

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 to review the most recent draft prior to publication for comment, the CCWG-Accountability elected to use the ICANN public consultation to perform a more complete analysis of the Draft [ICANN](#) Bylaws [dated 20 April 2016 that were posted for public comment](#) (“[Draft Bylaws](#)”).

[The CCWG-Accountability recognizes that the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations \(“CCWG Proposal”\) is complex. We understand that at times during the process of drafting the Draft Bylaws to implement the CCWG Proposal, the legal drafting team found the CCWG Proposal to be less than clear. The lawyers communicated with the Bylaws Coordination Group \(“BCG”\) during the drafting process to facilitate resolution of such issues; more than 65 questions were certified to the BCG.](#)

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 ~~its report~~ [the 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-Accountability recommendations.

Given the necessary complexity of the Draft Bylaws and the short timeframes we are working under, the CCWG-Accountability participants were unable to conduct a thorough review prior to publication for public consultation. To remedy this situation, the CCWG-Accountability 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-Accountability participants at meetings and has been agreed to as a CCWG-Accountability comment on the Draft Bylaws. The list of topics mentioned in [this](#) [CCWG-Accountability](#) 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 B](#)ylaws ~~language~~.

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

Comments:

1. Draft Bylaws [s](#)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*

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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: "~~nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations~~" ~~A~~ appears unnecessary to create some ambiguity.

1.3. Recommendation: Remove this clause and end the sentence with "such 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, nothing in the preceding sentence should be construed to suggest that ICANN does have such authority."

2. Draft Bylaws ~~s~~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-Accountability notes that ~~its Report~~ the CCWG Proposal mentioned grandfathering provisions for the RA and RAA only. Previous discussions within the CCWG-Accountability while preparing the ~~Draft~~ Bylaws ~~Draft~~ 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 term [based on previously agreed language]. Any new terms would however need to be within the scope and mission of ICANN. [Lawyer's Comment: We do not understand what is meant by a new term that is "based on previously agreed language."]

2.3. Recommendation: The CCWG-Accountability highlights for the benefit of its Chartering Organizations and the ICANN Board that provisions B, C and D of ~~s~~Section 1.1 (d)(ii) were not requested by the CCWG Proposal ~~Accountability Supplemental Report~~. It remains unclear whether they are required. In addition, some of the referenced documents, including the ICANN-PTI contract, do not yet exist although we understand that the ICANN-PTI contract will exist at the time of the transition. While we understand the desire to minimize disputes regarding the legitimacy of important agreements relevant to ICANN's Mission, it is not clear how a document that does not exist could be deemed to be within ICANN's Mission. We request that the groups most directly involved with the documents addressed in subsections (B) through (E) weigh in on the need to include grandfathering language for those documents. Depending on such input, a final determination should be made as to whether those documents should be included in the grandfathering provision.

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

3.1. Text from the Bylaws: "~~A~~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_;

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(2) any registry agreement or registrar 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 ~~Items~~-B (ASO-NRO-IETF-RIRs), C (RZM) and D (PTI contract) of Section 1.1(d)(ii) are not part of the CCWG-Accountability Recommendations. In addition, the text of the Draft Bylaws provision that grandfathers existing Registry Agreements and ~~the 2013~~-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-Accountability Report. 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, -(23) 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. new RAAs employing the 2013 form of agreement, and (3) RAs for applicants in the 2014 New gTLD round using the existing form of RA. We understand that ~~these existing RAs and RAAs agreements~~ are “evergreen” and must be renewable in accordance with their terms. ~~That said, there is no intent to grandfather future forms of RAs or RAAs, nor is there any intent to grandfather non-standard terms or conditions in agreements not in effect at this time.~~ [Lawyers’ Comment: Revised Item 3.2 to reflect instructions provided by the BCG dated 11 April 2016: “Lawyers shall ensure:

- Existing Ry and Rr agreements can be renewed
- Applicants of the current “round” can sign the Ry agreement in the currently used form
- The t&cs of new form gTLD Ry and Rr agreements are not grandfathered.”]

3.3. Recommendation: We request that the legal drafting team revisit and clarify the proposed Bylaws text to ensure that it captures the scope of the grandfathering contemplated in the CCWG ~~Supplemental~~ Proposal as further developed in CCWG discussions after the CCWG Proposal was issued.

4. Draft Bylaws Section ~~4.3-4~~ (s)

4.1. 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.*”

4.2. Issue: Some members of the CCWG-Accountability 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-Accountability Recommendation #7, which contemplates that, absent unusual circumstances, an IRP will be completed within six months of the filing of the Claim. We understand that this language has been added to the Draft Bylaws to assure that an IRP claim could not be brought against ICANN relating to the failure of an independent IRP Panel to meet the timeline when such matter is not within ICANN’s control but is in the control of the independent IRP Panel.

4.3. 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

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sentence that begins “For the avoidance of doubt” is necessary so as to assure that an IRP Panel failure to meet the six month deadline is not grounds for a new IRP against ICANN.
~~The language should be reviewed to ensure that it is consistent with the CCWG-Accountability Recommendations.~~

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

5.1. 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.*”

5.2. Issue: Although this is consistent with the CCWG-Accountability recommendations, 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.

