



May 20, 2016

Comments of the U.S. Council for International Business

New Draft ICANN Bylaws

The U.S. Council for International Business (USCIB) welcomes this opportunity to provide feedback on the Draft New ICANN Bylaws developed to reflect the recommendations contained in a comprehensive package of proposals developed by IANA Stewardship Transition Coordination Group (ICG) and the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG), which were provided to the ICANN Board on March 10, 2016 and transmitted to NTIA shortly thereafter. USCIB is a trade association composed of more than 300 multinational companies, law firms, and business associations, which includes a broad cross-section of the leading global companies in the information and communications technology (ICT) sector. [USCIB members](#), which include parties to the non-contracted and contracted houses of ICANN, offer a cross-community, cross-sectoral perspective on this critically important development in the Internet ecosystem.

USCIB actively contributed comments throughout the two-plus-year development of the ICG and CCWG-Accountability proposals. We [endorsed the final package](#), expressing confidence that it will meet NTIA's criteria for the transition of the IANA stewardship role and ensure the continued stability, security and resiliency of the domain name system as well as fundamental openness of the Internet. Equally important in USCIB's view, the March 10 package includes safeguards to enable active involvement by the community in processes designed to hold ICANN accountable as an independent entity.

We note that [ICANN is requesting community comment](#) concerning how the ICG and CCWG-Accountability proposals were brought into the Bylaws and not to reconsider the proposals themselves. Our comments are focused accordingly.

Bylaws Elements that have been Priorities for USCIB

Overall, the ICANN legal team and the external counsels to the CCWG-Accountability and Cross-Community Working Group Names (CWG-Stewardship) have done a good job in taking complex, publicly supported proposals calling for significant governance changes within ICANN and translating those into new Bylaws that will implement such changes as envisioned by the community. Specifically, we note with favor elements of the Bylaws that were USCIB priorities in our earlier comments concerning the ICG and CCWG-Accountability proposals:

Empowered Community – The Bylaws provide a very clear definition of the Empowered Community (EC), which will hold ICANN accountable for its central mission to manage the domain names system (DNS) and all related policies and actions. Importantly, the Bylaws clarify the EC's legal status, enumerate its powers and rights, and include ICANN's formal acknowledgment of the EC's legal personhood. USCIB believes these Bylaw provisions legitimize the EC as an entity capable of providing the oversight and accountability functions currently performed by NTIA.

Post-Transition IANA (PTI) Entity – The Bylaws clearly describe the PTI’s legal status under California laws, set forth its governing structure, and provide details about the contract that will be concluded between the PTI and ICANN to perform the IANA naming functions. The latter feature, in particular, represents another important accountability feature; should the operational communities find recurrent fault with the PTI’s performance of naming functions, there is a process established to terminate the PTI contractor and select a new IANA name functions operator.

Transparency – We are pleased to see language throughout the Bylaws that specifies how ICANN and its constituent bodies must operate in an open and transparent manner. These improvements range from the provision of more information on the website to enhance community engagement, to information on the ICANN budget, annual audit, and financial contributors, to documentation and public disclosure of rationales for decisions made by the Board and ICANN’s constituent bodies. These are welcome improvements which reflect both the text of the CCWG-Accountability proposals as well as the discussions and comments that shaped that text.

Role of the Governmental Advisory Committee (GAC) – As USCIB has stated in earlier comments, we believe the GAC should continue to perform its advisory role on public policy issues to the ICANN Board. We have urged equally strongly, however, that the GAC should provide such advice based on consensus, defined as adopting decisions by general agreement in the absence of any formal objection. Providing advice in any standard less than full consensus would have the effect of rendering GAC advice to the Board of little value. For this reason, USCIB supports the manner in which Section 12.2 (a) (x) ensures that this specific definition of consensus – adopting decisions by general agreement in the absence of any formal objection -- as well as the 60 percent threshold for Board rejection of GAC consensus advice are enshrined in the Bylaws. We feel this reflects both the letter and spirit of discussions for this element of the CCWG-Accountability proposal.

