



September 14, 2014

Via Electronic Mail

comments-bylaws-amend-gac-advice-15aug14@icann.org

Re: Public Comment on Proposed Bylaws Changes Regarding Consideration of GAC Advice

Google appreciates the opportunity to comment on the proposed bylaw revisions regarding the ICANN Board's treatment of Government Advisory Committee (GAC) advice. The proposed change would require two-thirds of the Board to agree when it decides not to follow the advice of the GAC.

We appreciate that the GAC puts significant time and effort into producing its advice. We also recognize that the GAC plays an important role in the multistakeholder model and that members of the GAC face a difficult task in coming to consensus on challenging issues.

Nevertheless, we have several specific concerns with the proposed change to the bylaws which we outline below.

The Proposed Change Will Not Increase Accountability and Transparency

We believe that the ICANN community will benefit from a streamlined and clearly articulated process for the ICANN Board to respond to GAC advice and to work toward mutually acceptable resolutions to any differences in a predictable, timely, and efficient manner. Further, we support the work undertaken to improve the quality of interactions between the GAC and the ICANN Board, and in particular, we support the goal of developing a more formal, transparent, and predictable consultation process for interactions between the Board and the GAC.

However, if the proposed goal of the proposed changes to the bylaws is to increase transparency and accountability around the Board's deliberative processes, the proposed change does not accomplish this goal.

The bylaws already require the Board to explain its reasons for disregarding GAC advice. They state:

In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. ... If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.¹

Thus, to the extent there are concerns that the Board is insufficiently transparent in circumstances where it does not accept GAC advice, those concerns reflect the possibility that the Board has not adhered to its *existing* bylaws. Addressing this concern requires renewed compliance with the existing bylaws, *not* a change to the bylaws.

The Proposed Change Does Not Encourage Government Participation in the Development of ICANN Policy

GAC advice often comes at the very end of the policymaking process, when it is extremely difficult to make changes to the policies or programs, which have been developed in a bottom-up fashion by the various stakeholder groups within ICANN. By making it more difficult for the Board to reject GAC advice, the proposed bylaws change would further cement the current arrangement between the GAC and the other stakeholder groups, wherein the community develops policy largely without direct governmental stakeholder participation and the GAC weighs in at the end. This proposed change disincentivizes governments from contributing to policy development via the Policy Development Process by strengthening their ability to veto the end result of that process. Rather, the community should be encouraging a working relationship between the GAC, the Board, and the other stakeholder groups within ICANN. In particular, GAC members and other governmental stakeholders should be encouraged to participate in various working groups and help develop policy alongside other stakeholders at all stages of the policy development process. Getting governmental input throughout the entire lifecycle of the policy development process is likely to streamline GAC advice and limit the number of times in which the Board disagrees with GAC advice.

The Proposed Change Is Not Limited to GAC Consensus Advice

Currently, GAC advice to the ICANN Board is predicated on the GAC's ability to reach consensus among its members. As established in Principle 47 of the GAC's Operating Principles:

¹ <https://www.icann.org/en/system/files/files/proposed-revisions-gac-advice-15aug14-en.pdf>

The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.²

Commitment to consensus is a fundamental element of the ICANN multistakeholder model. Google believes that the bylaws change should only be adopted if its application is limited to GAC advice that is adopted with the full consensus of its members. To the extent that the GAC were to issue non-consensus advice, such advice would have limited weight and the Board should not be subject to a higher threshold in rejecting it.

Conclusion

We support efforts to clarify, streamline, and formalize the manner in which the ICANN Board considers and responds to GAC Advice. However, the proposed bylaws change has significant flaws and does not address the key problem it aims to solve -- increasing transparency and accountability in Board-GAC interactions.

Sincerely,



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Google Inc.

² <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>