

# **CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations**

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23 February 2016



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# Summary

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- 01 Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is being distributed for the consideration and approval of the working group's 6 Chartering Organizations.
- 02 This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.
- 03 The main elements of the proposal are outlined below, supported by additional annexes and appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.
- **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.
  - An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.
  - New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
    - Reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans.
    - Reject changes to ICANN's Standard Bylaws.
    - Approve changes to new Fundamental Bylaws, Articles of Incorporation and ICANN's sale or other disposition of all or substantially all of ICANN's assets.
    - Remove an individual ICANN Board Director.
    - Recall the entire ICANN Board.
    - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
    - Reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of Post-Transition IANA separation.
    - The rights of inspection and investigation
  - A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.
- 04 All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.
- 05 The accountability elements outlined above will be supported through:
- Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when

needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.

- Core elements of ICANN’s governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

06 In addition, further proposed changes include:

- Recognition of **ICANN’s respect for Human Rights** into the Bylaws.
- Incorporation of ICANN’s commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.
- Improved accountability and diversity standards for ICANN’s **Supporting Organizations and Advisory Committees**.
- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016 that do not need to be in place or committed to prior to the IANA Stewardship Transition. These include:
  - Considering improvements to ICANN’s standards for diversity at all levels.
  - Further enhancements to the accountability of ICANN’s Supporting Organizations and Advisory Committees, as well as ICANN staff.
  - Improving ICANN’s transparency relating to ICANN’s Documentary Information Disclosure Policy (DIDP), interactions with governments, whistleblower policy and Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN’s Human Rights commitment in the Bylaws.
  - Addressing questions focused on jurisdiction of contracts and dispute settlements.
  - Considering enhancements to the role and function of the ICANN Ombudsman.

07 To develop these recommendations to improve ICANN’s accountability, the working group:

- Relied on suggestions and proposals generated inside the working group and by the broader Internet multistakeholder community.
- Conducted three public comment periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.
- Rigorously “stress tested” ICANN’s current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.
- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.
- Made the minimum enhancements to ICANN’s accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.
- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.
- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

- 08 Each of the twelve recommendations has a corresponding annex with additional details including a summary, CCWG-Accountability<sup>1</sup> Recommendations, Detailed Explanation of Recommendations, Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations,' Stress Tests Related to this Recommendation, how the recommendation meets the CWG-Stewardship<sup>2</sup> Requirements, and how the recommendation addresses NTIA Criteria.
- 09 **Note:** Minority statements can be found in Appendix A: Documenting Consensus (Including Minority Views)

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<sup>1</sup> Cross Community Working Group on Enhancing ICANN Accountability

<sup>2</sup> Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

# Background

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- 10 On 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the [Internet Assigned Numbers Authority \(IANA\) Functions](#) to the global multistakeholder community. NTIA asked ICANN to convene an inclusive, global discussion to determine a process for transitioning the stewardship of these functions to the Internet community.
- 11 During initial discussions on how to proceed with the transition process, the ICANN multistakeholder community, recognizing the safety net that the NTIA provides as part of its stewardship role of the IANA Functions, raised concerns about the impact of the transition on ICANN's accountability.
- 12 To address these concerns, the ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process. As a result, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened. The CCWG-Accountability's work consists of two tracks:

13 **Work Stream 1:** Focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

14 **Work Stream 2:** Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

- 15 Any other consensus items that are not required to be in place within the IANA Stewardship Transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN Management or others.
- 16 The work documented in this Draft Proposal focuses on Work Stream 1, with some references to related activities that are part of Work Stream 2's remit.



# Requirements

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17 This section provides an overview of the requirements the CCWG-Accountability has to fulfill in developing its recommendations

## 18 **NTIA Requirements**

19 NTIA [has requested](#) that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. Government stewardship role” with regard to the IANA Functions and related Root Zone management. In making its announcement, the NTIA specified that the transition Proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectations of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

20 NTIA also specified that it would not accept a Proposal that replaces its role with a government-led or an intergovernmental organization solution.

21 Additionally, NTIA also requires that the CCWG-Accountability Proposal clearly document how it worked with the multistakeholder community, which options it considered in developing its Proposal, and how it tested these.

22 Please Refer to Annex 14: NTIA Requirements for the details of how the CCWG-Accountability meets these requirements.

## 23 **CWG-Stewardship Requirements**

24 In the transmittal letter for the CWG-Stewardship transition plan to the IANA Stewardship Transition Coordination Group (ICG), the CWG-Stewardship noted the following regarding its dependencies on the CCWG-Accountability work in response to an earlier version of this document:

25 “The CWG-Stewardship is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms proposed by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The co-Chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability Work Stream 1 recommendations, if implemented as expected, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability. If any element of these level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship, this will require revision.”

26 The CWG-Stewardship requirements of the CCWG-Accountability are detailed on pages 20 – 21 of the CWG-Stewardship Proposal transmitted on 25 June 2015. The Work Stream 1 Proposals from the CCWG-Accountability address all of these conditions.

27 These requirements are:

1. ICANN Budget
  2. ICANN Board and Community Empowerment Mechanisms
  3. IANA Function Review and Separation Process
  4. Customer Standing Committee
  5. Appeals Mechanism
  6. Post-Transition IANA (PTI) Governance
  7. Fundamental Bylaws
- 28 Please refer to Annex 13: CWG-Stewardship Requirements for details on how the CCWG-Accountability meets these requirements.

# The CCWG-Accountability's Findings and Recommendations

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29 This section provides an overview of the CCWG-Accountability's findings and recommendations regarding Work Stream 1:

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30 **Recommendation #1:** Establishing an Empowered Community for Enforcing Community Powers

31 **Recommendation #2:** Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

32 **Recommendation #3:** Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

33 **Recommendation #4:** Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

34 **Recommendation #5:** Changing Aspects of ICANN's Mission, Commitments, and Core Values

35 **Recommendation #6:** Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries out its Mission

36 **Recommendation #7:** Strengthening ICANN's Independent Review Process

37 **Recommendation #8:** Improving ICANN's Request for Reconsideration Process

38 **Recommendation #9:** Incorporating the Affirmation of Commitments in ICANN's Bylaws

39 **Recommendation #10:** Enhancing the Accountability of Supporting Organizations and Advisory Committees

40 **Recommendation #11:** Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

41 **Recommendation #12:** Committing to Further Accountability Work in Work Stream 2

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42 Note:
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- The language in the Summary, CCWG-Accountability Recommendations, and Changes from the “Third Draft Proposal on Work Stream 1 Recommendations” sections of the Recommendations is copied from the matching Annexes which were approved as consensus positions by the CCWG-Accountability. Only the formatting has been modified to accommodate the structure of the main report.
- The language proposed in recommendations for ICANN Bylaw revisions are conceptual at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental and Standard Bylaws).

## Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

### 43 Summary

44 Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board of Directors has the final responsibility for the activities and affairs of ICANN.

45 With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the ICANN Board may object to the results.

46 The CCWG-Accountability recommends creating a new entity that will act at the direction of the multistakeholder community to exercise and enforce Community Powers. The entity will take the form of a California unincorporated association and be given the role of "Sole Designator" of ICANN Board Directors and will have the ability to directly or indirectly the Community Powers. The entity will be referred to as the "Empowered Community."

47 As permitted under California law, the Empowered Community will have the statutory power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws, may be provided to the Empowered Community.

48 The CCWG-Accountability accepts that its statutory power will be limited as described above, and that this is sufficient given:

- The creation of "Fundamental Bylaws" that can only be modified jointly by the ICANN Board and Empowered Community.
- All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
- The right of inspection is granted to "Decisional Participants" in the Empowered Community.
- The right of investigation is granted to the Decisional Participants in the Empowered Community.

49 The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

### 50 CCWG-Accountability Recommendations

51 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:

- This entity will take the form of a California unincorporated association and be given the role of Sole Designator of ICANN Board Directors and will have the ability to directly or indirectly enforce the Community Powers. This entity will be referred to as the Empowered Community.

- The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the Decisional Participants in the Empowered Community.
- The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws, along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
- The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

52 Additionally, the CCWG-Accountability recommends including in the ICANN Bylaws:

- The right for Decisional Participants in the Empowered Community to inspection as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.
- The right of investigation, which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.
- The following limitation associated with the Governmental Advisory Committee (GAC) acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out").

In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power.

The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus – as defined in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) – while protecting the Empowered Community's power to challenge such Board decisions.

53 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, emphasizing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduced additional suggestion by the ICANN Board regarding investigation right (audits), based on three Decisional Participants in the Empowered Community threshold.

- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the “GAC carve-out.”

#### 54 **Relevant Annexes**

- Annex 01 – Details on Recommendation #1: Establishing an Empowered Community for enforcing Community Powers
- Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

## **Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, and Enforcement**

#### 55 **Summary**

#### 56 **Engagement**

57 Today, the Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voluntarily consults with the multistakeholder community on a variety of decisions, including the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an “engagement process.”

58 The CCWG-Accountability is recommending that engagement processes for specific ICANN Board actions be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:

- Approving ICANN’s Five-Year Strategic Plan.
- Approving ICANN’s Five-Year Operating Plan.
- Approving ICANN’s Annual Operating Plan & Budget.
- Approving the Internet Assigned Numbers Authority (IANA) Functions Budget.
- Approving any modifications to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN’s sale or other disposition of all or substantially all of ICANN’s assets.
- Making ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process.

59 If it is determined that there is divergence between the ICANN Board and the community after the engagement process, the Empowered Community (as defined in Recommendation #1:

Establishing an Empowered Community for Enforcing Community Powers) may decide to use a Community Power after the appropriate “escalation process” has been satisfied.

60 The Empowered Community may begin an escalation process to:

- Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
- Reject a change to ICANN Standard Bylaws.
- Approve changes to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN’s sale or other disposition of all or substantially all of ICANN’s assets.
- Remove an individual ICANN Board Director.
- Recall the entire ICANN Board.
- Initiate a binding community Independent Review Process (IRP), where a panel decision is enforceable in any court recognizing international arbitration results, or a non-binding Request for Reconsideration, where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN’s Board or staff.

61 Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

## 62 **Escalation**

63 The escalation process can differ, sometimes significantly, from one Community Power to another.

64 One of the most standardized versions of the escalation process is required for all Community Powers to “reject,” remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.

- **This escalation process comprises the following steps:**

1. An individual starts a petition in a Supporting Organization (SO) or Advisory Committee (AC) that is a Decisional Participant in the Empowered Community (see Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers).
  - If the petition is approved by that SO or AC, it proceeds to the next step.
  - If the petition is not approved by that SO or AC, the escalation process is terminated.
2. The SO or AC that approved the petition contacts the other Decisional Participants to ask them to support the petition.
  - At least one additional SO and/or AC must support the petition (for a minimum of two or, for Board recall, three) for a Community Forum to be organized to discuss the issue.
    - If the threshold is not met, the escalation process is terminated.
    - If the threshold is met, a Community Forum is organized to discuss the petition.
3. An open Community Forum of one or two days is organized for any interested stakeholder in the community to participate.
  - The petitioning SO and/or AC will:



- Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants.
  - Designate a representative(s) to liaise with SOs/ACs to answer questions from the SOs/ACs.
  - If desired, optionally, request that ICANN organize a conference call prior to the Community Forum for the community to discuss the issue.
  - If the ICANN Board and the Empowered Community can resolve their issues before or in the Community Forum, the escalation process is terminated.
  - Otherwise, the Empowered Community must decide if it wishes to use its Community Power.
4. The Empowered Community considers use of a Community Power.
- If the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.
  - If the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and directs it to comply with the decision (as outlined in the Fundamental Bylaws for this Community Power).
5. The Empowered Community advises the ICANN Board.
- If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

65 **Enforcement**

66 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.

67 The enforcement process can proceed in one of two ways:

- The Empowered Community may initiate mediation and community IRP procedures.
- The Empowered Community may initiate an escalation process to recall the entire ICANN Board.

68 The enforcement process may result in a resolution of the issue. Otherwise, if needed, the result of the enforcement process is enforceable in court.

69 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

70 **CCWG-Accountability Recommendations**

- 71 Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
- Approving ICANN’s Five-Year Strategic Plan.
  - Approving ICANN’s Five-Year Operating Plan.
  - Approving ICANN’s Annual Operating Plan & Budget.
  - Approving the IANA Functions Budget.
  - Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN’s sale or other disposition of all or substantially all of ICANN’s assets.
  - Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.
- 72 Include the engagement, escalation and enforcement processes in the Fundamental Bylaws.
- Note: The escalation processes for each Community Power are outlined in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.

73 **Table: Required Thresholds for the Various Escalation and Enforcement Processes (Based on a Minimum of Five Decisional Participants in the Empowered Community)**

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
74 1. Reject a proposed Operating Plan/Strategic Plan/Budget	75 Two SOs/ACs	76 Four support rejection, and no more than one objection
77 2. Approve a change to Fundamental Bylaws and Articles of Incorporation, and approve ICANN’s sale or other disposition of all or substantially all of ICANN’s assets	78 N/A	79 Three support approval, and no more than one objection
80 3. Reject changes to Standard Bylaws	81 Two SOs/ACs, including the SO that led the PDP that requires the Bylaw change (if any)	82 Three support rejection, including the SO that led the PDP that requires the Bylaw change (if any), and no more than one objection

<b>Required Community Powers?</b>	<b>Petition Threshold to convene a Community Forum</b>	<b>Is there consensus support to exercise a Community Power?</b>
83 4a. Remove an individual Board Director nominated by an SO or AC (and appointed by the Empowered Community)	84 Majority within nominating SO/AC	85 Invite and consider comments from all SOs/ACs. 3/4 majority within the nominating SO/AC to remove their director
86 4b. Remove an individual Board Director nominated by the Nominating Committee (and appointed by the Empowered Community)	87 Two SOs/ACs	88 Three support, and no more than one objection
89 5. Recall the entire Board of Directors	90 Three SOs/ACs	91 Four support, and no more than one objection <sup>3</sup>
92 6. Initiate a binding IRP or a Request for Reconsideration	93 Two SOs/ACs	94 Three support, including the SO(s) that approved the policy recommendations from the PDP which result is being challenged through the IRP (if any), and no more than one objection 95 Require mediation before IRP begins
96 7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process	97 Two SOs/ACs	98 Four support, and no more than one objection

99 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the ALAC and GAC (if the GAC chooses to participate) would participate in the Empowered Community – that is, they will be listed in the Bylaws as the five Decisional Participants.

100 The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.

101 In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would, however, need to be a conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the

<sup>3</sup> A minority of CCWG-Accountability participants prefer to require five SOs and ACs, or allow one objection to block consensus.

change would follow the Fundamental Bylaw change process, which enables such a conscious decision to be undertaken.

102 The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects, with the following exception:

- Where the power to be exercised is recalling the entire Board for implementing GAC advice, the reduced threshold would apply only after an IRP has found that, in implementing GAC advice, the Board acted inconsistently with the ICANN Bylaws. If the Empowered Community has brought such an IRP and does not prevail, the Empowered Community may not exercise its power to recall the entire the Board solely on the basis of the matter decided by the IRP. It may, however, exercise that power based on other grounds.

### 103 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Extended time for certain escalation steps in response to comments. Kept overall timeline similar by combining and removing some steps (mandatory conference call).
- Made it mandatory for petitioning party to reach out to SOs/ACs to socialize relevant information before Community Forum.
- Acknowledged comments regarding the thresholds adjustment in case the number of Decisional Participants is lower (page 12, paragraph 60 of the Third Draft Proposal), by removing this option and replacing it with a lower threshold for approving changes to Fundamental Bylaws. Since the Fundamental Bylaw change process is a requirement for “approval” and not a “rejection” option, this would preserve the requirement for stronger protection of Fundamental Bylaws.
- Determined that the use of the corresponding percentage for thresholds as recommended by the Board can be suggested as a guideline in the event of the creation of new SOs/ACs, but there would need to be a conscious decision, depending on the circumstances. If such a new SO/AC were to become a Decisional Participant in the Empowered Community, this change would require a change to the Fundamental Bylaws and would therefore require approval by the Empowered Community.
- Implemented the compromise for Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) that the threshold requirements would be modified if the GAC was a Decisional Participant.

### 104 **Relevant Annexes**

- 105 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement
- 106 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- 107 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

## Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

### 108 **Summary**

109 Currently, the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) have a single mechanism for amendment.

- Any provision of the ICANN Bylaws can be changed by a 2/3 vote of all the Directors on the ICANN Board.
- The ICANN Board is not required to consult the multistakeholder community or the wider public before amending the Bylaws, but has voluntarily done so up to this point.

110 The CCWG-Accountability recommends classifying each ICANN Bylaw as either a “Fundamental Bylaw” or a “Standard Bylaw,” with Fundamental Bylaws being more difficult to change.

111 Specifically, the CCWG-Accountability recommends that:

- Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
- The requirement for public consultations to be added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
- Any changes to Fundamental Bylaws require approval from both the ICANN Board and Empowered Community, as outlined in the respective Community Power (as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers).
- The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised from 2/3 to 3/4.
- Approval for changes to the Articles of Incorporation use the same process required for approving changes to Fundamental Bylaws, including public consultations.

112 Why is the CCWG-Accountability recommending this?

- The CCWG-Accountability felt that it was critical to ensure that the ICANN Bylaws that embody the purpose of the organization (Mission, Commitments and Core Values) and are meant to ensure the accountability of the ICANN Board, cannot be changed by the ICANN Board acting alone.

### 113 **CCWG-Accountability Recommendations**

114 The CCWG-Accountability recommends:

- Classifying each ICANN Bylaw as either a Fundamental Bylaw or a Standard Bylaw.
- Making the following CCWG-Accountability and CWG-Stewardship Recommendations Fundamental Bylaws:

- The Empowered Community for enforcing Community Powers, including the role of Sole Designator of ICANN's Directors, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- The escalation and enforcement mechanisms as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
- The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets as described in Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.
- The seven Community Powers as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- The Mission, Commitments and Core Values as described in Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values.
- The framework for the Independent Review Process (IRP) as described in Recommendation #7: Strengthening ICANN's Independent Review Process.
- The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
- The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
- The rights of investigation and inspection as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- Requiring ICANN to conduct public consultations on any proposed changes to Standard Bylaws, Fundamental Bylaws or the Articles of Incorporation.
- Requiring approval for any changes to Fundamental Bylaws and the Articles of Incorporation from both the ICANN Board and the Empowered Community as outlined in the Community Power as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or the Articles of Incorporation from 2/3 to 3/4 of all the Directors on the ICANN Board.

115

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**








- Clarified that IANA Function Review (IFR) provisions apply only to the IANA naming functions (CWG-Stewardship requirement).
- Clarified the process for changes of Articles of Incorporation to be similar to process for changes to Fundamental Bylaws, as well as the process for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Added a specific recommendation that the current Articles of Incorporation be modified to remove the notion of members and reflect the need for an affirmative vote of at least 3/4 of all the Directors on the ICANN Board, as well as approval by the Empowered Community.

116 **Relevant Annexes**

117 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

118 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

## Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers

 <p><b>REJECT BUDGET OR STRATEGIC/ OPERATING PLAN</b></p>	 <p><b>REJECT CHANGES TO ICANN STANDARD BYLAWS</b></p>	 <p><b>APPROVE CHANGES TO FUNDAMENTAL BYLAWS OR ARTICLES, OR CERTAIN ASSET SALES</b></p>	
 <p><b>REMOVE INDIVIDUAL ICANN BOARD DIRECTORS</b></p>	 <p><b>RECALL ENTIRE ICANN BOARD</b></p>	 <p><b>LAUNCH COMMUNITY INDEPENDENT REVIEW PROCESS OR REQUEST FOR RECONSIDERATION</b></p>	 <p><b>REJECT ICANN BOARD DECISIONS RELATING TO IANA FUNCTIONS REVIEWS</b></p>

119 **Summary**

120 The CCWG-Accountability has recommended seven powers for the community that should be in place to improve ICANN's accountability and ensure community engagement.

121 These "Community Powers" are:

1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.

