. There is still work to be done in this area so that legitimate issues arising out of policy making can be independently reviewed where this is deemed necessary." (http://www.icann.org/en/documents/vint_cerf/ltrf.htm).

We are, of course, available to discuss, present or defend this proposed policy at any time deemed appropriate by ICANN. We would appreciate a response from your office concerning the conflict of interest and the ways ICANN might use other channels of review for this proposed policy. We look forward to your response and, please, do not hesitate to contact me at (703) 343-6256.

Sincerely,



Philip L. Sbarbaro
Senior Counsel

Encl.

cc.

Mr. David A. Olive
Vice President, Policy Development
Internet Corporation of Assigned Names and Numbers

Mr. Frank Fowlie, Ombudsman
Internet Corporation of Assigned Names and Numbers