

Public Comment on the Amended and Restated Articles of Incorporation of the Internet Corporation for Assigned Names and Numbers (ICANN)

This submission reflects the comments of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (Heritage) to the Draft Restated Articles of Incorporation. Heritage is a research and educational institution – a “think tank” – focused on U.S. domestic and international public policy and is a member of the Non-Commercial Users Constituency of the Generic Names Supporting Organization.

To begin, we think that the current language in Article 2 regarding ICANN’s incorporation and headquarters is ambiguous and should be made clear. We suggest replacing “organized” with “incorporated” in the second sentence and adding an additional sentence affirming the current location of the headquarters of ICANN.

In addition, we are concerned that the phrase “as such global public interest may be determined from time to time by the multistakeholder community through an inclusive bottom-up multistakeholder community process” leaves open the possibility that the global public interest could sometimes be determined through other processes. We suggest replacing “may” with “shall”.

Our suggested amended text would read:

2. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is **incorporated** under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. **The Corporation is headquartered in and has its principal office in Los Angeles, California.** The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 4 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet, as such global public interest **shall** be determined from time to time by the multistakeholder community through an inclusive bottom-up multistakeholder community process, by carrying out the mission set forth in the bylaws of the Corporation (“Bylaws”).

This amended phrasing makes clear to both lawyers and non-lawyers the legal jurisdiction under which ICANN is incorporated, clarifies the issue of where ICANN is headquartered, and

reaffirms that the global public interest for ICANN's purposes is to be determined through a bottom-up multistakeholder community process.

We think these clarifications would help “maintain the security, stability, and resiliency of the Internet DNS” and “meet the needs and expectation of the global customers and partners of the IANA services” by providing greater certainty regarding ICANN's legal jurisdiction.¹

Importantly, they would also ensure that future changes of jurisdiction are not taken lightly. ICANN recently reported that the total cost of the development of the transition proposal from July 2014 to March 2016 has been \$23.3 million.² A significant amount of this expense was for legal advice to ensure that the post-transition ICANN structure and bylaws would be consistent with U.S. and California law. A change in jurisdiction or headquarters could require significant additional expense and time to again amend the bylaws to bring ICANN's structure and governance model into compliance with differing laws.

We acknowledge that the matter of jurisdiction has been raised in CWG-Stewardship and CCWG-Accountability discussions and is scheduled for further discussion in Work Stream 2. The changes to Article 2 suggested above would not preclude a change of jurisdiction of incorporation or relocation of ICANN's headquarters if Work Stream 2 so decides. The more explicit wording, however, would ensure that these changes will be subject to due scrutiny by requiring approval of the Empowered Community under the new bylaws because they would require an amendment to the Articles of Incorporation.

In conclusion, we also note that Article 5(e)³ – which, based on our reading of the IRS Code reference, was included in the original Articles of Incorporation to ensure ICANN's compliance with specified governance standards⁴ -- was deleted from the text of the revised Articles. We

¹ NTIA, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” March 14, 2014, <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

² ICANN, “Jul 2014– Mar 2016 IANA Stewardship Transition Cost,” <https://www.icann.org/en/system/files/files/iana-stewardship-costs-summary-14jun16-en.pdf>.

³ Article 5(e) stated “In no event shall the Corporation be controlled directly or indirectly by one or more “disqualified persons” (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.”

⁴ “1. The term “disqualified person” bears importantly upon the treatment and status of exempt organizations as private foundations in several situations. Whether a transaction between a private foundation and another party is a self-dealing act under IRC 4941 depends upon whether the other party is a disqualified person with respect to the foundation. In determining whether a private foundation has excess business holdings under IRC 4943 with respect to a business interest, the holdings of the foundation's disqualified persons must be taken into account. The presence of contributions and patronage from disqualified persons is a factor that must be taken into account in deciding which IRC 501(c)(3) and IRC 4947(a)(1) organizations are not private foundations; this is because IRC 509(a)(2) employs a test requiring a certain level of support from persons other than disqualified persons. In like manner, the presence of control by disqualified persons is a matter that must be taken into account since IRC 509(a)(3) employs a test precluding control of an IRC 509(a)(3) organization by certain disqualified persons.

2. There are five general categories and two special purpose categories of disqualified persons as shown in the following table:

- Substantial contributor IRM 7.27.20.2
- Foundation manager IRM 7.27.20.3

note that no explanation was provided for the deletion nor was the deletion requested by the CWG-Stewardship or the CCWG-Accountability. We believe that the Board should, at a minimum, provide:

- An explanation of why the text was deleted;
- A summary of why the text was included in the original Articles of Incorporation, i.e. what was the purpose of the language and what potential issue was it designed to address; and
- An analysis of why that issue is no longer relevant or, if the IRS Code reference was erroneous, identify the correct IRS Code reference(s) that should be included in the amended Articles.

Thank you for your consideration of these comments.

—Brett D. Schaefer is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation. Paul Rosenzweig is a Visiting Fellow in the Douglas and Sarah Allison Center for Foreign and National Security Policy, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.

• Owner of more than 20 percent interest of an organization that is a substantial contributor to the foundation. IRM 7.27.20.4

• Family members of persons described in (a) through (c) within the meaning of IRC 4946(d). IRM 7.27.20.5

• Organization in which persons described in (a) through (d) hold more than a 35 percent interest. IRM 7.27.20.6

• A private foundation which is effectively controlled by the person or persons in control of the foundation in question. (For purposes of IRC 4943 only) IRM 7.27.20.7

• A government official. (For purposes of IRC 4941 only) IRM 7.27.20.8”

Internal Revenue Manual, “7.27.20 Disqualified Persons as Defined in IRC 4946,” 7.27.20.1 (03-16-1999), https://www.irs.gov/irm/part7/irm_07-027-020.html.