MEMORANDUM

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| To: | Cross-Community Working Group on Enhancing ICANN Accountability |
| From: | Sidley Austin LLP |
| Re: | Response to Questions Regarding ICANN’s Human Rights Obligations |
| Date: | July 29, 2015 |

**Overview**

This memorandum responds to a question provided to us on July 27, 2015 and is on a general level in keeping with the level of the question. Please note that we make the same qualifications as in our prior memoranda.

# What, if any, obligations towards human rights does ICANN currently have by virtue of its status as a U.S. government contractor that would not otherwise exist?

## ICANN’s obligations as a government contractor are spelled out by federal regulations, the Federal Acquisition Regulation (FAR) and Commerce Acquisition Regulation (CAR), as incorporated into the current IANA Functions Contract.  CAR does not contain any specific provisions that are relevant here. FAR has just a few provisions that impose obligations with respect to human rights (the civil, political and social rights of individuals) that are incorporated into ICANN’s current contract. These mainly involve nondiscrimination obligations that exist in parallel, though not necessarily in identical form, for corporations operating in the U.S. that are not government contractors.

## The FAR includes a range of provisions governing the contractual relationship, and contains various provisions that implement social policies.  These include such policies as discouraging texting while driving and encouraging two-sided photocopying.  However, only a handful affect human rights and are incorporated into the IANA Functions Contract:

### FAR 52.222-21 Prohibition Of Segregated Facilities (Feb 1999) at page 52 of the contract:  The Contractor agrees that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained.

### FAR 52.222-26 Equal Opportunity (Mar 2007) at page 52 of the contract:  The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin, except for work performed outside the United States by employees who were not recruited within the United States.  The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

### FAR 52.222.35 Equal Opportunity For Special Disabled Veterans, Veterans Of The Vietnam Era, And Other Eligible Veterans (Sep 2006) at page 53 of the contract:  The Contractor shall abide by the requirements of the equal opportunity clause at 41 CFR 60-300.5(a), as of March 24, 2014, which prohibits discrimination against qualified protected veterans, and requires affirmative action by the Contractor to employ and advance in employment qualified protected veterans.

### FAR 52.222-36 Affirmative Action For Workers With Disabilities (Jun 1998) at page 53 of the contract: The Contractor shall abide by the requirements of the equal opportunity clause at 41 CFR 60.741.5(a), as of March 24, 2014, which prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by the Contractor to employ and advance in employment qualified individuals with disabilities.

### FAR 52.222-37 Employment Reports On Special Disabled Veterans, Veterans Of The Vietnam Era, And Other Eligible Veterans (Sep 2006) at page 53 of the contract:  The Contractor shall report at least annually, as required by the Secretary of Labor, both the total number of employees in the contractor's workforce, by job category and hiring location, who are disabled veterans, other protected veterans (i.e., active duty wartime or campaign badge veterans), Armed Forces service medal veterans, and recently separated veterans and the total number of new employees hired during the same period, and of the total, the number of disabled veterans, other protected veterans (i.e., active duty wartime or campaign badge veterans), Armed Forces service medal veterans, and recently separated veterans.

### FAR 52.222-50 Combating Trafficking In Persons (Feb 2009) at page 53 of the contract:  The United States Government has adopted a policy prohibiting trafficking in persons including the trafficking-related activities of this clause. Contractors, contractor employees, and their agents shall not (1) Engage in severe forms of trafficking in persons during the period of performance of the contract; (2) Procure commercial sex acts during the period of performance of the contract; (3) Use forced labor in the performance of the contract; (4) Destroy, conceal, confiscate, or otherwise deny access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority; (5)(i) Use misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant cost to be charged to the employee, and, if applicable, the hazardous nature of the work; [and] (ii) Use recruiters that do not comply with local labor laws of the country in which the recruiting takes place.

### FAR 52.212-3(I) (Offeror Representations And Certifications – Certification Regarding Knowledge Of Child Labor For Listed End Products – Executive Order 13126) in Volume II of ICANN’s technical and cost proposal: The Executive Order is intended to ensure that U.S. federal agencies do not procure goods made by forced or indentured child labor. That goal is consistent with current laws that, among other things, outlaw the importation of products made by forced or indentured child labor.

### The FAR operates to reaffirm federal government support for protections under federal statutes such Title VII of the Civil Rights Act of 1964  (prohibiting discrimination on the basis of race, color, national origin, sex or religion), and the Americans with Disabilities Act (prohibiting discrimination against people with disabilities in employment, transportation, public accommodation, communications and governmental activities) and add to them in specific respects.  Thus, the prohibitions against segregation and discrimination add “sexual orientation’ and “gender identity” which are not included in the federal statute in the protected categories.

### As a general matter, in the absence of its federal contract, ICANN’s obligations for human rights will remain generally consistent although there will be some variation in particulars. This is because the statutes reinforced in the FAR make up part of the body of federal and state laws regulations in the United States that protect and otherwise relate to human rights. In addition to the Civil Rights Act and Americans with Disabilities Act, such statutes include:

### the Fair Labor Standards Act (establishing a minimum wage and prohibiting the employment and abuse of child workers)

### the Equal Pay Act (requiring that men and women in the same workplace be given equal pay for equal work)

### the Occupational Safety and Health Act (ensuring workers a place of employment free from recognized hazards to safety and health)

### the Family and Medical Leave Act (providing certain employees with job-protected leave to balance work and family responsibilities)

### the Labor-Management Relations Act (prohibiting unfair labor practices, permitting collective bargaining and regulating industrial action)

### the Alien Tort Claims Act (permitting U.S. courts to hear cases brought by foreign citizens for tortious conduct committed outside the U.S., which may include human rights violations)

### equal opportunity laws administered by the Equal Employment Opportunity Commission

### environmental laws administered by the Environmental Protection Agency

### laws prohibiting human trafficking (such as the Victims of Trafficking and Violence Protection Act of 2000 and its subsequent reauthorizations).

## Many states and local governments, including California, have similar laws and regulations that often impose even stricter standards. (We have not undertaken to review all federal, California, or other laws affecting individual rights that would apply to a post-transition ICANN.)

## These federal, state and local laws and regulations are the primary vehicle for the protection of individuals and human rights in the U.S. legal system. The United States is also a party to human rights treaties:  the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, and two optional protocols to the Convention on the Rights of the Child.   Such ratified treaties and other international agreements do not apply directly to corporations, but key aspects are implemented through the types of laws and regulations outlined above.

## Note that federal and state law and regulation in the U.S. highly encourages corporations to adopt internal compliance programs and related internal controls, including education and codes of ethical conduct, to ensure not only compliance with law and regulation, but a higher standard of corporate responsibility efforts.  For example, the U.S. Federal Sentencing Guidelines make clear that federal judges may consider the efforts of companies to imbue a high standard of ethics and compliance throughout a corporation as a mitigating factor in the penalty stage should actions by one or more rogue employees cause the corporation to violate the law.