

Appendix 1: Terms of Reference

ICANN GNSO Board Review 2004 /2005 Terms of Reference

Background

Article IV, Section 4 of the ICANN bylaws requires the ICANN Board to organise regular reviews of each Supporting Organisation, Council, and Advisory Committee. The review must be undertaken by an independent entity.

<http://www.icann.org/general/bylaws.htm#IV>

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review, if feasible no less frequently than every three years, of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine

- (i) whether that organization has a continuing purpose in the ICANN structure, and
- (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board.

2. The first of such reviews, to be initiated no later than 15 December 2003 and to be completed in time for Board consideration at ICANN's annual meeting in 2004, shall be of the GNSO Council and the ICANN Root Server System Advisory Committee. The second of such reviews, to be initiated no later than 15 November 2004 and to be completed in time for Board consideration at ICANN's annual meeting in 2005, shall be of the ccNSO, the ccNSO Council, and such other organizations as the Board may designate.

ICANN core values

ICANN's core values provide guidance as to how it should perform its mission. Certain of these are relevant for the GNSO Council review.

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

Role of the GNSO Council as described in the ICANN Bylaws

The Generic Names Supporting Organization (GNSO), is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains (Article X, Section 1). The GNSO Council is responsible for managing the policy development process of the GNSO (Article X, Section 2).

Timeline

The review of the GNSO Council (rather than the whole GNSO) is to be completed before the ICANN annual general meeting in Dec 2004. These terms of reference are recommended to the ICANN Board meeting of 18 October.

Methodology and scope

The review will be conducted by an independent consultant based on factual analysis prepared by the ICANN staff and a short report from the GNSO Council based on the same analysis. The consultant's report will then be submitted for a public comment period. The scope of the review is the work carried out by the GNSO Council to date including work brought forward to the GNSO Council from the DNSO Names Council.

Independent consultant

Given the tight time frame for this review it is recommend that the ICANN Board select a consultant with a working knowledge of ICANN and its structure.

Proposed terms of reference

Goal 1 “whether that organization has a continuing purpose in the ICANN structure”.

1. **Policy achievements.** Has the GNSO Council contributed to ICANN policy development?

- Analysis. List the policy achievements of the GNSO as administered by the Council indicating in a tabular form:
 - what has been done
 - what is work in progress
 - how was this done (task force, committee of the whole etc)
 - what has resulted in change to the contracts of registries or registrars.
 - what has resulted in other types of change (guidelines etc.)
- Do these policies have relevance for ICANN?
- Make recommendations.

2. **Outreach, geographic diversity and transparency.** Has the GNSO Council contributed to other ICANN core values such as outreach, bottom-up consensus based policy development, geographical diversity and transparency?

- Analysis. List in tabular form the other achievements of the GNSO Council including Council resolutions and other activities not directly related to policy achievements, such as outreach, workshops, interactions with the other supporting organisations (CCSO) and advisory committees (GAC, ALAC, SSAC) etc.
- Do these activities have relevance for ICANN?
- Make recommendations.

Goal 2. “whether any change in structure or operations is desirable to improve its effectiveness”.

Background analysis. List current structure of GNSO Council constituencies and members.

3. **PDP timelines.** Are the timelines relevant ?

- Analysis. Compare the bylaws stipulated timelines for policy development process with the actual timelines needed in the policy achievements listed under Goal 1.
- Were the stipulated timelines realistic for:

- the work of Council,
 - outreach by Council within the GNSO,
 - outreach by Council outside the GNSO?
 - Make recommendations.
4. **Staff support for policy development.** Has there been effective ICANN staff support for policy development?
- Analysis. For the table of policy achievements listed under Goal 1, list the number of reports by type (issue, drafts, final) written by ICANN staff (including man hours per report) and those written by GNSO members or others.
 - Analysis. List the number of GNSO Council calls attended by ICANN's legal counsel or deputy.
 - Based on this analysis consider if adequate ICANN staff support for the policy development process has been provided?
 - Has there been sufficient and timely input from ICANN's legal counsel? What has been the nature of this input?
 - Make recommendations.
5. **Policy implementation and compliance.** After the completion of policy development has policy implementation, compliance and outcome been effective?
- Analysis. For the table of policy achievements listed under Goal 1, list the timelines for ICANN staff to have fully:
 - implemented the policy (typically by making changes to contracts)
 - measured compliance of the implemented policy
 - measured outcomes (has the objective been achieved)
 - Based on this analysis, assess if the implementation, compliance and outcome measurement timelines have been effective.
 - Make recommendations.
6. **Demand-based raising of policy issues.** Is the current mechanism of alerting the GNSO Council to new policy issues effective?
- Analysis. Document how policy issues have been raised (e.g from ICANN staff, from within the GNSO via constituencies, from advisory committees etc). Is there today a systematic analysis of complaints received by ICANN staff that could assist the GNSO Council in prioritising work? Achieve this by polling of ICANN staff.
 - Make recommendations.
7. **Voting pattern.** Does the Council vote as a consensual body?
- Analysis. List the voting record including proxies of all GNSO Council votes by member by constituency including the nominating committee representatives.

