

Questions and Clarifications for Bylaws Coordination Group
April 2, 2016

RECONSIDERATION:

3. On Reconsideration requests, the CCWG proposal provides that “[r]ecordings and transcripts should be posted of the substantive Board discussions at the option of the requestor” (Annex 8, Paragraphs 23, also Paragraphs 3 and 5). Concerns have been raised that requiring both a recording and a transcript of Board discussion may add substantial administrative burden and expense without commensurate benefits; further concerns have been raised about waiving attorney-client privilege, or breaching laws or contractual obligations. If the Bylaws Coordination Group wishes to address these concerns, the following provision may be considered:

“If the party seeking reconsideration so requests, the Board shall post either a recording or a transcript of the substantive Board discussion from the meeting at which the Board considers the Board Governance Committee’s recommendation. The Board shall decide as between a recording and a transcript. The Board may only redact from the posted record that portion of the record that: (a) reflects privileged advice from legal counsel; (b) includes ICANN trade secrets; or (c) for which if disclosed would breach a binding contractual obligation or legal requirement to which ICANN is subject; or (d) if disclosed would present a material risk of negative impact to the security, stability or resiliency of the DNS.”

CCWG Response:

The CCWG would prefer to keep up its recommendation to post both, and look for any “agreed language” existing in the Bylaws to enable their redaction when strictly required (we note that the proposed redaction items are also introduced in section 18.4 - IFR Required inputs) . The CCWG discussion has highlighted that the recording - which can be produced and published with little effort - is the most accurate representation of the discussion, while transcripts are of questionable quality at times.

The fact that redaction may be subject to challenge should be added as a reminder.

REVIEWS:

4. There has been further effort in identifying items that can be explained in Operating Standards, while maintaining high-level principles, to try to optimize the Bylaws while preserving key items in the Bylaws. Are these changes acceptable?

CCWG Response:

It is acceptable to state that Operating Standards will be “developed with the global Internet community for the conduct of reviews under this Section 4.6.” And draft bylaws Section 4.6 a (i) requires that “The Operating Standards must be aligned with the

following guidelines:” and then lists guidance that was approved by the CCWG for composition of Review Teams.

Operating Standards are also cited in Section 4.6 a (iii) regarding decision-making practices of review teams. However, there is no requirement to align with this guideline in the CCWG final report:

In the event a consensus cannot be found among the members, a majority vote of the members may be taken. In this case, both a majority recommendation and a minority response should be provided in the final report of the Review Team. (para 58, Annex 9)

Operating Standards are also cited in Section 4.6 a (iv) relating to review teams considering independent expert advice. This is acceptable, noting that the CCWG proposal stated, “the review team may choose to accept or reject all or part of this advice”. (para 60, Annex 9)

5. On the SSR Review, we note that the CCWG-Accountability removed reference to some of the introductory language for the review. With some of that introductory text removed, the explicit reference to a security “plan” doesn’t make sense, so ICANN proposes a to security “efforts” so that we didn’t need to make major modifications to address inserting new definitions of terms. In addition, ICANN proposes a more specific language to add clarity to the contingency planning review scope. Are these changes acceptable?

CCWG Response:

In Annex 9 of the Final CCWG report we included all of AoC Review except for the first sentence, which describes a SSR plan:

ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS.

We did not include that line since it refers to an existing plan, as opposed to a commitment to update/generate an SSR plan regularly.

Perhaps it would be best to add the AoC text referring to a plan for SSR. Let’s consult with ICANN management about how to describe this plan in the bylaws. Add the plan description to the Bylaws so that subsequent references to “plan” make sense

Ask ICANN management how they describe their SSR plan and how often it is updated. Add the plan description to the Bylaws so that subsequent references to “plan” make sense

BOARD:

7. The CCWG proposal was silent on how the Interim Board is to consult with the community to make major decisions. We have included a suggestion that the Interim Board shall “(a) consult with the chairs of the Supporting Organizations and Advisory Committees before making major decisions (as if such action were a Rejection Action [as defined in Annex D]) and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section [] of Annex D)” prior to taking the action. Are these the right processes?

CCWG Response:

Agreed with Option a)

ANNEX D:

26. In rejection actions, transparency could be increased if there was a requirement for other Decisional Participants supporting a petition to give notice. The following language has been proposed: “Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC Chairs Council, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition.” Though this is not in the CCWG Proposal, does the CCWG support this being incorporated into the Bylaws?

CCWG Response:

Agreed.

27. PDP-Related Bylaws amendments. Given that there is a possibility that a Fundamental Bylaws change could result from a PDP, can the CCWG confirm that that in those instances, (a) the Fundamental Bylaws change process should apply, and not the Standard Bylaws change process contemplated in the Proposal, and/or (b) that the SO/AC that undertook the PDP relating to the Bylaws change is required to support such a Bylaws change?

