

# Staff Report of Public Comment Proceeding

## Reinstated ICANN Articles of Incorporation

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**Prepared By:** ICANN Staff

### Public Comment Proceeding

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## Section I: General Overview and Next Steps

Now that the IANA Stewardship Transition Coordination Group (ICG) and the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) proposals have been transmitted to the National Telecommunications and Information Agency (NTIA), one of the key implementation planning items is to amend ICANN's Articles of Incorporation to reflect the recommendations in those proposals.

The proposed draft of the Amended and Restated Articles of Incorporation circulated for public comment was developed collaboratively by the ICANN legal team and the independent counsel hired to advise the CCWG-Accountability and the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship). Both the independent counsel to the community groups and ICANN's General Counsel agree that the proposed draft Articles are consistent with the community proposals relating to the IANA Stewardship Transition.

The proposed draft Articles were posted on 27 May for a 40 day public comment period, and based upon community request, was extended for an additional seven days. This allowed any interested party to review and provide feedback. This timeline allows for comments to be analyzed and incorporated in time for adoption of the Amended and Restated Articles by the ICANN Board.

### Next Steps

In response to the comments received, slight modifications to the Amended and Restated Articles of Incorporation are posted with this Report. The ICANN Board will be requested to approve the new Articles and direct that they be filed with the California Secretary of State in order to make them legally effective if and when the NTIA's IANA Functions Contract with ICANN expires.

## Section II: Contributors

*At the time this report was prepared, a total of six (6) 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:**

<b>Name</b>	<b>Submitted by</b>	<b>Initials</b>
The Internet Service and Connectivity Providers Constituency	Olivier Muron	ISPCP
Business Constituency	Steve DelBianco	BC
Cross Community Working Group on Enhancing ICANN Accountability	Leon Sanchez, Thomas Rickert & Mathieu Weill	CCWG-Accountability
The Intellectual Property Constituency	Gregory S. Shatan	IPC

**Individuals:**

<b>Name</b>	<b>Affiliation (if provided)</b>	<b>Initials</b>
Brian Carpenter		
Brett Schaefer & Paul Rosenzweig	The Heritage Foundation	

**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.)*

Brian Carpenter objected to the deletion of historical text that described ICANN's mission, and questioned reflecting the mission through a reference to the ICANN Bylaws. He requested that ICANN's mission be reflected in the Articles as a protection against mission creep, and suggested it was more appropriate for the mission to be in the Articles.

The Heritage Foundation proposed that the text state that ICANN is "incorporated," as opposed to "organized," under California law, as well as adding an affirmation of the location of ICANN's principal office, in order to confirm the application of California law to ICANN's corporate governance, including the recent accountability enhancements to its Bylaws. The Heritage Foundation also requested a modification to the text regarding the definition of the global public interest, replacing a "may" with a "shall" in an attempt to clarify the mandatory nature of the community process for defining it. The Heritage Foundation also questioned the deletion of historic text a prohibition of control of ICANN by "disqualified persons" and requested the Board to provide an explanation for the deletion of the text, including specific analysis.

The ISPCP commented that the draft is consistent and reflects the consensus outcomes of the work in the Stewardship Transition Process.

The BC commented that the proposed draft Articles reflect changes required to implement the CCWG-Accountability and CWG proposals. While accepting statements from counsel that there is no legal difference between being "incorporated" or "organized" in this circumstance, the BC requests that the original text of "organized under" remain, but with a footnote explaining that this means the same thing as "incorporated" in this context.

The CCWG-Accountability provided proposed language to address the “may” versus “shall” issue in relation to clarifying the mandatory nature of the process for defining the global public interest wherever that is appropriate. The CCWG-Accountability referred to its proposal in the development of language. Finally, the CCWG-Accountability identified a typo that the counsel confirmed.

The IPC provided some further analysis of issues raised by other commenters. On Brian Carpenter’s concern, the IPC noted that the community would benefit from further explanation for the changes to the mission statement language in the Articles, and requested confirmation that the changes would not expand the permitted scope of ICANN’s activities. On the removal of the “disqualified persons” language, the IPC requested further explanation to support this removal. On the definition of the global public interest, the IPC supported the clarifications provided by the CCWG-Accountability in its comments.

#### **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.*

The comments require few changes to the proposed draft Amended and Restated Articles of Incorporation posted for comment.

