

Sidley/Adler Comments  
February 4, 2016

**Proposed Indemnification Language for Recommendation 4 – Board Liability Removal**

**ARTICLE XIV: INDEMNIFICATION**

Section 2. INDEMNIFICATION ARISING FROM DIRECTOR REMOVAL

1. ICANN shall indemnify each of the Sole Designator and the Sole Designator Secretariat<sup>1</sup> and each of the Advisory Committees, the Supporting Organizations and the Nominating Committee, and their respective chairs and vice chairs against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of a Director bringing any proceeding against such entity or person for defamation, slander, libel or any ~~substantially similar~~ other claim based on statements publicly made in the initiation of a Community Forum, on any public list or discussion that is part of the Community Forum, or contained in any written rationale submitted to the Board by the Sole Designator Secretariat pursuant to Sections [*Director removal provision*] or [*Board recall provision*] of Article [ ] or actions taken pursuant to Sections [*Director removal provision*] or [*Board recall provision*] of Article [ ] that, in each case, were made or taken in good faith by such entity or person. ICANN's best interests are deemed to be served by participation by any person in a process to remove a Director and/or recall the entire ICANN Board.

~~2. For the purposes of Section 2.1, in order for any statement to be deemed to have been made in good faith each of the following must be satisfied:~~

~~a. the entity or person seeking indemnification must have (i) conducted due and diligent inquiry confirming the truthfulness and accuracy of the statement, including by consulting and identifying reputable sources of information confirming such truthfulness and accuracy, prior to publicly making such statement in the initiation of a Community Forum, on any public list or discussion that is part of the Community Forum, or in any written rationale provided to the Board and (ii) must not have had knowledge of any facts or circumstances that could raise a reasonable doubt as to the truthfulness or accuracy of such statement unless such facts or circumstances were also clearly and conspicuously disclosed by such entity or person in the public statement made in the initiation of a~~

---

<sup>1</sup> Note: The drafters the Secretariat comprised of one of the chairs of the participating SOs/ACs, as appointed by such participating SOs and ACs. Notices from ICANN to the Sole Designator, and notices from the Sole Designator to ICANN, would flow through the Sole Designator Secretariat.

~~Community Forum, on any public list or discussion that is part of the Community Forum, or in written rationale provided to the Board;~~

- ~~b. if the statement was one of opinion, the requirements of Section 2.2.a shall also apply to any facts stated or implied by such statement; and~~
- ~~c. if the entity or person later becomes aware of facts or circumstances that could raise a reasonable doubt as to the truthfulness or accuracy of a prior statement included in any public statement made in the initiation of a Community Forum, on any public list or discussion that is part of the Community Forum, or in written rationale provided to the Board, any future statement or reference to the prior statement by such entity or person must clearly and conspicuously disclose the new facts or circumstances at the time of making such future statement or reference to the prior statement.~~
- ~~3. For the purposes of Section 2.1, in order for any act of an entity or person to be deemed to have been taken in good faith, such act must have been taken in compliance with the Bylaws.~~
- ~~4. The entity or person seeking indemnification under this Section 2 shall have the burden of proof in demonstrating that any statement or act was made or taken in good faith.~~
- ~~5. Notwithstanding Section 1, (a) this Section 2 shall govern ICANN's obligation to indemnify the Sole Designator and the Sole Designator Secretariat and each of the Advisory Committees, the Supporting Organizations and the Nominating Committee, and their respective chairs and vice chairs, relating to the subject matter addressed in this Section 2 and (b) ICANN's indemnification obligations pursuant to this Section 2 are limited to the entities and persons holding the positions specifically identified in Section 2.1.~~