Re: Policy v. Implementation
Date: February 21, 2013

Dear ICANN,

As a business, a consulting firm retained by major corporations, and a gTLD applicant, FairWinds Partners, LLC ("FairWinds") appreciates the opportunity to participate in this comment period, which seeks to draw a more distinct line between what should be considered policy and what can be considered a matter of implementation.

We agree with the framework's assertion that it may not be possible to draw a "bright line rule as to what is policy or what is implementation." We have seen how varied past situations have been and understand that the very nature of online growth and innovation means that we cannot yet imagine, let alone prepare for, every situation that ICANN will have to address.

However, clarifying the roles of ICANN's stakeholder groups with regard to policy and implementation is a critical undertaking, especially as the organization takes on greater complexity with the New gTLD Program. With the New gTLD Program well underway, ICANN will continue to see an influx of new stakeholders who are eager to participate in the multi-stakeholder model. At the same time, existing stakeholders who may have taken a less active role in ICANN until now might seek to increase their level of engagement in the organization. Bringing clarity to roles, processes, and opportunities for engagement and impact is not only necessary to solve existing confusion, but also to properly welcome and encourage the new expertise and talent that are poised to enter into the ICANN community.

Ensuring consistency, transparency, and respect throughout the processes of policy development, implementation, and enforcement will help reduce the confusion, ill feelings, and frustration that are bound to arise in an organization with so many diverse voices.

FairWinds also generally agrees with the starting premise that "a proposed change is treated as an implementation change unless the objective is to create new obligations on certain parties (in which case a PDP may be appropriate)."

Our feedback on specific points of the framework is as follows:

*1. Should the level of implementation that should be part of the actual PDP be detailed?*
  • Clarifications where possible are helpful, but, as mentioned above, there are a wide variety of situations that bring with them special requirements and limitations. We recognize, therefore, that information about implementation cannot be detailed at the

outset of the PDP in some cases, but any guidance that can be provided will help set expectations, clarify intentions, and reduce the likelihood of confusion down the road.

*Should it be mandatory to form a Community Implementation Review Team whose task it is to provide guidance and/or clarification as needed to ICANN Staff as they develop the implementation plan?*

- While FairWinds does not deem it appropriate to mandate the creation of a Community Implementation Review Team, we do think this is generally a good idea that should be explored further. This group would represent the community and provide the guidance that ICANN needs and welcomes in developing implementation plans.

*2. What guidance should there be on the level of particularity that PDP recommendations should embody and how/where should that be specified?*

- Similar to our response for question #1, FairWinds believes that, where possible, the PDP recommendations should provide guidance on how discussions about implementation should proceed. Such guidance should, of course, recognize the need for change if there is significant new information that was previously not considered at the PDP stage; however, to the extent possible, the following would provide helpful guidance and properly set expectations: 1) explicitly stating the steps that the PDP anticipates being needed for implementation and 2) how the impacted community may react to the PDP and its implementation details, including any concerns. Having this information from the beginning will help make discussions about implementation more productive.

*3. There should be recognition of the potential for overlap in responsibilities between an SO/AC and ICANN, such as when an issue can be the subject of a PDP, where it still may be appropriate for Staff or the Board to act. In ICANN's multi-stakeholder, bottom-up policy development structures, the inability to reach consensus on key issues could produce stalemates that by default preserve the "status quo" instead of enabling badly needed changes. Examples of this might be the vertical integration issue or the changes to the RAA. In addition, there may be instances where competing "policy advice" is given by different SO/AC. How is the Board expected to handle such situations?*

- FairWinds urges ICANN to foster more cross-constituency collaboration by creating more opportunities for stakeholders to gather to discuss, and hopefully resolve, their differences. However, even with this added encouragement to collaborate, there will always be situations where there is a stalemate between two or more stakeholder groups. While a stalemate is not necessarily a bad thing, stalemates can stymie development and innovation. Excessively long stalemates should be avoided when possible to be able to move forward. The community should work toward compromise to promote efficiency and a good use of time and resources. We would

like to explore a situation where a defined process can be used to help reach compromise and/or make decisions in spite of disaccord after a certain length of time.

4. *One distinction to consider between formal "P"olicies and little "p"olicies may be the expected longevity of the policy. For example, formal "P"olicies under the new GNSO PDP can only be modified after implementation by undergoing another formal PDP. This results in the formal "P"olicy becoming everlasting, and long lasting. In contrast, could a little "p"olicy adopted to meet the needs of a specific circumstance evolve based upon changing circumstances or experience with the effectiveness of the little "p"olicy?*

- It seems reasonable for ICANN to have ways to adjust "p"olicies quickly, as the Internet itself is a quickly evolving space that requires equally nimble policy to keep pace. Even where a formal PDP is not feasible, ICANN should have a way of consulting the community in an expedited fashion in advance of making little "p"olicy changes that are adhered to consistently and transparently. Notwithstanding, these little "p"olicy changes should only be adopted when necessary to adjust to changing circumstances, and be limited in scope. Something that aids the distinction between what should be able to change quickly ("p"olicies) and what requires a more substantial process to change ("P"olicies), is an up-to-date, accessible list of all "P"olicies. Some of these already exists, for example, in a list of "consensus policies" (http://www.icann.org/en/resources/registrars/consensus-policies).  Also, ICANN should use criteria to distinguish "P"olicies from "p"olicies that are clear, objective, and publicly known.

Finally, FairWinds generally supports the possible short-term improvements listed in the draft framework insofar as FairWinds supports consistency, clarity, and transparency on the part of the ICANN staff and all SOs and ACs. Any guidance, rationale, and increase in clear communication will help foster understanding and participation within the greater community.

Kind regards,

FairWinds Partners, LLC
Washington, DC