

Staff Report of Public Comment Proceeding

GNSO Operating Procedures and ICANN Bylaws

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Prepared By: Marika Konings

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Staff Contact: Marika Konings

Email: Policy-staff@icann.org

Section I: General Overview and Next Steps

On 1 December 2016, the GNSO Council directed 'ICANN Policy Staff to draft proposed language for any necessary modifications or additions to the GNSO Operating Procedures and, if applicable, those parts of the ICANN Bylaws pertaining to the GNSO. In its analysis of the Drafting Team (DT) recommendations (see <https://gns0.icann.org/en/drafts/bylaws-drafting-team-final-report-12oct16-en.pdf> [PDF, 278 KB]), staff took a minimalist approach by focusing on the minimum changes needed to implement the DT recommendations, recognizing that in certain cases additional work may be desirable to facilitate the GNSO's participation in the Empowered Community, such as creating templates or fact sheets. Where applicable, this further work has been flagged.

Based on the analysis of the DT recommendations, staff concluded that any necessary modifications or additions could basically be categorized as follows:

1. No new procedures and/or modifications to the ICANN Bylaws or GNSO Operating Procedures are needed as the current Bylaws and/or GNSO Operating Procedures provide sufficient guidance. For example, for those situations in which the DT indicated that a simple majority vote of each house would be applicable, no changes are needed as this is the default GNSO Council voting threshold.
2. No new procedures and/or modifications to the ICANN Bylaws or GNSO Operating Procedures are needed as a separate mechanism has been created (the GNSO Standing Selection Committee) which will deal with the required actions in relation to appointments and nominations.
3. Changes to section 11.3.i of the ICANN Bylaws to reflect new GNSO voting thresholds¹ which are different from the current threshold of a simple majority vote of each House.
4. Changes to the GNSO Operating Procedures, section 4.9 (Consent Agenda) to reflect that certain decisions are to be confirmed "automatically" by the GNSO Council through its consent agenda.

5. Addition to the GNSO Operating Procedures to clarify that in specific circumstances, the GNSO Council may waive the timeframes currently referenced in the GNSO Operating Procedures in relation to submission of motions as well as scheduling of meetings to meet its obligations under the timelines outlined in the ICANN Bylaws as a Decisional Participant.
6. Addition to the GNSO Operating Procedures to clarify that certain petitions submitted by an individual must be submitted through a GNSO Stakeholder Group or Constituency to the GNSO Council for consideration. For this purpose, each GNSO Stakeholder Group and Constituency must develop clear rules for the submission of such petitions, including any requirements for the criteria to be included in a petition. These rules would be added to the GNSO Operating Procedures as an annex once available.
7. Addition to the GNSO Operating Procedures to clarify that all petitions concerning a director removal process submitted by an individual must be submitted directly to the GNSO Council. For this purpose, the GNSO Council will develop a clear process and rules for the submission of such petitions, including any requirements for the criteria to be included in a petition. These rules would be added to the GNSO Operating Procedures as an annex once available.

The following staff report provides further details on how each of the DT recommendations has been addressed and in which category each of the items falls: [[PDF](#), 522 KB | [DOCX](#), 92 KB]. The proposed changes to the GNSO Operating Procedures can be reviewed here: [[PDF](#), 1 MB | [DOCX](#), 380 KB]. The proposed changes to the section in the ICANN Bylaws pertaining to the GNSO can be found here: [[PDF](#), 39 KB | [DOCX](#), 23 KB].

In addition to these modifications, the redline version also includes the following updates:

- Updated references to the ICANN Bylaws as many changed as a result of the post-transition Bylaws;
- Updated the generalized schedule for board elections to align it with the timing as well as notification requirements outlined in the post-transition Bylaws;
- Included references to the Governmental Advisory Committee (GAC) Quick Look Mechanism in the PDP Manual as a result of the GAC-GNSO Consultation Group recommendations, and;
- Included references to the inclusion of a draft PDP WG Charter in the Preliminary Issue Report in the PDP Manual as a result of the GNSO Improvements recommendations.

Following the close of the public comment forum, the GNSO Council will review the input received and determine what steps are to be taken next, which could include further modifications and/or approval of the proposed changes. Note that any changes to the ICANN Bylaws will also need to be approved by the ICANN Board before these come into effect.

Section II: Contributors

At the time this report was prepared, a total of five (5) 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.

Organizations and Groups:

Name	Submitted by	Initials
Registries Stakeholder Group	Stephane van Gelder	RySG
Business Constituency	Steve del Bianco	BC
Registrar Stakeholder Group	Zoe Bonython	RrSG
Internet Service and Connectivity Providers Constituency	Wolf-Ulrich Knoblen	ISPCP
Non-Commercial Stakeholder Group	Rafik Dammak	NCSG
Intellectual Property Constituency	Greg Shatan	IPC

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).

In its comments, the RySG, BC, NCSG express their support for the proposed changes to the GNSO Operating Procedures as well as ICANN Bylaws.