2. Reject a change to ICANN Standard Bylaws.
3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
4. Remove an individual ICANN Board Director.
5. Recall the entire ICANN Board.
6. Initiate a binding Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process for the IANA naming functions.

122 The Community Powers and associated processes were designed to ensure that no stakeholder can singlehandedly exercise any power, and that under no circumstances, would any individual segment of the community be able to block the use of a power.

## 123 **CCWG-Accountability Recommendations**

124 The CCWG-Accountability recommends:

- Defining the following Community Powers as Fundamental Bylaws:
  1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
  2. Reject a change to ICANN Standard Bylaws.
  3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  4. Remove an individual ICANN Board Director.
  5. Recall the entire ICANN Board.
  6. Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
  7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any PTI separation process for the IANA naming functions.
- Adding an ICANN Bylaw that states that if the entire ICANN Board is removed, an Interim Board will be established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations (SOs), Advisory Committees (ACs), and the Nominating Committee (NOMCOM) will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.



- The ICANN Bylaws will state that, except in circumstances in which urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.
- Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2.
- That there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:
  - Fundamental Bylaws would require that the ICANN Board not combine the approval of ICANN Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
  - Fundamental Bylaws would require the ICANN Board to clearly indicate if an ICANN Bylaw change is the result of a Policy Development Process when the Board approves it.
  - Fundamental Bylaws would require that if the change to the ICANN Bylaws is the result of a Policy Development Process, the SO that led the Policy Development Process must formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the SO that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.

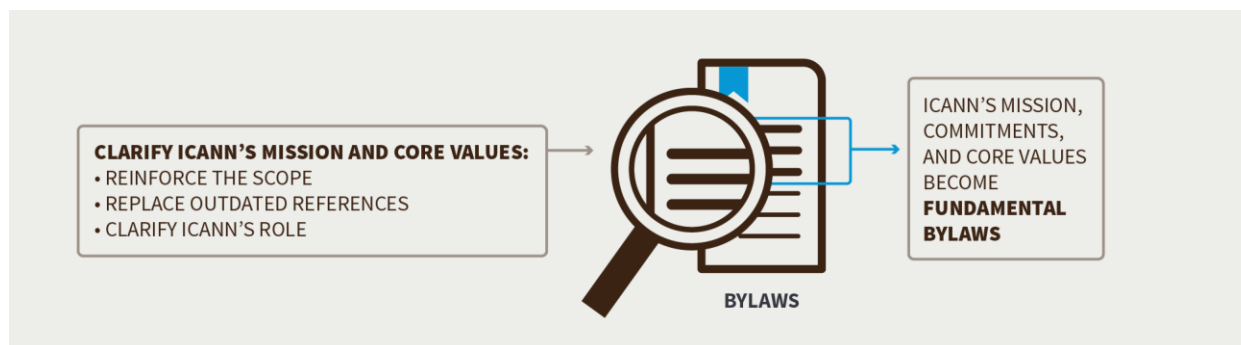
125 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Budget rejection for PTI significantly updated.
- Caretaker budget expanded.
- Indemnification for removal of an ICANN Board Director greatly expanded.
- Escalation steps amended to match process in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement.
- Scope of community IRP modified to match Recommendation #7: Strengthening ICANN's Independent Review Process.
- “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation” is now: “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets.”
- “The Power to Initiate a Binding IRP (Where a Panel Decision is Enforceable in any Court Recognizing International Arbitration Results)” now includes the possibility for the Empowered Community to file a Request for Reconsideration.

126 **Relevant Annexes**

- 127 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement
- 128 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- 129 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

## Recommendation #5: Changing Aspects of ICANN's Mission, Commitments, and Core Values



### 130 Summary

131 The CCWG-Accountability is recommending changes to the ICANN Bylaws to assure that the Bylaws reflect the CCWG-Accountability recommendations.

- Note: The language proposed in this recommendation for ICANN Bylaw revisions is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

### 132 Mission Statement

133 The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

- Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
- Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN's powers are "enumerated." Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN's authority.
  - Note: This does not mean ICANN's powers can never evolve. However, it ensures that any changes will be deliberate and supported by the community.

134 **Core Values**

01 The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN's existing Core Values provisions into "Commitments" and "Core Values."
  - Incorporate ICANN's obligation to "operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition" into the Bylaws.
  - Note: These obligations are currently contained in ICANN's Articles of Incorporation.
- Designate certain Core Values as "Commitments." ICANN's Commitments will include the values that are fundamental to ICANN's operation, and are intended to apply consistently and comprehensively.

Commitments will include ICANN's obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
  - Limit its activities to those within ICANN's Mission that require, or significantly benefit from, global coordination.
  - Employ open, transparent, bottom-up, multistakeholder processes.
  - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
    - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
    - Add an obligation to avoid capture.

135 Although previous CCWG-Accountability draft proposals proposed to modify existing Core Value 5 ("Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment") to drop the phrase "where feasible and appropriate," the CCWG-Accountability has reconsidered this recommendation. While acknowledging that ICANN is not an antitrust authority, on balance the CCWG-Accountability elected to retain the introductory language to ensure that ICANN continues to have the authority, for example, to refer competition-related questions regarding new registry services to competent authorities under the RSEP program and to establish bottom-up policies for allocating top-level domains (e.g., community preference).

136 **Balancing or Reconciliation Test**

137 The CCWG-Accountability recommends modification to the "balancing" language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

*These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with*

*the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.*

138 **Fundamental Bylaws Provisions**

139 The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

140 **CCWG-Accountability Recommendations**

141 Modify ICANN's Fundamental Bylaws to implement the following:

142 **Mission**

143 The Mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope is to coordinate the development and implementation of policies:
  - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and
  - That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN provides registration services and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.
4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

144 ICANN shall act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission.

145 ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

146 ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

147 Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to note the following:

1. The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages.
2. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called "Picket Fence") are intended and understood to be within the scope of ICANN's Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is included for reference at the end of this Annex.
3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party's right to challenge the other party's interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.
4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

## 148 **Section 2. Commitments & Core Values**

149 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.

### 150 **Commitments**

151 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:

1. Preserve and enhance its neutral and judgment-free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
2. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet.

3. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination.
4. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (1) seek input from the public, for whose benefit ICANN shall in all events act, (2) promote well-informed decisions based on expert advice, and (3) ensure that those entities most affected can assist in the policy development process.
5. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.
6. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

152 **Core Values**

153 In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. 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 and the roles of both ICANN's internal bodies and external expert bodies.
2. 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 to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
  - a. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
5. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.
6. Striving to achieve a reasonable balance between the interests of different stakeholders.

154 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.

155 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

156 In any situation where one Core Value must be reconciled with another, potentially competing  
Core Value, the balancing must further an important public interest goal within ICANN's Mission  
that is identified through the bottom-up, multistakeholder process.

157 Note: Specific recommendations on how to implement these modifications can be found at the  
end of the next section.

## 158 **Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations'**

159 For space considerations the list of changes is not included here. Please consult Annex 5 -  
Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values  
for a detailed list of modifications.

## 160 **Relevant Annexes**

161 Annex 05 – Details on Recommendation #5: Changing Aspects of ICANN's Mission,  
Commitments, and Core Values

# **Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission**

## 162 **Summary**

163 The subject of including a commitment to respect Human Rights in the ICANN Bylaws has been  
extensively discussed by the CCWG-Accountability.

164 The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA  
Functions Contract between ICANN and the U.S. National Telecommunications and Information  
Administration (NTIA), ICANN's specific Human Rights obligations could be called into question.  
It was found that, upon termination of the contract, there would be no significant impact on  
ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a  
commitment to respect Human Rights should be included in ICANN's Bylaws in order to comply  
with the NTIA criteria to maintain the openness of the Internet.

165 This proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within  
its Core Values, and would clarify ICANN's commitment to respect Human Rights.

166 Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent  
Mission expansion or "Mission creep," and under the proposed draft Bylaw, ICANN commits to  
respect internationally recognized Human Rights "within its Core Values."

167 The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation  
on ICANN to take action in furtherance of the Bylaw.

168 The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of  
this Bylaw until a Framework of Interpretation on Human Rights (FOI-HR) is developed and  
approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR

will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).

169 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights.

170 **CCWG-Accountability Recommendations**



- Include a Bylaw with the following intent in Work Stream 1 recommendations:

“Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations’ approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”

- Note: This proposed draft Bylaw will be reviewed by both CCWG-Accountability’s lawyers and ICANN’s legal department and then submitted to the CCWG-Accountability for approval before its submission to the Board for approval.
- Include the following in Work Stream 2 activities:
  - Develop an FOI-HR for the Human Rights Bylaw.
  - Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
  - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
  - Consistent with ICANN’s existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.



- Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

171 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The CCWG-Accountability considered comments received during the third public comment period, which were overall in favor of including Human Rights language with a few exceptions which included the ICANN Board.
- The CCWG-Accountability engaged with the ICANN Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- The CCWG-Accountability developed compromise text based on a proposal by its legal advisors, which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns, but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- The ICANN Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which were accepted by the CCWG-Accountability.

172 **Relevant Annexes**

- 173 Annex 06 – Details on Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

## **Recommendation #7: Strengthening ICANN's Independent Review Process**

- 174 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
- 175 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.

176 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions.

177 The CCWG-Accountability also proposes that the IRP:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
- Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Be subject to certain exclusions relating to the results of an SO's policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.

178 **CCWG-Accountability Recommendations**

- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
  - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
  - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
  - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
  - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
  - Size of Panel:
    - Standing Panel: Minimum of seven panelists.
    - Decisional Panel: Three panelists.
  - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
  - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- Standing: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board's failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- Community Independent Review Process: The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Standard of Review: The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- Accessibility and Cost: The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example

access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

- **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN's Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

179

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The scope of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN's failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- **Exclusion:** The IRP will not be applicable to protocols parameters.
- **Exclusion:** An IRP cannot be launched that challenges the result(s) of an SO's policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- **Limitation:** An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

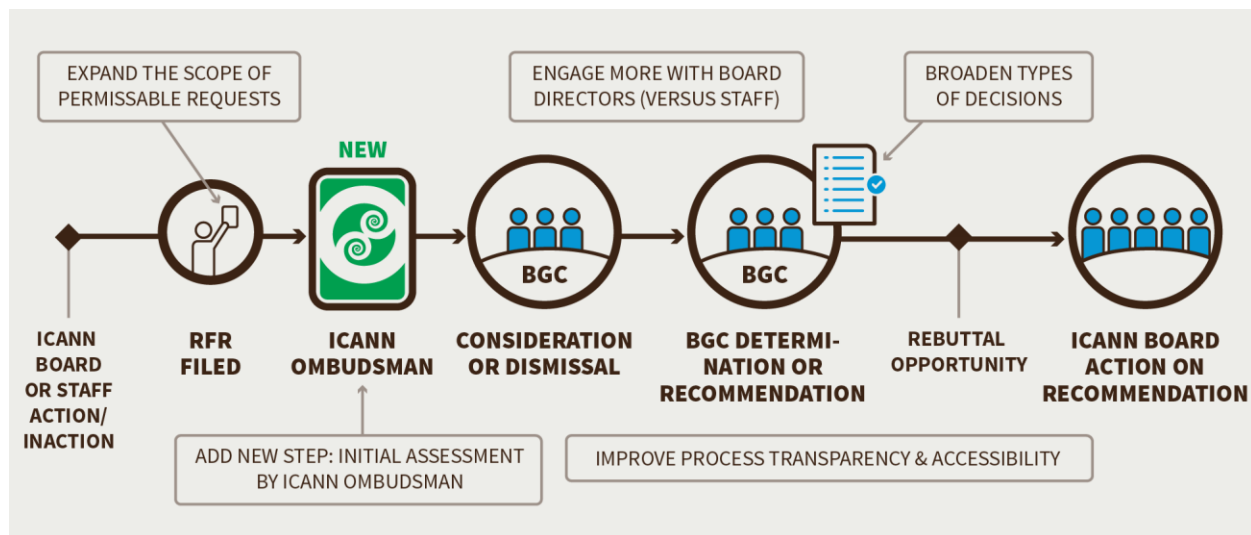
180

### **Relevant Annexes**

181

Annex 07 – Details on Recommendation #7: Strengthening ICANN's Independent Review Process

## Recommendation #8: Improving ICANN's Request for Reconsideration Process



### 182 Summary

183 Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in [Article IV, Section 2 of ICANN's Bylaws](#).

184 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
- Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.

185 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:

- Recordings/transcripts of Board discussion should be posted at the option of the requestor.
- An opportunity to rebut the Board Governance Committee's (BGC's) final recommendation before a final decision by the ICANN Board should be provided.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

186 ICANN's Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

## 187 **CCWG-Accountability Recommendations**

188 Modify [Article IV, Section 2 of ICANN's Bylaws](#) to reflect the following changes:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

## 189 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

## 190 **Relevant Annexes**

191 Annex 08 – Details on Recommendation #8: Improving ICANN's Request for Reconsideration Process

## Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws



### 192 Summary

193 Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), into the ICANN Bylaws. This will ensure that community reviews remain a central aspect of ICANN's accountability and transparency framework.

194 Specifically, the CCWG-Accountability proposes to:

- Add the relevant ICANN Commitments from the Affirmation of Commitments into the ICANN Bylaws.
- Add the four review processes specified in the Affirmation of Commitments to the ICANN Bylaws, including:
  - Ensuring accountability, transparency, and the interests of global Internet users.
  - Enforcing ICANN's existing policy relating to WHOIS, subject to applicable laws.
  - Preserving security, stability, and resiliency of the Domain Name System (DNS).
  - Promoting competition, consumer trust, and consumer choice.

195 In addition, to support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.

### 196 CCWG-Accountability Recommendations



197 The CCWG-Accountability evaluated the contingency of ICANN or NTIA unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the “Detailed Explanation of Recommendations” section, below).

198 To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:

- Preserve in the ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments<sup>4</sup>
  - This includes Sections 3, 4, 7, and 8 of the Affirmation of Commitments. Sections 3, 4, 8a, and 8c would be included in the Core Values section of the ICANN Bylaws.
  - Part of the content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN’s principal office), is already covered by ICANN Bylaws Article XVIII. Article XVIII is to be classified as a Standard Bylaw and is not to be moved into the Core Values section with material derived from Affirmation of Commitments Sections 8a and 8c.
  - Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.
- Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws
  - The following four reviews will be preserved in the reviews section of the Bylaws:
    - Ensuring accountability, transparency, and the interests of global Internet users.
    - Enforcing ICANN’s existing policy relating to WHOIS, subject to applicable laws.
    - Preserving security, stability, and resiliency of the DNS.
    - Promoting competition, consumer trust, and consumer choice.

199 After these elements of the Affirmation of Commitments are adopted in the ICANN Bylaws, the following should take place:

- ICANN and NTIA should mutually agree to terminate the Affirmation of Commitments.

<sup>4</sup> Sections 3, 4, 7, and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.



- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules.
- Through its Work Party IRP Implementation Oversight Team (WP-IRP IOT), the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP).
- To support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff, and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.
- These operational standards should include issues such as: composition of Review Teams, Review Team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to legal counsel.

200 A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws and will be classified as Fundamental Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

201 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
- All AoC reviews (and the IFR and Special IFR) should be incorporated into the Bylaws.
- The WP-IRP IOT will examine the suggestion to include a mid-term review of the IRP. The ATRT scope will be expanded to suggest a review of the IRP (paragraph 89).
- The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal (paragraph 54).
- The Board amendment on WHOIS/future Registration Directory Services policy (paragraph 127) should be included.
- The ICANN Articles of Incorporation address ICANN's state of incorporation (or corporate domicile), and the ICANN Bylaws (Article XVIII) address the separate issue of the location of ICANN's principal office. Article XVIII of the ICANN Bylaws will be classified as a Standard Bylaw (see paragraph 5).

- The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that Recommendation #9 would be respected and that this text would address implementation details only (see paragraph 8).
- CCWG-Accountability lawyers advised clarifying “diversity” in paragraph 54 regarding composition of AoC Review Teams. CCWG-Accountability notes that “diversity” considerations could include geography, skills, gender, etc., and that chairs of participating ACs and SOs should have flexibility in their consideration of factors in selecting Review Team members.
- CCWG-Accountability lawyers suggested “the group of chairs can solicit additional nominees or appoint less than 21 members to avoid potential overrepresentation of particular ACs or SOs if some nominate less than 3 members.” The CCWG-Accountability proposed “up to 21”, so it is not actually proposing a fixed number of Review Team members. “Fixed” has been replaced with “limited” in paragraph 54. CCWG-Accountability purposely allowed AC/SO chairs to select additional Review Team members from ACs/SOs that had offered more than 3 candidates. This is to accommodate ACs/SOs that had greater interest in a review, such as the GNSO, which would be the most concerned with reviews of new gTLDs and WHOIS/Directory Services. Therefore, the representation and number of seats on the Review Team will remain unchanged from the Third Draft Proposal.
- Replaced “participants” with “observers” in paragraph 54.

## Relevant Annexes

- 202 Annex 09 – Details on Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN’s Bylaws

## Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

### 203 Summary

204 The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:

- In Work Stream 1: Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
- In Work Stream 2: Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.

### 205 CCWG-Accountability Recommendations

206 Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations.

207 The CCWG-Accountability recommends the following.

208 **Work Stream 1:**

209 Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews that are performed on a regular basis.

- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:

*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 periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

*assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

210 **Work Stream 2:**

211 Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.

- Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and, if viable, undertake the necessary actions to implement it.<sup>5</sup>

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<sup>5</sup> CCWG-Accountability Advisor Willie Currie introduced a short description of the mutual accountability roundtable: *The idea of mutual accountability is that multiple actors are accountable to each other. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new Community Powers construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets at each ICANN meeting, perhaps replacing the current Public Forum. The form would be a roundtable of the Board, CEO, and all Supporting Organizations and Advisory Committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year who would be responsible for facilitating each Mutual Accountability Roundtable. Each Roundtable may pick one or two key topics to examine. Each participant could give an account of how his or her constituency addressed the issue, indicating what worked and didn't work. This could be followed by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.*

- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

212 Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

213 **Changes Made Since the Third Draft Proposal**

- Added: The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

*assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

- In Work Stream 2 recommendations, added: Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

214 **Relevant Annexes**

215 Annex 10 – Details on Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

## Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

### 216 Summary

217 Currently, Governmental Advisory Committee (GAC) advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:

*j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

218 Stress Test #18 considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters.

219 In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to so participate), some stakeholders believe that this could increase government influence over ICANN.

220 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice.

### 221 CCWG-Accountability Recommendations

222 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2 (emphasis added):

223 *j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of 60% of the Board**, and the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

224 This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must "try to find a mutually acceptable solution," as required in ICANN's current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to

consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.

- 225 The GAC has the autonomy to refine its operating procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- 226 The CCWG-Accountability recommends inserting a requirement that all ACs provide a rationale for their advice. A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN's Bylaws.
- 227 To address concerns regarding GAC advice that is inconsistent with the ICANN Bylaws, the CCWG-Accountability recommends adding this clarification for legal counsel to consider when drafting Bylaws language:

*ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.*

- 228 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

## 229 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC “carve out.”

## 230 **Relevant Annexes**

- 231 Annex 11 – Details on Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

## Recommendation #12: Committing to Further Accountability Work in Work Stream 2

### 232 **Summary**

233 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

234 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP).
  - Transparency of ICANN's interactions with governments.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

235 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN55 Meeting](#) in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.

236 The community raised concerns that after the IANA Stewardship Transition, there may be a lack of incentive for ICANN to implement the proposal arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. In a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

### 237 **CCWG-Accountability Recommendations**

238 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1

recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
  - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
  - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
  - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
  - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing DIDP.
  - Transparency of ICANN's interactions with governments.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

239 The CCWG-Accountability notes that further enhancements to ICANN accountability can be accommodated through the accountability review process (see Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees) or through specific, ad hoc, cross community working group initiatives.

240 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Interim Bylaws clarifications to address Board's concerns by highlighting that Work Stream 2 will be following similar rules as Work Stream 1: consensus recommendations, endorsement by Chartering Organizations, ability for the Board to engage in special dialogue, 2/3 threshold for such Board decision, etc.
- Edits to the documents will include focus on fact that Work Stream 2 deliberations will be open to all (similar to Work Stream 1).
- List of Work Stream 2 items is "limited to" instead of "related to." A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG-Accountability.



- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.
- Agreed to incorporate Public Experts Group (PEG) Advisor input to strengthen the diversity requirement.
- Enhancing the Ombudsman role and function is confirmed as a Work Stream 2 item.
- Re-inserted staff accountability requirement.

241 **Relevant Annexes**

242 Annex 12 – Details on Recommendation #12: Committing to Further Accountability Work in Work Stream 2

## Conclusion

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- 243 The CCWG-Accountability believes that the set of accountability mechanisms it has proposed, outlined above, empowers the community through the use of the bottom-up, multistakeholder model by relying on of the stakeholders within ICANN's existing and tested community structures. Furthermore, the CCWG-Accountability believes that this community-driven model is appropriate for replacing the accountability inherent in ICANN's historical relationship with the U.S. Government.

### **Community Powers are an Effective Replacement of the Safety Net Provided by the U.S. Government's Current IANA Stewardship Role**

- 244 The CCWG-Accountability believes that the Seven Community Powers, as a package, can effectively replace the safety net that the U.S. Government has provided to date as part of its oversight role. It is recommended that these powers need to be enforced by a court of law only as a last resort. The CCWG-Accountability has based its recommendations on existing structures and recommends:
- Considering the entire community as ICANN's Empowered Community.
  - Ensuring no part of the community has more rights than another part, either by having the ability to push through its individual interests or by blocking community consensus. The CCWG-Accountability has ensured that no Community Powers or statutory rights can be exercised singlehandedly.
  - Ensuring the community can only jointly exercise its powers using a consensus-based model.

### **The CCWG-Accountability Believes that the Recommended Accountability Frameworks Provided in this Proposal Meet the Requirements of the Domain Names Community and the IANA Stewardship Transition Proposal**

- 245 The CCWG-Accountability will seek confirmation from the Cross Community Working Group that developed the IANA Stewardship Transition that this Proposal meets its requirements.
- 246 The CCWG-Accountability believes that its Proposal also meets the requirements NTIA published for the transition and will present its analysis of this in the full Proposal.

# List of Annexes & Appendices

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- ⊙ **Annex 1** – Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers
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# Annex 01 – Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

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## 1. Summary

- 01 Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board of Directors has the final responsibility for the activities and affairs of ICANN.
- 02 With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the ICANN Board may object to the results.
- 03 The CCWG-Accountability recommends creating a new entity that will act at the direction of the multistakeholder community to exercise and enforce Community Powers. The entity will take the form of a California unincorporated association and be given the role of “Sole Designator” of ICANN Board Directors and will have the ability to directly or indirectly the Community Powers. The entity will be referred to as the “Empowered Community.”
- 04 As permitted under California law, the Empowered Community will have the statutory power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws, may be provided to the Empowered Community.
- 05 The CCWG-Accountability accepts that its statutory power will be limited as described above, and that this is sufficient given:
  - The creation of “Fundamental Bylaws” that can only be modified jointly by the ICANN Board and Empowered Community.
  - All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
  - The right of inspection is granted to “Decisional Participants” in the Empowered Community.
  - The right of investigation is granted to the Decisional Participants in the Empowered Community.
- 06 The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

## 2. CCWG-Accountability Recommendations

- 07 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:
- This entity will take the form of a California unincorporated association and be given the role of Sole Designator of ICANN Board Directors and will have the ability to directly or indirectly enforce the Community Powers. This entity will be referred to as the Empowered Community.
  - The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the Decisional Participants in the Empowered Community.
  - The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws, along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
  - The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

08 Additionally, the CCWG-Accountability recommends including in the ICANN Bylaws:

- The right for Decisional Participants in the Empowered Community to inspection as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.
- The right of investigation, which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.
- The following limitation associated with the Governmental Advisory Committee (GAC) acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out").

In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power.

The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus (as defined in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)) while protecting the Empowered Community's power to challenge such Board decisions.

## 3. Detailed Explanation of Recommendations

### 09 **Background**

- 10 With removal of NTIA as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.

### 11 **Objectives**

- 12 In developing a mechanism to ensure the community can effectively enforce its decisions, the CCWG-Accountability agreed to:

- Minimize the degree of structural or organizational changes required in ICANN to create the mechanism for these powers.
- Organize the mechanism in line and compatible with the current ICANN SO and AC structures (with flexibility to evolve these structures in the future).
- Address the dependencies of the CWG-Stewardship.
- Provide the following powers and rights that would be constituted in the Fundamental Bylaws and would also be legally enforceable:
  - The power to reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans (CWG-Stewardship dependency).
  - The power to reject changes to ICANN Standard Bylaws.
  - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency) and changes to the Articles of Incorporation, and to approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - The power to remove individual ICANN Board Directors (along with appointment, CWG-Stewardship dependency).
  - The power to recall the entire ICANN Board (CWG-Stewardship dependency).
  - The power to launch a community Independent Review Process (along with an appeal mechanism for issues relating to the IANA functions, CWG-Stewardship dependency) or Request for Reconsideration.
  - The power to reject ICANN Board decisions relating to reviews of the IANA functions, including the procedure to implement a separation process relating to Post-Transition IANA (CWG-Stewardship dependency).
  - The rights of inspection and investigation.

### 13 **Why the Sole Designator Model?**

#### **Concerns with Supporting Organization/Advisory Committee Membership Model**

- 14 The CCWG-Accountability's "[Initial Draft Proposal on Work Stream 1 Recommendations](#)" proposed a Supporting Organization/Advisory Committee Membership Model as the reference model for the community enforcement mechanism. However, in the Public Comment Period, 4

May – 3 June 2015, significant concerns were expressed and the CCWG-Accountability initiated work on alternative solutions.

15 A core concern of the Supporting Organization/Advisory Committee Membership Model was the ability of the ICANN community to fully participate in the new accountability framework, and was integral to the work in devising a new approach.

16 The CCWG-Accountability’s [“Second Draft Proposal on Work Stream 1 Recommendations”](#) proposed a “Sole Member” model instead of the Supporting Organization/Advisory Committee Membership Model.

### 17 **Concerns with a Sole Member Model**

18 In the Public Comment Period on the “Second Draft Proposal on Work Stream 1 Recommendations,” concerns were raised about the Sole Member model. Under California law, Members have certain statutory powers that cannot be waived. Commenters expressed concern that these rights, such as the ability to dissolve the corporation, could not be adequately constrained and might have unintended and unanticipated consequences.

### 19 **The Sole Designator Model**

20 To address the concerns described above, the CCWG-Accountability now recommends implementing a “Sole Designator” model. The Empowered Community will have the statutory power to appoint and, with that, the statutory power to remove individual ICANN Board Directors or the entire Board, which is a requirement of the CCWG-Accountability and the CWG-Stewardship.

21 This removes the concerns related to unintended and unanticipated consequences of the additional statutory powers associated with a Member. Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws, may be provided to the Empowered Community.

- Given that the right to inspect, as outlined in California Corporations Code 6333, is not a statutory right of a Sole Designator, and that the community felt this was a critical requirement, the CCWG-Accountability recommends this right be granted to Decisional Participants in the Empowered Community in the Fundamental Bylaws.

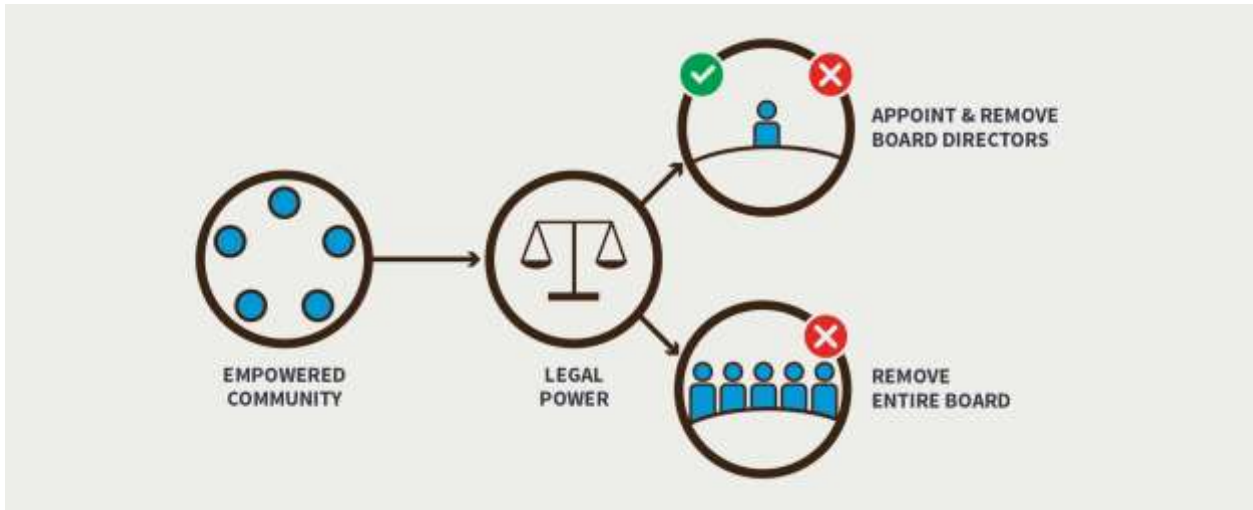
22 The CCWG-Accountability’s external legal counsel informed the group that adopting a Sole Designator model could effectively be implemented while meeting the community’s requirements and having minimal impact on the corporate structure of ICANN.

### 23 **Legal Advice on Implementing the Empowered Community**

24 To implement the Sole Designator model, ICANN’s SOs and ACs would create a unified entity to enforce their Community Powers. This unified entity will be referred to as the Empowered Community.

25 The Empowered Community will have the right to appoint and remove ICANN Board Directors, whether individually or in its entirety.





- 26 If the ICANN Board refused to comply with a decision by the Empowered Community to use the statutory rights, the refusal could be petitioned in a court that has jurisdiction to force the ICANN Board to comply with that decision.
- 27 The CCWG-Accountability accepts that its statutory power will be limited as described above and that this is sufficient given:

**1. All of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws and protected from any changes without Empowered Community approval.**

- This includes the Independent Review Process (IRP), which issues binding decisions. This also includes the Empowered Community’s power to launch a community IRP challenge if it believes the ICANN Board is in breach of its Articles of Incorporation or Bylaws.<sup>1</sup>
- The ICANN Board would be in breach of its own Bylaws if it refused to comply with a decision by the Empowered Community with respect to an accountability mechanism defined in the Fundamental Bylaws.
- If a community IRP challenge with respect to such a decision is successful and the Board still refused to comply with the decision, the Empowered Community could petition a court that has jurisdiction to force the ICANN Board to comply with that decision.
- Alternatively, the Empowered Community could remove the Board with the expectation that the new Board would respect the decision.

<sup>1</sup> For example, if the Board were not to accept the decision of the Empowered Community to use one of its Community Powers. Community Powers are documented in Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.

**2. The Empowered Community has legal standing as a California unincorporated association.**

- The Empowered Community will act as directed by participating SOs and ACs (the Decisional Participants in the Empowered Community).

**3. The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw, along with provisions in the Articles of Incorporation and Bylaws to protect it from any changes without its own approval.**

**4. The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.**

- Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ICANN Board must consider the community’s interpretation of the “global public interest” as ICANN pursues the charitable and public purposes set forth in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

28 **Additional Rights Granted by Inclusion in the ICANN Bylaws**

29 **Right to inspect accounting books and records of ICANN**

30 In addition to the statutory rights that the Empowered Community will have and the new Community Powers described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers, the CCWG-Accountability recommends including in the ICANN Fundamental Bylaws the right for Decisional Participants in the Empowered Community to inspect as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.

31 This inspection right is distinct from the Document Information Disclosure Policy (DIDP). While any eligible party can file a request according to the DIDP, inspection rights are only accessible to Decisional Participants in the Empowered Community. The scopes are also different as explained below.

32 This inspection right would include the accounting books and records of ICANN, and the minutes of proceedings of the Board of Directors and committees of the Board of Directors, on the conditions discussed below. Since ICANN will not have statutory “members,” the right to inspect “member” meeting minutes would not apply.

33 Although the Corporations Code does not define “books and records of account,” the term is generally understood to refer to the journals and ledgers in which financial transactions are originally entered and recorded, and the statements compiled from them. The term generally does not extend to source documents on which books and records of account are based, such as canceled checks and invoices. Similarly, the term generally encompasses documents relevant to the operation of the corporation as a whole, and not to those relevant to only a small or isolated aspect of the corporation’s operations.

34 Authority under Section 6333 is sparse, but it is nonetheless clear that a “purpose reasonably related to [a] person’s interests as a member” does not include a member’s commercial or political interests, harassment, or massive and repeated inspection demands probing the

minutiae of financial records and details of management and administration. Similar limitations will be applied to rights of inspection provided by the Bylaws.

- 35 Unlike the exercise of the other Community Powers, which require community engagement and escalation before initiating a request for action by the Empowered Community, the CCWG-Accountability recommends that a petition for inspection be brought directly by a single Decisional Participant in the Empowered Community or by multiple Decisional Participants in the Empowered Community through making a written demand on ICANN for the requested materials. If the Board refuses or ignores the request, the petitioning Decisional Participant(s) could enforce its inspection right directly through the IRP or by petitioning the Empowered Community to initiate the escalation processes for a community IRP or for removing the Board.

### 36 **Investigation right**

37 There could be events where the community might wish to have additional power of transparency into investigations of potential fraud or financial mismanagement in ICANN.

38 To address these concerns, the CCWG-Accountability recommends the adoption of the following audit process: Upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.

39 This right of investigation would be included in the ICANN Fundamental Bylaws.

### 40 **The Empowered Community**

41 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the At-Large Advisory Committee (ALAC), and the GAC (if the GAC chooses to participate) would participate in the Empowered Community—that is, they will be listed in the Bylaws as the five Decisional Participants.

42 However, if the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out"). In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power.

43 The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus (as defined in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice [Stress Test 18]) while protecting the Empowered Community's power to challenge such Board decisions.

44 Clarifications relating to the GAC carve-out:

- The GAC carve-out will only apply to Empowered Community challenges to ICANN Board actions that were based on GAC consensus advice, meaning the GAC advice was "approved by general agreement in the absence of any formal objection." The GAC carve-out will not apply to Empowered Community challenges to Board decisions that were based on GAC advice that was not supported by consensus (i.e., not "approved by general agreement in the absence of any formal objection").

- Process for identifying GAC consensus advice, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, and applying the GAC carve-out:
  - GAC confirmation: When the GAC provides advice to the Board, the GAC will need to indicate whether the advice was approved by consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.
  - Board confirmation: When the Board takes action that is based on GAC consensus advice, the Board will need to state in its resolution that its decision was based on GAC consensus advice.
  - GAC carve-out identified in petition to use Community Power: When a Board action that is based on GAC consensus advice is challenged, the petitioning SO or AC will need to indicate in the initial petition that the matter meets the requirements for the GAC carve-out and clearly identify the applicable Board action and GAC consensus advice at issue. The decision thresholds (as revised when the GAC carve-out is invoked in accordance in Annex 2) required for the escalation and enforcement processes will need to be met for the Community Power that is being exercised.
- Timing for invoking the GAC carve-out: The petitioning SO or AC will need to indicate in the initial petition to the Empowered Community that the matter meets the requirements for the GAC carve-out. Therefore, the timing restrictions for this aspect of the escalation process will apply (i.e., the petition must be brought within 21 days of a Board decision being published). While this addresses timing of the Board challenge, the Board decision that is being challenged could be based on standing GAC consensus advice that the GAC had provided at an earlier date.

<sup>45</sup> The thresholds presented in this document were determined based on five Decisional Participants. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, emphasizing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduced additional suggestion by the ICANN Board regarding investigation right (audits), based on three Decisional Participants in the Empowered Community threshold.
- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the “GAC carve-out.”

## 5. Stress Tests Related to this Recommendation

- ST5, 6, 7, 8, 9 10, 16, 24
- ST28
- ST31, 32, 36

## 6. How does this meet the CWG-Stewardship Requirements?

- 46 These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of community rights regarding the ability to appoint/remove Directors of the ICANN Board and recall the entire ICANN Board.

## 7. How does this address NTIA Criteria?

47 **Support and enhance the multistakeholder model.**

- Decentralizing power within ICANN through an Empowered Community.
  - Providing a legal set of powers to the community while avoiding the risks of making changes to ICANN's organizational structure.
- 

48 **Maintain the security, stability, and resiliency of the Internet DNS.**

- Creates an effective system of checks and balances on the ICANN Board, which could affect the security, stability and resiliency of the Internet DNS.
- 

49 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Provides a clear set of mechanisms and processes for how the community can participate in and interact with the Empowered Community.
- 

50 **Maintain the openness of the Internet.**

- Preserving policies of open participation in ICANN's SOs and ACs.
  - Retaining decision-making based on consensus rather than voting.
- 

51 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- To the extent the Government Advisory Committee (GAC) wishes to participate in decision-making by the Empowered Community, which the GAC has the flexibility to determine, it would be one of five Decisional Participants. In addition, the GAC will not participate as a decision-maker in community deliberations involving a challenge to the Board's implementation of GAC consensus advice. This "carve out," combined with the safeguards in Recommendation #11, leads the CCWG-Accountability to believe that this NTIA requirement is met, even when considering the increased threshold from 50 to 60% for the Board to reject GAC consensus advice.
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# Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement

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## 1. Summary

### 01 Engagement

- 02 Today, the Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voluntarily consults with the multistakeholder community on a variety of decisions, including the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an “engagement process.”
- 03 The CCWG-Accountability is recommending that engagement processes for specific ICANN Board actions be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
- Approving ICANN’s Five-Year Strategic Plan.
  - Approving ICANN’s Five-Year Operating Plan.
  - Approving ICANN’s Annual Operating Plan & Budget.
  - Approving the Internet Assigned Numbers Authority (IANA) Functions Budget.
  - Approving any modifications to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN’s sale or other disposition of all or substantially all of ICANN’s assets.
  - Making ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process.
- 04 If it is determined that there is divergence between the ICANN Board and the community after the engagement process, the Empowered Community (as defined in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers) may decide to use a Community Power after the appropriate “escalation process” has been satisfied.
- 05 The Empowered Community may begin an escalation process to:
- Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
  - Reject a change to ICANN Standard Bylaws.

- Approve changes to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Remove an individual ICANN Board Director.
- Recall the entire ICANN Board.
- Initiate a binding community Independent Review Process (IRP), where a panel decision is enforceable in any court recognizing international arbitration results, or a non-binding Request for Reconsideration, where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff.
- Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

06 **Escalation**

07 The escalation process can differ, sometimes significantly, from one Community Power to another.

08 One of the most standardized versions of the escalation process is required for all Community Powers to “reject,” remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.

09 **This escalation process comprises the following steps:**

1. An individual starts a petition in a Supporting Organization (SO) or Advisory Committee (AC) that is a Decisional Participant in the Empowered Community (see Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers).
  - If the petition is approved by that SO or AC, it proceeds to the next step.
  - If the petition is not approved by that SO or AC, the escalation process is terminated.
2. The SO or AC that approved the petition contacts the other Decisional Participants to ask them to support the petition.
  - At least one additional SO and/or AC must support the petition (for a minimum of two or, for Board recall, three) for a Community Forum to be organized to discuss the issue.
    - If the threshold is not met, the escalation process is terminated.
    - If the threshold is met, a Community Forum is organized to discuss the petition.
3. An open Community Forum of one or two days is organized for any interested stakeholder in the community to participate.
  - The petitioning SO and/or AC will:
    - Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants.
    - Designate a representative(s) to liaise with SOs/ACs to answer questions from the SOs/ACs.
    - If desired, optionally, request that ICANN organize a conference call prior to the Community Forum for the community to discuss the issue.



