

**BYLAWS SECTIONS INCORPORATING THE AFFIRMATION OF COMMITMENTS**

**SIDLEY-ADLER WORKING DRAFT**

**DECEMBER 23, 2015**

**THIS DOCUMENT UPDATES THE ADLER & COLVIN COMMENTS SUBMITTED TO  
THE CCWG-ACCT CO-CHAIRS ON NOVEMBER 25.**

Please note: Jones Day/ICANN Legal provided their comments and edits to the *Second* Proposal language. For this current working draft, we incorporated the changes to the underlying text from the *Third* Proposal, and we have accepted any edits by Jones Day/ICANN Legal we felt were appropriate. For the sake of readability, we have removed footnote comments from Jones Day/ICANN Legal except where we had follow-up comments or questions ourselves. We have inserted our own independent edits and comments into the text itself, with our comments highlighted in brackets, and in several footnotes.

## ARTICLE I: MISSION, COMMITMENTS AND CORE VALUES

### Section 1. MISSION<sup>1</sup>

1. The Mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

- a. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's Mission is to coordinate the development and implementation of policies (i) for which uniform or coordinated resolution is reasonably necessary to facilitate openness, interoperability, resilience, security and/or stability; and (ii) that are developed through a bottom-up, consensus-based multi-stakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.
- b. Coordinates the operation and evolution of the DNS root name server system. In this role, ICANN's Mission is to [to be provided by RSSAC].
- c. Coordinates the allocation and assignment at the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN's Mission is set forth in Exhibit [\_\_\_\_], which is derived from the Address Supporting Organization Memorandum of Understanding approved on 26 August 1999, as amended.
- d. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's Mission is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

2. ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve, its Mission. ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide. ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission.

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<sup>1</sup> Apart from making limited non-substantive corrections and revising the incorporation by reference of external agreements (which we have advised against doing), we have refrained from making edits to Section 1, pending definitive drafting guidance from the CCWG in the form of the Final Proposal. In particular, we note the continued discussion over whether the definition of "Mission" should encompass all of Section 1 or be limited to the chapeau statement at the very top. California nonprofit corporate law is unlikely to distinguish Bylaws language labeled as "Mission" from prescriptions in the Bylaws about corporate roles and responsibilities within the scope of or in furtherance of the Mission.

## Section 2. COMMITMENTS AND CORE VALUES

1. In performing its Mission, ICANN shall comply with the provisions of this section 2, except to the extent that such compliance would result in ICANN taking actions outside its Mission. ICANN shall operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, while carrying out its activities in conformity with applicable domestic and international law and through open and transparent processes that enable competition and open entry in Internet-related markets.<sup>2</sup>

2. Commitments: The following Commitments shall guide the decisions and actions of ICANN:

- a. Preserving and enhancing the neutral operation of the DNS [We recommend clarifying what is meant by “neutral”], and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
- b. Allowing ICANN to maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;
- c. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to matters that are within ICANN’s Mission and require or significantly benefit from global coordination;
- d. Employing open, transparent and bottom-up multistakeholder policy development processes, led by the private sector (including, without limitation, business stakeholders, civil society, the technical community academia, and end users), while duly taking into account the public policy advice of governments and public authorities that (i) seek input from the public, for whose benefit ICANN shall act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;

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<sup>2</sup> We have converted the former lead-in to the “Commitments” section into a general preamble for both the Commitments and Core Value, in response to a Jones Day/ICANN Legal note that the sections should be structured similarly. (Previously, Commitments had a lead-in plus specifics, whereas Core Values had only specifics.) Also, Jones Day/ICANN Legal noted concern with the language “and through open and transparent processes that enable competition and open entry in Internet-related markets.” We are uncertain as to what the concern is and need to seek clarification.

- e. Reaching decisions by applying documented policies consistently, neutrally, objectively, fairly and on a non-discriminatory basis<sup>3</sup> and in accordance with the requirements of Article II, Section 3 of these Bylaws; and
  - f. Remaining accountable to the Internet community through mechanisms contained in these Bylaws that enhance ICANN's effectiveness.
3. Core Values: The following Core Values shall also guide the decisions and actions of ICANN:
- a. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies;
  - b. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of the ICANN community's policy development and decision-making processes to ensure that the bottom-up, multistakeholder policy development process is used as the means to ascertain the global public interest, and that those processes are transparent and accountable to the global Internet community;
  - c. Depending on market mechanisms to promote and sustain a competitive environment in the registration of domain names;
  - d. Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;
  - e. Operating with efficiency and excellence, in a fiscally responsible and accountable manner, and at a speed that is responsive to the needs of the global Internet community;
  - f. While remaining rooted in the private sector (including, without limitation, business stakeholders, civil society, the technical community and academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly considering the public policy advice of governments and public authorities; and
  - g. Striving to achieve a reasonable balance between the interests of different stakeholders.

