

## Questions and Clarifications for Bylaws Coordination Group

April 2, 2016

### Mission:

1. The latest draft text for Article 1, Section 1.1.a.i describes ICANN's naming mission as follows: "Coordinates the allocation and assignment of names in the Domain Name System ..." This text differs from the conceptual language proposed in Annex 05 – Recommendation #5, which read as follows: "Coordinates the allocation and assignment of names in the root zone of the Domain Name System ...." The words "the root zone of" do not appear in the current ICANN Bylaws, which states that ICANN "Coordinates the allocation and assignment of [...] Domain names" (without any qualifier or limitation to "the root zone"). It is not true that ICANN coordinates assignment ONLY in the root zone, as such term is currently understood. ICANN's gTLD registry and registrar agreements and policies deal substantially and primarily with issues relating to assignment of names at the second (and in some cases lower) levels of the DNS. If in the root zone is currently intended to include the second level, that should be clarified in the use of the term. For example, the UDRP, the Inter-Registrar Transfer Policy, and the Expired Registration Recovery Policy are all ICANN policies relating to second-level gTLD registrations <<https://www.icann.org/resources/pages/registrars/consensus-policies-en>>. Do we need to define the term "root zone" to include the second level or remove the words?
2. The latest draft text for Article 1, Section 1.1.d.ii provides that existing gTLD registry agreements and registrar accreditation agreements (and unsigned/future agreements on the same current forms) may not be challenged on the basis that they exceed the scope of ICANN's mission. This concept is based on the "Note to drafters" at paragraph 48 (#3) of Annex 05. The conceptual language in the Annex however proposed to restrict this protection for current agreements to last only "...until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement." This concept of allowing for challenges to agreements once they have been renewed does not appear in the current proposed draft Bylaws, based on the rationale that ICANN's current and legacy registry and registrar agreements all include clauses mandating renewal by ICANN under specified circumstances. ICANN is requesting the Bylaws Coordination Group to confirm that existing gTLD registry and registrar agreements should not be subject to challenge as outside of mission just because they have expired and have been renewed pursuant to the renewal provisions of those agreements. ICANN is also requesting the Bylaws Coordination Group to confirm that "new" form gTLD registry and registrar agreements should receive the same grandfathering treatment but only for the terms and conditions of the "new" agreements that are contained in the existing form agreements.

### Reconsideration:

3. On Reconsideration requests, the CCWG proposal provides that "[r]ecordings and transcripts should be posted of the substantive Board discussions at the option of the requestor" (Annex 8, Paragraphs 23, also Paragraphs 3 and 5). Concerns have been raised that requiring both a recording and a transcript of Board discussion may add substantial administrative burden and expense without commensurate benefits; further

concerns have been raised about waiving attorney-client privilege, or breaching laws or contractual obligations. If the Bylaws Coordination Group wishes to address these concerns, the following provision may be considered:

“If the party seeking reconsideration so requests, the Board shall post either a recording or a transcript of the substantive Board discussion from the meeting at which the Board considers the Board Governance Committee’s recommendation. The Board shall decide as between a recording and a transcript. The Board may only redact from the posted record that portion of the record that: (a) reflects privileged advice from legal counsel; (b) includes ICANN trade secrets; or (c) for which if disclosed would breach a binding contractual obligation or legal requirement to which ICANN is subject; or (d) if disclosed would present a material risk of negative impact to the security, stability or resiliency of the DNS.”

#### **REVIEWS:**

4. There has been further effort in identifying items that can be explained in Operating Standards, while maintaining high-level principles, to try to optimize the Bylaws while preserving key items in the Bylaws. Are these changes acceptable?
5. On the SSR Review, we note that the CCWG-Accountability removed reference to some of the introductory language for the review. With some of that introductory text removed, the explicit reference to a security “plan” doesn’t make sense, so ICANN proposes a to security “efforts” so that we didn’t need to make major modifications to address inserting new definitions of terms. In addition, ICANN proposes a more specific language to add clarity to the contingency planning review scope. Are these changes acceptable?

