

## **IAB comments on Draft New ICANN Bylaws**

- *To:* comments-draft-new-bylaws-21apr16@xxxxxxxxx
- *Subject:* IAB comments on Draft New ICANN Bylaws
- *From:* IAB Chair <iab-chair@xxxxxxxx>
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The Internet Architecture Board (IAB) appreciates the opportunity to comment on the draft new ICANN Bylaws. We commend all those involved in drafting the new Bylaws for their tremendous efforts over a very short period.

The IAB understands that the purpose of amending the Bylaws at this time is to implement the recommendations contained in the IANA Stewardship Transition package, comprised of the ICG and CCWG-Accountability proposals. The call for public comment [1] specifically solicits inputs on how those proposals were brought into the Bylaws and whether there are areas seen as inconsistent with the IANA Stewardship Transition package.

The IAB has concerns about sections 1.1(d) (ii) (B)-(E). Section 1.1(d) of the draft Bylaws contains so-called "grandfathering" provisions. These provisions are designed to prevent any party from raising a challenge on the basis that the terms and conditions of various agreements between ICANN and other parties violate the newly edited ICANN Mission statement. Paragraph 147 of the CCWG-Accountability proposal specifically provides for grandfathering of registry and registrar accreditation agreements, thereby laying the foundation for referencing them in section 1.1(d) (ii) (A). By contrast, there is no foundation in either the CCWG-Accountability proposal or the ICG proposal for sections 1.1(d) (ii) (B)-(D), which apply to agreements between ICANN and the ASO, NRO, IETF, Root Zone Maintainer, and PTI; neither is there foundation for 1.1(d) (ii) (E), which applies to ICANN's five-year plans.

The IAB believes that the provisions of sections 1.1(d) (ii) (B)-(E) -- which are substantive provisions that materially affect large parts of the Internet community -- are outside the scope of both the ICG proposal and the CCWG-Accountability proposal. The IAB cannot identify any provision of either proposal that indicates a need for the inclusion of sections 1.1(d) (ii) (B)-(E) in the Bylaws. The purpose of amending the Bylaws was only to fulfill the requirements as stated in the proposals, so we believe the inclusion of these additional provisions is not justified.

As a result, the IAB recommends that sections 1.1(d) (ii) (B)-(E) be deleted from the final Bylaws, and that section 1.1(d) (ii) (F) be amended such that it applies only to renewals of agreements described in section 1.1(d) (ii) (A).

From the beginning of the transition proposal development process, the IAB has repeatedly emphasized the importance of having the transition plans reflect the consensus of the Internet community and the autonomy

of the operational communities in defining their own transition plans [2][3]. As the proposals get implemented, it is even more critical that the desires of the communities precisely as documented in the proposals be faithfully carried forward, without new requirements or provisions being inserted when the opportunity has passed for the kind of community discussion and consensus-building that occurred over the months and years of transition proposal development. The fact that even minimal discussion and coordination about section 1.1(d) between the Bylaws drafters, the CCWG, and the operational communities failed to occur before the draft Bylaws were posted for public comment [4] -- despite concerns being raised about this section within days of the initial draft Bylaws publication [5] -- demonstrates exactly how introducing additional provisions at this stage undermines the legitimacy of the transition process overall. Sections 1.1(d) (ii) (B)-(E) directly impact all of the operational communities and the Root Zone Maintainer as well as the entire ICANN community and this sort of overreach could have been caught and prevented had this discussion not been left to the late stages of the process.

We have read the grandfathering explanation provided by the CCWG legal team, which provided the reasoning for these sections [7]. We understand the reasoning, but it is not grounded in the community's expression of what the community desired. Instead, the grandfathering explanation argues that the external agreements and the five-year plans ought to be covered under the Mission anyway, so it is acceptable to protect the agreements and plans from challenge. That reasoning is circular. The point of a challenge on the grounds that an agreement is not within the Mission is exactly to discover whether it is within the Mission. One cannot therefore exclude the challenge on the basis that the agreements are (or will be) within the Mission.

Although sections 1.1(d) (ii) (B)-(E) deserve to be struck from the Bylaws on procedural grounds alone, it is not difficult to imagine substantive objections to these provisions that may have emerged had the community debated them as part of the proposal development process. Consider the portion of 1.1(d) (ii) (B) that applies to the IETF as an example:

- The effect of prohibiting any challenge of any agreement or agreement renewal on grounds of Mission violation is that the terms of the agreements come to define ICANN's Mission, since no party who identifies a violation can seek to rectify it. One could argue that it is backwards to have agreements with external parties define the ICANN Mission, in particular when the community put an immense amount of work into narrowly and appropriately defining ICANN's Mission. That work is reflected in paragraphs 140-144 of the CCWG-Accountability proposal. The language from those paragraphs that pertains to the protocol parameters is copied nearly word-for-word into the draft Bylaws section 1.1(a). The IAB had substantial input into this proposal language and welcomed its finalization with pleasure [6]. From this, one could conclude that no further additions to it are necessary.
- Should ICANN or the IETF exercise the termination clause of the existing IETF-ICANN Memorandum of Understanding (MoU), ICANN's Mission statement will contain a reference to an agreement that no longer exists. One could argue that an independent organization's

foundational documentation is not the appropriate place to create such an external dependency.

- With the CCWG-Accountability proposal having achieved community consensus in the design of new ICANN accountability mechanisms, including the Independent Review Panel process, one could argue that immediately foreclosing the ability for any party to make use of those mechanisms for the purposes specified in section 1.1(d) is inappropriate, or that the risks to the legitimacy of the mechanisms that accrue by foreclosing their use outweigh the risks of any potential challenge on the grounds that the IETF-ICANN MoU violates the ICANN Mission.

We have listed these potential arguments merely to illustrate why the creation of sections 1.1(d) (ii) (B)-(E) by the Bylaws drafting team without any basis in the community proposals is problematic. A variety of other substantive debates concerning other parts of (B) as well as (C), (D), and (E) are imaginable, in particular given that some of the agreements they reference have yet to be written or publicly reviewed, and most have yet to be approved.

It is the IAB's firm belief that given the time remaining to successfully conclude the transition process in 2016, the only option is for the implementation process to remain faithful to the ICG and CCWG-Accountability proposals. We reiterate our recommendation that sections 1.1(d) (ii) (B)-(E) be deleted from the final Bylaws, and that section 1.1(d) (ii) (F) be amended such that it applies only to renewals of agreements described in section 1.1(d) (ii) (A).

Respectfully submitted,

Andrew Sullivan  
For the IAB

[1] <https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>

[2]

<https://www.iab.org/wp-content/IAB-uploads/2014/04/iab-response-to-20140408-20140428a.pdf>

[3]

<https://www.iab.org/documents/correspondence-reports-documents/2015-2/iab-comments-on-icg-proposal/>

[4]

<http://mm.icann.org/pipermail/accountability-cross-community/2016-April/012060.html>

[5]

<http://mm.icann.org/pipermail/accountability-cross-community/2016-April/011867.html>

[6]

<https://www.iab.org/documents/correspondence-reports-documents/2015-2/iab-comments-on-the-ccwg-accountability-3d-draft-report/>

[7]

<http://mm.icann.org/pipermail/accountability-cross-community/2016-April/012058.html>

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