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ICANN Board
Los Angeles, California, USA
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

Re: Public Comments to Bylaws Amendments and Documents to Implement the NomCom2 Review

Dear Madam/Sirs:

I welcome the opportunity to submit comments to the documents in reference.

My responses follow to the questions designed to aid in the drafting of submissions to this Public Comment proceeding as well as my input on the proposed amendments to the ICANN Bylaws, the proposed NomCom Standing Committee Charter, and the proposed statement defining “Unaffiliated” Directors:

1. Do you have input on the Fundamental Bylaws amendment proposed for Article 7 of the ICANN Bylaws and the related proposed statement defining “Unaffiliated” Directors?

The wide definition of “Unaffiliated” Directors in the related proposed statement defining “Unaffiliated” Directors includes:

“Unaffiliated” Directors. Any candidate named to this position shall be able to demonstrate that they:

.... 10. Have not been an employee or contractor of a member of an ICANN SO, AC, Stakeholder Group, Constituency, or RALO.¹

¹ See <https://www.icann.org/en/system/files/files/draft-nomcom-unaffiliated-director-statement-10apr23-en.pdf>, p. 2.

The Fundamental Bylaws amendment proposal that *only Directors initially nominated as “unaffiliated” Directors may be nominated for consecutive subsequent terms of service as “unaffiliated” Directors*² further reduces the number of prospective directors with knowledge from past experience of the ICANN environment and activities.

While the intention to have unaffiliated or independent directors may be based on the wish that the NomCom bring a balance to the Board when viewed alongside those Directors selected by the ICANN Supporting Organizations and the At-Large community, independent directors are not free of downsides in corporate environments.

- Independent directors have been found to lack detailed operational knowledge about the entities they serve, and a material percentage of directors lack organization-specific commitment and may use NGO directorships as a stepping ladder to remunerated directorships elsewhere,
- Stringent requirements for independent directors means more director turnover, more new directors, and hence more directors at such an informational disadvantage that they risk following management's view, as they do not have their own experience within the organization³,
- Independent directors have been less involved with the organization they represent, they may lack sufficient information to base their decisions. This is the risk of information asymmetry, as independent directors are generally less informed about the company than the management staff. Although a director may be independent by definition, it does not imply that the director is acting in absolute independence – independent directors can be steered by management. In addition, they may not have the requisite skills and knowledge to be an effective board member.⁴

The NomCom2 Review refers to an undated survey⁵ where respondents either “agree” or “strongly agree” that the NomCom should prioritize appointees who act independently. However, I feel from my corporate law experience that the “need” for independent directors in for-profit corporations of management and shareholders is not

2 See <https://www.icann.org/en/system/files/files/proposed-bylaws-amendments-10apr23-en.pdf>, p.2.

3 See THEODORE N. MIRVIS & WILLIAM SAVITT, THE DANGERS OF INDEPENDENT DIRECTORS, DELAWARE JOURNAL OF CORPORATE LAW, p. 481, at <https://www.law.berkeley.edu/wp-content/uploads/2017/09/Mirvis-and-Savitt-Dangers-of-Independent-Directors.pdf>

4 See Scott Powell, Independent Director, at <https://corporatefinanceinstitute.com/resources/career/independent-director/>

5 See NomCom Review Implementation Working Group (NomComRIWG) 30 June 2022 at [https://community.icann.org/display/OR/Implementation+Progress+Report?preview=/126421307/212107593/NomCom2%20Review%20Final%20Report%20\(Progress%20and%20Implementation%20Status%20Report%20%235\)%20-%2030%20June%202022.pdf](https://community.icann.org/display/OR/Implementation+Progress+Report?preview=/126421307/212107593/NomCom2%20Review%20Final%20Report%20(Progress%20and%20Implementation%20Status%20Report%20%235)%20-%2030%20June%202022.pdf)

as urgent in a public benefit non-profit entity like ICANN with a highly diverse environment of multiple stakeholders engaging in discussion at different levels.

Some people expressed in the interviews that the NomCom's primary role is to appoint individuals who are not affiliated with ICANN at all (i.e., not "ICANN insiders") and can therefore bring new ideas to ICANN, even though said purpose is listed nowhere in the ICANN Bylaws. The California Nonprofit Public Benefit Corporation Law ("CNPBCL")⁶ under which ICANN is chartered has no specific requirement for "unaffiliated" or independent directors.

If the "unaffiliated" or independent directors are to be implemented:

- at least members of an ICANN SO, AC, Stakeholder Group, Constituency, or RALO not remunerated for said role should be allowed,
- any "unaffiliated" directors should have previous experience attending ICANN events outside of the categories of "affiliated" directors which may create a conflict of interest,
- directors who are affiliated but by the beginning of their term become "unaffiliated" director should be allowed to be nominated as such.

