

Internet Corporation for Assigned Names and Numbers

North American Region – Staff Documents Series

NORTH AMERICAN REGION OF AT-LARGE

REVIEW OF PROVISIONS OF THE DRAFT MEMORANDUM OF UNDERSTANDING BETWEEN ICANN AND THE ALS COMMUNITY IN NORTH AMERICA

prepared by the Staff

The text which follows has been prepared by the ICANN staff in order to facilitate reaching agreement on the draft Memorandum of Understanding. As with all such documents, this is presented for information only. However, there is a discussion of several points which ICANN has identified as troublesome; in these cases there is generally a specific amendment proposed, and in others an elaboration on the nature of the issue and the reason why it is seen as problematic.

There are [number] points with respect to the current text that this document addresses, in some cases providing alternate text to illustrate the point made.

The reader is encouraged to review document AL/2007/INF.3 Rev2, and AL/2007/INF.4, compilations of the MoUs and the Operating Principles or Bylaws of other RALOs, respectively, both of which are available from https://st.icann.org/naralo/index.cgi?ralo_organising_documents.

Each proposal can be identified as follows:

- Text that is in plain format represents the original text.
- **Bolded** text represents new text.
- Text with a ~~strike through~~ represents original text that would be deleted.

Section 2 - Definitions.

Since it is a hallmark of the organization of the regional structure of At-Large that members of one RALO should not at the same time also be members of any other RALO, we suggest that the addition of an additional item to the list of characteristics defining an individual is worthy of inclusion, such as:

*** is not a member of another RALO either directly or indirectly.**

For certainty and to avoid confusion we suggest that defined terms are capitalised and used consistently through out the document.

Section 3: Composition of NARALO

Clause 3.1 provides that NARALO

“...shall be comprised of At-Large Structures and individuals...”

We think that this is ambiguous in two respects: First, it is not certain whether some, or all, At-Large Structures are members of the NARALO. Second, since the defined term ‘Individual User’ from section 2 is not used, it could be understood that every single individual on the continent is a member.

It is an important feature of all the RALOs that they contain *by definition* all accredited At-Large Structures, and not a subset. To that end, we suggest that the clause should be modified as follows:

“...shall be comprised of **all** At-Large Structures and **Individuals Users**...”

Section 4: ICANN Obligations

Clause 4.4

Clause 4.5 provides that ICANN shall provide funds to support NARALO activities and its Secretariat. We would prefer that this clause be amended to reflect the provisions agreed with other RALO’s since other RALO’s do not have a corresponding provision. We do not wish to suggest that the North American region will receive more support of this nature than the other RALOs, which would not be either true or desirable and may quite naturally cause concern to the other RALO’s.

ICANN also believes that it is important to place any obligations of a financial nature in this MOU in the context of our overall budgeting, strategic planning, and the bottom-up consultative process that guides and informs these processes, for the benefit of all stakeholders. As a consequence, ICANN would prefer the following amendment to this clause:

4.4 Providing the necessary ~~fund~~ **resources** to support NARALO activities and ~~the an~~ NARALO Secretariat, **subject to ICANN's annual operational and budgetary plans and processes.**

Your attention is drawn to the fact that this clause would then be identical to that found in Clause 4.4 of the LAC MoU, and Clause 4.4 of the AP MoU.

ICANN does want the region to know that it will continue to support the activities of the region, and that it remains committed to At-Large.

Clause 4.6

The MOU currently provides in Clause 4.6 that ICANN is obligated to provide specific types documents in both English and French.

ICANN has a stated commitment to expanding access to non-English speaking constituents, which is demonstrated by the considerable increase in the number of major documents made available in multiple languages in the last six months. ICANN is, in fact in the process of drafting a policy in respect of multilingualism in the work of the organization. Until that consultative process is concluded, ICANN believes it is premature to commit itself definitively to a specific obligation as it is presently drafted, especially when the obligation could then apply to one community only, and not to others who would prefer to receive the same information in other languages.

Additionally, by way of example, providing that “contracts” shall be provided in English and French could be read as meaning *all* contracts, which could lead to a situation in which there is an expectation that every single contract ICANN enters into would need to be translated which would clearly not be a useful way to spend a considerable sum each financial year.

However, a more general obligation, such as that provided in Clause 4.6 of the LAC MoU, would be acceptable to ICANN.

We suggest the following amendment :

4.6 Assuring the availability of ~~any major documents defined as contracts, relevant MOUs, policy briefings, staff reports and Strategic and Operational plan~~ in English and French.

Clause 4.7

This clause proposes wide and sweeping obligations of a very general nature that are outside the scope and subject matter of this MOU.