- If the ICANN Board and the Empowered Community can resolve their issues before or in the Community Forum, the escalation process is terminated.
  - Otherwise, the Empowered Community must decide if it wishes to use its Community Power.
4. The Empowered Community considers use of a Community Power.
    - If the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.
    - If the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and directs it to comply with the decision (as outlined in the Fundamental Bylaws for this Community Power).
  5. The Empowered Community advises the ICANN Board.
    - If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

## 10 **Enforcement**

- 11 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.
- 12 The enforcement process can proceed in one of two ways:
  - The Empowered Community may initiate mediation and community IRP procedures.
  - The Empowered Community may initiate an escalation process to recall the entire ICANN Board.
- 13 The enforcement process may result in a resolution of the issue. Otherwise, if needed, the result of the enforcement process is enforceable in court.
- 14 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

## **2. CCWG-Accountability Recommendations**

- 15 Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
  - Approving ICANN's Five-Year Strategic Plan.

- Approving ICANN's Five-Year Operating Plan.
  - Approving ICANN's Annual Operating Plan & Budget.
  - Approving the IANA Functions Budget.
  - Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.
- 16 Include the engagement, escalation and enforcement processes in the Fundamental Bylaws.
- Note: The escalation processes for each Community Power are outlined in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.

### 3. Detailed Explanation of Recommendations

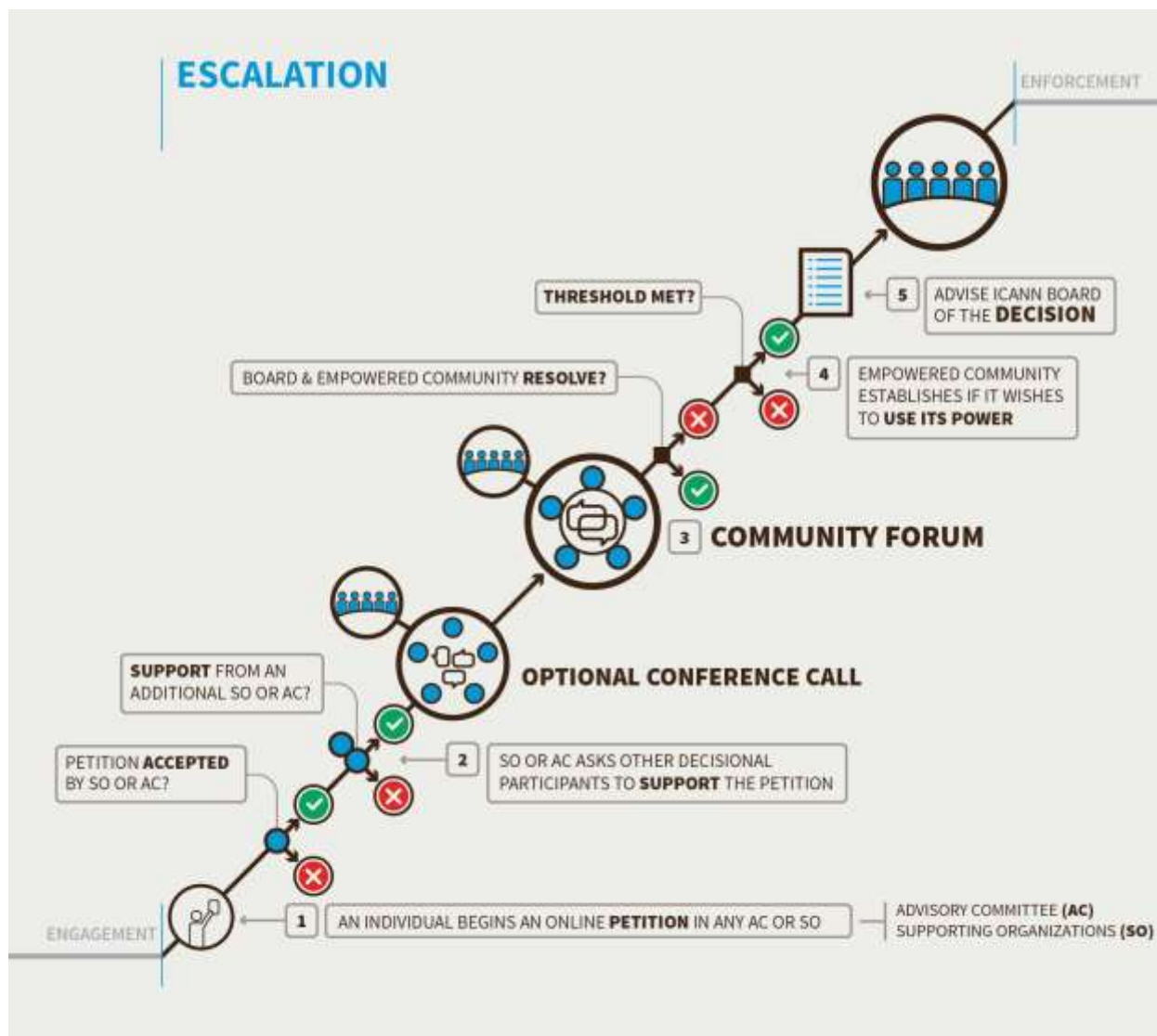
#### 17 Engagement

- 18 Today, the ICANN Board voluntarily consults with the community on a variety of decisions, such as the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms, such as public consultations, to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an engagement process.
- 19 The CCWG-Accountability is recommending that this engagement process be constituted in the Fundamental Bylaws. Although the ICANN Board already convenes this process, this recommendation would require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
- Approving ICANN's Five-Year Strategic Plan.
  - Approving ICANN's Five-Year Operating Plan.
  - Approving ICANN's Annual Operating Plan & Budget.
  - Approving the IANA Functions Budget.
  - Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.
- 20 If it is determined that there is divergence between the ICANN Board and the community during the engagement process, the Empowered Community may decide to use a Community Power after the appropriate escalation process is satisfied.
- 21 The Empowered Community may begin an escalation process to:
- Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
  - Reject a change to ICANN Standard Bylaws.

- Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Remove an individual ICANN Board Director.
- Recall the entire ICANN Board.
- Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
- Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

## 22 Escalation

- 23 The escalation process can differ, sometimes significantly, from one Community Power to another. One of the most standardized versions of the escalation process is required for all Community Powers to "reject," remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.
- Note: Certain exceptions apply to the power to reject changes to Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process, as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- 24 The right to reject an ICANN Board decision relating to IANA Function Reviews (including the triggering of any PTI separation process) may be exercised by the Empowered Community an unlimited number of times.
- Note: The power to approve changes to Fundamental Bylaws and the Articles of Incorporation, and to approve ICANN's sale or other disposition of all or substantially all of ICANN's assets, and the power to remove individual Directors nominated by an SO or AC contain special features that are covered in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.



## 25 **Step 1. Triggering Review by Community Petition**

26 (21 days)

- ⦿ Note: To exercise any of the rejection powers, such as rejection of a budget, the 21-day period begins at the time the Board publishes its vote on the element that may be rejected. If the first step of the petition is not successful within 21 days of the Board publication of the vote, the rejection process cannot be used. A petition begins in an SO or AC that is a Decisional Participant in the Empowered Community.
- ⦿ Any individual can begin a petition as the first step to using a Community Power.
- ⦿ For the petition to be accepted, the SO or AC, in accordance with its own mechanisms, must accept the petition.

27 **Decision point:**

- ⦿ If the SO or AC does not approve the petition within 21 days, the escalation process terminates.
- ⦿ If the SO or AC approves the petition, it can proceed to the next step.

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28 **Step 2. Triggering Review by Community Petition, Part Two**

29 (7 days from the end of the previous step)

- ⦿ The SO or AC that approved the petition contacts the other Decisional Participants in the Empowered Community to ask them to support the petition. At least one additional Decisional Participant must support the petition (for a minimum of two) for a Community Forum to be organized to discuss the issue. To petition for a Community Forum to consider the recall of the entire ICANN Board requires three Decisional Participants to support the petition.

30 **Decision point:**

- ⦿ If the petition fails to gather the required level of support within seven days, the escalation process terminates.
- ⦿ If a minimum of two (or three, as applicable) Decisional Participants support the petition within seven days, a Community Forum is organized.

- ⦿ Note: For ICANN Board resolutions on changes to Standard Bylaws, Annual Budget, and Strategic or Operating Plans, the Board would be required to automatically provide a 28-day period before the resolution takes effect to allow for the escalation to be confirmed. If the petition is supported by a minimum of two Decisional Participants within the 28-day period, the Board is required to put implementation of the contested resolution on hold until the escalation and enforcement processes are completed. The purpose of this is to avoid requiring ICANN to undo things (if the rejection is approved), which could be potentially very difficult.

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31 **Step 3. Holding a Community Forum**

32 (21 days to organize and hold the event from the date of the petition causing it)

- ⦿ The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any SO or AC may circulate in writing their preliminary views on the exercise of this Community Power, before or in the Community Forum.
- ⦿ The Forum is to be held within 21 days of the successful petition to hold a Community Forum.
- ⦿ Within 24 hours of a petition being approved, the petitioning Decisional Participant will:

- Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants. Any SO or AC may contribute preliminary thoughts or questions in writing via a specific publicly archived email list set up for this specific issue.
  - Designate a representative(s) to liaise with Decisional Participants to answer questions from the SOs/ACs.
  - If desired, optionally, request that ICANN organize a conference call for the community to discuss the issue.
- ⊙ Community Forum format:
- It is expected that for most powers, this will only involve remote participation methods such as teleconferences and Adobe Connect-type meetings over a period of one or two days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting, there is no expectation that participants will meet face to face. The one exception to this is the power to recall the entire Board, which would require a face-to-face meeting.
  - The Decisional Participants who supported the petition would decide if holding the Community Forum can wait until the next regularly scheduled ICANN meeting or if a special meeting is required to bring participants together (only in the case of Board recall). In both these cases, the Decisional Participants who supported the petition leading to the Community Forum will publish the date for holding the event, which will not be subject to the 21-day limitation. In this case, the Community Forum would be considered completed at the end of the face-to-face meeting. Note: This extension is not available for exercise of the Community Power regarding the ICANN or IANA Budgets, due to the importance of maintaining a timely budget approval process.
  - Open to all interested participants.
  - Managed and moderated in a fair and neutral manner.
  - ICANN to provide support services. ICANN support staff will collect and publish a public record of the Forum(s), including all written submissions.
  - Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.
  - Should the relevant Decisional Participants determine a need for further deliberation, a second and third session of the Community Forum could be held.
  - The Forum will not make decisions or seek consensus, and will not decide whether to advance the petition to the decision stage, although the issue may be resolved before or in the Community Forum, as discussed below.

33 **Decision point:**

- ⊙ If the Empowered Community and ICANN Board can resolve the issue before or in the Community Forum, the escalation process terminates. Resolving an issue will be confirmed by the Decisional Participants who supported the petition formally agreeing, in accordance with their own mechanisms, that the escalation process should be halted.
- ⊙ If the Empowered Community and ICANN Board cannot resolve the issue, the Empowered Community must decide if it wishes to take further action.

34 **Step 4. Decision to Use a Community Power as an Empowered Community**

35 (21 days from the conclusion of the Community Forum)

36 **Decision point:**

- ⦿ If four or more (for some powers, three) Decisional Participants support and no more than one objects within the 21-day period, the Empowered Community will use its power. The Empowered Community will also publish an explanation of why it has chosen to do so. The published explanation can reflect the variety of underlying reasons.
- ⦿ If the proposal does not meet the required thresholds during the 21-day period, the escalation process terminates.

37 **Step 5. Advising the ICANN Board**

38 (1 day)

- ⦿ The Empowered Community will advise the ICANN Board of its decision and direct the Board to take any necessary action to comply with the decision.

39 **Enforcement**

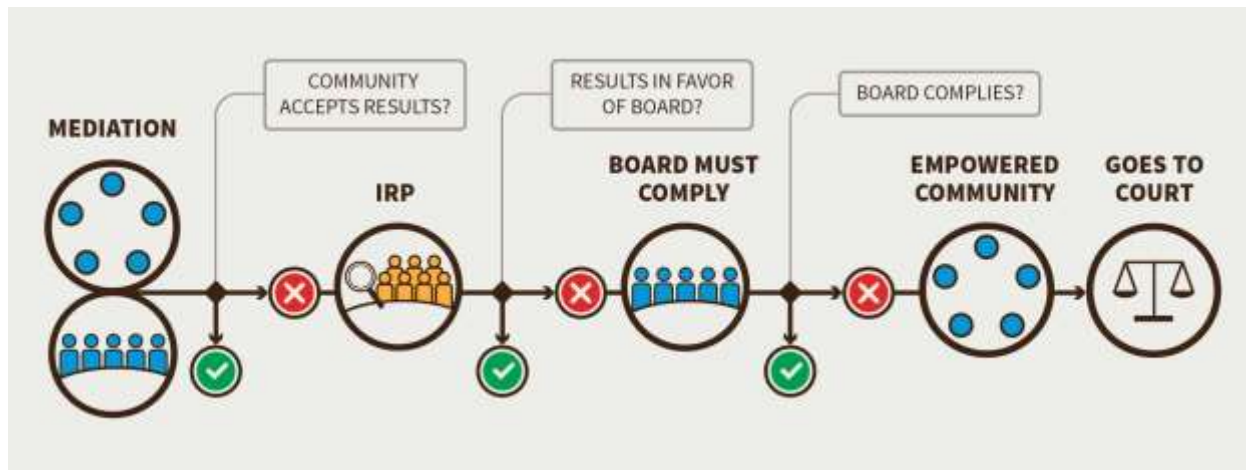
40 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.

41 The ICANN Board will be deemed to have refused or failed to comply with a request by the Empowered Community to use one of its Community Powers if it has not complied with the request within 30 days of being advised of the request by the Empowered Community.

42 The exception to this is removal of ICANN Board Directors or the entire ICANN Board, which should be effective immediately upon notice being provided to the Board. If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

43 The enforcement process can proceed in one of two ways, discussed below.

44 **Option 1: Initiate mediation and community IRP procedures.**



**a) Representatives from ICANN Board and Empowered Community undertake a formal mediation phase.**

- If the Empowered Community accepts the result from the mediation phase (as discussed below), the enforcement process would be terminated.
- If the Empowered Community does not accept the result from the mediation phase, the Empowered Community will proceed with a community IRP.
- Process specification (general guidelines for implementation):
  - The individuals selected by the Decisional Participants to represent them in the Empowered Community will be the Empowered Community representatives in the mediation process.
  - Once the mediator has determined that mediation efforts are completed, the Empowered Community will produce and publicly post a report with its recommendations within 14 days.
  - The Decisional Participants in the Empowered Community should use the standard escalation process to confirm whether to proceed with a community IRP challenge to the Board failing to comply with a decision of the Empowered Community to use a Community Power, using the above report as the basis for the petition. If the Empowered Community does not approve initiating a community IRP, the Empowered Community will be considered as having accepted the result of the mediation.

**b) Representatives from the ICANN Board and Empowered Community undertake a formal and binding IRP.**

- If the result of the community IRP is in favor of the ICANN Board, the enforcement process is terminated.
- If the result of the binding IRP is in favor of the Empowered Community, then the ICANN Board must comply within 30 days of the ruling.



**c) If the ICANN Board does not comply with the decision of the IRP, the Empowered Community has two options:**

- The Empowered Community can petition a court of valid jurisdiction to enforce the result of the IRP.
- The Empowered Community can use its Community Power to recall the entire ICANN Board.

**45 Option 2: Initiate an escalation process to recall the entire ICANN Board.**

- If the requisite threshold of support of Decisional Participants is achieved, the Empowered Community will remove all of the members of the ICANN Board (except the CEO) and replace them with an Interim Board until a new Board can be seated.
- The Empowered Community may legally enforce the power to recall the entire Board in court.

**Table: Required Thresholds for the Various Escalation and Enforcement Processes (Based on a Minimum of Five Decisional Participants in the Empowered Community)**

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
46 1. Reject a proposed Operating Plan/Strategic Plan/Budget	47 Two SOs/ACs	48 Four support rejection, and no more than one objection
49 2. Approve a change to Fundamental Bylaws and Articles of Incorporation, and approve ICANN's sale or other disposition of all or substantially all of ICANN's assets	50 N/A	51 Three support approval, and no more than one objection
52 3. Reject changes to Standard Bylaws	53 Two SOs/ACs, including the SO that led the PDP that requires the Bylaw change (if any)	54 Three support rejection, including the SO that led the PDP that requires the Bylaw change (if any), and no more than one objection

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
55 4a. Remove an individual Board Director nominated by an SO or AC (and appointed by the Empowered Community)	56 Majority within nominating SO/AC	57 Invite and consider comments from all SOs/ACs. 3/4 majority within the nominating SO/AC to remove their director
58 4b. Remove an individual Board Director nominated by the Nominating Committee (and appointed by the Empowered Community)	59 Two SOs/ACs	60 Three support, and no more than one objection
61 5. Recall the entire Board of Directors	62 Three SOs/ACs	63 Four support, and no more than one objection <sup>1</sup>
64 6. Initiate a binding IRP or a Request for Reconsideration	65 Two SOs/ACs	66 Three support, including the SO(s) that approved the policy recommendations from the PDP which result is being challenged through the IRP (if any), and no more than one objection 67 Require mediation before IRP begins
68 7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process	69 Two SOs/ACs	70 Four support, and no more than one objection

71 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the ALAC and GAC (if the GAC chooses to participate) would participate in the Empowered Community – that is, they will be listed in the Bylaws as the five Decisional Participants.

72 The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.

<sup>1</sup> A minority of CCWG-Accountability participants prefer to require five SOs and ACs, or allow one objection to block consensus.

- 73 In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would, however, need to be a conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the change would follow the Fundamental Bylaw change process, which enables such a conscious decision to be undertaken.
- 74 The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects, with the following exception:
- Where the power to be exercised is recalling the entire Board for implementing GAC advice, the reduced threshold would apply only after an IRP has found that, in implementing GAC advice, the Board acted inconsistently with the ICANN Bylaws. If the Empowered Community has brought such an IRP and does not prevail, the Empowered Community may not exercise its power to recall the entire the Board solely on the basis of the matter decided by the IRP. It may, however, exercise that power based on other grounds.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Extended time for certain escalation steps in response to comments. Kept overall timeline similar by combining and removing some steps (mandatory conference call).
- Made it mandatory for petitioning party to reach out to SOs/ACs to socialize relevant information before Community Forum.
- Acknowledged comments regarding the thresholds adjustment in case the number of Decisional Participants is lower (page 12, paragraph 60 of the Third Draft Proposal), by removing this option and replacing it with a lower threshold for approving changes to Fundamental Bylaws. Since the Fundamental Bylaw change process is a requirement for “approval” and not a “rejection” option, this would preserve the requirement for stronger protection of Fundamental Bylaws.
- Determined that the use of the corresponding percentage for thresholds as recommended by the Board can be suggested as a guideline in the event of the creation of new SOs/ACs, but there would need to be a conscious decision, depending on the circumstances. If such a new SO/AC were to become a Decisional Participant in the Empowered Community, this change would require a change to the Fundamental Bylaws and would therefore require approval by the Empowered Community.
- Implemented the compromise for Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) that the threshold requirements would be modified if the GAC was a Decisional Participant.

## 5. Stress Tests Related to this Recommendation

- ST5, 6, 7, 8, 9, 10, 16, 24, powers
- ST12
- ST13
- ST27
- ST28

## 6. How does this meet the CWG-Stewardship Requirements?

- 75 The CWG-Stewardship required community empowerment mechanisms that would be able to:
- Appoint and remove members of the ICANN Board and to recall the entire ICANN Board.
  - Exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA functions) by reviewing and approving (1) ICANN Board decisions with respect to recommendations resulting from an IANA Function Review (IFR) or Special IFR and (2) the ICANN budget.
  - Approve amendments to ICANN's Fundamental Bylaws.
- The defined escalation and decision-making mechanism recommended by the CCWG-Accountability provide the processes needed to meet these requirements.

## 7. How does this address NTIA Criteria?

76 **Support and enhance the multistakeholder model.**

- Decentralizing power within ICANN through an Empowered Community.
- Solidifying consultation processes between the ICANN Board and community into the ICANN Bylaws.
- Establishing a public Community Forum to ensure that all voices and perspectives are heard before execution of a Community Power.
- Retaining decision-making based on consensus rather than voting.