- Compare this record to the working assumption of the “Evolution and Reform Process” of conflict between the user (business, non-commercial, IP, ISP) and supplier (registries and registrars) constituencies. Based on this assess the actual mediating role of the nominating committee representatives in the above listed votes.
- Make recommendations.

8. Number of constituency representatives. Has the presence of three rather than two representatives per constituency helped or hindered the GNSO Council?

- Analysis. List the record of members present per GNSO Council meeting by constituency and geographic region.
- Is there evidence that the current size of the GNSO Council has reduced its effectiveness?
- Is there evidence that three representatives per constituency has enhanced the Council’s effectiveness?
- Make recommendations.

9. Communication to the ICANN community. Are the enabling mechanisms for GNSO Council outreach effective?

- Analysis. Short questionnaire-based survey to each member of the GNSO Council to determine inter alia:
 - Does the GNSO Council section and the customised constituency sections of the ICANN web site effectively support the work of the GNSO Council?
 - Does the GNSO outreach via e-mail effectively support the work of the GNSO Council?
 - Do GNSO constituency meetings and other meetings during ICANN physical meetings effectively support the work of the GNSO Council?
- Make recommendations.

END

Appendix 2: List of interviewees

Jordyn Buchanan
Marilyn Cade
Grant Forsyth
Demi Getchko
Chuck Gomes
Tony Harris
Tony Holmes
John Jeffrey
Niklas Lagergren
Steve Metalitz
Jeff Neuman
Elliot Noss
Mike Palage
Alejandro Pisanty
Kurt Pritz
Ross Rader
Thomas Roessler
Barbara Roseman
Tim Ruiz
Suzanne Sene
Marc Schneiders
Philip Sheppard
Ken Stubbs
Bruce Tonkin
Louis Touton
Paul Verhoef
Alick Wilson

Appendix 3: GNSO Self Review

0. Background

In accordance with its bylaws, ICANN must review on a periodic basis its various bodies. The first of these reviews is focused on the GNSO (Generic Names Supporting Organisation) Council. The goal of the review shall be to determine

- whether the GNSO Council has a continuing purpose in the ICANN structure, and
- if so, whether any change in structure or operations is desirable to improve its effectiveness.

This document is a self-review of the GNSO Council, which is intended to be presented to the ICANN Board, as well as to form an input to the independent external review of the GNSO Council.

1. Policy Achievements

Has the GNSO Council contributed to ICANN policy development?

1.1. What has been done

The GNSO Council has completed the following consensus policies. (Note some of the work was begun under the old bylaws through the Names Council). These can be found listed on the ICANN website at:

<http://www.icann.org/general/consensus-policies.htm>

- [Whois Data Reminder Policy](#) (adopted by ICANN Board 27 March 2003; implementation documents issued 16 June 2003).
- [Inter-Registrar Transfer Policy](#) (effective on 12 November 2004, adopted by ICANN Board 25 April 2003; implementation documents issued 13 July 2004).

- [Whois Marketing Restriction Policy](#) (effective on 12 November 2004, adopted by ICANN Board 27 March 2003; implementation documents issued 12 August 2004).
- [Restored Names Accuracy Policy](#) (effective on 12 November 2004, adopted by ICANN Board 27 March 2003; implementation documents issued 12 August 2004).
- [Expired Domain Deletion Policy](#) (effective on 21 December 2004, adopted by ICANN Board 31 October 2003; implementation documents issued 21 September 2004).

The GNSO also established by consensus, as advice to the Board and staff, a set of criteria for the process in designating a successor operator for .net.

1.2.What is work in progress

The GNSO Council is currently working on the following areas using the policy development process (PDP) outlined in the ICANN bylaws:.

- Restricting access to WHOIS data for marketing purposes
- Review of what domain name related data should be collected and displayed
- Improving accuracy of collected data for the WHOIS service
- Procedure for use by ICANN in considering requests for consent and related contractual amendments to allow changes in the architecture or operation of a gTLD registry

1.3.How is work done?

