

CCWG-Accountability

Preparation for Comments on Draft Bylaws

Process

- Review issues raised on the list individually to arrive to a consensus position.
- Timeline for CCWG Comment on Draft Bylaws
 - - May 3rd: CCWG ACCT Meeting #93
 - - May 10th: Submission

WHOIS review vs 5 year requirement

- Draft Bylaws Section 4.6.(e).v
 - The Directory Service Review shall be conducted no less frequently than every five years, measured from the date the previous Directory Service Review Team was convened.
- CCWG Recommendations – Annex 06 – Lines 140 and 141
 - This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.
- WHOIS Policy Review Team Final Report 11 May 2012
 - Formed in October 2010, the WHOIS Review Team comprised
- Issue – Approving the new Bylaws in October 2016 would make the WHOIS (Directory Services) Review immediately 1 year late.
- Proposal – modify this to avoid being in default

Bylaws section 1.1.(c), issue with language (1)

- Draft Bylaws Section 1.1.(c)
 - ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority, and nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations.
- CCWG Recommendation*
 - ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

Bylaws section 1.1.(c), issue with language (2)

- Issue: My concern is with the last clause of the last sentence: "nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations." The particular problem is the phrase "such regulations."
- Suggested fix: The simplest solution would be to remove this clause and end the sentence with "authority." That removes the issue of "What does "such regulations" refer to?" I support this fix.

Bylaws section 1.1.D - Issue with integrating external agreements into the mission statement, especially agreements that are not yet defined or agreed to (1)

- Draft Bylaws section 1.1.(d)(ii)
 - Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (F) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("Bylaws") or ICANN's Articles of Incorporation ("Articles of Incorporation"):
 - A to F include: RA (A1), RAA(A2), ASO-NRO-IETF-RIRs (B), RZM (C), PTI contract (D), ICANN's Strat and 5 year Ops plans (E), renewals of A to D (F)

Bylaws section 1.1.D - Issue with integrating external agreements into the mission statement, especially agreements that are not yet defined or agreed to (2)

- Issues – Is it reasonable to include agreements which are not yet agreed to.
- Suggested solution – Remove all but RA and RAA agreements which were in the CCWG recommendations to be “grandfathered”.

Bylaws 1.1(d)ii(A)(1) –Includes grandfathering RA and RAA agreements that are not yet signed. (1)

- Draft Bylaws 1.1.(d).(ii).A.1
 - all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on, or undergoing negotiation as of, [1 October 2016]¹, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;
- Para 147 of the CCWG Final report states:
 - 3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements ([including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013](#)) should be grandfathered to the extent that such terms and conditions might otherwise be cons

Bylaws 1.1(d)ii(A)(1) –Includes grandfathering RA and RAA agreements that are not yet signed. (2)

- Issue: 1.1(d)ii(A)(1) – The RA and RAA exceptions includes not just those in force as of the date, but also those under negotiation. This is not specifically mentioned in the CCWG draft. Moreover, it seems to be overly broad and inconsistent with the overall intent of the CCWG proposal that future agreements should be within the scope and mission of ICANN. Indeed, all of the other exception listed in this section only cover those in force, effective as of, or existing on the specified date. The phrase “, or undergoing negotiation as of,” should be eliminated.

Draft Bylaws 1.1(d)ii(B-D) – Agreements note should not be exempted but rather in-scope of the mission.

- Draft Bylaws 1.1(d)ii(B-D)
 - B to D include: ASO-NRO-IETF-RIRs (B), RZM (C), PTI contract (D)
- CCWG Recommendation 6 Line 147 (3)
 - For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission.
 - Note Agreements B,C,D and E from the Draft Bylaws 1.1(d)ii are not in the CCWG recommendations in the same manner.
- These agreements should not be exempted, they should be within the scope and mission of ICANN and subject to IRP challenge, as is a central principle of the CCWG report.

Draft Bylaws 1.1.(d).ii.(F) – Arguing against renewal as drafted

- Draft Bylaws 1.1.(d).ii.(F)
 - (F)any renewals of agreements described in subsections (A)-(D) pursuant to their terms and conditions for renewal.
- CCWG Recommendations - TDB
- The ability to renew seems very sweeping. Would this permit a “renewal” of a substantially changed agreement, even if it involves provisions outside the scope and mission of ICANN since this is the purpose of this section, if the existing terms allowed for adjustments in their terms? This renewal provision should be tightened to prevent such efforts.