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<sup>3</sup> Jones Day / ICANN Legal deleted "without singling out any particular party for discriminatory treatment." We surmise that this was to avoid redundancy with the word "fairly." To the extent that the concept of non-discrimination is important to emphasize, we suggest including "and on a non-discriminatory basis."

4. The provisions of this section reflect the requirement for ICANN to act for the benefit of the Internet community as a whole and shall be applied consistently, in the broadest possible range of circumstances.
  - a. Notwithstanding the above, the specific way in which Commitments and Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Commitments and Core Values simultaneously is not possible. Accordingly, in any situation where one provision of this section must be reconciled with another potentially competing provision, the balancing applied by the Board of Directors or by such person(s) acting pursuant to a delegation of authority from the Board of Directors must further an important public interest goal that is within ICANN's Mission and that is or has been identified in advice given to ICANN or in policies developed, in each case through the bottom-up, multistakeholder process.<sup>4</sup>

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<sup>4</sup> Jones Day/ICANN Legal noted the need for guidance on how to reconcile potentially conflicting Commitments and Core Values, and recommended keeping a variation of the current test, which we assume refers to the last paragraph of Article I in the existing bylaws. We have edited the paragraph to accord with what we understand CCWG has determined at this time.

## **[ARTICLE III: TRANSPARENCY]**

### **[NEW] Section 8: PERIODIC IMPACT REPORTING**

ICANN shall perform and publish on an annual basis analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

### **[NEW] Section 9: TRANSPARENCY IN BUDGETING PROCESSES**

ICANN shall adhere to transparent and accountable budgeting processes, providing appropriately advance notice in each situation to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration. ICANN shall publish an annual report, as part of the Annual Report described in Article XVI, Section 3, that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and strategic and operating plans for the foregoing year.

[CCWG: This provision is unclear in meaning and scope. Consider limiting the scope of the progress report to a specific set of criteria.]

## [ARTICLE IV]

### Section 5. ACCOUNTABILITY AND TRANSPARENCY REVIEW

#### 1. Periodic Reviews<sup>5</sup>

ICANN shall produce an annual report, as part of the Annual Report described in Article XVI, Section 3, on its accountability and transparency, including any improvements thereto and the status of implementation of the recommendations arising from the reviews described in this Article IV, Section 5, which will be posted on the Website for public review and comment. Each such annual report and the public comments thereto will be considered by the Board and serve as input to the continuing process of implementing the recommendations arising from such reviews.

- a. Review teams shall be established and include both a fixed number of members and an open number of participants. Each participating Supporting Organization and Advisory Committee may suggest up to 7 prospective members for the applicable review team. The chairs of the Supporting Organizations and Advisory Committees will select up to 21 members for the applicable review team, allocating at least 3 members from each participating Supporting Organization and Advisory Committee that suggests 3 or more prospective members. [CCWG: We do not understand how this mechanism would work, except in the most straightforward scenarios. We suggest developing a simpler method for composing the teams.] The Supporting Organization and Advisory Committee chairs shall work together to achieve a review team that is balanced for diversity [Please clarify the meaning of “diversity”—e.g., diversity across which categories?] and skill. In

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<sup>5</sup> We note that Jones Day/ICANN Legal had suggested the following as an alternative:

*Delete Sections 1 and 2 of Article IV in their entirety and replace them with the following:*

1. *ICANN will produce an annual report on its accountability and transparency, including any improvements thereto and the status of implementation of the recommendations arising from the reviews described in this Article IV, Section 5, which will be posted on the Website for public review and comment. Each such annual report and the public comments thereto will be considered by the Board and serve as input to the continuing process of implementing the recommendations arising from such reviews. [Note: Same as current 1(a).]*
2. *The reviews described in this Article IV, Section 5 will be conducted in accordance with the most recent Board-approved practices for periodic reviews, which will be developed in coordination with the Supporting Organizations and Advisory Committees.*

In view of the extensive community discussion about the composition of review teams and other details of Sections 1 and 2, however, Sidley and Adler do not believe that deferring these matters to future Board-SO/AC negotiations would reflect current community consensus.

addition, the ICANN Board may designate one director as a member of the review team. If consensus cannot be reached among the members and participants of a review team, consensus will be sought among just the members. In the event consensus cannot be reached among the members, a majority vote of the members may be taken. If a vote is taken, both a majority recommendation and a minority response shall be provided in the final report of the review team. A recommendation shall be deemed a “majority recommendation” if at least 51% of all the members of the review team approve it.