In addition, we support the Bylaws’ incorporation of the so-called GAC Carve-out, Section 3.6 (e), which would prevent the GAC from participating in the EC’s exercise of its right to challenge the Board’s implementation of GAC consensus advice. The text appropriately incorporates another important and extensively negotiated element of the CCWT-Accountability proposal. Thus, USCIB believes that, taken together, the clarification of what constitutes GAC consensus advice, the Board threshold to reject such consensus advice, and the carve-out provisions will ensure that the GAC may duly perform its advisory role while providing the community with significant, tangible safeguards to prevent the ability of any government or group of governments to “capture” ICANN and upend the bottom-up, multistakeholder decision-making process that has enabled the Internet’s incredible growth.

Other Bylaws Elements

USCIB believes that some aspects of the so-called “grandfathering clauses” in Article 1 (Mission, Commitments and Core Values) and other elements in Section 1.2(b)(viii), Section 4.3(a)(i), and Section 4.6 need to be addressed before USCIB can offer its full support for the draft bylaws. We believe that these issues can be addressed in a relatively straightforward manner.

“Grandfathering Clauses” -- Section 1.1(d) of the draft Bylaws contains "grandfathering" clauses designed to prevent any party from raising a challenge to ICANN on the basis that the terms and conditions of agreements between ICANN and other parties violate the ICANN Mission statement. Section 1.1(d)(ii)(A) applies to registry

and registrar agreements and was the subject of substantial discussion within the CCWG. It appears to be a direct implementation of paragraph 147 of the CCWG-Accountability proposal, which USCIB supports.

References to Agreements with Other Entities – However, we note that Sections 1.1(d)(ii)(B)-(E) do not appear to correlate to any provision of either the ICG or CCWG proposals. These sections apply to agreements with other entities — the ASO, NRO, IETF, Root Zone Maintainer, and PTI — as well as ICANN’s five-year plans. In USCIB’s view, the inclusion of sections 1.1(d)(ii)(B)-(E) would pose problems.

The effect of prohibiting challenges to these agreements is that the terms of the agreements come to define ICANN’s Mission, since no party who identifies a violation can get it fixed. This is problematic since several parts of the agreements these sections reference do not yet exist. In the case of the ICANN-PTI agreement, one of the parties (PTI) currently does not exist. And even where agreements do exist in draft, most of them have not been agreed to by the affected parties yet.

As a result, these references to presently non-final agreements and documents make it difficult for USCIB at this time to provide full support. In view of the waning time remaining before the transition deadline, it is unlikely that the community will have ample time to ensure that all of the documents being grandfathered can only be interpreted as being strictly within ICANN’s Mission.

Referencing external agreements in the Bylaws also puts ICANN in an awkward position in the event that these agreements get terminated in the future, because at that point its Mission will be partially defined by agreements that no longer exist. This seems inappropriate especially since the key focus of the transition work was to develop an ability for the operational communities to change IANA functions operators.

Given that these sections have no anchor in the community proposals, USCIB urges that the Sections 1.1(d)(ii)(B)-(E) be removed from the Bylaws.

Human Rights Commitment – USCIB supports the protection of internationally recognized human rights. We greatly value the primarily *technical mission* of ICANN in coordinating the global internet’s system of unique identifiers and ensuring openness, interoperability, resilience, and stability of the DNS. Throughout the CCWG-Accountability’s work, we urged careful consideration of how to include a human rights-related commitment in ICANN’s Bylaws so that it does not have the effect of extending ICANN’s core mission. We would support Bylaws language that anchors a human rights commitment in ICANN’s primarily technical mission but does not open the door to mission creep.