2. Do you have input on the proposed Standard Bylaws amendments proposed to Article 8 of the ICANN Bylaws as well as the Transition Clause proposed for Article 27? These would:

- **Change NomCom delegates' terms to serve two-year terms, instead of one year.**
- **Transform all NomCom delegates into voting delegates to be able to vote, except for leadership.**
- **Create a NomCom Standing Committee to provide continuity across annual NomCom cycles and to build the institutional memory of the NomCom.**

I support the changes of NomCom delegate terms and transforming all delegates into voting delegates, except for leadership.

On the issue of NomCom terms, the current process demands at least 6 months from volunteer delegates to learn the different requirements from ICANN bodies for candidates meeting their expectations. This then compresses into 6 months a large amount of work reviewing an increasing number of applications, checking their backgrounds, conducting interviews and other tasks. The NomCom received 127 applications in 2019, 96 in 2020, 116 in 2021, 85 in 2022, and now a high of 155 for 2023. Changing NomCom delegates terms to serve 2-year terms instead of 1-year is an improvement to ensure their initial training is put to better use and results in better candidates.

All NomCom delegates should vote as they participate equally in the training, reviews, assessment and discussion. This will encourage and reward their participation.

The creation of a NomCom Standing Committee outside from the rest NomCom at-large seems contradictory to the pretended intention of generating change through “unaffiliated” directors at Board level. In any case, it is a duty of a NomCom delegate to review the backgrounds of current and past directors as part of understanding the “institutional memory” and the expectations of ICANN entities for which candidates are being nominated. I find a separate NomCom Standing Committee to be redundant as “institutional memory” is preserved when:

- NomCom past, current and future chairs assume leadership roles during discussions and meetings
- ICANN staffers knowledgeable with NomCom bylaws and procedures are assigned to the meetings
- NomCom staggered delegate terms (preferably of 2 years) create an ad-hoc mentorship system for incoming delegates.⁷

3. Do you have input on the NomCom Standing Committee Charter?

The draft NomCom Standing Committee Charter provides :

VI. Meetings

1. The NomCom Standing Committee will meet by remote participation (using appropriate technology) as frequently as necessary, but no fewer than six times per year.⁸

The primary disadvantage with a NomCom Standing Committee system of separate meetings is the diminished opportunity for all NomCom delegates to have the same deep level of understanding of the “institutional memory” or whatever benefit the Standing Committee brings, if other NomCom delegates are not present at the Standing Committee meeting.⁹

If a Standing Committee is necessary for NomCom under the NomCom2 Detailed Implementation, a better alternative would be 4 NomCom delegates with

7 The work of NomCom delegates under the current structure can be improved if the Nominating committee Handbook includes all training material and detailed meeting dates from the first day of their term, instead of spread out in separate emails throughout the year. This enhanced Handbook would provide an “institutional memory” or “case law” without the bias of Standing Committee individuals.

8 See <https://www.icann.org/en/system/files/files/draft-nomcom-standing-committee-charter-10apr23-en.pdf>, p.5.

9 See Donna Dunn Standing Committees – Good or Bad?, at <https://www.tecker.com/standing-committees-good-or-bad/> for an opinion on standing committees

staggered 3-year terms – as in the proposed charter - meeting alongside all NomCom members.

4. Do you have input on the requested changes to Article 12 related to the RSSAC?

For the Root Server System Advisory Committee (or "RSSAC"), changes to Article 12. Section 12.2.(c)(i) deleted the phrase: *The RSSAC chair and members shall be appointed by the Board.*¹⁰ I share the ccNSO Council's concern in their Submission¹¹ that by removing the appointment by the Board, with no other mechanism in place, it is unclear (and presumably to the wider community as well) who is eligible to become part of RSSAC and how.

These opinions are solely my own and do not necessarily represent the opinion of any Committees or entity I am affiliated to.

Sincerely,

Alvaro Aguilar-Alfu¹²

10 See <https://www.icann.org/en/system/files/files/proposed-bylaws-amendments-10apr23-en.pdf>, p. 8.

11 See <https://www.icann.org/en/public-comment/proceeding/bylaws-amendments-and-documents-to-implement-the-nomcom2-review-17-04-2023/submissions/ccnso-council-29-05-2023>

12 The author is tech law attorney based in Panama, co-founder of Panamanian Association of Law and New Technologies (APANDETEC), formed in 2013 by attorneys and engineers who specialize in tech regulation, and an At-Large Structure of the Latin American and Caribbean Islands Regional At-Large Organization and participating with ICANN since 2018.. See https://icannwiki.org/Alvaro_Javier_Aguilar