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77 **Maintain the security, stability and resiliency of the Internet DNS.**

- Proposing a series of procedures that ensure both sides have had the chance to completely and thoroughly discuss any disagreements and have multiple opportunities to resolve any such issues without having to resort to the powers of the Empowered Community for accountability or enforceability.
- Embedding thresholds into procedures to eliminate any risks of capture.

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78 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Including limited timeframes, transparent processes and associated thresholds to maintain operational viability.

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79 **Maintain the openness of the Internet.**

- Establishing a public Community Forum to ensure that all voices and perspectives are heard.
- Preserving policies of open participation in ICANN's SOs and ACs.

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80 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- To the extent the Government Advisory Committee (GAC) wishes to participate in decision-making by the Empowered Community, which the GAC has the flexibility to determine, it would be one of five Decisional Participants. In addition, the GAC will not participate as a decision-maker in community deliberations involving a challenge to the Board's implementation of GAC consensus advice. This "carve out," combined with the safeguards in Recommendation #11, leads the CCWG-Accountability to believe that this NTIA requirement is met, even when considering the increased threshold from 50 to 60% for the Board to reject GAC consensus advice.
  - Enabling all interested stakeholders to join consultations through SOs and ACs or through the Community Forum.
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# Annex 03 – Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

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## 1. Summary

- 01 Currently, the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) have a single mechanism for amendment.
  - Any provision of the ICANN Bylaws can be changed by a 2/3 vote of all the Directors on the ICANN Board.
  - The ICANN Board is not required to consult the multistakeholder community or the wider public before amending the Bylaws, but has voluntarily done so up to this point.
- 02 The CCWG-Accountability recommends classifying each ICANN Bylaw as either a “Fundamental Bylaw” or a “Standard Bylaw,” with Fundamental Bylaws being more difficult to change.
- 03 Specifically, the CCWG-Accountability recommends that:
  - Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
  - The requirement for public consultations to be added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
  - Any changes to Fundamental Bylaws require approval from both the ICANN Board and Empowered Community, as outlined in the respective Community Power (as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers).
  - The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised from 2/3 to 3/4.
  - Approval for changes to the Articles of Incorporation use the same process required for approving changes to Fundamental Bylaws, including public consultations.
- 04 Why is the CCWG-Accountability recommending this?
  - The CCWG-Accountability felt that it was critical to ensure that the ICANN Bylaws that embody the purpose of the organization (Mission, Commitments and Core Values) and are meant to ensure the accountability of the ICANN Board, cannot be changed by the ICANN Board acting alone.

## 2. CCWG-Accountability Recommendations

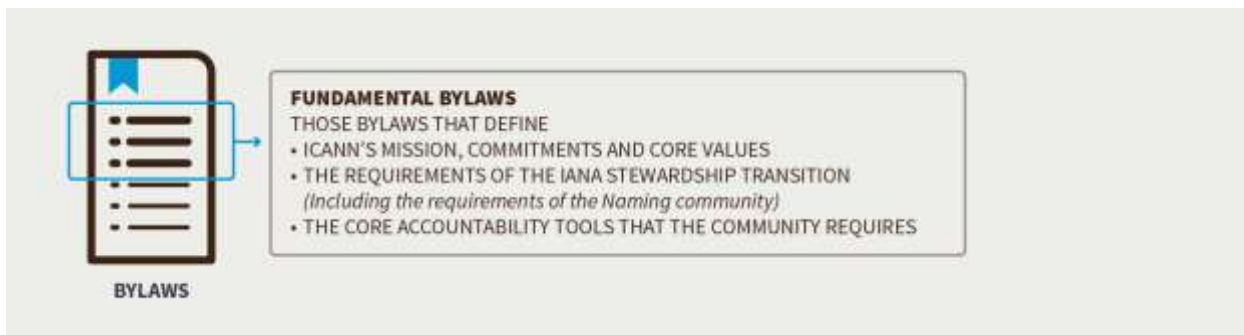
05 The CCWG-Accountability recommends:

- Classifying each ICANN Bylaw as either a Fundamental Bylaw or a Standard Bylaw.
- Making the following CCWG-Accountability and CWG-Stewardship Recommendations Fundamental Bylaws:
  - The Empowered Community for enforcing Community Powers, including the role of Sole Designator of ICANN's Directors, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
  - The escalation and enforcement mechanisms as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
  - The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets as described in Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.
  - The seven Community Powers as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
  - The Mission, Commitments and Core Values as described in Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values.
  - The framework for the Independent Review Process (IRP) as described in Recommendation #7: Strengthening ICANN's Independent Review Process.
  - The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
  - The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
  - The rights of investigation and inspection as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- Requiring ICANN to conduct public consultations on any proposed changes to Standard Bylaws, Fundamental Bylaws or the Articles of Incorporation.
- Requiring approval for any changes to Fundamental Bylaws and the Articles of Incorporation from both the ICANN Board and the Empowered Community as outlined in the Community Power as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or the Articles of Incorporation from 2/3 to 3/4 of all the Directors on the ICANN Board.

## 3. Detailed Explanation of Recommendations

06 **What Is a Fundamental Bylaw?**

- 07 ICANN Bylaws describe how power is exercised in ICANN, including setting out the organization's Mission, Commitments and Core Values. Together with the Articles of Incorporation, the Bylaws are an essential part of ICANN because they set the scope of the organization's corporate authority, determine its governance framework and define working practices.
- 08 Today, ICANN Bylaws can be changed by a resolution of the Board upon a 2/3 vote of all the Directors. The CCWG-Accountability believes that the set of key Bylaws that are fundamental to ICANN's stability and operational continuity and essential for the community's decision-rights should be given additional protection from changes by requiring Empowered Community approval of any amendments.
- 09 These key Bylaws will be identified as Fundamental Bylaws.



- 10 As such, the CCWG-Accountability proposes making Fundamental Bylaws harder to change than Standard Bylaws in two ways:
  - By sharing the authority to authorize changes between the ICANN Board and the Empowered Community, organized through participating Supporting Organizations (SOs) and Advisory Committees (ACs) as the “Decisional Participants” in the Empowered Community, as outlined in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
  - By requiring a higher threshold of ICANN Board support to authorize changes to Fundamental Bylaws than for Standard Bylaws.
- 11 The establishment of Fundamental Bylaws would indirectly enhance ICANN's accountability to the global Internet community by sharing the authority of decision-making more widely and increasing the difficulty of amending these key aspects of ICANN.
- 12 This recommendation is important in the context of the IANA Stewardship Transition because the historical contractual relationship with the U.S. Government provided assurance to the multistakeholder community that the fundamental nature of ICANN was unlikely to be changed without widespread agreement. Without that relationship in place, procedural protections and more widely shared decision-rights on core components of ICANN's scope and authority should help maintain the community's confidence in ICANN.

### 13 **Establishing Fundamental Bylaws**

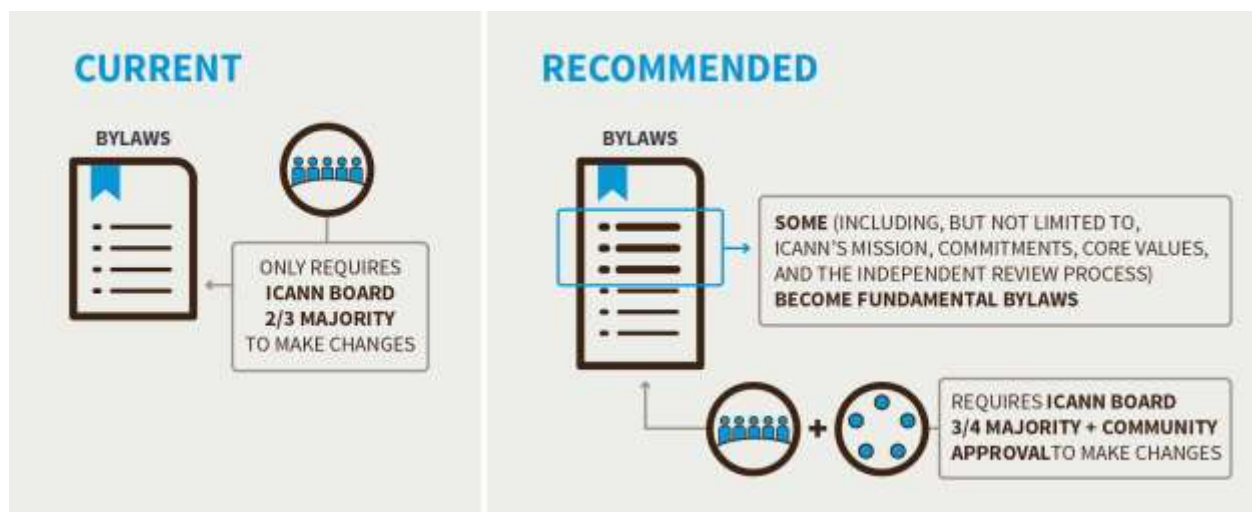
- 14 To implement the establishment of Fundamental Bylaws, a new provision would be added to the Bylaws that sets out:



- Which sections of the Bylaws are Fundamental Bylaws (i.e., a list of the fundamental articles/sections/subsections).
- How new Fundamental Bylaws can be defined, and how existing Fundamental Bylaws can be amended or removed.

15 **Adding New or Amending Existing Fundamental Bylaws**

- 16 While the CCWG-Accountability recommends fortifying certain aspects of the ICANN Bylaws, the global public interest would not be served if ICANN could not evolve in response to the changing Internet environment.
- 17 Therefore, the CCWG-Accountability recognizes the importance of the ability to define new Fundamental Bylaws over time, or to amend or remove existing ones.



- 18 The following steps would be required to establish a new Fundamental Bylaw, or to amend or remove an existing one, where the ICANN Board (or the staff through the ICANN Board) is proposing the addition, amendment or removal:
- The Board proposes a new Fundamental Bylaw, amendment of a Fundamental Bylaw, or removal of a Fundamental Bylaw.
  - The Board approves the addition, amendment, or removal of the Fundamental Bylaw with a 3/4 vote of all the Directors on the ICANN Board.
  - The Empowered Community approves the addition, amendment or removal of the Fundamental Bylaw (as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers).
- 19 If the addition, amendment, or removal of the Fundamental Bylaw is agreed upon by both the ICANN Board and the Empowered Community:
- The new/revised Fundamental Bylaw would be inserted into the ICANN Bylaws, and an appropriate reference to the text as a Fundamental Bylaw would be added (if needed) to the part of the Bylaws that lists them.
  - In the case of an amendment to existing ICANN Bylaws text, the text would be updated.

- In the case of a removal, the text would be removed from the ICANN Bylaws.

20 The CCWG-Accountability does not propose that the community gain the power to directly propose changes to the Bylaws.

## 21 **Which of the Current Bylaws Would Become Fundamental Bylaws?**

22 The CCWG-Accountability recommends that only critical aspects of the ICANN Bylaws be classified as Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN's structures. The CCWG-Accountability concluded that recommending that all changes to ICANN Bylaws should face the same thresholds that are proposed for Fundamental Bylaws would harm, not help, ICANN's overall accountability.

23 The CCWG-Accountability views "critical aspects" as those that define ICANN's Mission, Commitments and Core Values; the requirements of the CWG-Stewardship Proposal; and the core accountability tools the community requires.

24 Accordingly, the CCWG-Accountability recommends that the following aspects be made Fundamental Bylaws as a part of Work Stream 1:

- The Empowered Community for enforcing Community Powers, including the role of sole designator of ICANN's Directors, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- The escalation and enforcement mechanisms, as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
- The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets, as described in Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.
- The seven Community Powers, as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- The Mission, Commitments and Core Values, as described in Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values.
- The framework for the Independent Review Process, as described in Recommendation #7: Strengthening ICANN's Independent Review Process.
- The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
- The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
- The rights of investigation and inspection, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.

## 25 **Articles of Incorporation**

26 The CCWG-Accountability legal counsel has advised the following when considering changes to the ICANN Articles of Incorporation:

*“The constituent documents of a California nonprofit public benefit corporation such as ICANN are its Articles of Incorporation and its Bylaws. There is a hierarchy between these documents—the articles prevail to the extent that there is any conflict between the Articles and the Bylaws. This hierarchical relationship holds even if the conflict is between the Articles and a “fundamental” Bylaw that requires the consent of a third-party (in the case of ICANN, the Empowered Community) to be amended.*

*Under California nonprofit corporation law, if a corporation has no statutory members, amendments to the articles may be adopted by the Board. However, the amendment of articles may be made subject to the consent of a third party, just as the amendment of bylaws may be. In the case of ICANN, if the Empowered Community is not provided a right to approve amendments to the Articles, there is a risk that Fundamental Bylaw provisions could be undermined by amendment of the Articles by the ICANN Board, given the hierarchical relationship described above. Thus, we recommend including an approval right with respect to amendments to ICANN’s Articles in favor of the Empowered Community in the same way the Empowered Community has approval rights with respect to Fundamental Bylaws.”*

- 27 As such, the CCWG-Accountability is recommending that changes to the ICANN Articles of Incorporation follow the same approval process and thresholds described above for approving changes to Fundamental Bylaws.



- 28 It is important to note ICANN’s current Articles of Incorporation state that:

*“9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.”*

- 29 Therefore, the CCWG-Accountability recommends that the Articles of Incorporation be modified to remove the notion of members and reflect the need for a higher affirmative vote of at least 3/4 of all the Directors on the ICANN Board, as well as approval by the Empowered Community using the same approval process and thresholds as for approving changes to Fundamental Bylaws.

30 **Does the location of ICANN’s principal office need to be a Fundamental Bylaw?**

31 The ICANN Articles of Incorporation and Bylaws address both the state of incorporation (or corporate domicile) of ICANN and the location of its principal office:

- ICANN’s present Articles of Incorporation state:

*“3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.”*

- ICANN’s present Bylaws Article XVIII Section 1 state:

*“OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”*

- The Affirmation of Commitments paragraph 8(b) states:

*“ICANN affirms its commitments to: (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community...”*

32 As recommended by the CCWG-Accountability in the above section, the Articles of Incorporation would require that approval of any changes to the Articles of Incorporation use the same process and thresholds required for approving changes to Fundamental Bylaws.

33 Thus, ICANN’s state of incorporation/corporate domicile could not be changed without the affirmative consent of the Empowered Community. However, to ensure that ICANN’s status as a California nonprofit public benefit corporation could not be changed by way of transfer of assets and/or dissolution without the affirmative consent of the Empowered Community, a provision will need to be added to the Articles of Incorporation requiring Empowered Community approval for a transfer of all or substantially all of the assets of ICANN.

34 The ICANN Board could propose a change to the Bylaws provision requiring the location of ICANN’s “principal office” in California, but the Empowered Community could block the change.

35 There was not consensus to support making this provision a Fundamental Bylaw requiring the affirmative consent of the Empowered Community.

36 **Community Power: Approve Changes to Fundamental Bylaws and the Articles of Incorporation**

37 Establishing Fundamental Bylaws and requiring Empowered Community approval of amendments to the Articles of Incorporation would ensure that critical aspects of the powers and processes required to maintain ICANN’s accountability to the community, and the organization’s Mission, Commitments and Core Values, can only be changed as a result of broad consensus of both the ICANN Board and the community.

- 38 The Empowered Community would have to affirmatively consent to any change proposed and adopted by the ICANN Board before the amendment could become legally effective, as part of a joint decision process between the ICANN Board and the Empowered Community. By creating this special joint decision process, authority to change fundamental aspects of ICANN's governing framework is shared more broadly than it is today.
- 39 The CCWG-Accountability is working under the assumption that the Articles of Incorporation and the ICANN Bylaws provisions that are recommended to become Fundamental Bylaws are not likely to change frequently. Where changes are made, they are unlikely to arise on short notice or be needed to deal with short-term operational situations.
- 40 The CCWG-Accountability therefore does not believe that this Community Power, as proposed, poses any challenges to ICANN's ongoing operational viability, stability or efficiency.
- 41 Such changes require a high degree of support from the Decisional Participants in the Empowered Community, as the purpose of this power is to make changing Fundamental Bylaws or the Articles of Incorporation possible only with very wide support from the community.
- 42 For further information about the other Community Powers recommended by the CCWG-Accountability, see Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Clarified that IANA Function Review (IFR) provisions apply only to the IANA naming functions (CWG-Stewardship requirement).
- Clarified the process for changes of Articles of Incorporation to be similar to process for changes to Fundamental Bylaws, as well as the process for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Added a specific recommendation that the current Articles of Incorporation be modified to remove the notion of members and reflect the need for an affirmative vote of at least 3/4 of all the Directors on the ICANN Board, as well as approval by the Empowered Community.

## 5. Stress Tests Related to this Recommendation

- N/A

## 6. How does this meet the CWG-Stewardship Requirements?

- 43 These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of Fundamental Bylaws. These include the following:

- ICANN Budgets and Strategic/Operating Plans and IANA Budgets: Community rights regarding the development and consideration of ICANN Budgets, Strategic/Operating Plans and IANA Budgets.
- ICANN Board: Community rights regarding the ability to appoint/remove Directors of the ICANN Board and recall the entire Board.
- ICANN Bylaws: Incorporation of the following into ICANN's Bylaws: IANA Function Review, Special IANA Function Review, PTI Governance, Customer Standing Committee, and the Separation Process.
- Independent Review Process: Should be made applicable to IANA functions and accessible by managers of top-level domains.

## 7. How does this address NTIA Criteria?

44 **Support and enhance the multistakeholder model.**

- Ensuring the multistakeholder model accountability mechanisms cannot be modified without the Empowered Community's approval.
- 

45 **Maintain the security, stability and resiliency of the Internet DNS.**

- Establishing Fundamental Bylaws that provide additional protections to ICANN Bylaws that are critical to the organization's stability and operational continuity.
- 

46 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- N/A
- 

47 **Maintain the openness of the Internet.**

- N/A
- 

48 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A
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# Annex 04 –Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers

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## 1. Summary

- 01 The CCWG-Accountability has recommended seven powers for the community that should be in place to improve ICANN's accountability and ensure community engagement.
- 02 These “Community Powers” are:
  1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
  2. Reject a change to ICANN Standard Bylaws.
  3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  4. Remove an individual ICANN Board Director.
  5. Recall the entire ICANN Board.
  6. Initiate a binding Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
  7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process for the IANA naming functions.
- 03 The Community Powers and associated processes were designed to ensure that no stakeholder can singlehandedly exercise any power, and that under no circumstances, would any individual segment of the community be able to block the use of a power.