In this regard, we concur with the ICANN Business Constituency (BC) that language at the end of Section 1.2(b)(viii) – “except as provided herein” – is a bit ambiguous. It could be read as creating the possibility that the Framework of Interpretation of Human Rights (FOI-HR), a Work Stream 2 project described in Section 27.3(a), might give rise to IRP enforcement actions against ICANN based on selected human rights. We join the BC in urging that the text be revised as follows to avoid ambiguity about enforceable rights (see italicized text):

(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 enforce human rights, but rather, as provided in Section 27.3, to respect human rights.*

Independent Review of Covered ICANN Actions – Concerning Section 4.3 (a)(i), we propose striking “limited technical” on grounds that ICANN’s mission is clearly defined in Section 1 of the draft Bylaws with explicit limitations to constrain the scope of ICANN activities. We therefore proposed that the text be revised as follows:

- (i) Ensure that ICANN does not exceed the scope of its ~~limited technical~~ Mission and otherwise complies with its Articles of Incorporation and Bylaws.

Annual Reviews – USCIB comments have consistently called for enshrining the Affirmation of Commitments reviews into the Bylaws. These reviews include the Accountability and Transparency Review (ATRT), the Security, Stability, and Resiliency Review (SSR), the Competition, Consumer Trust, and Consumer Choice Review (CCT), and the Registration Directory Service Review (Whois/Directory Service Review). These reviews are a central aspect of the accountability and transparency framework, and in some areas address matters that would otherwise not be addressed in the Bylaws.

In general, we support the inclusion of this element of the CCWG-Accountability proposal as Section 4.6, requiring ICANN to produce an annual report on the status of all review processes and the status of ICANN’s implementation of the consensus-supported recommendations set forth in the final reports issued by the review teams.

However, we share the BC’s concerns about *the timing* of these reviews as follows:

- Draft Bylaws Section 4.6(b)(vi), regarding the timing of the ATRT, calls for a review no less frequently than every five years measured from the date of the previous ATRT. We note that the previous ATRT was convened in February 2013, which means that ATRT-3 could begin as late as February 2018. USCIB urges ICANN to take advantage of the extra year (2017) to address accountability items called for in Work Stream 2 from the CCWG’s final proposal before beginning ATRT-3.
- Draft Bylaws Section 4.6(c)(v), regarding the timing of the SSR, calls for a review no less frequently than every five years, measured from the date of the previous SSR. Since the previous SSR was convened in 2010, the next required review would have been October 2015. We are concerned that ICANN already is failing to meeting this obligation. We join the BC in urging ICANN to follow through on the Board-approved 2016 start date for the SSR-2 review. We further urge that the SSR-2 evaluates the extent to which ICANN is prepared to meet future challenges and threats to the security, stability, and resiliency of the Internet DNS, consistent with ICANN’s mission.
- Draft Bylaws Section 4.6(e)(v), regarding the timing of the Whois/Directory Service Review, calls for a review no less frequently than every five years measured from the date of the previous Whois/Directory Service review. The previous Whois review was in October 2010, which would have required the next review to be in October 2015. Similar to our concerns about the lateness of the SSR review, USCIB is worried that the Whois/Directory Service review already is one year past-due, which would make ICANN non-compliant with the new Bylaws upon their adoption. We join the BC in urging ICANN to follow through on the Board-approved resolution to begin the Whois-2 review in 2016.

Final Thoughts

In general, USCIB is inclined to support the manner in which ICANN counsel and external counsel have translated the ICG and CCWG-Accountability proposals into new Bylaws. With the important changes we have proposed to Section 1.1(d), Section 1.2(b)(viii), Section 4.3(a)(i), and Section 4.6, USCIB would offer our full support. We

remain committed to participating in the bottom-up, multi-stakeholder process that produced the March 10 approved proposals. USCIB believes this package ultimately will enable a seamless IANA stewardship transition that meets the four NTIA requirements¹ and, thus, safeguard the continued the security, stability, and resiliency of the DNS and openness of the Internet.

Thank you for your consideration.

A handwritten signature in cursive script that reads "Barbara P. Wanner".

Barbara P. Wanner
Vice President, ICT Policy

¹ (1) Support and enhance the multistakeholder model; (2) maintain the security, stability, and resiliency of the Internet DNS; (3) meet the needs and expectations of the global customers and partners of IANA services; and (4) maintain the openness of the Internet.