

Staff Report of Public Comment Proceeding

Draft New ICANN Bylaws															
Publication Date:	25 May 2016														
Prepared By:	ICANN Staff														
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Section I: General Overview and Next Steps															
<p>Now that the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) proposals have been transmitted to the National Telecommunications and Information Agency (NTIA), one of the key implementation planning items is to amend the ICANN Bylaws to reflect the recommendations in those Proposals. The proposed draft of the New ICANN Bylaws was developed collaboratively by the ICANN legal team and the independent counsel hired to advise the CCWG-Accountability and the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship). In developing the Draft New ICANN Bylaws, the attorneys consulted a Bylaws Coordination Group composed of both community and Board members, as well as with leadership from the CWG-Stewardship and the CCWG-Accountability.</p> <p>Both the independent counsel to the community groups and ICANN's General Counsel have confirmed that the Draft New ICANN Bylaws are consistent with the community proposals relating to the IANA Stewardship Transition.</p> <p>These proposed draft Bylaws were out for a 30-day public comment from 21 April – 21 May to allow any interested party to review and provide feedback. This timeline allows for comments to be analyzed and incorporated in time for a tentative 27 May adoption of the Bylaws by the ICANN Board.</p> <p>NTIA has stated that it needs to see that changes to the Bylaws have been adopted sufficient to implement the Transition Proposals before NTIA can complete its review of the Transition Proposals. This public comment period was designed to meet that deadline.</p>															
Section II: Contributors															
<p><i>At the time this report was prepared, a total of 31 community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p> <p><u>Organizations and Groups:</u></p>															
Name	Submitted by	Initials													
Internet Architecture Board	Andrew Sullivan	IAB													

Cross Community Working Group on Enhancing ICANN Accountability	Thomas Rickert, Leon Felipe Sanchez, Mathieu Weill	CCWG-Accountability
IANA Stewardship Transition Coordination Group	Alissa Cooper	ICG
Address Supporting Organization	Oscar Robles	ASO
Registry Stakeholder Group	Stephane Van Gelder	RySG
Council of European National Top-Level Domain Registries	Peter Van Roste	CENTR
Internet Service Providers and Connectivity Providers	Olivier Muron	ISPCP
Google Inc.	Hibah Hussain	
Government of Peru	Milagros Castañón	
Dot Registry LLC	Shaul Jolles	
Communications Regulatory Commission of Colombia	Ricardo Pedraza-Barrios	CRC
U.S Council for International Business	Barbara P. Wanner	USCIB
International Trademark Association	Etienne Sanz de Acedo	INTA
Italian Government	Rita Forisi	
Business Constituency	Steve DelBianco	BC
Non Commercial Stakeholder Group	Milton Mueller	NCSG
Institute of Internet Governance Research	Liyun HAN	IGR
Centre for Internet and Society	Pranesh Prakash, Vidushi Marda, Udbhav Tiwari and Swati Muthukumar	
DotMusic	Constantine Roussos	
Centre for Internet and Society	Pranesh Prakash, Vidushi Marda, Udbhav Tiwari and Swati Muthukumar	CIS
Karsten Manufacturing Corporation and Ping Registry Provider, Inc.	Dawn Grove	Karsten
Intellectual Property Constituency	Gregory S. Shatan	IPC
At-Large Advisory Committee	Alan Greenberg	ALAC

Individuals:

Name	Affiliation (if provided)	Initials
Chris LaHatte	ICANN Ombudsman	
Holly Raiche		
Lincoln Lui		
Giuseppe Deluca		
Klaus Stoll		
Lauren Allison		
Alan Greenberg		
Liu Yue		

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

As part of the comprehensive review of the comments, a chart is provided that sets out all of the comments, divides them into relevant subparts, and provides a discussion of whether the comment resulted in a change to the Bylaws and if not, reasons why that comment could not be taken on.

In general, most of the commenters were very supportive of the work performed on the Bylaws and noted that the draft New Bylaws remained consistent with the proposals.