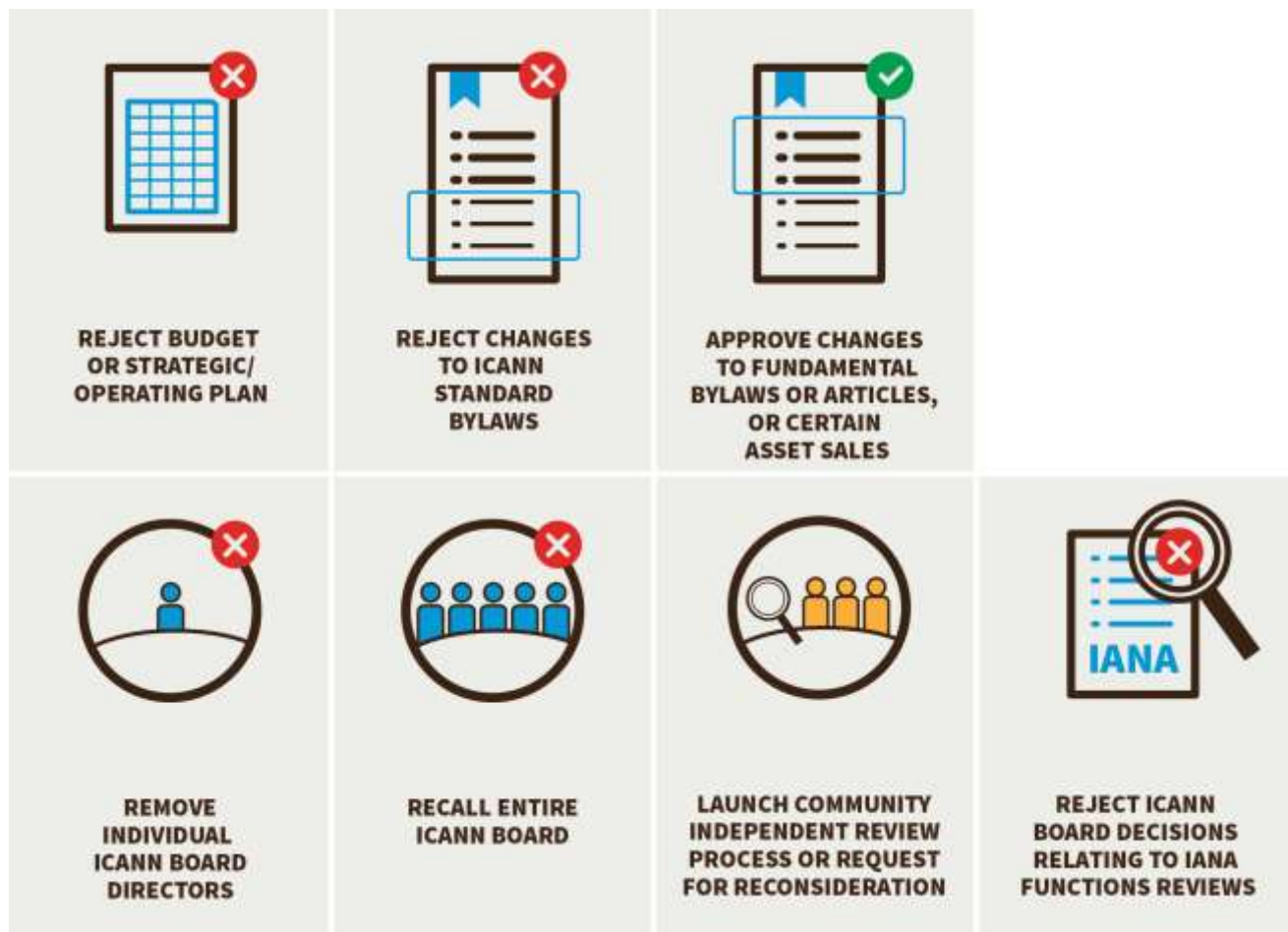
## 2. CCWG-Accountability Recommendations

- 04 The CCWG-Accountability recommends:
  - Defining the following Community Powers as Fundamental Bylaws:
    1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
    2. Reject a change to ICANN Standard Bylaws.

3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  4. Remove an individual ICANN Board Director.
  5. Recall the entire ICANN Board.
  6. Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
  7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any PTI separation process for the IANA naming functions.
- Adding an ICANN Bylaw that states that if the entire ICANN Board is removed, an Interim Board will be established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations (SOs), Advisory Committees (ACs), and the Nominating Committee (NOMCOM) will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.
    - The ICANN Bylaws will state that, except in circumstances in which urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.
    - Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2.
  - That there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:
    - Fundamental Bylaws would require that the ICANN Board not combine the approval of ICANN Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
    - Fundamental Bylaws would require the ICANN Board to clearly indicate if an ICANN Bylaw change is the result of a Policy Development Process when the Board approves it.
    - Fundamental Bylaws would require that if the change to the ICANN Bylaws is the result of a Policy Development Process, the SO that led the Policy Development Process must formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the SO that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.



### 3. Detailed Explanation of Recommendations



05 The CCWG-Accountability has proposed a set of seven Community Powers designed to empower the community to hold ICANN accountable for the organization's Principles (the Mission, Commitments and Core Values).

06 **The proposed Community Powers are:**

The Power to Reject ICANN's Budget, IANA Functions Budget or Strategic/Operating Plans

The Power to Reject Changes to ICANN Standard Bylaws

The Power to Remove Individual ICANN Board Directors

The Power to Recall the Entire ICANN Board

The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets

The Power to Initiate a Binding IRP or a Non-Binding Request for Reconsideration

The Power to Reject ICANN Board Decisions Relating to Reviews of IANA Functions, including the Triggering of Any PTI Separation Process

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07 It is important to note that the above powers, as well as the launch of a Separation Cross Community Working Group<sup>1</sup> (as required by the CWG-Stewardship dependencies), can be enforced by using the community IRP or the Community Power to recall the entire Board.

08 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

09 **The Power to Reject ICANN's Budget or Strategic/Operating Plans**

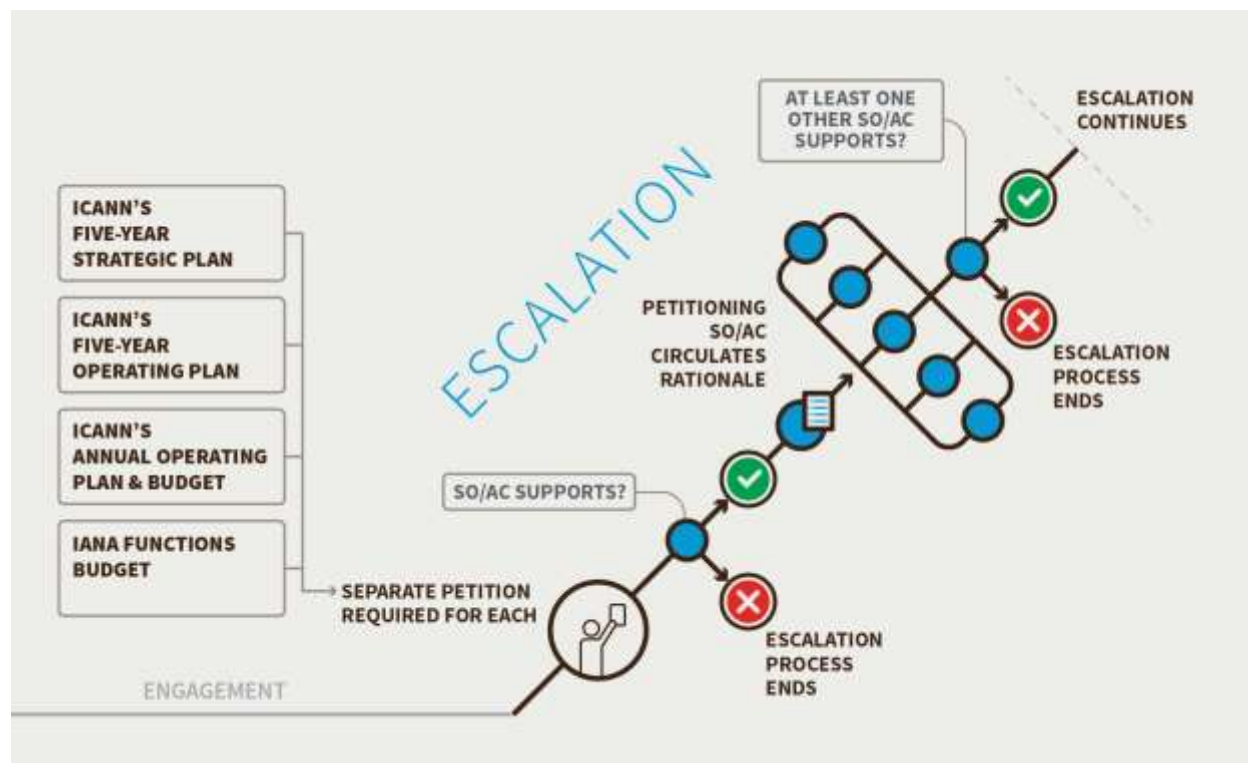
10 The right to set budgets and strategic direction is a critical governance power for any organization. By allocating resources and defining the goals to which these resources are directed, strategic plans, operating plans, and budgets have a significant impact on what ICANN does and how effectively it fulfills its role. The ICANN community already plays an active role in giving input into these key documents through participation in the existing consultation processes ICANN organizes.

11 To provide additional accountability safeguards, the CCWG-Accountability has proposed that the Empowered Community be given the power to reject:

- ICANN's Five-Year Strategic Plan
- ICANN's Five-Year Operating Plan
- ICANN's Annual Operating Plan & Budget
- IANA Functions Budget

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<sup>1</sup> If the CWG-Stewardship's IANA Function Review determines that a Separation Process for the IANA naming functions is necessary, it will recommend the creation of a Separation Cross Community Working Group. This recommendation will need to be approved by a supermajority of each of the Generic Names Supporting Organization and the Country-Code Names Supporting Organization Councils, according to their normal procedures for determining supermajority, and will need to be approved by the ICANN Board after a Public Comment Period, as well as by the Empowered Community.



- 12 The CCWG-Accountability has determined that a separate petition would be required for each budget or strategic/operating plan being challenged. A budget or strategic/operating plan could only be challenged if there are significant issue(s) brought up in the engagement process that were not addressed prior to approval.
- 13 To reinforce the bottom-up, transparent and collaborative approach that ICANN currently uses to enable the community to give input into ICANN's budget documents, the CCWG-Accountability recommends adding a similar consultation process into the ICANN Bylaws for both the ICANN Budget and the IANA Functions Budget. The Bylaws must assure that sufficient budget detail is available, in a timely way, for the community to carefully consider budget matters and provide informed and constructive input (and for this input to be thoroughly considered) prior to the Board making decisions on budget matters.
- 14 A community decision to reject a budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws; the global public interest; the needs of ICANN stakeholders; financial stability, or other matters of concern to the community. The veto could only concern issues that had been raised in the public consultations conducted before the Board approved the budget or plan.
- 15 An SO or AC that is a Decisional Participant in the Empowered Community petitioning to reject a budget or strategic/operating plan would be required to circulate a rationale and obtain support for its petition from at least one other Decisional Participant according to the escalation process.
- 16 The escalation and enforcement processes for rejecting any strategic/operating plan or budget is detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
- 17 If the Community Power to reject the Annual Budget is used, a caretaker budget would be implemented. A caretaker budget is one that provides ongoing funding for crucial ICANN

functions, while the issue/s that caused the Empowered Community's use of the Community Power are resolved. It will be based on current ICANN operations, according to rules developed in the implementation process (which will form a public and transparent "defined approach" to the caretaker budget).

- 18 The CCWG-Accountability also recommends that the caretaker budget concept be embedded in the Fundamental Bylaws, including the responsibility of ICANN's Chief Financial Officer to establish the caretaker budget in accordance with the defined approach.

## 19 **The IANA Functions Budget**

- 20 Under this power, the community will be able to consider the IANA Functions Budget as a separate budget. The IANA Functions Budget is currently part of ICANN's Annual Operating Plan & Budget.

- 21 Under the CWG-Stewardship Final Proposal, an itemization of IANA costs as set forth in the IANA Functions Budget would include "direct costs for the IANA Department", "direct costs for shared resources" and "support functions allocation." Furthermore, the CWG-Stewardship Final Proposal states that these costs should be itemized into more specific costs related to each specific function to the project level and below as needed.

- 22 The IANA Functions Budget requires protection, as recommended by the CWG-Stewardship's Final Proposal. The IANA Functions Budget must be managed carefully and not decreased (without public input) regardless of the status of the other portions of the budget.

- 23 The CCWG-Accountability recommends that there be two distinct processes with respect to the Community Power to reject the IANA Functions Budget and the Community Power to reject the ICANN Budget, meeting the requirements of the CWG-Stewardship. The use of the Community Power to reject the ICANN Budget would have no impact on the IANA Functions Budget, and a rejection of the IANA Functions Budget would have no impact on the ICANN Budget.

- 24 The escalation and enforcement processes for rejecting an IANA Functions Budget is detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

- 25 Should the power be used to reject the annual IANA Functions Budget, a caretaker budget would be implemented (details regarding the caretaker budget are currently under development as noted above).

- 26 The CCWG-Accountability recommends that the caretaker budget approach be embedded in the Fundamental Bylaws, including the responsibility of ICANN's Chief Financial Officer to establish the caretaker budget in accordance with the defined approach.

- 27 The CCWG-Accountability acknowledges that the CWG-Stewardship (or a successor implementation group) is required to develop a proposed process for the IANA Functions Operations-specific Budget establishment and review. This process will be a key input for the implementation of this specific power.

- 28 The CWG-Stewardship may wish to detail the planning process by which the IANA Functions Budget is established as part of its implementation program of work, including the level of detail required to be provided for community input and the timeframes for consultations and approvals. The CCWG-Accountability limits its requirements to those set out in this Recommendation.

- 29 In implementation, any process through which a portion or the whole of the IANA Functions Budget is subject to rejection should include the voice of the operational communities served by the IANA functions (i.e., Domain Names, Numbering Resources and Protocol Parameters). The process must also be implemented in such a way as to ensure the stable and continuous

delivery of the IANA functions, and the proper delivery of contractual service levels to the respective operational communities.

### 30 **The Power to Reject Changes to ICANN Standard Bylaws**

31 In addition to the safeguard against the possibility of the ICANN Board unilaterally amending Fundamental Bylaws without consulting the community, the CCWG-Accountability recommends that the Empowered Community be given the power to reject changes to Standard ICANN Bylaws after the Board approves them, but before the changes go into effect.

32 Any changes approved by the Board would take 30 days to go into effect to enable the Empowered Community to decide whether a petition to reject the change should be initiated.

33 This power, with respect to Standard Bylaws, is a rejection process that is used to tell the ICANN Board that the Empowered Community does not support a Board-approved change. It does not enable the Empowered Community to rewrite a Standard Bylaw change that has been proposed by the Board.

34 It is important to note that the CCWG-Accountability has been careful to try not to change ICANN's core policy-making processes. The tools it has proposed to improve accountability are generally aimed at ICANN-wide issues, not policy development in the SOs. However, the power to reject a Standard Bylaw change could interfere with the implementation of a Policy Development Process that requires such a change.

- To ensure this power does not interfere with ICANN's bottom-up Policy Development Processes, the CCWG-Accountability has added an exception to the Standard Bylaws rejection power to ensure that a Bylaw change that is the result of a Policy Development Process cannot be rejected after it is approved by the ICANN Board without the approval of the SO that led the Policy Development Process.

35 The escalation and enforcement processes for this power are described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement, with the following exception:

- The CCWG-Accountability proposes that there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:
  - Fundamental Bylaws would require that the ICANN Board not combine the approval of ICANN Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
  - Fundamental Bylaws would require the ICANN Board to clearly indicate if an ICANN Bylaw change is the result of a Policy Development Process when the Board approves it.
    - Fundamental Bylaws dealing with rejection of an ICANN Bylaw change would require, if the Bylaws change is the result of a Policy Development Process, that the SO that led the Policy Development Process must formally support holding a Community Forum and exercise the power to reject the Bylaw change.
    - If the SO that led the Policy Development Process that requires the ICANN Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.

36 **The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets**

37 To safeguard against the possibility that the ICANN Board could unilaterally amend ICANN Bylaws and/or the Articles of Incorporation without consulting the community, the CCWG-Accountability determined that the community consultation process should be reinforced in Fundamental Bylaws.

38 The proposed set of Fundamental Bylaws would be harder to change than the Standard Bylaws for two reasons:

- The authority to change Fundamental Bylaws and/or the Articles of Incorporation would be shared between the ICANN Board and the Empowered Community.
- The required threshold of ICANN Board support to change a Fundamental Bylaw would be significantly higher than the threshold to change a Standard Bylaw.

39 The CCWG-Accountability emphasizes the importance for the ICANN Board and Empowered Community to be able to define new Fundamental Bylaws and/or Articles of Incorporation over time, or to change or remove existing ones to ensure that ICANN can adapt to the changing Internet environment.

40 The same escalation process applies to ICANN's sale or other disposition of all or substantially all of ICANN's assets.

41 **The escalation process for this power is as follows:**

42 **Step 1. The ICANN Board publishes its approval of a change to the Fundamental Bylaws and/or Articles of Incorporation and/or sale or other disposition of all or substantially all of ICANN's assets**

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43 **Step 2. Holding a Community Forum**

44 (30 days to organize and hold the event from the date of the publication by the Board)

- ⊙ It is expected that this will only involve remote participation methods, such as teleconferences and Adobe Connect-type meetings over a period of one or two days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting, there is no expectation that participants will meet face-to-face.
- ⊙ The Community Forum would be open to all interested participants and ICANN will provide support services, including the publishing of recordings and transcripts.
- ⊙ Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.
- ⊙ The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any SO or AC may circulate their preliminary views in writing on the exercise of this Community Power.
- ⊙ The Community Forum will neither make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage; although the issue may be resolved before or in the Community Forum. Resolving an issue will be confirmed by the Decisional

Participants that supported the petition formally agreeing, in accordance with their own mechanisms, that the escalation process should be halted.

- ⊙ The Community Forum should be managed/moderated in a fair and neutral manner.
  - ⊙ Should the relevant Decisional Participants determine a need for further deliberation, a second and third session of the Community Forum could be held.
  - ⊙ ICANN staff will collect and publish a public record of the Forum(s), including all written submissions.
- 

45 **Step 3. Decision to use a Community Power as an Empowered Community**

46 (21 days from the conclusion of the Community Forum)

- ⊙ If three or more Decisional Participants support and no more than one objects within the 21-day period, the Empowered Community will use its power to approve the change to the Fundamental Bylaws or Articles of Incorporation.
  - ⊙ If the required thresholds during the 21-day period are not met, the escalation ends without the change to the Fundamental Bylaws or Articles of Incorporation being approved.
- 

47 **Step 4. Advising the ICANN Board**

48 (1 day)

- ⊙ The Empowered Community will advise the Board of its decision.
- 

49 **The Power to Remove Individual ICANN Board Directors**

50 The power to remove individual ICANN Board Directors would allow for the removal of an ICANN Board Director before the Director's current term comes to an end. This was a formal requirement from the CWG-Stewardship. Note that this power applies only to voting members of the ICANN Board, and not to liaisons (who, as non-voting members of the Board are not treated as Directors under California law).

51 Given that ICANN Board Directors can be nominated in two significantly different ways, (1) Specific SO or AC nomination or (2) Nomination Committee nomination, the processes for removing each type of Director will be different.

52 In cases where the nominating SO or AC perceives that there is a significant issue with its appointed Director, it can use the following escalation process to determine if removal of the Director is recommended.

- It is important to note that this power can only be used once during a Director's term if the escalation process reaches the step of holding a Community Forum, as described above, and then fails to remove the Director.

53 As a condition to being nominated by an SO, AC or the Nominating Committee and seated on the Board, each Director-nominee shall be required to sign an irrevocable letter agreement that:

- Expresses a contractual commitment that: (1) Acknowledges that the nominating AC or SO, or, for Directors nominated by the Nominating Committee, the Empowered Community, has the right to remove the Director from service at any time and for any reason through the processes set out in the ICANN Bylaws (as described below); and (2) Confirms that service as an ICANN Board Director does not establish any employment or other relationship to ICANN, the Empowered Community, the SOs, the ACs, the Nominating Committee, or the agents of any of them, that provides any due process rights related to termination of service as a Director other than those specified in the Bylaws.
- Provides a conditional irrevocable resignation from the ICANN Board that is automatically effective upon a final determination of removal through the individual Director removal process or the full Board recall process upon communication of such decision to the Board (as set forth below).