The GNSO Council creates either task forces or subcommittees of the Council for policy development. The constituencies of the GNSO appoint representatives to the task forces. The Council also often invites liaisons from Advisory Committees such as the At-large Advisory committee to participate in task forces. Members of task forces are generally appointed for their specialist knowledge in a particular area (for example WHOIS or Transfers). A subcommittee of Council can be formed where the Council believes that there is sufficient expertise and experience within the Council for the particular topic area (for example in the development of an approval process for use by ICANN staff), or where there is insufficient time to form a separate task force (e.g the development of the .net criteria).

The ICANN bylaws provide an outline of the policy development process. Key to the development of a TF's work is the development of an Issues Report by the ICANN staff. Task forces are responsible, with the support of the ICANN staff to undertake analysis of a particular issue(s) and to work toward consensus on a particular issue(s). Prior to finalising a particular consensus policy the Council has often appointed an implementation committee to consider issues of implementation of a policy such as WHOIS, Transfers or Deletes. The implementation committee will typically include representatives from several organisations (e.g registrars and registries) that will be required to implement the policy as part of their contractual obligations, as well as representatives from the GNSO constituencies and ICANN advisory committees. These representatives then provide input on implementation issues for a particular policy. The report of the implementation committee is included in the final report on the proposed consensus policy. It is important to note that Implementation committees cannot make new policy or change the policy recommendations of a TF. Where the implementation committee suggests changes to the policy recommendations developed by the task force, the Council will consider these changes after consultation with the appropriate task force.

The GNSO Council meets monthly and tracks progress of its various task forces and implementation committees, and identifies and seeks to resolve issues that may be hampering progress. Before voting on a consensus policy recommendation, the GNSO Council members consult with the members of the GNSO constituencies, and seek to determine the level of consensus within the whole GNSO for a particular policy. The Council also seeks public comment through a prescribed publication process via the ICANN web site. The Council then takes into account public comments received on a particular policy recommendation. If the Council does not believe that there is sufficient consensus on a particular recommendation, it will take action to identify and resolve substantive issues raised with respect to a policy. As a result of the extensive work undertaken to achieve consensus, most consensus recommendations have passed with near unanimous support when finally put to the vote.

1.4.What has resulted in change to the contracts of registries or registrars

Registries and registrars are required by contract to comply with consensus policies. In some cases registry operators (e.g Verisign for the transfers policy) have requested registrars sign an amendment to their contracts, in other cases registrars have had to modify their agreements with third parties (for example WHOIS bulk access agreements) to comply with the new policy.

1.5.What has resulted in other types of change

In most cases with the introduction of new policies, ICANN accredited registrars and their resellers have had to alter their business processes to comply with the new policies. For larger registrars and resellers, this usually results in significant costs as software designed to handle millions of registrants must be modified and thoroughly tested. This is particularly the case with policies such as transfers and the WHOIS data reminder policy. For smaller registrars that use manual processes, there can be additional staffing costs.

With respect to the new transfers policy, registry operators have had to develop and implement dispute resolution procedures, and also develop transfer UNDO mechanisms.

1.6.Summary

It is the GNSO Council view that the Council has contributed to ICANN policy development through the development of improved policies in areas such as Transfers, WHOIS and Deletes. Each of these areas has attracted significant controversy within the ICANN community.

The development of an improved transfers policy is consistent with ICANN's core value of introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest. Registrants value the ability to choose a domain name provider, and value the ability to change their domain name provider at any time. Whilst registrars support the need for transfers, there are the normal tensions in a competitive market where registrars are both trying to hold onto their existing customers, and gain customers from competitors. In the first few years of competition, problems emerged such as registrars or their resellers transferring in domain names without ensuring they received the informed consent from the registrant, or registrars or their

resellers blocking transfers-away without receiving the consent of the registrant. The new policy ensures that in both cases the registrar must receive consent from the registrant before allowing a transfer-in or denying a transfer-away.

The development of improved WHOIS and deletes policies relates to ICANN's core mission to ensure the stable and secure operation of the Internet's unique identifier systems (which includes gTLD domain names).

The WHOIS service provides information on the person or organisation responsible for managing the operation of a particular domain name. If an Internet user is affected by the operation of the domain name, then the user can contact the person to seek to correct the problem. The WHOIS service was never intended to be used as a customer list for marketing purposes. WHOIS policy development has become a controversial area, as while registrants are required to provide accurate contact information, the present contracts do not require registrars to authenticate the contact information provided by domain name registrants. The WHOIS policy development is seeking to meet the needs of WHOIS users that seek more accurate contact information, while also meeting the needs of those that don't want their contact information used for purposes unrelated to the use of the domain name (e.g to find the home address of a person for the purposes of paying a social visit). The difficulty is in maintaining efficient access to contact data for the purposes of ensuring the stable and secure operation of the Internet, while preventing misuse of the data.