Since these obligations' effects would largely fall completely outside of the ICANN/NARALO relationship, it would also be inappropriate in ICANN's view to create obligations of such a nature in an agreement with only one constituency without appropriate consultation with all other stakeholders.

Clause 4.8

The obligation in this clause is quite general and vague and seems to encompass matters outside the scope of the MOU. For example, what is the context of 'Responding to public comments' in this MOU?

It is important that to enable parties to live up to their obligations in a document both must be able to understand clearly what is meant by those obligations. This is clearly not the case with either Clause 4.7 or 4.8.

Section 5

In Clause 5.6, the current draft provides a much more limited provision relating to the region's advice and involvement in the process of accrediting new members of the At-Large community than all other regions have.

The clause that each other region has adopted is reproduced below, amended for terminology to match NARALO:

The NARALO recognizes that ICANN has established criteria and standards for the certification of ALSes. The NARALO will encourage organizations to apply for certification and assist with certification, including by:

- a. reviewing ALS applications from organizations in North America upon submission to ICANN and recommending whether or not the organization should be certified as an ALS;**
- b. providing NA ALS applicants with NARALO information and, if recommended by the NACRALO for certification, provisional membership in the NARALO whilst the ALS application is under consideration by the ALAC;**
- c. when ALS certification is verified by the ALAC for NA applicants, these applicants will be granted membership in the NARALO.**

This provision has been adopted by the other RALO's because Article IX Section 2(4)(i) of the Bylaws requires that the criteria and standards for the certification of ALS within a Geographic Region be established by the Board and be stated in any MOU between ICANN and any relevant RALO. As you are aware the Board, on the recommendations of ALAC, has established criteria and standards. As such any MOU requires reference to the establishment of them.

In addition, the above clause envisages the NARALO having a greater role to play than is currently suggested.

While, ICANN does not object to the NA region deciding to limit its ability to have an impact on such a fundamental decision – and to have less ability to influence these matters than every other RALO per se – ICANN does hope that the region will look carefully at these provisions and be absolutely certain that it does wish to limit its influence in this very important respect.

Section 6: General Provisions

Clauses 6.2 and 6.3

Given that either party can terminate at will with notice, we query the need for a termination date for the Memorandum of Understanding. Additionally, not having a date of termination gives much more flexibility to both parties.

Accordingly, we propose the following amendment to clause 6.3:

6.3 This Agreement will become effective when signed by all parties. The Agreement ~~will terminate on July 30th, 2010, but~~ may be amended at any time by mutual agreement of the parties **in writing**. Either party may terminate this Agreement by providing one hundred twenty (120) days written notice to the other party. In the event this Agreement is terminated, each party shall be solely responsible for the payment of any expenses it has incurred.

Clause 6.4 and 6.5

These clauses would, in combination, create almost unlimited liability for ICANN with respect to legal action that could be initiated by any of literally hundreds of millions of people and organizations throughout the region. No prudent board of directors, or staff of an organization, would agree to create liability on this scale.

Your attention is drawn in this regard to the opinion provided by the Office of the General Counsel of ICANN, provided by ICANN staff to the North American regional discuss list on 14th April 2007, annexed to this document.

Clause 6.6

Since this is an MoU, not an agreement enforceable at law, it is submitted that it is not appropriate to include this clause .

Additional Clause in Section 6

The following clause, taken from the MoU with the European Region, We recommended that you consider the following clause for inclusion in this MoU.

It is designed to allow the region to define for itself the process by which new ALSes signify their agreement to assume the rights and obligations of the MoU – and for ALSes who choose not to do so for one reason or another, it allows the NARALO to decide if the refusal to do so shall limit in any way the participation of those ALSes who do not agree to become, in effect, a ‘Signing Organisation’ themselves.

It also allows for ALSes which at some stage cease to be an ALS (if any do so) to withdraw from the MoU, and for the regional community to decide how they shall do so.

6.7 The NARALO shall determine the extent to which ALSes in the North American Region not a party to this Memorandum of Understanding must consent to be bound by its terms in order to participate in the governance and activities of the NARALO, and any procedure to be used to signify the same, as well as the procedure by which an ALS may revoke its consent once given.

Un-Numbered Provisions Immediately Below Section 6

In order to respect the principle of public consultation on all significant ICANN agreements with other parties, the provision reproduced below which is present in all other MoUs is needed in this one, in order to protect the public consultation process and to reinforce the transparency of the process of making agreements. It is reproduced below, and it is submitted that it would best fit directly above the paragraph beginning “IN WITNESS WHEREOF...”:

Execution shall be on signature for the Signing Organisations. For ICANN, execution shall be contingent upon final approval by the ICANN Board following completion of the public comment period.

[End of document]