54 Indemnification associated with the removal of individual ICANN Board Directors:

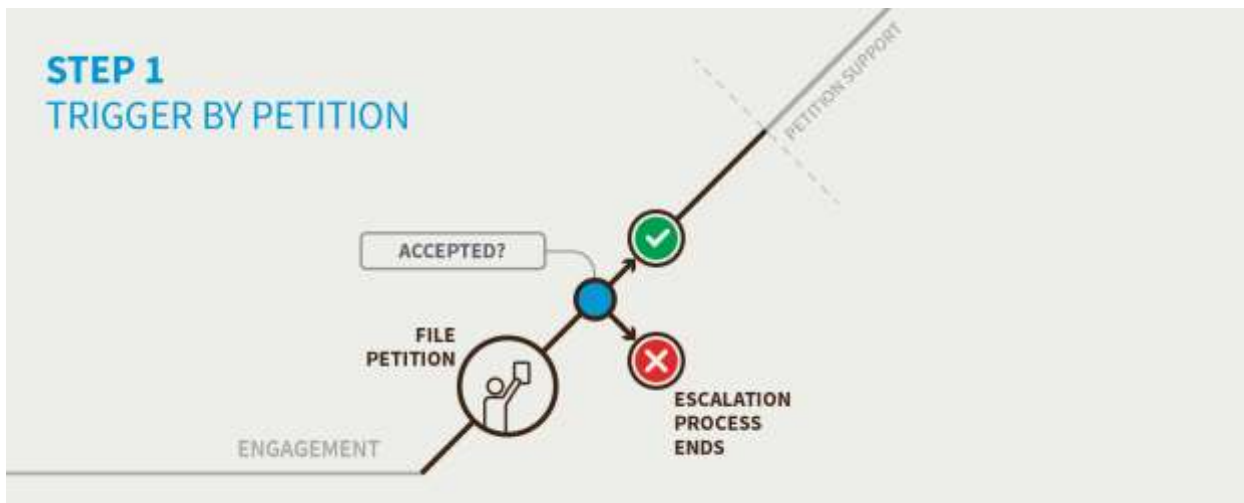
- If a Director initiates a lawsuit in connection with his or her removal or recall (for example, a Director claims that he was libeled in the written rationale calling for his removal), ICANN will provide indemnification and advance expenses as provided below.
- Indemnification will be available (1) to a member of an SO, an AC, the Nominating Committee, or the Empowered Community (2) who is acting as a representative of such organization or committee (3) for actions taken by such representative in such capacity pursuant to processes and procedures set forth in the Bylaws (for example, the chair of an SO submitting a written rationale for the removal of a Director).
- As required by California law and consistent with ICANN's current Bylaws, indemnification will only be available if the actions were taken (1) in good faith and (2) in a manner that the indemnified person reasonably believed to be in the best interests of ICANN.
- Guidelines for standards of conduct that will be presumed to be in good faith (for example, conducting reasonable due diligence as to the truthfulness of a statement) will be developed in Work Stream 2.
- Indemnification will cover amounts actually and reasonably incurred in connection with the lawsuit, such as reasonable attorneys' fees of no more than one firm, judgments, and settlements approved by the Board in its reasonable discretion.
- ICANN will advance funds to cover defense expenses where the person meeting the requirements set forth above undertakes to repay to ICANN amounts received for expenses for which the requirements for indemnification are ultimately determined not to have been met.

55 **Directors Nominated by the Nominating Committee (and Appointed by the Empowered Community)**

56 **Step 1. Triggering Individual ICANN Board Director Removal by Community Petition**

57 (21 days from the official posting of the original petition)





- ⦿ Begin a petition in an SO or AC that is a Decisional Participant in the Empowered Community.
- ⦿ Any individual can begin a petition as the first step to using a Community Power. A petition must be supported by a written rationale stating the reasons why removal is sought.
- ⦿ For the petition to be accepted, the SO or AC, in accordance with its own mechanisms, must accept the petition.
- ⦿ Prior to completion of the petition phase, the affected Director and the Chair of the Board (or Vice Chair if appropriate) are invited to a dialogue, which also includes the individual(s) bringing the petition and the chair of the SO/AC where the petition is under consideration. The purpose of the dialogue is to gain a full understanding of the issues leading to the petition and consider if there are other ways to address the concerns.
- ⦿ If the SO or AC does not approve the petition within 21 days, the escalation process terminates.
- ⦿ If the SO or AC approves the petition, it can proceed to the next step.

58 **Step 2. Triggering Review by Community Petition, Part Two**

59 (7 days from the end of the previous step)



- ⊙ The SO or AC that approved the petition contacts the other Decisional Participants in the Empowered Community to ask them to support the petition. At least one additional Decisional Participant must support the petition (for a minimum of two) for a Community Forum to be organized to discuss the issue.
- ⊙ If the petition fails to gather the required level of support within seven days, the escalation process terminates.
- ⊙ If a minimum of two Decisional Participants support the petition within seven days, a Community Forum is organized.

60 **Step 3. Holding a Community Forum**

61 (21 days to organize and hold the event from the date of the decision to hold It)



- ⦿ It is expected that this will only involve remote participation methods, such as teleconferences and Adobe Connect-type meetings over a period of one or two days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting, there is no expectation that participants will meet face-to-face.
- ⦿ The Community Forum would be open to all interested participants and ICANN will provide support services. The ICANN Board Director who is the subject of the petition would be invited and expected to attend and be prepared to address the issues raised.
- ⦿ The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any SO or AC may circulate in writing their preliminary views on the exercise of this Community Power.
- ⦿ The Community Forum will neither make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage; although the issue may be resolved before or in the Community Forum. Resolving an issue will be confirmed by the Decisional Participants that supported the petition formally agreeing, in accordance with their own mechanisms, that the escalation process should be halted.
- ⦿ The Community Forum should be managed/moderated in a fair and neutral manner.
- ⦿ Should the relevant SOs or ACs determine a need for further deliberation, a second and third session of the Community Forum could be held.
- ⦿ Staff will collect and publish a public record of the Forum(s), including all written submissions.
- ⦿ If the Empowered Community and the ICANN Board Director can resolve the issue in the Community Forum, the escalation process terminates. Note after this point, this process cannot be used again by the Empowered Community to remove this specific ICANN Board Director during his or her current term.
- ⦿ If the Empowered Community and the ICANN Board Director cannot resolve the issue, the Empowered Community must decide if it wishes to take further action.

62 **Step 4. Decision to Use a Community Power as an Empowered Community**

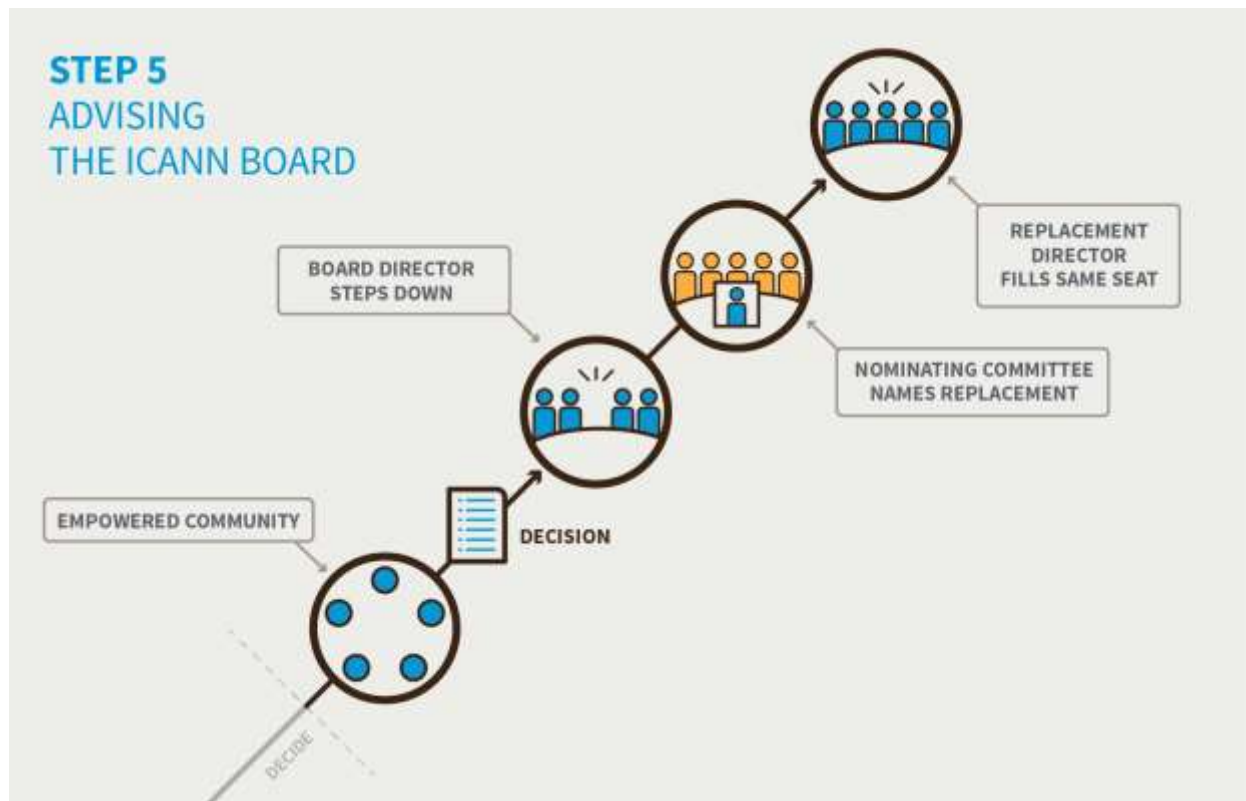
63 (21 days from the conclusion of the Community Forum)



- ⦿ If three or more Decisional Participants support and no more than one objects within the 21-day period, the Empowered Community will use its power. The Empowered Community will also publish an explanation of why it has chosen to do so. The published explanation can reflect the variety of underlying reasons.
- ⦿ If the proposal for the Empowered Community to use a Community Power does not meet the required thresholds during the 21-day period, the escalation process terminates.

64 **Step 5. Advising the ICANN Board**

65 (1 day)



- ⦿ If the Empowered Community has decided to use its power, it will advise the ICANN Board Director of the decision and direct him or her to comply with the decision.
- ⦿ Naming a replacement:
  - The Nominating Committee may instruct the Empowered Community to appoint a new Director. It is expected that the Nominating Committee will amend its procedures so as to have several “reserve” candidates in place.
  - Replacement Directors will fill the same “seat” and their term will come to an end when the term of the original Director was to end.

66 **Directors Nominated by a Supporting Organization or Advisory Committee  
(and Appointed by the Empowered Community)**

- 67 **Step 1. Triggering Individual ICANN Board Director Removal by Community Petition**  
 68 (21 days from the official posting of the original petition)



- ⦿ The petition can only be started in the SO or AC that nominated the Director and that is a Decisional Participant in the Empowered Community.
- ⦿ Any individual can begin a petition as the first step to using a Community Power.
- ⦿ For the petition to be accepted, the SO or AC, in accordance with its own mechanisms, must accept the petition.
- ⦿ If the SO or AC does not approve the petition within 21 days, the escalation process terminates.
- ⦿ If the SO or AC approves the petition, it can proceed to the next step.

69 **Step 2. Holding a Community Forum**

70 (21 days to organize and hold the event from the date of the decision to hold it)

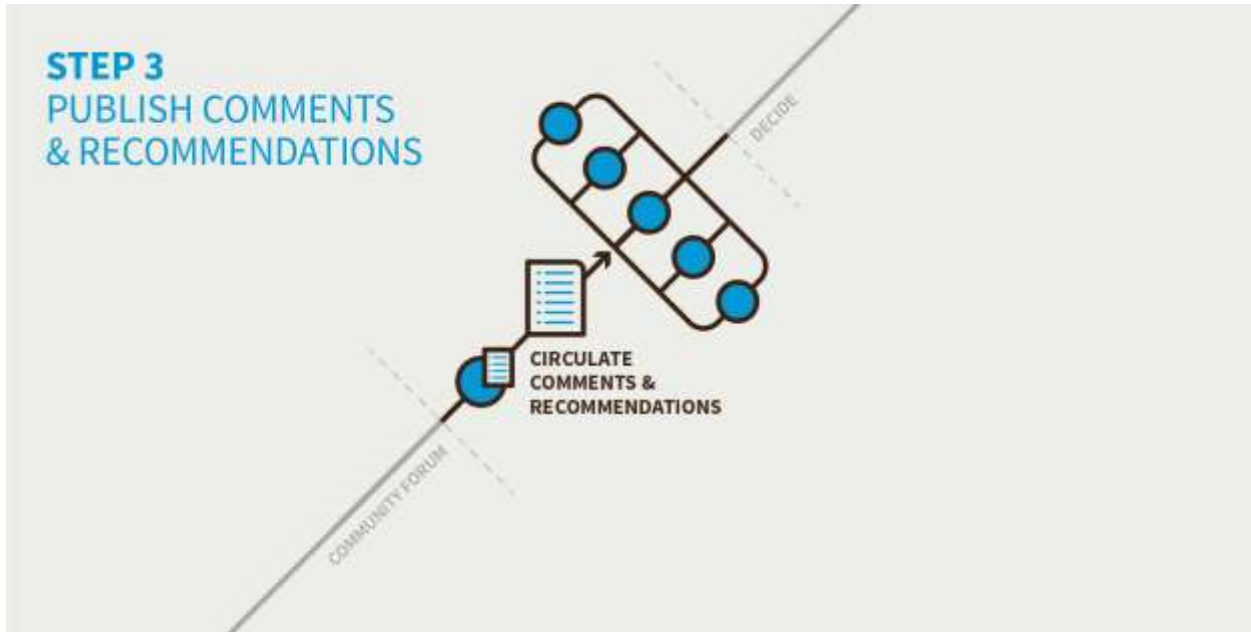


- ⦿ It is expected that this will only involve remote participation methods, such as teleconferences and Adobe Connect-type meetings over a period of one or two days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting, there is no expectation that participants will meet face to face. The Community Forum would be open to all interested participants, and ICANN will provide support services. The ICANN Board Director that is the subject of the petition would be invited and expected to attend and be prepared to address the issues raised.
- ⦿ The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any SO or AC may circulate in writing its preliminary views on the exercise of this Community Power.
- ⦿ The Community Forum will neither make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage, although the issue may be resolved before or in the Community Forum. Resolving an issue will be confirmed by the nominating SO/AC that supported the petition formally agreeing, in accordance with its own mechanisms, that the escalation process should be halted.
- ⦿ The Community Forum should be managed/moderated in a fair and neutral manner and cannot involve a representative of the nominating SO or AC.
- ⦿ Should the relevant SO or AC determine a need for further deliberation, a second and third session of the Community Forum could be held.
- ⦿ Staff will collect and publish a public record of the Forum(s), including all written submissions.
- ⦿ If the Empowered Community and the ICANN Board Director can resolve the issue in the Community Forum, the escalation process terminates. Note after this point, this process cannot be used again by the Empowered Community to remove this specific ICANN Board Director during his or her current term.
- ⦿ If the Empowered Community and the ICANN Board Director cannot resolve the issue, the Empowered Community must decide if it wishes to take further action.
  - At the end of the Community Forum, the Community Forum Chair will issue a formal call for comments and recommendations from the community within seven days, and input received will be sent to the relevant SO or AC and posted publicly.

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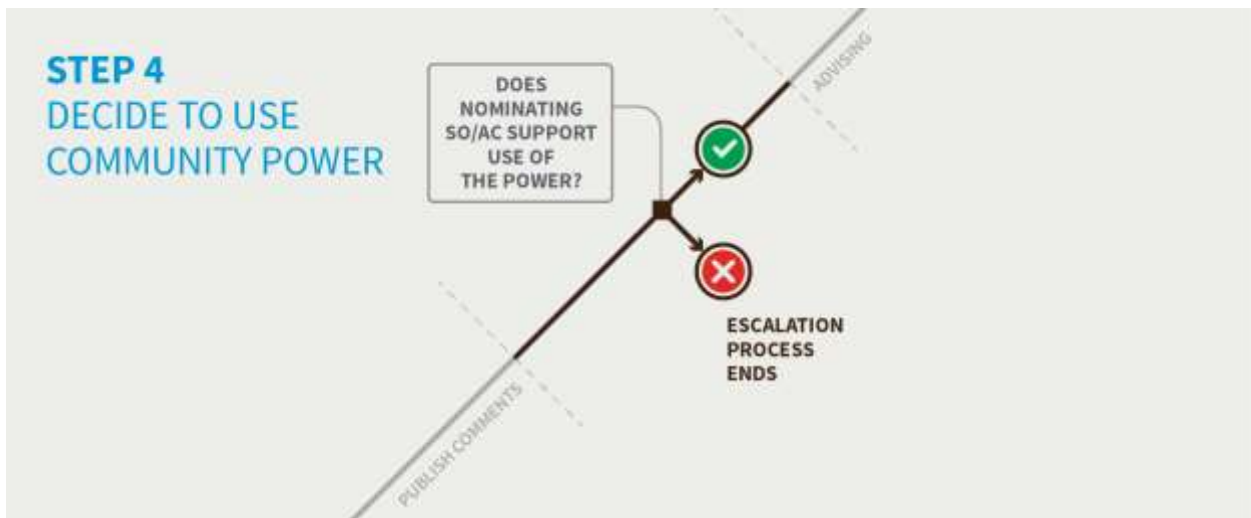
71 **Step 3. Supporting Organizations and/or Advisory Committees Publish Their Comments and Recommendations**

72 (7 Days)



73 **Step 4. Decision to Use a Community Power as a Decisional Participant**

74 (21 days from the conclusion of the period for Supporting Organization and Advisory Committee comments)

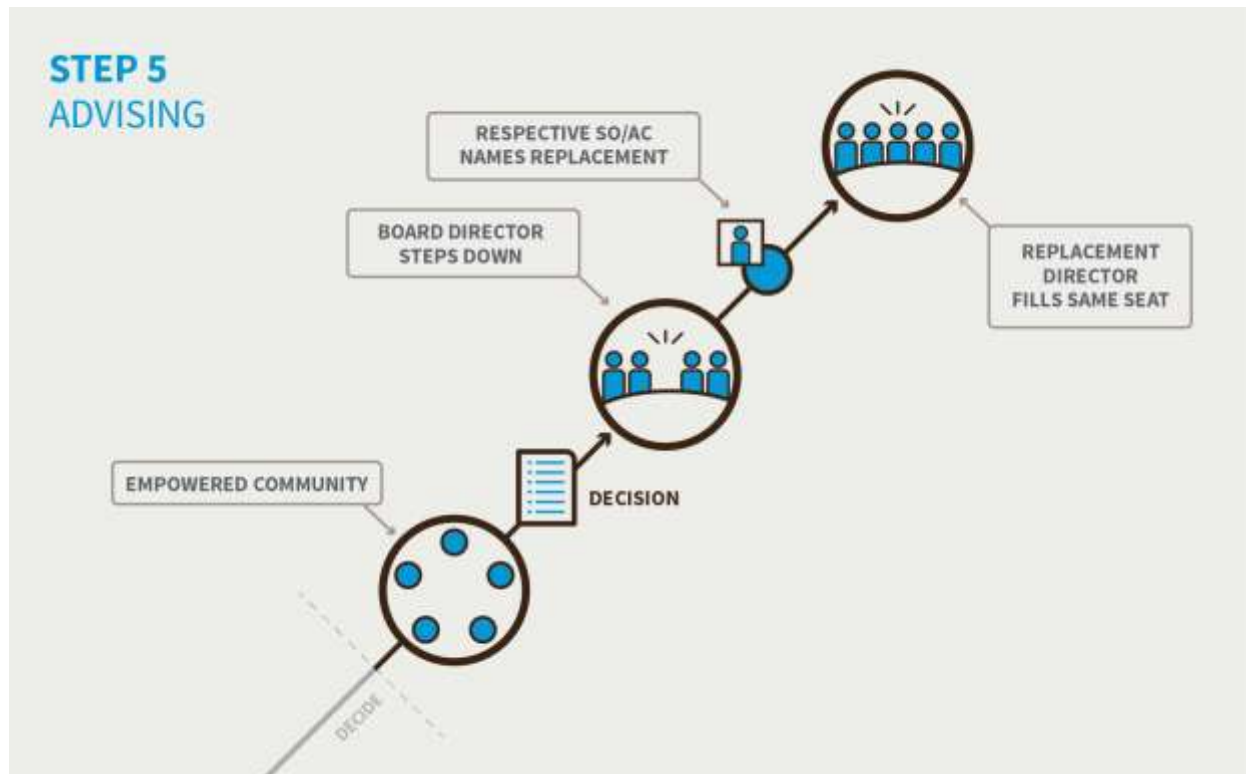


- ⊙ If a three-quarters majority within the nominating SO or AC supports using the power within the 21-day period, the Empowered Community will use its power. The SO or AC will also publish an explanation of why it has chosen to do so.
- ⊙ If the nominating SO or AC does not adequately support using the power within the 21-day period, the escalation process terminates.