The process of deleting names is important to ensure that domain names that are no longer used operationally in the Internet are removed from the system, such as DNS nameservers, that are a critical part of the Internet infrastructure. This ensures that the systems continue to contain accurate information, and are not unduly overloaded with information that is no longer needed. Registrants also benefit in being able to obtain a licence to use a domain name that is no longer being used. Problems have arisen when some registrars seek to continue to manage a domain name after a domain name licence has expired, on the basis that the original registrant may wish to renew the licence at some stage in future, or on the basis that a registrant may agree to transfer the licence to another registrant for a fee. The GNSO has developed policies that ensure the timely deletion of names when a name is no longer being used, and the original registrant does not desire to renew their licence.

2. Outreach, geographic diversity and transparency.

Has the GNSO Council contributed to other ICANN core values such as outreach, bottom-up consensus based policy development, geographical diversity and transparency?

The GNSO Council consists of members from a broad range of constituencies: business users, non-commercial users, intellectual property, internet service providers, registrars and registries. It also has 3 members appointed by ICANN's nominating committee. It has liaisons with the Government Advisory Committee (GAC) and the At-Large Advisory Committee (ALAC), and has maintained an ongoing relationship with the ccTLD operators through liaisons whilst they have been forming the Country-Code Name Supporting Organisation (ccNSO). The 3 members of Council per constituency come from a wide range of geographic regions, and these members bring to the Council a wide range of language skills and different cultural perspectives.

The GNSO Council and Council members have arranged public workshops in cooperation with ICANN staff on topics of relevance to ICANN, such as WHOIS, internationalized domain names, and the World Summit of Information Society (WSIS). The Council has also arranged briefings for the ICANN community from Advisory Committees (e.g the Security and Stability advisory committee on the impact of Verisign's Sitefinder service in the Internet) on areas that related to the operation of gTLD domain names.

While most of the activity has been conducted in English, Council members are able to interact with their local communities using their native languages and help pass on information and discuss issues of relevance to ICANN. This also helps with the transparency of the ICANN processes, where most documentation is still in English, and Council members can improve the transparency of ICANN by summarising the information verbally for the communities around the world.

Once the ccTLD community determined the need for their own Supporting Organization, the Council worked consistently in support of this objective and has maintained a liaison relationship from the cc's to the Council throughout the process of creating the ccNSO, to ensure cross communication and any necessary collaboration.

The Council has also provided advice to the ICANN board on issues such as the .net criteria, the process for selecting new gTLDs, and the WIPO-II recommendations.

It is the GNSO Council's view, that the Council and Council members have taken a leadership role in initiating workshops and briefings on topics of importance to ICANN.

Recommendation: The ICANN bylaws require the GNSO Council to drop from 3 members per constituency to 2 members per constituency. The Council recommends that the bylaws be modified to re-instate the requirement for 3 representatives per constituency. The experience of the Council over time has validated the importance of the geographic diversity that having three representatives provides. The Council's work load is continuing to grow, and the Council relies on Councillors to both communicate into their constituencies, as well as to represent Constituencies into the Council and work on its Task Forces. This will ensure that the Council can continue to ensure that the broader Internet community is involved in the policy development process within ICANN, and also ensure that there is a sufficient pool of volunteers within Council to manage more than one policy development activity at one time.

3. Policy Development Process timelines

Are the timelines relevant?

The ICANN bylaws stipulate a set of timelines for each step in the policy development process. These timelines would result in a policy taking about 4 months from requesting the development of an issues report through to final vote from the Council. Whilst the Council has been able to respond quickly on issues such as the .net criteria (which built on the established specifications of the current .net agreement and also benefited from the process used to re-assign .org), it has generally found it difficult to meet the timelines for complex and contentious issues such as transfers and deletes.

An example of a tight timeline in the ICANN bylaws that is difficult to meet, is that after a task force receives a report summarizing the various constituency positions and the public comments received, it has five days to meet to reach a consensus position., Clearly this timeline is impractical for any complex issue.

