

CCWG-Accountability Comments on Draft New ICANN Bylaws

Introduction

Because of the complexity of the Draft ICANN Bylaws and the limited time that was available to the CCWG-Accountability (“CCWG”) to review the most recent draft prior to publication for comment, the CCWG elected to use the ICANN public consultation to perform a more complete analysis the Draft ICANN Bylaws dated 20 April 2016 that were posted for public comment (“Draft Bylaws”).

These comments are not offered as criticism of the outstanding work performed by the legal drafting team in producing these Draft Bylaws. The CCWG tasked the two law firms that have advised the CCWG when it prepared the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (“CCWG Proposal”) to be part of the legal drafting team. The drafting exercise was a collaborative effort between the law firms and ICANN’s legal department. We commend the lawyers involved for the collegial manner in which this exceptionally complex task was undertaken, and for the work product, which with the few exceptions noted here embodies the spirit of the CCWG Proposal.

Given the necessary complexity of the Draft Bylaws and the short timeframes we are working under, the CCWG participants were unable to conduct a thorough review prior to publication for public consultation. To remedy this situation, the CCWG has held a series of meetings since the publication of the Draft Bylaws for public consultation to identify any remaining issues its participants, as a group, had with the Draft Bylaws.

Each issue presented in this document has been discussed by the CCWG participants at meetings or on the list and has been agreed to as a CCWG comment on the Draft Bylaws. The list of topics mentioned in this CCWG public comment might appear to be long, but many of the points cited are included as a final check to ensure that the CCWG Proposal requirements have been implemented in the ICANN Bylaws.

CCWG members and participants may also submit comments in their individual or organizational roles.

Comments:

1. Draft Bylaws Section 1.1 (c)

- 1.1.** Text from the Bylaws: *“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.”*

1.2. Issue: The last clause of the last sentence: "*...and nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations.*" appears to create some ambiguity.

1.3. Recommendation: Remove this clause and end the sentence with "authority." The text would now read: "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."

2. Draft Bylaws Section 1.1 (d) (ii)

2.1. Text from the Bylaws: "*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"):*"

2.2. Issue: The CCWG notes that the CCWG Proposal mentioned grandfathering provisions for the RA and RAA only. Previous discussions within the CCWG while preparing the Draft Bylaws led to the conclusion that inclusion of renewals were acceptable for these types of agreements, as long as these renewals did not include any new terms. Any new terms would need to be within the scope and mission of ICANN.

2.3. Recommendation: The CCWG notes that provisions B, C, D and E of Section 1.1 (d)(ii) were not requested by the CCWG Proposal. In addition, some of the referenced documents, including the ICANN-PTI contract, do not yet exist. While we understand the desire to minimize the possibility of disputes regarding the legitimacy of important agreements relevant to ICANN's Mission, the implementation phase is not a time to incorporate new provisions that were not in the CCWG Proposal. As a consequence, our group's recommendation is to remove provisions B, C, D and E of Section 1.1 (d)(ii).

3. Draft Bylaws Section 1.1(d) (ii) (A)(1) - (2)

3.1. Text from the Bylaws: "*(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; (2) any registry agreement or registrar*

¹ When "[1 October 2016]" is used, that signals that the date that will be used is the effective date of the Bylaws.

accreditation agreement not encompassed by (1) above that is based on substantially the same underlying form of registry agreement or registrar accreditation agreement that existed on [1 October 2016]”

- 3.2.** Issue: As discussed above under Comment 2, the documents listed in subsections B (ASO-NRO-IETF-RIRs), C (RZM), D (PTI contract) and E of Section 1.1(d)(ii) are not part of the CCWG Proposal. In addition, the text of the Bylaws provision that grandfather’s existing Registry Agreements and Registrar Accreditation Agreements as well as new agreements on the existing forms appears to require clarification to ensure that it embodies the intent of the CCWG Proposal. Specifically, the CCWG agreed (1) to grandfather existing Registry Agreements (RAs) and Registrar Accreditation Agreements (RAAs), (2) that existing RAs and RAAs can be renewed, (3) that applicants of the current gTLD round can sign the RA in the currently used form and (4) that the terms and conditions of new form gTLD RAs and RAAs are not grandfathered. We understand that existing RAs and RAAs are “evergreen” and must be renewable in accordance with their terms.
- 3.3.** Recommendation: Review the language to ensure it is consistent with the CCWG Proposal and captures the scope of the grandfathering contemplated in the CCWG Proposal as further developed in CCWG discussions after the CCWG Proposal was issued.

