



# Comment on Draft New ICANN Bylaws

Status: FINAL

Version: 3

21-May-2016

**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

## General Comment on Draft New Bylaws

The Business Constituency (BC) supported the final proposals by the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

We generally believe that the draft new Bylaws published on 20-Apr-2016 faithfully reflect the final proposals, subject to several specific comments described below.

## Specific Comments on Draft New Bylaws

1. Draft Bylaws section 1.1 (d), on ‘grandfathering’ current Registry and Registrar agreements, so that they would not be challenged on the basis of exceeding ICANN’s more explicitly limited mission in the new Bylaws.

Text from new 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”):*

(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], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;*

*(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];*

*(B) any agreement, letter of intent, memorandum of understanding, agreement in principle, or other similar agreement between ICANN and the Address Supporting Organization (“ASO”), the Number Resource Organization (“NRO”), the IETF, or one or more RIRs in force on [1 October 2016];*

*(C) any agreement, letter of intent, memorandum of understanding, agreement in principle, or other similar agreement between ICANN and a third party identified by ICANN relating to the root zone maintainer function (the “Root Zone Maintainer”), in force on [1 October 2016];*

*(D) the IANA Naming Function Contract between ICANN and PTI effective [1 October 2016];*

*(E) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on [1 October 2016]; and*

*(F) any renewals of agreements described in subsections (A)-(D) pursuant to their terms and conditions for renewal.*

**BC comment:** the agreements listed in B through D (above) were not part of the CCWG final report, so they should not be included in this Bylaws section.

2. Draft Bylaws Section 1.2(b)(viii), regarding enforcement of a Framework of Interpretation for Human Rights, a Work Stream 2 project described in Section 27.3 (a).

Text from new Bylaws:

(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. 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 herein.

**BC comment:** The CCWG Final Report called for a Work Stream 2 project that defines how ICANN will “respect” human rights. However, the phrase “except as provided herein” at the end of the above text creates the possibility that the *Framework* might give rise to IRP enforcement actions against ICANN based on selected human rights.

To avoid ambiguity about enforceable rights, we recommend replacing the text with the following:

*“(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.”*

3. Draft Bylaws Section 4.6 (c) (v), regarding timing of the Security, Stability, and Resiliency (SSR) review required under the Affirmation of Commitments, which is now to be brought into ICANN Bylaws.

Text from new Bylaws:

*The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened.*

**BC Comment:** The previous SSR review was convened in 2010, so a five-year interval would require the next review to begin by Oct-2015. Some CCWG members are concerned that the above text creates a new problem since the SSR review would be at least one year late at the time the Bylaws are approved. Those concerned are suggesting revisions to the draft Bylaws to avoid a situation where ICANN is immediately failing to honor its new Bylaws.

The SSR review is already late, relative to the requirements in the Affirmation of Commitments. Consequently, we are not troubled by a new Bylaw that also requires ICANN to begin the next SSR review as soon as possible.

We request that ICANN follow through on the Board-approved 2016 start date for SSR-2 review.<sup>1</sup> We expect SSR-2 to assess ICANN's implementation of SSR-1, including the extent to which ICANN is prepared to meet future challenges and threats to the security, stability, and resiliency of the Internet DNS, consistent with ICANN's limited technical mission.

4. Draft Bylaws Section 4.6 (e) (v), regarding timing of the Whois/Directory Service review required under the Affirmation of Commitments, which is now to be brought into ICANN Bylaws.

Text from new 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.*

**BC Comment:** The previous Whois review was convened in Oct-2010, so a five-year interval would require the next review to begin by Oct-2015. Some CCWG members are concerned that the above text creates a new problem since the Whois/Directory Service review would be at least one year late at the time the Bylaws are approved. Those concerned are suggesting revisions to the draft Bylaws to avoid a situation where ICANN is immediately failing to honor its new Bylaws.

The Whois review is already late, relative to the requirements in the Affirmation of Commitments. Consequently, we are not troubled by a new Bylaw that also requires ICANN to begin the next Whois/Directory Service review as soon as possible.

We request that ICANN follow through on the Board-approved 2016 start date for Whois-2 review.<sup>2</sup> We expect Whois-2 to assess ICANN's implementation of Whois-1 and current Whois policy. We recognize that there are policy efforts underway to develop a next generation registration directory service. ICANN's Board has repeatedly reinforced the notion that the effort to replace Whois complements, and runs in parallel with, ICANN's obligation to fully enforce existing consensus policy and contractual conditions relating to Whois.<sup>3</sup>

5. Draft Bylaws Section 4.6 (b) (vi), regarding timing of the Accountability and Transparency Review (ATRT) required under the Affirmation of Commitments, which is now to be brought into ICANN Bylaws.

*(vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.*

**BC comment:** The previous ATRT was convened in Feb-2013, so ATRT-3 could begin as late as Feb-2018. The BC believes that we should take advantage of the extra year (2017) to address the Work Stream 2 (WS2) accountability and transparency items from CCWG's final proposal, before starting ATRT-3.

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<sup>1</sup> ICANN Board resolution on Proposed Schedule and Process / Operational Improvements for AoC and Organizational Reviews: <https://www.icann.org/resources/board-material/resolutions-2015-07-28-en#2.c>

<sup>2</sup> ICANN Board resolution on Proposed Schedule and Process / Operational Improvements for AoC and Organizational Reviews: <https://www.icann.org/resources/board-material/resolutions-2015-07-28-en#2.c>

<sup>3</sup> ICANN Board resolution on Composition and Scope of the Board Working Group on Registration Data Directory Services (BWG-RDS), at <https://www.icann.org/resources/board-material/resolutions-2015-07-28-en#1.d>

The new Bylaws for Board adoption of WS2 recommendations give the community more leverage than the Bylaws process for adoption of ATRT recommendations. So it may be prudent to address difficult accountability and transparency enhancements in WS2 instead of in ATRT-3.

6. Draft Bylaws Sections 4.3(a)(i) and 4.6 ( c ) ( iii ), regarding the phrase “limited technical” appearing before “Mission” in only 2 instances in the entire Bylaws.

*4.3(a)(i) (Ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.*

and

*4.6 ( c ) ( iii ) The SSR Review Team shall also assess the extent to which ICANN has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS, and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS, consistent with ICANN’s limited technical Mission.*

**BC Comment:** Both of the above paragraphs match CCWG Final report text in using the phrase “limited technical” before the term “Mission”. However, these are the only 2 instances in the draft Bylaws where that qualifier is used. Thirty other instances of the term “Mission” have no such modifier.

No modifier is needed because In Section 1 of the draft Bylaws, ICANN’s Mission is described with explicit limitations to constrain the scope of ICANN activities.

It is therefore inconsistent and unnecessary to add “limited technical” before “Mission” in Sections 4.3(a)(i) and 4.6 ( c ) ( iii ), so we request that “limited technical” be deleted.

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This comment was drafted by Steve DelBianco, Denise Michel, and Chris Wilson.

This document was approved in accordance with the BC Charter.