CCWG Response:

The CCWG agrees that the Fundamental Bylaws change process shall apply and that the SO/AC that undertook the PDP relating to the Bylaws change is required to support the Bylaws change for it to be accepted.

28. For Approval Actions, would it be appropriate for the Board to be able to request an additional community forum (likely for the purpose of helping to explain an action that the Board initiated, such as Fundamental Bylaws change or an asset sale)? This is not contemplated in the CCWG Proposal.

CCWG Response:

The CCWG agrees that it should be possible for the Board to request that a session of the community forum is held to discuss the matter. This should be optional and not mandatory for the Board to do. We would like to stress that the notion of additional community forum is understood as another session of the community forum, not a new, parallel body. Should the Board request such a session the community forum it would be required to publish a rationale for doing so.

30. Paragraph 56 of Annex 2 provides that the threshold to convene a Community Forum in relation to removing an SO/AC director is a “[m]ajority within nominating SO/AC” whereas Paragraph 68 of Annex 4 allows the approval to be “in accordance with the [SO/AC’s] own mechanisms. Please provide guidance on these inconsistencies.

CCWG Response:

The CCWG has always made clear that it does not wish to alter the methods based on which the SO/ACs make their decisions. Therefore, the language “in accordance with the SO/AC’s own mechanisms” is preferred.

31. In the SO/AC director removal process, the CCWG Proposal has exclusions on who could manage/moderate a community forum. Consider whether this exclusion (i.e., person who initiated a petition) as well as exclusion of the Decisional Participant’s designated liaisons, should be incorporated into the processes for managing/moderating Community Forums relating to other types of decisions by the EC (e.g., Board recall petitions), to ensure that the Community Forum is managed in a neutral manner. If so, Community Forums relating to what kinds of EC Decisions should include such an exclusion?

CCWG Response:

This exclusion might be difficult to manage in the case of decisions that affect ICANN’s general direction. It was specifically mentioned in the SO/AC director removal process because of the potential personal conflicts that might be associated with such a process. In that spirit, our recommendation is to extend this exclusion to all any Board director removal process, but leave it to the wisdom and good sense of the community to prevent any conflict of interest in the organization of the community forum in other cases.

32. During the SO/AC director removal process, should there be a requirement to hold a dialogue between the relevant director, the SO/AC and the Chair of the Board prior to the SO/AC accepting the removal petition? The CCWG Proposal contemplated such a dialogue in the context of NomCom director removal (Paragraph 57 of Annex 4) but did not specifically mention it in the context of SO/AC director removal.

CCWG Response:

The process should be as similar as possible for any Director's removal, and this informal discussion at the start of the process can only be helpful in resolving concerns or in showing that the removal process needs to proceed. Thus, the CCWG supports including this requirement.

34. Should the use of the EC's right to initiate a reconsideration request be limited to the EC's decision rights/powers, similar to the community IRP?

CCWG Response:

Since the EC shall be granted a limited and finite catalogue of powers, the answer is "yes".

Additional questions from the CCWG, added after the legal teams circulated their draft on 2-Apr-2016.

1. Selection of IRP panel

The report states : [...]

3. The community would nominate a slate of proposed panel members.
4. Final selection is subject to ICANN Board confirmation.

The Draft Bylaws include:

ICANN shall, in consultation with the global Internet community, initiate a process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP. The community shall be directly involved in the selection of the Standing Panel and the designation of the Chair of the Standing Panel.

This does not seem to fully capture the importance of a community driven selection process, as well as the role of the Board, which is to confirm (or veto) Panelists. Our recommendation is to provide additional safeguards about this process in the Bylaws to ensure that the intent of the Report is carried out.

2. IRP rules of procedure

The Report states:

Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created

by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the

Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.

Bylaws:

Members of the global Internet community shall develop processes for the IRP that are governed by clearly understood and pre-published rules applicable to all parties ("Rules of Procedure").

The community driven nature of the establishment of the rules of procedure should be reinforced in the Bylaws

3. GAC Carve out - Annex D Section 3.3

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process (“Board Recall Petition”). Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board and a statement, where applicable, that the Board Recall Petition is based solely [or almost solely] on ICANN’s implementation of a GAC Consensus Board Resolution, citing (i) the specific GAC Consensus Board Resolution, (ii) the acts of the Board that implemented such specific GAC Consensus Board Resolution, and (iii) the IRP Panel award concluding that the Board’s implementation of such GAC Consensus Advice did not comply with the Articles of Incorporation or Bylaws (“Board Recall GAC Consensus Statement”). The process set forth in this Section 3.3 of this Annex D is referred to herein as the “ Board Recall Process.”

Comments:

1. The manner in which the above txt is drafted may give the impression that "Board Recall Process " IS solely designed on ICANN's implementation of a GAC Consensus Board Resolution, which would not be compliant with paragraph 77-83 of Annex 4 (Recommendation 4) of the supplemental CCWG Report.