Draft Bylaws 6.1.(b) – Expand examples (1)

- Draft Bylaws 6.1.(b) excerpt
 - ...Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creations of additional Supporting Organizations or Advisory Committees), and any corresponding changes in the voting thresholds for exercise of the EC's rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D....
- CCWG Recommendation 2 Line 100-101
 - The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.
 - In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would, however, need to be conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the

Draft Bylaws 6.1.(b) – Expand examples (2)

- 6.1(b) – The current text states that “any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creations of additional Supporting Organizations or Advisory Committees).” Should the possibility of SSAC or RSSAC deciding that they wish to become Decisional Participants in the EC also be specifically addressed? This is not captured in either example.

Draft Bylaws 22.8 - Why does this specify that the Decisional Participants have to decide by consensus?

- Draft Bylaws 22.8 - excerpt
 - If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, **by consensus**, determined that there is a credible allegation that ICANN has committed fraud or that there has been a gross mismanagement of ICANN's resources, ICANN shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement.
- CCWG Recommendations Annex 1 – Lines 37-38
 - *37 There could be events where the community might wish to have additional power of transparency into investigations of potential fraud or financial mismanagement in ICANN.*
 - *38 To address these concerns, the CCWG-Accountability recommends the adoption of the following audit process: **Upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.***
- This is not in the CCWG report and is inconsistent with the EC practice of letting Decisional Participants determine their own procedures. The phrase “,by consensus,” should be struck.

Draft Bylaws 22.8 – Board power to redact should not be as significant as proposed.

- Draft Bylaws 22.8 - excerpt
 - ...The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, including to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN will provide the Decisional Participants that submitted the certification a written rationale for such redactions.
- CCWG Recommendations Annex 1 – Lines 37-38
 - *...The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.*
- Board power to redact should not be so broad and was not specified in the CCWG proposal. Suggest replacing “Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, including to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN will provide the Decisional Participants that submitted the certification a written rationale for such redactions.” Suggest striking “, including”.

Draft Bylaws Annex D Section 1.4.(b)

- Draft Bylaws Annex D Section 1.4.(b)
 - (b)The EC Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice (“EC Approval Notice”) to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 1.4(b) of this Annex D, the EC has approved the Approval Action if:
 - (i)The Approval Action does not relate to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or
 - (ii)The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP Decisional Participant if the Board Notice included a PDP Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant.
- CCWG Recommendations * COMPLEX
- Annex D Section 1.4(b) – After “if” at the conclusion add the following phrase “after accounting for any adjustments to the below as required by the GAC Carve-out pursuant to Section 3.6(e) of the Bylaws if the Approval Action Board Notice included a GAC Consensus Statement”. This construction mirrors that for the Rejection Action.

Draft Bylaws Annex D Section 2.2.(c).(i).(A) – Specific rationales not required in all CCWG Recommendations

- Draft Bylaws **Annex D Section 2.2.(c).(i).(A)**
 - *...(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN Budget, an IANA Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN's Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN's stakeholders, financial stability, or other matter of concern to the community; and*
 - Note – unclear if drafting is correct in requiring a rationale for the rejection of the rejection Action.
- CCWG Recommendations Annex 04
 - Note – The CCWG Recommendation for the Rejection of a Bylaws change does not require the petition include a rationale
- Annex D Section 2.2 (c)(i)(A) – These specific rationales were not specified in the CCWG proposal and I don't recall discussion of them. Suggest a reversion to a requirement for unspecified rationale.

Approval of Human Rights FOI -1

- Section 27.3 of the draft Bylaws
 - (i) the CCWG-Accountability as a consensus recommendation in Work Stream 2, (ii) [each of the CCWG-Accountability's chartering organizations](#)
- CCWG Recommendation #6
 - ...(1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 ([including Chartering Organizations' approval](#))
- Suggested approach – replace ii in draft Bylaws with: “and approved by the CCWG using the same process as for WS1 recommendations.”

Draft Bylaws 1.2.(b).(viii) – Wording of Human Rights text

- Draft Bylaws 1.2(b)(viii)
 - Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create and shall not be interpreted to create any additional obligations for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN, [except as provided herein](#).
- CCWG Recommendation 6 Line 170
 - “Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN.”
- The phrase “[except as provided herein](#)” is not in the CCWG draft and it is not clear what it refers to. This is concerning because it would seem to undermine the clear constraints stated prior to the phrase: “this Core Value does not create and shall not be interpreted to create any additional obligation for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.” The phrase “[except as provided herein](#)” should be deleted.