One of the areas of highest attention was 1.1(d)(ii), or the “grandfathering” sections, where the drafters included Bylaws terms that would keep the contracts necessary to perform the IANA functions, as well as the Five Year Strategic and Operating Plans already in force, from being subject to challenge on the grounds that they exceed the mission. These specific items had not been included in the CCWG-Accountability Work Stream 1 Report, and multiple commenters noted their concerns with extended the “grandfathering” to agreements that had not yet been entered into. (IAB, ICG, CIS, CENTR, ISPCP, Google, USCIB, INTA, BC, NCSG, IPC, CCWG-Accountability). Some of the commenters also questioned the inclusion of grandfathering any agreements (even Registry and Registrar contracts) due to concerns that contracted parties might be deprived of using accountability mechanisms.

Another topic that generated a lot of comments was on the timing of the reviews that are being brought into the Bylaws from the Affirmation of Commitments. Multiple commenters provided a range of opinion on the timing of those reviews, from the RySG (supported by the Registrar Stakeholder Group) urging consideration of volunteer capacity in the timing of the reviews, to the BC, USCIB and the IPC urging the reviews to begin as quickly as possible. Holly Raiche and the ALAC (through Alan Greenberg) each raised the issue of the interaction of the WHOIS/Registration Directory Services Review with the ongoing policy work.

Upon the posting of the New Bylaws for public comment, concerns were raised about how the drafters included the new obligation for ICANN to respect human rights, and the path to approve a recommended Framework for Interpretation for that obligation in line with ICANN’s limited technical mission. The commenters primarily called for return to language closer to the language used in the report. (CCWG-Accountability, CIS, USCIB, INTA, BC, NCSG). The Government of Peru raised additional questions on the meaning and effectiveness of the work on human rights in light of international norms.

Many commenters proposed revisions on the Independent Review Process (IRP), including extensive line edits proposed by INTA, IPC, dotMusic, and dotRegistry that are all evaluated individually in the chart. Comments discussed a range of issues, including: evaluating conflict of interest of IRP panelists; consideration of how the IRP Rules will be formed; panelist selection methods (including the use of a standing panel and selecting individual panels where necessary); standard of review; cost shifting provisions; the scope of the IRP and a variety of other issues.

The Reconsideration Process was also discussed in multiple comments, including the scope of the Reconsideration Process and the role of the Ombudsman in the Reconsideration process, as well as clarifications on the process. Comments were also received on the scope of the transcripts and records that will be made available at the request of the party requesting reconsideration. Commenters include IPC, INTA, dotMusic, dotRegistry, and the Chris LaHatte in his capacity as the ICANN Ombudsman.

Three commenters highlighted the interaction of trademark issues with the transition proposals, and highlighted their concerns about how trademark rights are upheld in the proposals and the Bylaws. (IPC, INTA, Karsten)

A few commenters discussed the issue of jurisdiction, and highlighting that jurisdiction will continue to be discussed in the Cross-Community Working Group on Enhancing ICANN Accountability’s Work

Stream 2, and confirming that the Bylaws would not include terms that would preclude consideration of those WS2 outcomes. (CIS, Liu Yue, Government of Peru)

Many of the comments proposed specific line edits to the Bylaws, and each of those are reflected in the chart.

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

The Bylaws comment forum was primarily seeking inputs on whether the Bylaws remained true to the community-developed transition proposals, and whether further changes were needed to achieve consistency. The vast majority of commenters noted general support for the work of the Bylaws drafting team. While generally supportive, the commenters also raised key issues that resulted in changes to the Bylaws in order to directly address or respond to those comments. While these changes are important and improve the document and to more closely track the proposal, the comments did not require any large redrafting efforts or substantive changes that would warrant further comment.

Please note that there are three documents posted with this report, accessible from the Public Comment page at <https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>:

1. 25 May 2016 Revised Bylaws to Address Comments (Redline from 20 April 2016 version)
2. 25 May 2016 Revised Bylaws to Address Comments (Clean)
3. 25 May 2016 Chart of Detailed ICANN Analysis of Submitted Comments

The referenced chart provides substantial detail on how each of the comments were considered. Below are some of the highlighted issues.