The reasons for not meeting the timelines include:

- Insufficient ICANN staff resources to complete issues reports within the timeline, and to provide ongoing support for the committees and task forces to undertake needed analysis, and to create draft policy documents.
- The lack of in-depth analysis of an issue prior to the commencement of policy development.
- Some issues such as WHOIS require ongoing refinement. It is unlikely that the same task force members will participate in each refinement, and there is often time lost while new task force members catch up on the context and outcomes of previous discussions.
- Limited time available from the volunteer Council members. Most of these members come from the organisations that participate in a highly competitive information technology industry, where members work long hours for their day jobs, and have limited time available for drafting policy documents during evenings and weekends. Council members are prepared to review documents and provide comments after consultation with the GNSO community, but often do not have time to create substantive policy material.
- The public comment process suffers from some of the same issues relating to volunteers as the Council. There are few substantive public comments provided on policies, but discussions with affected members of the GNSO community often reflect dissatisfaction with proposed policy recommendations. The burden to make these concerns known to the Council

often falls on Council members, who do not have the benefit of referring to substantive papers from members of the GNSO community.

- Contentious issues such as WHOIS result in widely diverging views from constituencies within the GNSO, and possible changes to the existing policies require wide consultation and take considerable time in educating members of the GNSO and the wider community of the issues, perspectives, costs, and benefits of a proposed new policy.
- The GNSO Council cannot recommend policies to the ICANN Board until it determines that consensus is reached within the GNSO. Different issues take different periods of time to reach consensus.
- Face to face meetings are often the most successful way of progressing towards consensus on contentious issues. Given the international nature of the GNSO membership, face-to-face meetings tend to occur in 3 to 4 month intervals. Once there is agreement on the high level policy changes, the detailed work on implementation issues can often be achieved productively via teleconference and email discussion lists.

Although there is general agreement within the ICANN community that the GNSO and ICANN need to respond more quickly to issues that arise, the reality is that the GNSO and ICANN can not establish new policies unless consensus is reached within the GNSO community. The policy development timelines need to be flexible to account for the different time necessary to reach consensus depending on the issue.

The time taken by the GNSO and ICANN to resolve complex issues is comparable to other processes undertaken within the Internet community, including the IETF technical standards process.

To some degree, the time taken to produce a new consensus policy will be inversely proportional to the amount of resources devoted by either the community of volunteers within the GNSO or the ICANN staff. Given the increasing demands on volunteers, the policy development timelines are only likely to be improved through the provision of professional staff resources at critical parts of the process.

Recommendations:

- The PDP timelines should be a guideline for the ideal case, but should not be treated as rigid timelines. The GNSO Council should be allowed to set and adjust timelines for a policy development process based on the available resources (staff and volunteers) and the degree by which members of the GNSO community disagree on a particular issue.
- Prior to the commencement of policy development on a particular issue, the ICANN staff should fully analyse an issue and provide an issue report. The issue report should indicate how the issue is currently handled within the existing contractual and policy framework. In some cases, it may be necessary to commission an independent expert to analyse an issue (which may include interviewing affected parties within the GNSO) and propose options for policy recommendations that may address the issue.

- ICANN staff should research previous policy deliberations (which are documented) on any topic, and support the Council and task forces by directing members to the outcomes of previous discussions on particular issues.
- During the early public comment process, encourage members of the ICANN community to submit possible solutions to a particular issue to help the committee or task force to consider different approaches.
- During the public comment process on a proposed policy recommendation, an independent expert may need to be commissioned to produce a report on the views of the GNSO community in relation to a proposed policy recommendation.
- Provide staff support to the task forces and GNSO Council sub-committees that are skilled in creating reports that reflect the input provided by members of Council, and clearly identify where the areas of agreement and disagreement exist, and who understand the role of staff support to policy development processes.

4. Staff support for policy development

Has there been effective ICANN staff support for policy development?

The GNSO Council has been fortunate to have a very efficient GNSO Secretariat to organise teleconferences, manage the GNSO website content, create and publish meeting minutes, and make arrangements at physical venues for the wide range of meetings held by the GNSO community. This has been essential to the operation of the GNSO.

The reports generated as part of the process for task force, committee and Council meetings have been written and edited by volunteers. In some cases, during the life of the DNSO, there was some staff support in providing detailed analysis of the impact of a proposed policy upon the existing contracts. Research, analysis, and document drafting has been undertaken by the members of the TFs, typically with a high degree of drafting undertaken by the chairs and a few members. The time taken to complete a particular report is often dependent on the time available from those volunteers. The impact of limited ICANN staff resources has been described in the section on policy development process guidelines.

The GNSO Council often requires procedural advice and legal advice on points of procedure that relate to the ICANN bylaws, and these points of procedure are important to ensure that the policy development process complies with the ICANN bylaws and the relevant agreements with registries and registrars.

Experience with task forces in areas such as WHOIS and Transfers has often highlighted the lack of understanding in the GNSO community of the current contractual requirements for registrars and registries. This can result in task forces spending time on issues that are already specified in contracts (but often not enforced).