We would request confirmation that this not the case and would welcome, if possible, any improvement in language that would alleviate this possible misinterpretation.

4. HR Fol - Section 27.3

Section 27.3 is part of article 27 Transition Article and now reads:

Section 1.1. human rights

(a) Within the scope of its Mission and Core Values, ICANN commits to respect internationally recognized human rights as required by applicable law. This commitment 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.

(b) Section 27.3(a) 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). Upon approval of the FOI-HR as contemplated in this Section, the text included within Section 27.3(a) shall be inserted into Section 1.2(b) as a Core Value

(c) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2 or the independent review process provided in Section 4.3 with respect to this Section 27.3 for any actions by ICANN or the Board occurring prior to the date that the conditions set forth in Section 27.3(b) are satisfied

Section 27.3 as a whole should be put in section 1.2 (a) as it is a commitment by ICANN and it is not really meant to be a transitional bylaw but instead a firm commitment pending full applicability to the development of the FOI as part of WS2.

5. AoC Review of new gTLDs - Section 4.6

Jeff Neuman observed that CCWG Final Report is not fully reflected in the draft bylaws text at Section 4.6 d - Competition, Consumer Trust and Consumer Choice Review (CCT). Per the Affirmation of Commitments, a CCT review team is already in process. There are also several other reviews of the latest round of new gTLDs already in progress. CCWG anticipated that the “new” bylaws reviews might conflict with the AoC reviews already underway, and added this to our final proposal:

New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules. (para 6 of Annex 9)

Jeff also asks about draft bylaws text regarding when a CCT review would be required, if ICANN were to open an ongoing process for new gTLD applications -- instead of discrete batched rounds.

CCWG anticipated that new gTLDs might be a rolling application instead of discrete rounds of applications. In Annex 9 para 118 we said:

The Board shall cause a review of ICANN's execution of this commitment after any batched round of new gTLDs have been in operation for one year.

The draft bylaws text at Section 4.6 d (ii) did not retain the word “batched” and should probably include that concept to clarify if and when the 1-year trigger applies.

After any discrete New gTLD Round has been in operation for one year, the Board shall initiate a competition, consumer trust and consumer choice review as specified in this Section 4.6(d) (“CCT Review”).

If ICANN moves to rolling applications for new gTLDs, then a review is required no less frequently than every 5 years (para 127).

For that reason, Bylaws Section 4.6 d (iii) should avoid using the phrase “the New gTLD Round” and retain the CCWG proposal text “expansion of gTLDs”, as follows:

(iii) The review team for the CCT Review (“CCT Review Team”) will examine (A) the extent to which the expansion of gTLDs New gTLD Round has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD Round’s application and evaluation process and safeguards put in place to mitigate issues arising from the expansion New gTLD Round.

41) MEDIATION INITIATION PROCESS: section 4.1

This section was introduced during the Bylaw drafting stage at the request of the Coordination group. Lawyers identified that the process to engage in a Mediation, if the Board fails to comply with an EC decision, was not described in the report.

The current section 4.1 describes a new escalation process, following all typical steps (petition, community forum, etc.) before initiating the Mediation. This is option (a) An alternate possibility would be to mandate the EC Council to initiate mediation automatically, in order to streamline the process. This is option (b)

6. AoC Review Team Draft Reports - Section 4.6

Draft bylaws Section 4.6 a (vii) B states that “Each draft report of the review team shall be posted on the Website for public review and comment.”

In the CCWG final proposal, we stated “The draft report of the review will be published for public comment.” (para 76, Annex 9). That was in keeping with AoC review team practice.

We realize that a review team may decide to publish several iterations of its draft reports for public comment. But we do not want to imply that each every internal draft report must be posted for public comment.

We recommend this change to draft bylaws Section 4.6 a (vii) B:

(B) The review team may post its draft reports to the Website for public review and comment. ...

We note that final reports of the review team must be posted for public comment:

(C) Each final report of a review team shall be published for public comment in advance of the Board’s consideration.

7. Confirm approval of the concept of the EC Council

During drafting, the concept of the EC Council was introduced. This construct was needed to allow the Bylaws to be clearly drafted (and then followed!). Our group supports the introduction of that concept.

8. Apart from the grandfathering, there was an explicit provision that PICs could be part of future agreements entered and enforced by ICANN (annex 5, para 15: ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments (“PICs”), with contracted parties in service of its Mission.)

Section 1.1 d) iv) of the draft Bylaws states:

"(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements with any party in service of its Mission."

Can the lawyers confirm that it is meeting the requirement or detail the reason why PICs are not mentioned explicitly?

CCWG Response:

“This provision meets the specification, in that it permits ICANN to include terms and conditions in contracts in service of its Mission. Public Interest Specifications (PICs) are, simply put, contractual terms. Nothing precludes the inclusion of Public Interest Commitments – by that name or any other name - in Registrar Accreditation Agreements and/or Registry Agreements so long as the are consistent with the Mission.