

ICANN Board Inputs - CCWG WS2 Jurisdiction Report

Summary: The CCWG-Accountability provides a report on the topic of Jurisdiction with the following:

1. Recommendations relating to the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury.¹
2. Recommendations relating to the Choice of Law and Choice of Venue Provisions in ICANN Agreements.

The ICANN Board appreciates the opportunity to provide input to the CCWG WS2 Jurisdiction report. We provide these inputs to the Jurisdiction Subgroup, with a copy to the public comment for the wider community, to support further deliberations by the Subgroup and the CCWG-Accountability.

Several of the recommendations are actionable and implementable, and in some instances, codify current practice by the ICANN organization. There are other recommendations which may prove problematic to fully address, and we provide our input on those for further consideration. This input is not intended to interfere with this work, but rather to provide information to further the Subgroup and CCWG-Accountability's efforts as it finalizes its full report.

Regarding Recommendations concerning OFAC

There are four components to the recommendations regarding OFAC, where ICANN should:

1. Amend the terms and conditions for Registrar Accreditation Application related to OFAC licenses to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). The recommendation also suggests that ICANN should be more "helpful and transparent" in the licensing process and in communications with the applicant.

¹ The CCWG-Accountability noted at fn10: "The Sub-group recognizes that many countries impose sanctions regimes and cooperate in the creation and enforcement of sanctions. As a practical matter, the effect of sanctions other than US sanctions has not been a concern for ICANN operations. Therefore, this report focuses on concerns raised by US sanctions. However, the concerns and recommendations in this report could be considered and applied in the context of other jurisdictions' sanctions regimes if there are effects from those regimes." ICANN organization requests the CCWG-Accountability to confirm that it is not recommending at this time that ICANN take any actions as it relates to sanctions regimes in other countries.

2. Commit to applying for and using best efforts to secure an OFAC license for all gTLD Registry applicants of sanctioned countries if the applicant is otherwise qualified (and is not on the Specially Designated Nationals (SDN list). The same transparency obligations are suggested here.
3. Clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN is also recommended to “explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.”
4. Take steps to pursue one or more OFAC “general licenses” with the U.S. Department of Treasury in connection with DNS-related transactions, beginning with ICANN producing a study of costs, benefits, timeline and details of the process. If it turns out that there are “significant obstacles” to pursuing general licenses, then “ICANN needs to find other ways to remove ‘friction’ from transactions between ICANN and residents of sanctioned countries.”

As ICANN organization has discussed with the group, ICANN has a regular practice of applying for specific licenses for proposed Registrars as well as Registry operators, except those subject to individual sanctions (if they are on the SDN list). These portions of the recommendations are therefore codification of existing practice, can be implemented.

ICANN organization also, as a regular practice, remains in contact with applicants for which a license is sought. The Subgroup provides commentary on the experience of new gTLD applicants for which ICANN needed to apply for an OFAC license, and even suggests that ICANN had not informed an applicant that an OFAC license was being sought. While the statements surrounding ICANN organization’s interaction with applicants may not be correct, we concur with the CCWG-Accountability on the broader issue that ICANN organization should strive for open communication with applicants on potential OFAC issues and license status.

On the recommendation for ICANN to confirm to non-U.S based registrars that OFAC rules do not apply to their operations solely by virtue of a contract with ICANN, the first portion of the recommendation does not appear to be an issue based on ICANN’s understanding. As noted in the recommendation, ICANN is not able to provide legal advice to registrars on which laws actually apply, and any confirmation would have to be provided alongside a note that this should not be considered as legal advice from ICANN. It is a registrar’s obligation to understand the laws to which they are subject and what is necessary to be in Registration Agreements, or what rules govern the registrar’s actions with parties other than ICANN.²

² ICANN organization has not and cannot in the future review Registration Agreements to determine if references to U.S. OFAC rules are appropriate. ICANN also does not have a position on whether the registrars cited in the report should or

For the portion of the recommendation that states “ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships,” it is not clear what other tools the CCWG-Accountability is considering outside of ICANN’s confirmation. Contracted parties already have this obligation. If further tools have already been considered by the CCWG-Accountability, it would be helpful to understand what those are.

Regarding the fourth component, pursuing OFAC “general licenses,” the Board appreciates the recommended approach of an initial step where the ICANN organization study costs, benefits, timeline and details of such a process. The Board also requests that opportunity costs be identified in that study. The study may also be aided by a further problem statement from the community to identify the scope of issues that the CCWG-Accountability believes will be solved through a general license.

During deliberations, details were provided by ICANN organization to the Subgroup regarding some concerns regarding seeking a general license. For example, there is no application process to seek a general license; a general license requires a change in regulation by the U.S. Department of the Treasury, or a change in legislation. As the report notes, the regulatory process may be a significant undertaking, with no guarantee of success from any such lobbying effort or expense.

The second part of that recommendation, regarding “removing ‘friction’” from transactions in the event that there are “significant obstacles” to pursuing general licenses, could be clarified. If the CCWG-Accountability has further recommendations beyond what is laid out in the report, those would be beneficial to state, as there is no basis against which to measure if ICANN can successfully implement this part of the recommendation.

Regarding recommendations relating to the Choice of Law and Choice of Venue Provisions in ICANN Agreements:

The Board agrees with the CCWG-Accountability’s clarification that it cannot make recommendations requiring ICANN to make amendments to the RA or the RAA outside of the contractually required amendment process. The Board looks forward to the broader participation of contracted parties in reacting to this recommendation, to better understand their views on the issue and paths forward.

The Board understands that there has not yet been an impact or feasibility assessment of any of the approaches presented by the CCWG-Accountability and

should not have referenced OFAC regulations, or whether the “cut and paste” was appropriate.

appreciates the broad range of approaches presented. In addition, the recognition that there are some portions of the agreement that are appropriate for uniform treatment is an important concept to provide for some level of predictability in practice and enforcement.

Any potential study of these ideas would need to assess the impact, as these scenarios could raise concerns related to potential loss of predictability in enforcement, or increased enforcement costs.

Acknowledgment

We thank the CCWG-Accountability and the Jurisdiction Subgroup for its work on the draft recommendations and look forward to providing further inputs as appropriate during the finalization of the recommendations by the community.