A key issue associated with new policy recommendations is the ability to monitor and enforce compliance with a new policy. Some of the issues considered by the GNSO Council such as transfers, have arisen from a lack of ICANN resources to enforce the terms of the registry and registrar agreements, and the difficulty of establishing clear breach of contract with the existing contract text. The GNSO policy development process would benefit from more legal advice earlier in the process to ensure that the wording of new recommendations is appropriate. The lack of advice on how the policy can be worded to manage compliance has resulted in delays in implementing policies such as transfers once the ICANN Board has approved the policy.

Recommendations:

- Prior to the commencement of policy development on a particular issue, utilize the ICANN staff to analyse an issue, and prepare a comprehensive Issues report. In some cases, it may be necessary to commission an independent expert to analyse an issue (which may include interviewing affected parties within the GNSO) and propose options for policy recommendations that may address the issue.
- ICANN staff should research previous policy deliberations (which are documented) on any topic, and support the Council and task forces by directing members to the outcomes of previous discussions on particular issues.
- During the public comment process on a proposed policy recommendation, there may be circumstances where the Council recommends the use of an independent expert commissioned to produce a report on the views of the GNSO community in relation to a proposed policy recommendation. Care must be taken that the decisions to utilize experts are agreed to by the Council and not merely a transfer of the work and work of the Staff whose job it is to become expert in the functions and processes and issues addressed by the Council.
- Provide staff support to the task forces and GNSO Council sub-committees that are skilled in creating reports that reflect the input provided by members of Council, and clearly identify where the areas of agreement and disagreement exist.
- Provide staff support to the Task Forces and to the GNSO Council subcommittees that familiarize themselves with the bylaws and the policy development processes, as well as the relevant previous work of the Council.
- Ensure that legal counsel is available for GNSO Council calls as requested by the Council, and ensure that legal counsel is available to task forces and subcommittees as required. With respect to policy development activity, ensure that the legal counsel is fully briefed on the existing contractual arrangements with registries and registrars that relate to the particular issue under discussion.
- Given that legal contracts between ICANN and registries and registrars may be open to different interpretation by the contracted parties, ensure that legal advice from ICANN legal counsel (or external counsel to ICANN) is in writing, and allow affected registrars and registries to submit their own written legal advice for consideration by the GNSO community.

- Prior to the development of a final policy recommendation for the GNSO Council, ICANN staff should ensure that the recommendation has been reviewed by legal counsel to ensure that the recommendation can be implemented and enforced via the relevant contracts.

5. Policy implementation and compliance

After the completion of policy development has policy implementation, compliance and outcome been effective?

In the past 2 years, there have been significant delays in the implementation of policies following approval by the ICANN Board. Some of these delays have resulted from limited ICANN staff resources, and some of these delays have been the result of additional work required for implementation. For example in the case of transfers: standard text for notices needed to be developed, techniques for introducing a transfers “undo” command, procedures for 1st level dispute resolution, and the identification of providers of second level dispute resolution.

Policies areas such as transfers, WHOIS and deletes are likely to require regular review and update. For this review process to be effective, ICANN and the GNSO Council should agree on appropriate measurements and reporting on the outcomes of the new policies.

In the past there has been little if any enforcement of the contracts between ICANN and registrars. ICANN needs to establish an effective complaints process, and take action against registrars that do not comply with the new policies. Without effective monitoring and enforcement of contractual compliance, there will be little benefit in developing new policies.

Recommendations:

- Ensure that the policy is ready for implementation after approval by the GNSO Council and ICANN Board.
- Establish a project management process within ICANN that defines a plan and expected dates for implementation
- As part of the Council report at the end of the policy development process, establish key metrics for measuring the success of the policy, and ensure that appropriate measurement and reporting systems are put in place.

- Ensure that the mechanisms are established for monitoring and enforcing compliance with the new policy. This is particularly important in the first 6 months of a new policy, when registry and registrars systems are being modified to support a new policy.
- To the extent that the lack of intermediate sanctions for non-compliance with contractual obligations presents a significant impediment to compliance activities, the GNSO should, without prejudice to efforts to enforce existing contractual obligations, develop recommendations for a system of graduated or intermediate sanctions for incorporation in revised contracts. As an initial step, ICANN legal counsel should brief GNSO Council (or a relevant subgroup/task force) on ICANN's current plans to correct ongoing harm and provide greater flexibility and legitimacy for the compliance function.

6. Demand based raising of policy issues

Is the current mechanism of alerting the GNSO Council to new policy issues effective?

The primary mechanism for raising policy issues is from the GNSO community through the members of Council. Council members liaise with their constituencies and raise issues before Council that are of importance. The Council then prioritises issues on a consensus basis. Generally no more than around 3 policy development processes can be managed at once using the volunteer resources available to the Council.