**Subject to budgetary constraints and the availability of funding,**<sup>6</sup> review teams may also select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of such advice.

- b. Each review team may recommend termination or amendment of its respective review.

## **2. Confidential Disclosure to Review Teams**

- a. To facilitate transparency and openness regarding ICANN's deliberations and operations, a review team, or a subset thereof, shall have access to ICANN internal information and documents in connection with that team's review. If ICANN staff declines to reveal documents or information so requested by a review team within the reasonable timeframe specified by the review team, ICANN staff must promptly provide a written explanation to the review team. If a consensus of the review team's members are not satisfied with ICANN's explanation, the review team may appeal to the Ombudsman and/or the Board for a determination on the disclosure request, which in the case of the Board shall be final. Any determination of the Ombudsman is not binding on ICANN staff, but may be submitted by the applicable review team when appealing to the Board for a determination. **[Clarify the meaning of “consensus” to avoid ambiguity over whether a team has authority to escalate a matter.]**
- b. ICANN may, in its reasonable discretion, designate certain documents and information that are disclosed to a review team as not for further disclosure by the review team's members, either in its report or otherwise, and may, as a condition to receiving any such documents and information, require the review team members to sign a non-disclosure agreement. Such documents and information will only be provided to the review team's members and will not be distributed to

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<sup>6</sup> Jones Day/ICANN Legal added this proviso along with a footnote reiterating that budgetary constraints needed to be considered. It was unclear to us, however, who would make this budgetary determination in specific instances, and whether a review team would have any recourse if, for example, ICANN refused to fund the cost of an expert whose advice the team believed was crucial.



participants.<sup>7</sup> Any review team member who is found to have subsequently disclosed such information will be removed from the review team and will not be eligible to be a member or participant of future review teams without the approval of the Board. If a consensus of the review team's members are not satisfied with ICANN's designation of non-disclosable documents or information, it can appeal to the Ombudsman and/or the Board for a determination on the non-disclosure designation, which in the case of the Board shall be final. Any determination of the Ombudsman is not binding on ICANN staff, but may be submitted by the applicable review team when appealing to the Board for a determination.

c. Confidential Disclosure Framework

- (i) A confidential disclosure framework shall be published and periodically reviewed and updated by ICANN. The confidential disclosure framework shall describe the process by which documents and information are classified, including a description of the levels of classification that documents or information may be subject to, and the classes of persons who may access such documents and information.
- (ii) The confidential disclosure framework shall describe the process by which a review team may request access to documents and information pursuant to Article IV, Section 5, clause 2.a.
- (iii) The confidential disclosure framework shall also describe the provisions of any non-disclosure agreement that members of a review team may be asked to sign pursuant to Article IV, Section 5, clause 2.b.
- (iv) The confidential disclosure framework shall provide a mechanism to appeal a refusal to release documents and information to review teams.<sup>8</sup>

d. Review Team Reports

- (i) All draft reports of each review team must describe the degree of consensus reached by the review team on each recommendation contained in such reports.

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<sup>7</sup> Jones Day/ICANN Legal added extensive provisions here to limit confidential disclosure requests to items related to the review and reasonably necessary for the new, and to protect against leaks. While we have provisionally accepted their changes, we strongly recommend further discussion on this matter. In particular, further discussion is needed about how imposing confidentiality obligations on review team members will impact the ability of non-member participants to participate.]

<sup>8</sup> Jones Day/ICANN Legal had deleted this provision, which we have added back with minor changes.

- (ii) Where consensus of the review team members can be reached, review teams should, whenever it is reasonably possible to do so, prioritize their recommendations and provide a rationale for such prioritization.<sup>9</sup>
- (iii) Draft reports of review teams will be published for public comment. The review team must consider the public comments received and shall amend its report as it deems appropriate before issuing its final report to the Board. The final report must describe the degree of consensus reached by the review team on each recommendation contained in the report as well as a summary of changes made in response to the public comments.
- (iv) All final reports issued by review teams will be published for public comment. The final report should include an explanation of how public comments to the draft report were considered. [CCWG: Please confirm our clarification here of the Third Proposal language.] Within 180 days after the conclusion of such public comment period, the Board shall consider the final report and all public comments received in response thereto in deciding how to implement the recommendations of the review team. Following any such approval, the Board shall instruct ICANN staff immediately to begin implementation of the recommendations approved by the Board.

### 3. Accountability and Transparency Review

- a. The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to the Internet community ("Accountability and Transparency Review").
- b. The Accountability and Transparency Review may address any number of issues, including the following:
  - (i) assessing and improving Board governance, including an ongoing evaluation of the Board's performance, the Board selection process, and the extent to which the Board's composition meets ICANN's present and future needs;<sup>10</sup>

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<sup>9</sup> Jones Day/ICANN Legal extensively revised this section. We have softened the requirement here for prioritizing in light of our understanding that it can be extremely difficult for teams to prioritize their recommendations, which can involve many nuances.