4. Draft Bylaws Section 1.2(b)(viii)

- 4.1.** Text from the Bylaws: *“(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.”*
- 4.2.** Issue: The current wording creates ambiguity with regards to the potential enforcement duties of ICANN. The CCWG Proposal Annex 6, Paragraph 10 mentions that “any type of external enforcement or regulatory activity would be wholly out of scope.”
- 4.3.** Recommendation: Replace current language with the following: *“(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 obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.”*

5. Draft Bylaws Section 4.3 (s)

5.1. Text from the Bylaws: “An *IRP Panel* should complete an *IRP proceeding* expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. For the avoidance of doubt, an *IRP Panel’s failure* to issue a written decision within six months after the filing of a Claim shall not be grounds for another Claim.”

5.2. Issue: Some members of the CCWG are concerned that the language “*For the avoidance of doubt, an IRP Panel’s failure to issue a written decision within six months after the filing of a Claim shall not be grounds for another Claim*” may be inconsistent with CCWG Proposal, Annex 7, which contemplates that, absent unusual circumstances, an IRP will be completed within six months of the filing of the Claim. However, nowhere does the CCWG Proposal contemplate an IRP against an IRP Panel for failure to issue a timely decision, nor does the CCWG Proposal contemplate an IRP against ICANN to hold an independent IRP Panel, over which ICANN has no control, accountable for failure by the IRP Panel to issue a timely decision.

5.3. Recommendation: The CCWG Proposal was silent as to the means for ensuring that an independent IRP Panel would complete the IRP within six months and this should be addressed in the Rules of Procedure. Consideration should also be given to whether the sentence that begins “For the avoidance of doubt” is necessary to assure that an IRP Panel failure to meet the six-month deadline is not grounds for a new IRP against ICANN.

6. Draft Bylaws Section 4.6(b)(ii)

6.1. Text from the Bylaws: “*The issues that the review team ... may assess are the following*”

6.2. Issue: The use of “may assess” does not properly implement CCWG Proposal Annex 9, Paragraph 84 which states: “Issues that may merit attention in this review include:” The Draft Bylaws formulation may unintentionally restrict the list of issues that are within the scope of the review team.

6.3. Recommendation: Review the language to ensure it is consistent with the CCWG Proposal.

7. Draft Bylaws Section 4.6 (c) (v)

7.1. Text from the Bylaws: “The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened.”

7.2. Issue: Although this is consistent with the CCWG Proposal, approving the new Bylaws in October 2016 would make the Security Stability and Resiliency (SSR) Review immediately 1 year late, given the last review began in 2010.

7.3. Recommendation: The review is already late per the Affirmation of Commitments, and would also be late according to the new Bylaws. However, an appropriate correction to avoid this default situation could be implemented.

8. Draft Bylaws Section 4.6 (e) (v)

8.1. Text from the Bylaws: *“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.”*

8.2. Issue: Although this is consistent with the CCWG Proposal, approving the new Bylaws in October 2016 would make the Directory Services (WHOIS) Review immediately 1 year late given the last review began in October 2010.

8.3. Recommendation: The review is already late per the Affirmation of Commitments, and would also be late according to the new Bylaws. However, an appropriate correction to avoid this default situation could be implemented.