#### **BOARD:**

6. There remains the ability for the Board to remove directors without cause, but only after a ¾ vote of the Board and consent of the EC. However, the proposal is silent on how the Board could obtain the consent of the EC. One possibility, to be agreed upon and then drafted appropriately, is: (1) Board approves the director’s removal; (2) the EC has the opportunity to oppose the removal, using the escalation process and thresholds for the standard bylaws rejection process in Annex D; (3) if the EC does not oppose, the EC must send a certification of such lack of opposition (i.e., consent to the director removal), to the Secretary.
7. The CCWG proposal was silent on how the Interim Board is to consult with the community to make major decisions. We have included a suggestion that the Interim Board shall “(a) consult with the chairs of the Supporting Organizations and Advisory Committees before making major decisions (as if such action were a Rejection Action [as defined in Annex D]) and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section [ ] of Annex D)” prior to taking the action. Are these the right processes?

#### **CSC:**

8. Clarify whether “direct customers” and “primary customers” are the same thing or what the differences are, in the context of the CSC’s mission: “The mission of the CSC is to ensure continued satisfactory performance of the IANA naming function for the direct customers of the naming services. The primary customers of the naming services are top-level domain registry operators, but also include root server operators and other non-root zone functions.” [*See Paragraphs 130 and 310 of the CWG Proposal.*]
9. Confirm that the appointment of a liaison to the CSC by the GNSO is intended to come from the Registrars Stakeholder Group or the Non-Contracted Parties House.
10. Confirm that we can add a Bylaw that requires appointing organizations to use reasonable efforts to fill vacancies on the CSC within a month and, if so, whether the ccNSO and GNSO (which are required to approve each annual slate of CSC members) are required to approve the filling of vacancies.
11. Clarify which organization selects the representatives from the ccNSO and the Registries Stakeholder Group who will review the CSC Charter – is it the ccNSO and the Registries Stakeholder Group? [*Paragraph 357 of the CWG Proposal provides that the “Charter will initially be reviewed by a committee of representatives from the ccNSO and the RySG one year after the first meeting of the CSC.”*]
12. Given that there will not be regularly scheduled reviews of the CSC Charter (beyond the first review), should the Board be one of the entities that can call for a review of the CSC Charter? [*Paragraph 358 of the CWG Proposal provides that “the Charter will be reviewed at the request of the CSC, ccNSO or GNSO and may also be reviewed in connection with the IANA Function Review.”*]

**IFR:**

13. Clarify whether the gTLD and ccTLD registry operators are the same as the “consumers of the IANA naming functions” whose needs must be considered by the IFRT (Paragraph 276 of the CWG Proposal).
14. Is it appropriate for language to be added to try to align some of the review process to the AoC reviews? A proposed inclusion is: “Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT’s report shall also propose timelines for implementing the IFRT’s recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.”
15. Confirm that we can add a Bylaw that requires appointing organizations to use reasonable efforts to fill vacancies on the IFRT within a month.

**Special IFR:**

16. The CWG response chart provided on March 10, 2016 stated the following in response to a question around the method of consultation between SOs and ACs when determining whether or not to initiate a Special IFR: “CWG-Stewardship has chosen

to reference the mechanisms developed by the CCWG-Accountability, and these can be cross-referenced as part of implementation.” The CCWG Final Proposal contemplates a community forum mechanism, as well as optional conference calls; clarify which consultation mechanism CWG expects SOs/ACs to follow and whether such mechanism is to be referred to in the Bylaws or left to implementation outside of the Bylaws.

17. Confirm that the following insertion is acceptable, that would require each recommendation of the IFRT to be “directly related and limited to remediating the PTI Performance Issue.” The CWG Proposal provides that there is no prescribed outcome for an IFR (Paragraph 126).]

#### **SCWG:**

18. On a decision to create an SCWG, confirm that the EC functions as a reconsideration of the Board decision (meaning that if the Board rejects the creation of the SCWG, the EC can reject that decision and escalate).
19. Given that the Board liaison is a role that is becoming instituted in Cross-Community Working Group practices, is it appropriate for the Board be able to appoint a liaison to a SCWG. This is not contemplated in the CWG Proposal.
20. Clarify whether every member of the SCWG should have experience managing an RFP process, or whether a minimum number of SCWG members (e.g., four) with experience managing or participating in an RFP process would suffice. [*Paragraph 396 of the CWG Proposal provides that “To the extent possible, it is recommended that individuals with experience managing an RFP process be appointed to the SCWG.”*]
21. Confirm that we can add a Bylaw that requires appointing organizations to use reasonable efforts to fill vacancies on the SCWG within a month.
22. Consider whether an absolute majority of SCWG members should be required in cases where consensus cannot be reached, which would ensure at least 50+1% are in favor of the recommendation.

