

## Comments on Proposed Bylaws

- *To:* <comments-draft-new-bylaws-21apr16@xxxxxxxxxx>
- *Subject:* Comments on Proposed Bylaws
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The following comments are being submitted on my own behalf. However, they are also undergoing review by the ALAC and I will post before the comment deadline, the extent to which these comment reflect theviews of the ALAC.

Alan Greenberg

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### Background:

The Affirmation of Commitment (AoC) Reviews are being integrated into the Bylaws. The AoC called for the reviews to be held every three years, but was unclear as to how the three years was to be measured. The three years has been interpreted flexibly to allow more time between some reviews and the Board has deferred some reviews due to community overload (with the agreement of the NTIA, the AoC co-signer). The CCWG Proposal required the new reviews to be carried out no less frequently than every five years, measured from the start of one review until the start of the next one. It was recently realized that the last WHOIS review started in October 2010, so when the new Bylaws are adopted, we will already be several months past the October 2015 date for the next one to start and will need to initiate the next one immediately.

Since the required review is on Registration Directory Services Review, renamed from WHOIS Review, we would technically NOT be in default, since there never has been an "RDS Review". But it is assumed that this distinction will not affect ICANN's actions.

### Section 4.6(e) (v)

During the CCWG discussions on the interval between the reviews, the issue of ICANN immediately being in default on the WHOIS/RDS review was never raised. Moreover, since those discussions were held, theGNSO new RDS PDP WG has been convened and is well underway. It is reasonably clear that the people in the volunteer community who would likely participate in an RDS review significantly overlap with thosewho are heavily involved in the RDS PDP. To schedule an RDS Review soon after the Bylaws are enacted would be serious error and will only serve to slow the work of the PDP - a PDP that even now may go on for quite some time.

It is clear that there is work that needs to be done that would fall under the auspices of a full-blown AoC-like Review. We need a good picture of how

the various current WHOIS/RDS efforts mesh together. We need to assess how the recommendations of the first WHOIS Review are being implemented and their impact, as well as other WHOIS/RDS related activities unrelated to that last AoC review.

But these efforts, as important as they are, do not need to be done by a full-blown AoC-like review. Most of the work can be done by staff. To the extent that "staff cannot be trusted", I and others in the community will gladly act as a sounding board and review their work. [For the record, I was the person on the ATRT2 who did the full analysis of the WHOIS RT Recommendation implementation, so I have some idea of what I am talking about.]

The current Bylaws for the organizational reviews all have explicit time limits in them, but also have the words "if feasible". That was true even when the organization review interval was (foolishly) threeyears instead of the five years it was quickly changed to. "If feasible" allowed the Board to save an immense amount of wasted community expense and ICANN dollars. We need some wriggle room in the current case as well.

I strongly suggest that the draft Bylaws be revised to allow additional flexibility to defer the RDS review until there is a real RDS or RDS plan to review, and would even suggest that once implemented, the new Bylaws soon after be amended to add the missing "if feasible".

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Background:

The CCWG Proposal requires the Empowered Community (EC) to take a variety of actions but was not specific on exactly how this would happen or what people would take responsibility for ensuring that theactions are carried out. As a result this had to be addressed during Bylaw drafting. The concept of the EC Administration was created, embodied by the Chairs (or other delegates) of the AC/SOs participating in the EC.

Along with the creation (or perhaps naming, since there was always a need for such a body/group) of the EC Administration, a section was added to the draft Bylaws placing restrictions on the people involvedin the EC Administration.

Section 7.4(d)

"No person who serves on the EC Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC Administration and as aDirector or Liaison to the Board."

Lawyers Comments (in reply to my early raising of this issue):

On March 31, 2016, counsel posed the following question to the Bylaws Coordination Group and received confirmation that the disqualification in Section 7.4(d) be included in the Bylaws: "Confirm that chairs of the Decisional Participants and persons designated by the Decisional Participants to serve on the EC Chairs Council cannot be nominated or serve on the ICANN Board. Such a provision would be consistent with other provisions in the current Bylaws, which provide that (a) "no person who serves in any capacity (including as a liaison) on any Supporting Organization Council shall simultaneously serve as a Director or liaison to the Board (Article VI, Section 4.2)" and (b) persons serving on the Nominating Committee must be "neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities" (Article VII, Section 4.4)."]

I note that the term "nominated" as used in the new Bylaws is used in the sense of the current Nominating Committee. Once a person is "nominated" by the NomCom or an AC/SO, they will become a Director once the EC takes the appropriate action (and the EC has no option to NOT take such action). However, this is confusing terminology, because an AC/SO may well have a nomination process used to select candidates who will then vie for the actual AC/SO selection.

I believe that the Bylaws Coordination Group may have erred in its reply and moreover, the Bylaw drafters went farther than was required in implementing that response. There are several reasons.

1. The CCWG has been very careful to only implement exactly what is specified or implied in the CCWG Proposal. The EC Administration is not explicitly named, but is implied in Proposal Paragraph 178, bullet 8 and elsewhere. There is no mention of restrictions such as those in this proposed Bylaw, and as described below, I can see no compelling reason to vary from the CCWG Proposal.

2. I cannot understand what the relationship is between the EC Administration and the rules that apply to the NomCom. The NomCom makes decisions. The AC/SO Chairs or other delegates who participate in the EC Administration have no discretion whatsoever. They MUST follow the directions of the entity nominating or removing a director.

3. Given that lack of ability to influence outcomes, I find it unreasonable to restrict such a person from submitting an SoI to the NomCom or to their own AC/SO as a potential director (ie to be "considered").

4. I would find it quite reasonable that they would have to surrender (or be deemed to have surrendered) their EC Administration seat if they are actually nominated (nominated in the sense of the Bylaws -will actually serve on the Board once the EC Designates them). This is in line with the reference to serving "simultaneously"

5. I note that the wording in the proposed Bylaws is different from what was asked. The March 31st question was "Confirm that chairs of the Decisional Participants and persons designated by the Decisional Participants to serve on the EC Chairs Council cannot be nominated or serve on the ICANN Board.". The draft Bylaws extend that to "considered for nomination" which is a much wider group.

6. The path of AC/SO Chair to Director is not unreasonable - both require high degree of confidence in the person expressed by the AC/SO. And to be blunt, arguably two of our best currently seated AC/SO Directors have followed exactly that path, as did the current Board Chair (although in that case, since the SSAC has chosen not to be part of the EC, the rule would not be applicable).

I strongly suggest that Section 7.4(d) be replaced by: "No person may serve simultaneously on the EC Administration and as a Director or Liaison to the Board. If a member of of the EC Administration is appointed as a Liaison to the Board, that person must be replaced by their AC/SO on the EC Administration prior to the Liaison appointment becoming effective. If a person is nominated by the Nominating Committee or an AC/SO to become a Director, that person must be replaced by their AC/SO on the EC Administration prior to the EC Administration designating that person as a Director and prior to that person taking part in any Board activities as an observer."