The RrSG also notes its support for most of the proposed changes but flags a concern with regards to section 11.3 (j)(ii) and (j)(iii) of the ICANN Bylaws dealing with inspection rights. Although the relevant section of the ICANN Bylaws specifies the scope of the inspection rights, the RrSG would like some assurances that ‘document inspection is not used to obtain or disclose contractual or sensitive information’ related to registry or registrar contracts.

The RrSG also suggest clarifying in the voting results table in Appendix 1 relating to the approval of a petition and approval of a petition notice to remove a director holding seat 13 or 14, that it concerns >75% of the House that appointed the Director, instead of >75% of one. In relation to the same voting threshold, the ISPCP points to a possible inconsistency as Annex 6 of the GNSO Operating Procedures (“Registries Stakeholder Group and Registrars Stakeholder Group Process to select ICANN Board Seat #13 Candidates”) refers to a decision by the Stakeholder Groups not the House.

In relation to the waiver for petitions (section 5.3 of the GNSO Operating Procedures), the IPC requests that the discretionary decision by the Chair and Vice-Chairs of the GNSO Council concerning a waiver for deadlines and timing requirements related to petitions should be unanimous.

Furthermore, the RySG, RrSG and NCSG reaffirm their support for “the GNSO Council to speak on behalf of the GNSO as Decisional Participant in the Empowered Community” with the RySG pointing out that this conform “current practice and working methods”.

In their comments, the BC (supported by the ISPCP) and IPC restated their position, as outlined in the minority report to the GNSO Bylaws Drafting Team Final Report, that “the GNSO Council is not the appropriate vehicle for GNSO to exercise Empowered Community rights and responsibilities” but instead these responsibilities should be held directly by GNSO Stakeholder Groups and Constituencies. The IPC furthermore expresses the view that “the current construct creates a risk which has not been properly analyzed from a legal point of view” which creates a risk as the ICANN Bylaws currently do not foresee “any voting power to the GNSO Council in relation to the exercise of powers of the Empowered Community” and recommends that independent legal advice is obtained with regards to this question.

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.

Staff notes the general support for the proposed changes to the GNSO Operating Procedures and ICANN Bylaws and their consistency with the intent of the Bylaws DT recommendations.

With regards to some of the specific comments:

- In relation to the scope of document inspection rights as pointed out by the RrSG, staff observes that the scope is outlined in section 22.7 (a) of the ICANN Bylaws which is a result of the recommendations of the CCWG-Accountability which were adopted by the ICANN Board. As such, it is not considered within scope of this effort to suggest any changes or clarifications to this specific section. However, as the staff report also outlined, there are a number of instances where templates may be useful for Council motions related to exercise of Empowered Community decisions and responsibilities, as such, staff recommends that any templates related to document inspection would refer to the scope of document inspection rights as outlined in section 22.7(a) so that there is no confusion around what is considered within scope.
- In relation to clarifying the voting results table in Appendix 1 with regards to approval of a petition and approval of a petition notice to remove a director holding seat 13 or 14, staff supports the clarification as proposed by the RrSG.
- In relation to the potential inconsistency observed by the ISPCP in Annex 6 of the GNSO Operating Procedures (“Registries Stakeholder Group and Registrars Stakeholder Group Process to select ICANN Board Seat #13 Candidates”), staff notes that this Annex was not subject to the Bylaws DT recommendations nor any other changes. As such, staff would like to recommend that the ISPCP shares its observation with the RySG and RrSG who may decide to address this issue separately.
- In relation to the waiver for petitions and the suggestion by the IPC that any recommendations in this regard are unanimously taken by the GNSO Chair and Council Vice-Chairs, staff notes that the proposed language reads ‘as recommended by the GNSO Chair and Council Vice-Chairs’ which implies that this is a unanimous recommendation. However, should there be a desire to explicitly state this assumption, the following wording could be considered ‘as recommended unanimously by the GNSO Chair and Council Vice-Chairs’.
- In relation to the IPC’s recommendation for independent legal advice regarding the ability for the GNSO Council to exercise the GNSO’s rights and responsibilities in the Empowered Community, staff notes that in its resolution adopting the Bylaws DT Final

Report, the GNSO Council also resolved to request “that ICANN Legal evaluate whether the proposed modifications are consistent with the post-transition Bylaws”. As such, feedback was provided on a number of inconsistencies which were subsequently addressed by the Bylaws DT prior to the publication of the revised GNSO Operating Procedures and ICANN Bylaws for public comment. With regards to the role of the GNSO Council, as the Staff report pointed out, “On the general question of whether GNSO Council has the authority to speak for GNSO on these matters, ICANN staff has advised that no changes need to be made to the ICANN Bylaws in relation to the role and description of the GNSO Council in order for the GNSO Council to take on these decisions on behalf of the GNSO as the Decisional Participant in the Empowered Community as recommended by the DT”.

As a next step, staff will submit this report of public comments to the GNSO Council so it can consider the appropriate next steps with regards to the revised GNSO Operating Procedures and ICANN Bylaws.