#### **BYLAWS AMENDMENTS:**

23. Counsel are still completing a compilation of proposed Fundamental Bylaws sections and will update the text accordingly.

#### **BUDGET**

24. Proposed language has been inserted as a first attempt to address the recent determination by the CWG to ask for a continued IANA functions funding commitment in the Bylaws. The provision reads: “To maintain ongoing operational excellence and financial stability of the IANA functions (so long as they are performed by ICANN or pursuant to contract with ICANN), ICANN shall be required to plan for and allocate funds sufficient for the future expenses and contingencies reasonably related to the performance of those functions.”. The placement may change (currently in Section 21.4(f)).

## ANNEX D:

25. CCWG Counsel and ICANN are not yet in alignment on the language to describe how a Petition in the EC process can be identified as based on GAC advice. Initially, “solely” was added to tie the Petition Notice to the GAC Consensus Board Resolution. For example, the ICANN Budget is an amalgamation of many different inputs. If a particular expenditure is tangentially related to GAC advice, then the GAC should not be removed from voting on that petition. CCWG Counsel has accepted this approach for purposes of this draft, with the small addition of “or almost solely”, and with the clarification that the EC could undertake two rejection petitions at the same time, one narrowly tailored to a GAC Consensus Board Resolution, and thus subject to the GAC carve out rule, and one that does not involve a GAC Consensus Board Resolution. It will be helpful to see if the CCWG thinks this approach captures the carve out rule, as CCWG understands it. ICANN’s concern rests with the issue that “almost solely” is not a generally understood standard against which to assess action, and does not provide guidance to the community, ICANN or future IRP panels.
26. In rejection actions, transparency could be increased if there was a requirement for other Decisional Participants supporting a petition to give notice. The following language has been proposed: “Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC Chairs Council, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition.” Though this is not in the CCWG Proposal, does the CCWG support this being incorporated into the Bylaws?
27. PDP-Related Bylaws amendments. Given that there is a possibility that a Fundamental Bylaws change could result from a PDP, can the CCWG confirm that that in those instances, (a) the Fundamental Bylaws change process should apply, and not the Standard Bylaws change process contemplated in the Proposal, and/or (b) that the SO/AC that undertook the PDP relating to the Bylaws change is required to support such a Bylaws change?
28. For Approval Actions, would it be appropriate for the Board to be able to request an additional community forum (likely for the purpose of helping to explain an action that the Board initiated, such as Fundamental Bylaws change or an asset sale)? This is not contemplated in the CCWG Proposal.
29. On NomCom Board member removals, should the GAC Carve-out only apply if the Board member is subject to the removal process because of a vote in support of a GAC Consensus Resolution?
30. Paragraph 56 of Annex 2 provides that the threshold to convene a Community Forum in relation to removing an SO/AC director is a “[m]ajority within nominating SO/AC” whereas Paragraph 68 of Annex 4 allows the approval to be “in accordance with the [SO/AC’s] own mechanisms. Please provide guidance on these inconsistencies.
31. In the SO/AC director removal process, the CCWG Proposal has exclusions on who could manage/moderate a community forum. Consider whether this exclusion (i.e., person who initiated a petition) as well as exclusion of the Decisional Participant’s

designated liaisons, should be incorporated into the processes for managing/moderating Community Forums relating to other types of decisions by the EC (e.g., Board recall petitions), to ensure that the Community Forum is managed in a neutral manner. If so, Community Forums relating to what kinds of EC Decisions should include such an exclusion?

32. During the SO/AC director removal process, should there be a requirement to hold a dialogue between the relevant director, the SO/AC and the Chair of the Board prior to the SO/AC accepting the removal petition? The CCWG Proposal contemplated such a dialogue in the context of NomCom director removal (Paragraph 57 of Annex 4) but did not specifically mention it in the context of SO/AC director removal.
33. It is unclear from the CCWG Proposal how issues based on GAC Consensus Resolutions or PDP matters are to be handled in the mediation and community IRP process and how the relevant carveouts are to apply. Should anything be added to the Bylaws to address this?
34. Should the use of the EC's right to initiate a reconsideration request be limited to the EC's decision rights/powers, similar to the community IRP?