On occasion the ICANN Board has also sent issues for the GNSO Council to work on. For example, the request for advice on creation of the .net criteria.

The Council would benefit from having access to summary reports on the areas where registrants and Internet users have made complaints to ICANN. This would help ensure that the Council can respond to the needs of the user community.

Recommendation:

- ICANN staff develop a complaints handling process that is capable of logging complaints regarding gTLD domain name registration practices, and capable of producing data on a trend basis. This data reporting would be useful on a monthly basis. For example: Of 1000 complaints, 20% were in relation to registrars preventing transfers, 20% were in relation to unauthorised transfers, 20% were in relation to inaccurate WHOIS, and 40% were in relation to areas outside of ICANN's mission such as SPAM emails. The Council would also be able to see what affect new policies have on the types of complaints received by ICANN.

7. Voting Pattern

Does the Council vote as a consensual body?

The GNSO Council minutes show that apart from some procedural motions (such as scheduling meetings) which are raised within a meeting without advance notice and discussion, the Council votes as a consensus body on policy issues. This reflects the time and effort the Council puts in to ensure that a new policy has consensus support before raising the matter for a formal vote.

On one occasion recently where some Council members had conflicts of interest (e.g the .net criteria) the affected members gave their proxies to an independent member of Council appointed by the Nominating Committee. This was an effective way of managing such conflict.

8. Number of constituency representatives

Has the presence of three rather than two representatives per constituency helped or hindered the GNSO Council?

It is the GNSO Council's view that three representatives per constituency is the best balance between a Council of manageable size, and the need for sufficient volunteers to manage outreach with the GNSO community and participate in GNSO task forces and sub-committees. There is no evidence that a smaller Council would be any more efficient.

The discussion in Council teleconferences tends to be dominated by those for whom English is their native language. This does not mean that other Council members are not participating. The benefit of three representatives per constituency means that each constituency will have representatives from three different regions of the world, thus helping to ensure geographic diversity on the Council. Often before Council calls, constituency representatives meet to discuss feedback received from members of their constituencies. This feedback is often obtained through the local contacts and languages of the Council members. Thus often there is a single spokesperson speaking for a particular constituency, but the views expressed are often the result of prior discussions. The result of this practice is that conference calls and meetings are easily managed despite the apparent size of the Council.

The workloads of Council members also means that often not all Council members can attend a particular conference call, and thus having a pool of at least 3 representatives available from each constituency – usually means that most constituencies have at least 2 representatives available per call.

The Council frequently needs to form sub-committees of Council to address specific issues in a short period of time, and the availability of 3 volunteer representatives per constituency that have already have the support of their constituencies has been very useful. Most constituencies elect their representatives to represent their views on Council as well as to work on Task Forces. With respect to task forces it is often difficult for constituencies to find additional volunteers to serve on task forces, and the formal procedures within a constituency to appoint a task force member can also be time consuming and resource intensive (on the part of volunteers managing an election).

At the time of the evolution and reform process, it was anticipated that additional constituencies may be formed within the GNSO and thus the Council would grow too large with 3 representatives per constituency. The result after 2 years, is that no additional constituencies have joined the Council. If the Council grows too large in future, then the issue of a smaller number of representatives per constituency could be revisited.

Recommendation:

- Alter the ICANN bylaws to maintain the present 3 representatives per constituency.

9. Communication to the ICANN Community

Are the enabling mechanisms for GNSO Council outreach effective?

The GNSO Council uses a public website (<http://www.gnso.icann.org>) as a central repository for all GNSO policy related material, and is a central reference point for meeting agendas and minutes. Audio recordings are also made available of most task force, committee and Council calls. The mailing lists are archived for the GNSO Council and its sub-committees and task forces.

While audio recordings of calls are made available, these would be difficult to understand for non-native English speakers. Transcripts are made of Council meetings held at physical ICANN meetings, and ICANN may give consideration to providing transcriptions for other significant teleconferences – especially where there is a briefing from an ICANN staff member or outside expert. These transcriptions are also a useful reference source for staff completing drafts of reports. Rough translations of the

English transcriptions can be done using publicly available language translation software by those interested in understanding the full detail of discussions rather than just relying on the minutes of the meeting.

The GNSO Council also maintains an announcement list that goes out to members of the GNSO community.

The individual constituencies also use mailing lists. Some of these constituencies also make their mailing lists public.