Grandfathering Agreements

On the “grandfathering” issue, the provisions at issue were agreed among the Bylaws drafters to be an important mechanism to insulate the core provision of the IANA functions from being challenged as outside of ICANN’s mission. The community concern raised over these items necessitates that they be removed from the grandfathering provision. These were suggested to provide stability to the relationships between ICANN and the operational communities for the continued performance of the IANA functions in line with the full transition proposals.

Much of the community concern raised is about the agreements and the unfinalized nature of the agreements. As a result, the items that were included in the draft Bylaws at 1.1(d)(ii)(B)-(D) are removed.

This is a separate issue from the existing ICANN Five-Year Strategic Plan, which was approved in 2014 and is in force. The CCWG-Accountability confirmed that the “accountability improvements set out [] are not designed to change ICANN’s multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN’s day-to-day operations.” (Summary, Paragraph 2). An important part of continuing ICANN’s day-to-day operations is to make sure that the foundation for those operations – the existing Strategic Plan – should continue on course, without risk of an immediate mission-based challenge. The ICANN community was deeply involved in the process for developing the Strategic Plan, and will be even more so in future iterations. Because of the importance of ensuring operational stability for ICANN at the time of transition, the five-year Strategic Plan remains within the grandfathering provision. However, to alleviate any concern that there is an attempt to use this provision to bring in new activities, the Bylaw reference will be modified to the plan

approved as of 10 March 2016, the date the proposals were approved and transmitted to the NTIA. Renewals or future iterations of the Strategic Plan are not included in the grandfathering provision.

The comments that suggested that all of the grandfathering provisions were inappropriate and should not be incorporated did not result in any changes to the Bylaws. The CCWG-Accountability Work Stream 1 Report required that some grandfathering provisions be incorporated.

Timing of Reviews

The timing issues raised were very important for consideration to reach a collective solution for the issue that the required Bylaws timing of the WHOIS/RDS review, and potentially the SSR review, could place ICANN in violation of the Bylaws at the moment the Bylaws come into effect. Though there were opposing views on the need to initiate the WHOIS/RDS review at the anticipated late 2016 start date, or to postpone review either for policy work to proceed or to account for volunteer capacity, ICANN has determined that the most appropriate resolution of this issue is to proceed with the agreed-upon timing for each of the reviews. To that end, small modifications to the Bylaws will be inserted that require the reviews to start promptly while noting that there is no Bylaws violation for the reviews not being in place at the time the Bylaws come into effect.

Human Rights and the Framework of Interpretation

The language has been modified to address the community concern over an unintended modification to how CCWG-Accountability Chartering Organizations would approve a Human Rights Framework of Interpretation. Similarly, the community comment on the timing of when the obligation to respect human rights would become operative led to some modification.

Independent Review Process

There were small modifications made to this section in response to comments, mostly for clarification. Many of the comments discussed items that reserved for the IRP Implementation Oversight Team, including definition of rules and conflict of interest standards for the panelists. Revisions were not made to address these comments, as the IRP-IOT work will continue. Comments that suggested expansion of the scope of the IRP, or removal of the Standing Panel, or other variances that are not supported in the CCWG-Accountability Work Stream 1 Report were similarly not taken on.

Reconsideration Process

Small modifications were made to this section in response to comments, mostly for clarification. The comments that suggested modification to the scope of the Reconsideration Process or removal of the role of the Ombudsman in the Reconsideration Process are not supported in the proposals and were not taken on.

Conclusion

ICANN thanks all contributors for participating in the comment process. While not all comments resulted in changes to the Bylaws, many of the comments helped make the new Bylaws clearer and more aligned with the proposals and the needs of the community. There are still many items of work that will need to be completed in the Work Stream 2 efforts and the ongoing implementation work. For all commenters who raised issues that are more appropriate to address in that Work Stream 2 effort, ICANN encourages the commenters to participate in the those activities.

The Bylaws as modified will be provided to the Bylaws Coordination Group and the ICANN Board for further consideration.