5.3. Recommendation: This was an unintended consequence of the CCWG-Accountability Recommendations and an appropriate correction to avoid this default situation should be implemented.

6. Draft Bylaws Section 22.8

6.1. 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.*”

6.2. Issue: Requiring that the Decisional Participants determine by “consensus” is inconsistent with the CCWG-Accountability Recommendations (CCWG Recommendations Annex 1 – Lines 37-38) and is also inconsistent with the Empowered Community EC practice of allowing Decisional Participants to determine their own procedures.

6.3. Recommendation: The phrase “by consensus,” should be struck.

7. Draft Bylaws Section 22.8

7.1. 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.*”

7.2. Issue: The Board power to redact should not be so broad and was not specified in the ~~CCWG-Accountability P~~proposal (CCWG Recommendations Annex 1 – Lines 37-38). The CCWG-Accountability 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.

7.3. Recommendation: Suggest striking “including” ~~in~~ from the above text.

8. Draft Bylaws Section 27.3(a)

8.1. 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*

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the case of the Board, using the same process and criteria used by the Board to consider the Work Stream 1 Recommendations).”

- 8.2. 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-Accountability Recommendation #6.
- 8.3. Recommendation: The CCWG-Accountability would ask that this language be reviewed to ensure that there is no need that the FOI-HR be approved by all Chartering Organizations but rather align with the approval from the CCWG-Accountability Charter.

9.— Draft Bylaws Annex D Section 1.4(b)

~~9.1. Text from the Bylaws: “(b)The EC Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice (“EC Approval Notice”) to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 1.4(b) of this Annex D, the EC has approved the Approval Action if:~~

~~(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.”~~

~~9.2. Issue: Does not properly include the possibility of the GAC Carve Out being used for approval.~~

~~9.3. Recommendation: The ICANN Board should consider addressing this issue if it deems it necessary.~~

[Lawyers’ Comment: We recommend that Comment 9 be deleted as the statement in Item 9.2 that the Draft Bylaws do not properly include the possibility of the GAC Carve Out being used for approval actions is incorrect. Section 3.6(e)(ii) of the Draft Bylaws includes several references to approval actions in the context of the GAC Carve Out (italicized herein): “When the GAC Carve-out applies (A) any petition notice provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC Consensus Board Resolution and the line item or provision that implements such specific GAC Consensus Board Resolution (“GAC Consensus Statement”), (B) the Governmental Advisory Committee shall not be eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC Decision that requires the support of four or more Decisional Participants pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.” If Comment 9 is to be included in the CCWG public comment, it should be revised so that it fully describes what the Draft Bylaws provide with respect to the applicability of the GAC Carve Out to approval actions.]

10. Draft Bylaws Annex D Section 2.2 (c) (i) (A)

~~10.1. Text from the Bylaws: “...(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN Budget, an IANA Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC Administration unless the rationale set~~

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forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN's Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN's stakeholders, financial stability, or other matter of concern to the community; and"

10.2. ~~Issue: The CCWG Accountability Recommendations do not require a "rationale" for approving a petition to hold a Community Forum for a Rejection Power except in the case of the rejection of an ICANN Budget, an IANA Budget, an Operating Plan or a Strategic Plan.~~

10.3. ~~Recommendation: The language should be reviewed to better implement the CCWG Accountability Recommendations on this topic.~~

[Lawyers' Comment: We recommend that Comment 10 be deleted as the statement in Item 10.2 that the CCWG Proposal does not require a rationale for rejection actions other than in relation to budgets and plans is an inaccurate description of the CCWG Proposal. The CCWG Proposal requires a rationale to be included in the petition notice for all rejection actions, as described in Annex 2, Paragraph 32 (also at Paragraph 9): "Within 24 hours of a petition being approved, the petitioning Decisional Participant will: Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants." The lead-in language to the escalation process set forth in Annex 2 provides that "[o]ne of the most standardized versions of the escalation process is required for all Community Powers to "reject," remove individual Nominating Committee-nominated Board Directors, or recall the entire Board." A rationale is therefore required for all rejection actions, not just rejection actions relating to budgets and plans. In addition (and in contrast) the CCWG Proposal requires a specific rationale for rejection actions relating to budgets and plans because, as required by Annex 4, Paragraph 14 of the CCWG Proposal, "A community decision to reject a budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws; the global public interest; the needs of ICANN stakeholders; financial stability, or other matters of concern to the community. The veto could only concern issues that had been raised in the public consultations conducted before the Board approved the budget or plan." In addition, Annex 4, Paragraph 12 provides that a "budget or strategic/operating plan could only be challenged if there are significant issue(s) brought up in the engagement process that were not addressed prior to approval" and Annex 4, Paragraph 15 provides that an "SO or AC that is a Decisional Participant in the Empowered Community petitioning to reject a budget or strategic/operating plan would be required to circulate a rationale and obtain support for its petition from at least one other Decisional Participant according to the escalation process."]

[Lawyers' Comment: The draft CCWG comment letter does not include a recommendation regarding the last sentence of Draft Bylaws Section 1.2(b)(viii), which ends, "except as provided herein." We suggest that the CCWG recommend that the sentence be modified to refer to Section 27.3 of the Draft Bylaws so that it reads: "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 in Section 27.3."]

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