At physical ICANN meetings, Council members often facilitate joint meetings of constituencies to discuss issues of mutual interest. Council members also cooperate closely with ICANN staff to organise workshops on topics such as WHOIS and Internationalized domain names. Constituency meetings are held before the GNSO Council meets, and this helps Council members assess the degree of consensus prior to voting on a specific policy issue.

The GNSO Council is establishing its own public forum prior to Council meetings to give the opportunity for members of the GNSO community to verbally express any concerns or ideas regarding a policy matter before the GNSO Council.

The public comment process used in the policy development process has been less useful in obtaining substantive comments on policy. As discussed in the section on timelines and effectiveness of the policy development process, it would be useful on occasion to use an independent expert to interview members of the GNSO Community to obtain more substantive comments.

10. Summary and recommendations

The GNSO Council believes that the evidence shows that the GNSO Council has a continuing purpose in the ICANN structure. The following recommendations relate to actions the GNSO requests the ICANN Board to take with respect to the bylaws, and to requests for additional ICANN staff resources to be applied in specific areas to make the bottom-up policy development process of the GNSO and ICANN more effective.

10.1. Required changes to ICANN bylaws

10.1.1. Maintain the present 3 representatives per constituency

10.1.2. Adjust the bylaws to specify that the timelines in the policy development process are guidelines, and allow the GNSO Council to set and revise timelines according to the level of consensus on a particular issue and the amount of volunteer and staff resources available for the specific issue.

10.2. Additional ICANN staff resources required

10.2.1. Prior to the commencement of policy development on a particular issue, ensure that ICANN staff provide an analysis and Issues Paper that provides sufficient background and information to support the development of the Terms of Reference and statement of work for a Task Force. . The issue report should indicate how the issue is currently handled within the existing contractual and policy framework. In some instances, it may be necessary for Council to agree to commission an independent expert to analyse an issue (which may include interviewing affected parties within the GNSO) and propose options for policy recommendations that may address the issue.

10.2.2. During the public comment process on a proposed policy recommendation, an independent expert may need to be commissioned to produce a report on the views of the GNSO community in relation to a proposed policy recommendation.

10.2.3. Provide staff support to the task forces and GNSO Council sub-committees that are skilled in creating reports that reflect the input provided by members of Council, and clearly identify where the areas of disagreement exist.

10.2.4. Provide staff support to the Task Forces and to the GNSO Council subcommittees that familiarize themselves with the bylaws and the policy development processes, as well as the relevant previous work of the Council.

10.2.5. Ensure that legal counsel is available for all GNSO Council calls, and ensure that legal counsel is available to task forces and subcommittees as required. With respect to policy development activity, ensure that the legal counsel is fully briefed on the existing contractual arrangements with registries and registrars that relate to the particular issue under discussion.

- 10.2.6. Prior to the development of a final policy recommendation for the GNSO Council, ICANN should ensure that the recommendation has been reviewed by legal counsel to ensure that the recommendation can be implemented and enforced via the relevant contracts.
- 10.2.7. Establish a project management process within ICANN that defines a plan and expected dates for implementation of a policy once it is approved by the ICANN Board.
- 10.2.8. Ensure that the mechanisms are established for monitoring and enforcing compliance with a new policy. This is particularly important in the first 6 months of a new policy, when registry and registrars systems are being modified to support a new policy.
- 10.2.9. ICANN staff develop a complaints handling process that is capable of logging complaints regarding gTLD domain name registration practices, and capable of producing data on a trend basis. This data reporting would be useful on a monthly basis.

10.3.Actions required by the GNSO Council

- 10.3.1. During the early public comment process, encourage members of the ICANN community to submit proposals for solutions to a particular issue.
- 10.3.2. Given that legal contracts between ICANN and registries and registrars may be open to different interpretation by the contracted parties. Ensure that legal advice from ICANN legal counsel (or external counsel to ICANN) is in writing, and allow affected parties (such as registrars and registries) to submit their own written legal advice for consideration by the GNSO community.
- 10.3.3. Ensure that the policy is ready for implementation after approval by the GNSO Council and ICANN Board.
- 10.3.4. As part of the Council report at the end of the policy development process, establish key metrics for measuring the success of the policy, and ensure that appropriate measurement and reporting systems are put in place.
- 10.3.5. To the extent that the lack of intermediate sanctions for non-compliance with contractual obligations presents a significant impediment to compliance activities, the GNSO should, without prejudice to efforts to enforce existing

contractual obligations, develop recommendations for a system of graduated or intermediate sanctions for incorporation in revised contracts. As an initial step, ICANN legal counsel should brief GNSO Council (or a relevant subgroup/task force) on ICANN's current plans to correct ongoing harm and provide greater flexibility and legitimacy for the compliance function.