#### **Mission**

The community devoted significant effort to precisely crafting ICANN’s mission statement within the ICANN Bylaws. Any summary of the mission statement in the Articles would be necessarily incomplete and inaccurate. Restating the mission in full in the Articles as it is stated in the Bylaws would increase the risk that future amendments could make the two documents inconsistent; a cross-reference from the Articles to the Bylaws ensures that there is only one mission statement; that no inconsistency can arise inadvertently between the Articles and Bylaws; and that the detailed version of the mission statement in the Bylaws, where it is more readily accessible to the community, will govern ICANN. Moreover, the mission statement is part of the “fundamental” Bylaws. Community approval is required to modify the mission statement, following the same procedures and requirements as amending the Articles. Accordingly, the concerns raised by Brian Carpenter do not require modifications to the text. The risk of mission creep raised by Mr. Carpenter would not be reduced through the inclusion of the requested text in the Articles. As the IPC noted, the reason for the removal of the text in the Articles and reference to the Bylaws was to create an explicit incorporation of the carefully crafted mission statement into the Articles and reduce any possibility for there to be conflicting statements of ICANN’s mission between the two documents. The removal of the specific mission statement language from the Articles does not provide any authorization for ICANN to act outside of that mission.

#### **Incorporated versus Organized Under**

Both ICANN and the independent counsel to the CCWG-Accountability confirmed that the appropriate language for use in California Articles of Incorporation is “organized under”. California corporate law specifies the exact language required to be used. As a result, the suggested language presented by The Heritage Foundation would not be accepted by the California Secretary of State and cannot be taken on. Similarly, the use of explanatory footnotes in Articles of Incorporation, which must be accepted by and filed with the California Secretary of State, is not a usual practice and could risk the document being rejected for filing. As a result, ICANN is not able to take on the BC’s suggestion.

While no public comment objected to the inclusion of the word “California” in the proposed draft Articles in the phrase “organized under the California Nonprofit Public Benefit Corporation Law,” and it was included for emphasis and clarity, CCWG-Accountability’s external counsel’s recent experience with filing Articles with the California Secretary of State indicates that including the word “California” may cause the filing to be rejected. Accordingly, we have removed it from the proposed draft Articles.

### **Principal Place of Business**

The Heritage Foundation’s request to insert into the Articles of Incorporation that ICANN’s headquarters be located in California is not able to be taken on. As the external counsel to the CCWG-Accountability confirmed, including this in the Articles would not be consistent with the CCWG-Accountability’s proposal. In the development of the proposal, the CCWG-Accountability elected to keep the statement regarding the location of “the principal office for the transaction of the business of ICANN” in Article 24.1 of the Bylaws as a “standard” Bylaw, rather than making it a “fundamental” Bylaw that would require a higher threshold for amendment. Restating the location of ICANN’s headquarters or principal place of business in the Articles would override that decision of the CCWG-Accountability.

### **Disqualified Persons**

Both The Heritage Foundation and the IPC requested explanation for the proposed draft’s removal of the “disqualified persons” language that appears in the current Articles. Some language in the governing documents of tax-exempt organizations such as ICANN relates to, or is required by, their tax-exempt status. It is clear from the current Articles that when ICANN’s Articles were originally drafted, there was uncertainty about what ICANN’s tax-exempt status would be. It appears the specific language about disqualified persons was included to address a potential tax-related status (as a supporting organization) that may have been contemplated when ICANN was formed in 1998. However, as events occurred, ICANN did not need status as a supporting organization under applicable U.S. tax-exemption law; it qualifies as a public charity in its own right. Moreover, a supported organization would have to be named in ICANN’s Articles, and the subordinate relationship to another 501(c)(3) public charity required for supporting organization status is inappropriate for ICANN now. Finally, the disqualified person language prohibits control by persons whose control over ICANN has never arisen as a concern otherwise, and there is no legal or practical reason for concern going forward, given the governance structures and accountability enhancements in ICANN’s Bylaws. After nearly 20 years of time that has elapsed since ICANN was formed, there is no reason to keep the language in the Articles today. Counsel uniformly recommended the removal of the language, which if retained would be superfluous and confusing.

### **Definition of Global Public Interest**

The Heritage Foundation, CCWG-Accountability and IPC each commented on this item. The proposed draft Articles will be modified to incorporate the language addressing this issue provided by the CCWG-Accountability. This language separates out the requirement that the definition of global public interest will arise from a multistakeholder process from the understanding that the definition may change from time to time, which was the source of misunderstanding in the CCWG-Accountability conversations on this point. The language proposed by CCWG-Accountability clearly addresses both the requirement and the understanding, making it clearer than the edit suggested by The Heritage Foundation.

**Edits to Address Typographic Errors**

The typographic error identified by the CCWG-Accountability was already fixed in the version posted for public comment. No further edits are necessary.