9. Draft Bylaws Section 7.12 (b)

9.1. Text from the Bylaws: *“This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a)(ii). Within five days following the date such Directors are removed.....”*

9.2. Issue: Allowing 5 days to replace Board vacancies due to the EC recalling the Board seems inconsistent with the CCWG Proposal Annex 4, Paragraph 82: *“If the ICANN Board were to be recalled, an Interim Board would be put in place. Interim Directors would be named with the exercising of the Community Power to ensure continuity.”*. [Note that the cross-reference 7.11(a)(ii) is in error and should be to Section 7.11(a)(iii).]

9.3. Recommendation: Correct the cross-reference in Section 7.12(b) and replace the current language with: *“(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a)(iii). Concurrently with delivery of any EC Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC Administration shall provide written notice of the EC’s designation of individuals to fill such vacancies (each such individual, and “Interim Director”) to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website.”*

10. Draft Bylaws Section 22.8

10.1. Excerpt from the Bylaws: *“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.”

- 10.2.** Issue: Requiring that the Decisional Participants determine by “consensus” is inconsistent with the CCWG Proposal (CCWG Proposal Annex 1, Paragraphs 37-38) and is also inconsistent with the Empowered Community practice of allowing Decisional Participants to determine their own procedures.
- 10.3.** Recommendation: The phrase “by consensus,” should be struck, and should be replaced with a clarification that such decisions are made according to individual Decisional Participant’s decision making processes.

11. Draft Bylaws Section 22.8

- 11.1.** Excerpt from the Bylaws: “...*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.*”
- 11.2.** Issue: The Board power to redact should not be so broad and was not specified in the CCWG Proposal (CCWG Proposal, Annex 1, Paragraphs 37-38). The CCWG accepts that there is a need to provide the Board with the ability to redact some information but believes that the current language would allow the Board to solely determine what it can redact without limitations. The CCWG believes only a specified list of grounds, as set out in the draft Bylaws, should be an acceptable basis for redaction.
- 11.3.** Recommendation: Suggest replacing “including” with “in order to” to limit what can be redacted by the Board to a set list of elements.

12. Draft Bylaws Section 27.3 (a)

- 12.1.** Text from the Bylaws: “(a) *The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights (“FOI-HR”) is approved by (i) the CCWG-Accountability as a consensus recommendation in Work Stream 2, (ii) each of the CCWG-Accountability’s chartering organizations and (iii) the Board (in the case of the Board, using the same process and criteria used by the Board to consider the Work Stream 1 Recommendations).*”
- 12.2.** Issue: The language stating that the FOI-HR must be approved by “(ii) each of the CCWG-Accountability’s chartering organizations...” is inconsistent with the CCWG

Proposal, Annex 6 and may lead to some interpretations that formal approval is required from every Chartering Organization.

- 12.3.** Recommendation: The CCWG would ask that this language be reviewed to ensure that the decision process for the FOI-HR is aligned with the approval process from the CCWG Charter, which does not require the approval of all Chartering Organizations.

13. Draft Bylaws Annex D, Section 1.4(b)(i-ii)

- 13.1.** Text from the Bylaws: “*(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.*”

- 13.2.** Issue: The CCWG Proposal did not address whether a higher threshold relating to PDP-related Fundamental Bylaw amendments or Articles amendments would apply. It only addressed the higher threshold relating to PDP-related Standard Bylaws amendments (see Annex 2, Paragraph 54). In response to a question from the legal teams, the Bylaws Coordination Group confirmed that that the PDP threshold requirement should also apply to Fundamental Bylaws amendments but did not address whether the PDP threshold requirement should apply to Articles amendments. It would be consistent with the spirit of the CCWG Proposal that the higher threshold apply not only to Fundamental Bylaws, but also to the Articles of Incorporation^{12.3}.

- 13.3.** Recommendation: Apply higher threshold to the change of Articles of Incorporation.

Conclusion

In conclusion, we reiterate that these comments are not offered as criticism of the outstanding work performed by the legal drafting team in producing these Draft Bylaws. We applaud the lawyers involved for their outstanding support.

Our group looks forward to the adoption of these Bylaws and is committed to remaining fully engaged in their finalization, as well as the rest of the implementation effort.