<sup>10</sup> We have removed the reference to considering an appeal mechanism for Board decisions here, since the CCWG proposal already contemplates an appeal mechanism

- (ii) assessing the role and effectiveness of the Governmental Advisory Committee's interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of the Governmental Advisory Committee's input on the public policy aspects of the technical coordination of the DNS;
  - (iii) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);
  - (iv) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and
  - (v) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.
- c. The Accountability and Transparency Review team shall also assess the extent to which prior Accountability and Transparency Review recommendations have been implemented by ICANN, and the extent to which implementation of the recommendations has had the intended effect.
  - d. The Accountability and Transparency Review team may recommend termination or amendment of other periodic reviews required by this Article IV, Section 5, and may recommend the creation of additional periodic reviews.
  - e. The Accountability and Transparency Review team should issue its final report within one year of convening its first meeting.
  - f. The Accountability and Transparency Review shall be conducted no less frequently than every five years, measured from the date the previous review team convened its first meeting.

#### 4. Security, Stability, and Resiliency Review

- a. The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS ("SSR Review").
- b. The SSR Review may address any number of issues, including the following:

- (i) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;
  - (ii) ensuring appropriate contingency planning; and
  - (iii) maintaining clear processes [Clarification needed regarding what is meant by this phrase]
- c. Each SSR Review will also assess the extent to which ICANN has successfully implemented its current security plan, the effectiveness of the current plan to deal with actual and potential challenges and threats to security and stability, and the extent to which the current security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical Mission.
  - d. The SSR Review team shall assess the extent to which prior SSR Review recommendations have been implemented by ICANN.
  - e. The SSR Review team should issue its final report within one year of convening its first meeting.
  - f. The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous review team convened its first meeting.

## 5. gTLD Review

- a. The Board shall cause a review of ICANN's execution of its commitment to adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection as it expands the TLD space, within one year after any batched round of new gTLDs have been in operation ("gTLD Review"). [CCWG please confirm: Previous language called for a review after a batched round of new gTLDs has been in operation for one year (i.e., an intervening period of at least one year after operation begins), whereas the revision proposed here by Jones Day/ICANN Legal and provisionally accepted by us calls for a review within one year after a batched round of new gTLDs have been in operation (i.e., one year or less after operation begins)]
- b. The gTLD Review will examine the extent to which the applicable expansion of gTLDs has promoted competition, consumer trust, and consumer choice, as well as the effectiveness of:
  - (i) the gTLD application and evaluation process; and

- (ii) the safeguards put in place to mitigate issues involved in the expansion of generic top level domains.
- c. The gTLD Review team shall also assess the extent to which prior gTLD Review recommendations have been implemented by ICANN, and the extent to which implementation of the recommendations has had the intended effect.
- d. The gTLD Review team should issue its final report within one year of convening its first meeting.
- e. Each recommendation in a gTLD Review team's final report shall indicate whether implementation of the recommendation should be accomplished before a new round of gTLD expansion occurs. [CCWG: We added this language to reflect what we understood to be the Dublin consensus. Please confirm.] The Board shall consider the gTLD Review team's recommendations in determining if, when and how subsequent rounds of new gTLDs (if any) should be implemented.
- f. The gTLD Review shall be conducted no less frequently than every five years, measured from the date the previous review team convened its first meeting.

## 6. WHOIS/Directory Services Review

- a. ICANN is committed to enforcing its policy relating to the current WHOIS and any future gTLD Director Service, subject to applicable laws, and working with the community to explore structural changes to improve accuracy and access to gTLD registration data, as well as consider safeguards for protecting data.
- b. The Board shall cause a periodic review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement, promotes consumer trust and safeguards data ("WHOIS/Directory Services Review").
- c. The WHOIS/Directory Services Review Team shall consider the OECD Guidelines on the Protection of Primacy and Transborder Flows of Personal Data, as amended.<sup>11</sup> The Review Team shall also assess the extent to which prior WHOIS/Directory Services Review recommendations have been completed by ICANN, and the extent to which implementation of the recommendations has had the intended effect.

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<sup>11</sup> We have reinserted a modified version of this sentence, which Jones Day/ICANN Legal had deleted. Ideally, however, the direction here should be more precise: What are Review Teams required here to do? How are they to "consider" the OECD Guidelines?

- d. The WHOIS/Directory Services Review team should issue its final report within one year of convening its first meeting.
- e. The WHOIS/Directory Services Review shall be conducted no less frequently than every five years, measured from the date the previous review team convened its first meeting.