75 **Step 5. Advising the ICANN Board**

76 (1 Day)



- ⦿ If the Empowered Community has decided to use its power, it will advise the ICANN Board Director of the decision and direct him or her to comply with the decision.
- ⦿ Naming a replacement:
  - The nominating SO or AC is responsible for nominating an individual to fill the vacancy on the ICANN Board through its usual process (as set out in Article VI, Section 12.1 of the Bylaws).
  - Replacement Directors will fill the same “seat” and their term will come to an end when the term of the original Director was to end. Directors appointed in such circumstances will not have their remaining time in the role counted against any term limits, to which they would otherwise be subject.

77 **The Power to Recall the Entire ICANN Board**

78 The CCWG-Accountability believes there may be situations where removing individual Directors from the ICANN Board may not be a sufficient accountability remedy for the community.

- 79 In cases where the community perceives that a set of problems has become impossible to resolve, the community may wish to signal its lack of confidence in the ICANN Board by petitioning for a recall (i.e., the removal) of the entire Board (except the CEO, who is appointed by the Board).
- 80 The power to recall a Board is a critical enforcement mechanism for the Empowered Community because it can be used to support the other Community Powers and provide a final and binding accountability mechanism.
- 81 By exercising this power, the entire ICANN Board (except the CEO and liaisons who, as non-voting members of the Board are not treated as Directors under California law) could be removed by the Empowered Community. However, it is unlikely that the Empowered Community would use this power lightly, and the engagement and escalation processes are designed to encourage agreement between the ICANN Board and the Empowered Community.
- 82 If the ICANN Board were to be recalled, an Interim Board would be put in place. Interim Directors would be named with the exercising of the Community Power to ensure continuity.
- 83 The CCWG-Accountability expects that this power would only be exercised as a last resort after all other attempts at resolution have failed. As a recall of the Board would be extremely disruptive for the entire organization, the CCWG-Accountability has included several safeguards in the proposed escalation process to ensure that this decision reaches the maturity and level of support needed before it can be used
- Note: Special conditions may apply if the “carve out” is invoked for recalling the entire Board. Please consult Annex 2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement for further details.
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84 **Step 1. Triggering Recalling the ICANN Board Directors by Community Petition**

85 (21 days from the official posting of the original petition)

- ⊙ Begin a petition in an SO or AC that is a Decisional Participant in the Empowered Community.
  - ⊙ Any individual can begin a petition as the first step in using a Community Power.
  - ⊙ For the petition to be accepted, the SO or AC, in accordance with its own mechanisms, must accept the petition.
  - ⊙ If the SO or AC does not approve the petition within 21 days, the escalation process terminates.
  - ⊙ If the SO or AC does approve the petition within the 21-day period, it proceeds to the next step.
- 

86 **Step 2. Triggering Removal of ICANN Board by Community Petition, Part Two**

87 (7 days from the end of the 21-day period of the previous step)

- ⊙ The SO or AC that approved the petition contacts the other Decisional Participants in the Empowered Community to ask them to support the petition. At least two additional Decisional Participants must support the petition (for a minimum total of three) for a Community Forum to be organized to discuss the issue.

- ⊙ If the petition fails to gather the required level of support within seven days, the escalation process terminates.
- ⊙ If a minimum of three Decisional Participants support the petition within seven days, a Community Forum is organized.

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88 **Step 3. Holding a Community Forum**

89 (21 days to organize and hold the event from the date of the decision to hold it)

- ⊙ The power to recall the entire Board would require a face-to-face meeting. The three or more SOs or ACs that approved holding the Community Forum would decide if holding the Community Forum can wait until the next regularly scheduled ICANN meeting or if a special meeting is required to bring participants together. In both of these cases, the three or more SO or ACs that have requested the Community Forum will publish the date for holding the event which will not be subject to the 21-day limitation. In this case, the Community Forum would be considered completed at the end of the face-to-face meeting.
- ⊙ The Community Forum would be open to all interested participants, and ICANN will provide support services. The ICANN Board would be invited and expected to attend and be prepared to address the issues raised.
- ⊙ The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any SO or AC may circulate in writing its preliminary views on the exercise of this Community Power.
- ⊙ The Community Forum will neither make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage, although the issue may be resolved before or in the Community Forum. Resolving an issue will be confirmed by the Decisional Participants that supported the petition formally agreeing, in accordance with their own mechanisms, that the escalation process should be halted.
- ⊙ The Community Forum should be managed/moderated in a fair and neutral manner.
- ⊙ Should the relevant SOs or ACs determine a need for further deliberation, a second and third session of the Community Forum could be held.
- ⊙ Staff will collect and publish a public record of the Forum(s), including all written submissions.
- ⊙ If the Empowered Community and the ICANN Board can resolve the issue in the Community Forum, the escalation process terminates.
- ⊙ If the Empowered Community and the ICANN Board cannot resolve the issue, the Empowered Community must decide if it wishes to take further action.

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90 **Step 4. Decision to Use a Community Power as an Empowered Community**

91 (21 days from the conclusion of the Community Forum)

- ⊙ If four or more Decisional Participants support and no more than one objects within the 21-day period, the Empowered Community will use its power. The Empowered Community will also publish an explanation of why it has chosen to do so. The published

explanation can reflect the variety of underlying reasons. In a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects.

- ⊙ If the proposal to use a Community Power as the Empowered Community does not meet the required thresholds during the 21-day period, the escalation process terminates.

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92 **Step 5. Advising the ICANN Board**

93 (1 day)

- ⊙ If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct it to comply with the decision.

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94 **Interim Board**

95 The CCWG-Accountability proposes that a Bylaw be added that states that if the Board is removed, the Interim Board will be in place only as long as is required for the selection/election process for the Replacement Board to take place.

96 SOs, ACs and the Nominating Committee will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days.

97 The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

98 The ICANN Bylaws will state that, except in circumstances of where urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.

99 **The Power to Initiate a Community Independent Review Process or Request for Reconsideration**

100 A community IRP or Request for Reconsideration may be launched as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement. One example could be to require ICANN to provide documents as required under the right of inspection requirement.

101 A community IRP may be launched for any of the following reasons:

- To hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Articles of Incorporation or Bylaws resulting from action taken in response to advice/input from any AC or SO).

- To hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
- To hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- To hear and resolve issues relating to Documentary Information Disclosure Policy (DIDP) decisions by ICANN, which are inconsistent with the ICANN Bylaws.
- To hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or ICANN Bylaws.

102 A Request for Reconsideration can be initiated, to require the Board of Directors to reconsider a recent decision or action/inaction by the ICANN Board or staff.

103 The escalation and enforcement processes for initiating a community IRP or a Request for Reconsideration are detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

104 **The Power to Reject ICANN Board Decisions Relating to Reviews of IANA Functions, Including the Triggering of any Post-Transition IANA Separation Process for the IANA Naming Functions**

105 The IANA Functions Review, Special IANA Function Review, and the Separation Cross Community Working Group are all accountability mechanisms for the IANA naming functions that the CWG-Stewardship has requested the CCWG-Accountability constitute in the Fundamental Bylaws.

106 As such, these structures will exist within ICANN and many of their recommendations will require ICANN Board approval before implementation (i.e., change in the Statement of Work for the IANA Functions Operator). The CWG-Stewardship determined it was critical that the recommendations of these various bodies be respected by the ICANN Board, and so further required that the CCWG-Accountability provide mechanisms to ensure that the recommendations from these bodies could be enforced.<sup>2</sup>

107 The escalation and enforcement processes for rejecting an ICANN Board decision relating to IANA Function Review, Special IANA Function Review and Separation Cross Community Working Group recommendations are detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

108 The right to reject ICANN Board decisions relating to reviews of IANA naming functions, including ICANN Board decisions relating to Special IANA Function Review and Separation Cross Community Working Group recommendations, can be exercised by the Empowered Community an unlimited number of times.

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<sup>2</sup> Consult the [CWG-Stewardship Final Report](#) for further details.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Budget rejection for PTI significantly updated.
- Caretaker budget expanded.
- Indemnification for removal of an ICANN Board Director greatly expanded.
- Escalation steps amended to match process in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement.
- Scope of community IRP modified to match Recommendation #7: Strengthening ICANN’s Independent Review Process.
- “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation” is now: “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN’s Sale or Other Disposition of All or Substantially All of ICANN’s Assets.”
- “The Power to Initiate a Binding IRP (Where a Panel Decision is Enforceable in any Court Recognizing International Arbitration Results)” now includes the possibility for the Empowered Community to file a Request for Reconsideration.

## 5. How does this meet the CWG-Stewardship Requirements?

- “The Power to Reject ICANN’s Budget or Strategy/Operating Plans” directly meets the following CWG-Stewardship requirement:
  - ICANN Budget: Community rights regarding the development and consideration of the ICANN Budget.
- “The Power to Remove Individual ICANN Board Directors” and “The Power to Recall the Entire ICANN Board” directly meets the following CWG-Stewardship requirement:
  - ICANN Board: community rights regarding the ability to appoint/remove Directors of the ICANN Board, and recall the entire Board.
- “The Power to Approve Changes to Fundamental Bylaws” is directly related to the following CWG-Stewardship requirement:
  - Fundamental Bylaws: All of the foregoing mechanisms are to be provided for in the ICANN Bylaws as Fundamental Bylaws.

## 6. How does this address NTIA Criteria?

### 109 Support and enhance the multistakeholder model.

- Decentralizing power within ICANN through an Empowered Community.
- Establishing a public Community Forum to ensure that all voices and perspectives are heard before execution of a Community Power.

- Recommending a process where all are welcome to participate in the consultation processes prior to designing the document that will be put for discussion.
  - Retaining decision-making based on consensus rather than voting.
- 

110 **Maintain the security, stability, and resiliency of the Internet DNS.**

- Elaborating Community Powers associated with a defined escalation process.
  - The multi-step engagement process associated with the escalation process prevents single-step actions and encourages a conciliatory approach.
  - The escalation process includes high thresholds for using accountability actions that are based on consensus of the Empowered Community. This process provides safeguards to prevent a situation where an SO/AC might initiate a petition to reject with the intention of negatively impacting another SO/AC's budget by ensuring that no single SO/AC can use a power singlehandedly and no single AC/SO can singlehandedly block the use of a power.
- 

111 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Including limited timeframes, transparent processes, and associated thresholds to maintain operational viability.
- 

112 **Maintain the openness of the Internet.**

- Establishing a public Community Forum to ensure that all voices and perspectives are heard before execution of a Community Power.
  - Preserving policies of open participation in ICANN's SOs and ACs.
  - The escalation process includes the convening of a Community Forum where all would be welcome to participate as a potential step. In addition, all are welcome to participate in the consultation process that organized to elaborate these key documents.
- 

113 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- To the extent the Government Advisory Committee (GAC) wishes to participate in decision-making by the Empowered Community, which the GAC has the flexibility to determine, it would be one of five Decisional Participants. In addition, the GAC will not participate as a decision-maker in community deliberations involving a challenge to the Board's implementation of GAC consensus advice. This "carve out," combined with the safeguards in Recommendation #11, leads the CCWG-Accountability to believe that this NTIA requirement is met, even when considering the increased threshold from 50 to 60% for the Board to reject GAC consensus advice.

- Enabling all interested stakeholders to join consultations through SOs and ACs or through the Community Forum.
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# Annex 05 – Recommendation #5: Changing Aspects of ICANN’s Mission, Commitments and Core Values

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## 1. Summary

01 The CCWG-Accountability is recommending changes to the ICANN Bylaws to assure that the Bylaws reflect the CCWG-Accountability recommendations.

- Note: The language proposed in this recommendation for ICANN Bylaw revisions is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

### 02 **Mission Statement**

03 The CCWG-Accountability recommends the following changes to ICANN’s “Mission Statement,” (Bylaws, Article I, Section 1):

- Clarify that ICANN’s Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
- Clarify that ICANN’s Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN’s powers are “enumerated.” Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN’s authority.
  - Note: This does not mean ICANN’s powers can never evolve. However, it ensures that any changes will be deliberate and supported by the community.

### 04 **Core Values**

05 The CCWG-Accountability recommends the following changes to ICANN’s “Core Values” (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN’s existing Core Values provisions into “Commitments” and “Core Values”.
  - Incorporate ICANN’s obligation to “operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition” into the Bylaws.
  - Note: These obligations are currently contained in ICANN’s Articles of Incorporation.

- Designate certain Core Values as “Commitments.” ICANN’s Commitments will include the values that are fundamental to ICANN’s operation, and are intended to apply consistently and comprehensively.

Commitments will include ICANN’s obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
  - Limit its activities to those within ICANN’s Mission that require, or significantly benefit from, global coordination.
  - Employ open, transparent, bottom-up, multistakeholder processes.
  - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
    - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
    - Add an obligation to avoid capture.
    - Although previous CCWG-Accountability draft proposals proposed to modify existing Core Value 5 (“Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment”) to drop the phrase “where feasible and appropriate,” the CCWG-Accountability has reconsidered this recommendation. While acknowledging that ICANN is not an antitrust authority, on balance the CCWG-Accountability elected to retain the introductory language to ensure that ICANN continues to have the authority, for example, to refer competition-related questions regarding new registry services to competent authorities under the RSEP program and to establish bottom-up policies for allocating top-level domains (e.g., community preference).

## 06 **Balancing or Reconciliation Test**

- 07 The CCWG-Accountability recommends modification to the “balancing” language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

*These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.*

## 08 **Fundamental Bylaws Provisions**

- 09 The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

## 2. CCWG-Accountability Recommendations

- 10 Modify ICANN's Fundamental Bylaws to implement the following:

11 **Mission**

- 12 The Mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope is to coordinate the development and implementation of policies:
  - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and
  - That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN provides registration services and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.
4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

- 13 ICANN shall act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission.

- 14 ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

- 15 ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

- 16 Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to note the following:

1. The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages.

2. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called “Picket Fence”) are intended and understood to be within the scope of ICANN’s Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is included for reference at the end of this Annex.
3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN’s Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN’s approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party’s right to challenge the other party’s interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN’s Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN’s Mission.
4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

17 **Section 2. Commitments & Core Values**

18 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values, both described below.

19 **Commitments**

20 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN’s action must:

1. Preserve and enhance its neutral and judgment-free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
2. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet.
3. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to matters that are within ICANN’s Mission and require or significantly benefit from global coordination.
4. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (1) seek input from the public, for whose benefit ICANN shall in all events act, (2) promote well-informed decisions based on expert advice, and (3) ensure that those entities most affected can assist in the policy development process.

5. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.
6. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

21 **Core Values**

22 In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. 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 and the roles of both ICANN's internal bodies and external expert bodies.
2. 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 to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
  - a. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
5. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.
6. Striving to achieve a reasonable balance between the interests of different stakeholders.

23 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.

24 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

25 In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.

26 Note: Specific recommendations on how to implement these modifications can be found at the end of the next section.

### 3. Detailed Explanation of Recommendations

#### 27 **Background**

28 To whom is ICANN accountable? For what is it accountable? Those questions were a necessary starting point for the work of the CCWG-Accountability, and the answers inform all of our recommendations. The Bylaws changes recommended here are designed to answer these questions. Most important, ICANN has a limited Mission, and it must be accountable for actions that exceed the scope of its Mission. In undertaking its Mission, ICANN is also obligated to adhere to policy supported by community consensus and an agreed-upon standard of behavior, articulated through its Commitments and Core Values. Taken together, the proposed Mission, Commitments, and Core Values articulate the standard against which ICANN's behavior can be measured and to which it can be held accountable. Because these Bylaws provisions are fundamental to ICANN's accountability, we propose that they be adopted as Fundamental Bylaws that can only be changed with the approval of the Empowered Community subject to procedural and substantive safeguards.

#### 29 **Mission and Core Values**

30 ICANN's current Bylaws contain:

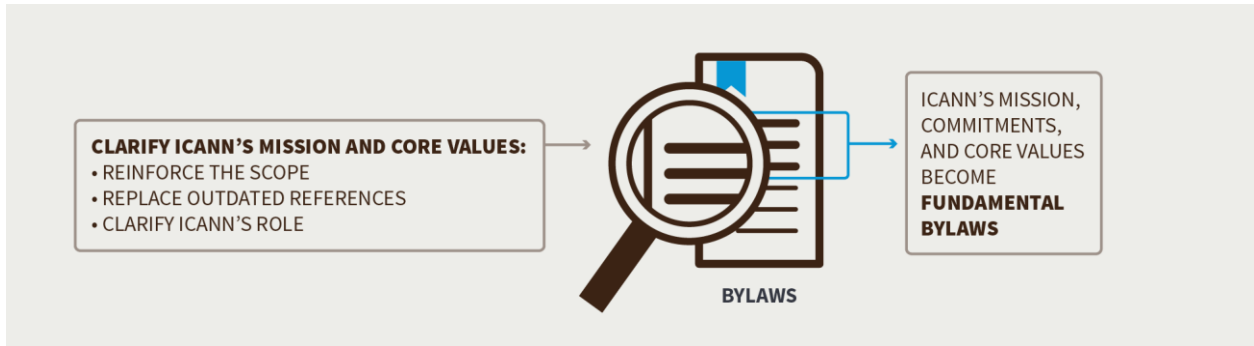
- Mission statement.
- Statement of Core Values.
- Provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment.

31 These three sections are at the heart of ICANN's accountability because they obligate ICANN to act only within the scope of its limited Mission, and to conduct its activities in accordance with certain fundamental principles. As such, these three sections also provide a standard against which ICANN's conduct can be measured and held accountable through existing and enhanced mechanisms such as the Request for Reconsideration process and the Independent Review Process.<sup>1</sup>

32 Based on community input and CCWG-Accountability discussions, it was concluded that these ICANN Bylaws provisions, which were originally adopted in 2003, should be strengthened and enhanced to provide greater assurances that ICANN is accountable to its stakeholders and the global Internet community.

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<sup>1</sup> The current relevant language on this in the ICANN Bylaws was adopted in 2003.

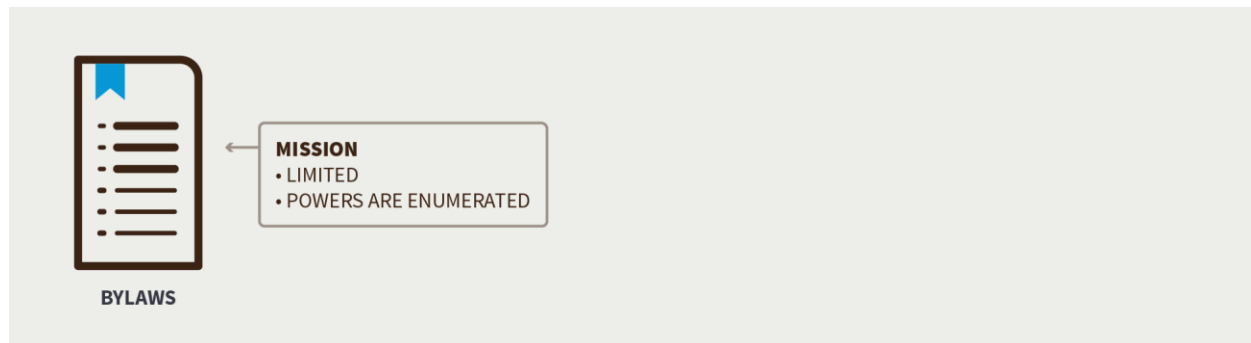


33 In particular, the CCWG-Accountability found that:

- ICANN's Mission statement needed clarification with respect to the scope of ICANN's policy authority.
- The language in the Bylaws describing how ICANN should apply its Core Values was weak and could permit ICANN decision-makers to exercise excessive discretion.
- The current Bylaws did not reflect key elements of the Affirmation of Commitments.
- The Board should have only a limited ability to change these key accountability provisions of ICANN's Bylaws.

34 The CCWG-Accountability recommendations to change aspects of ICANN's Mission, Commitments and Core Values are to address the deficiencies described above. The CCWG-Accountability discussed how to balance the needs of limiting ICANN's Mission and the necessary ability of the organization to adjust to a changing environment.

### 35 Mission Statement

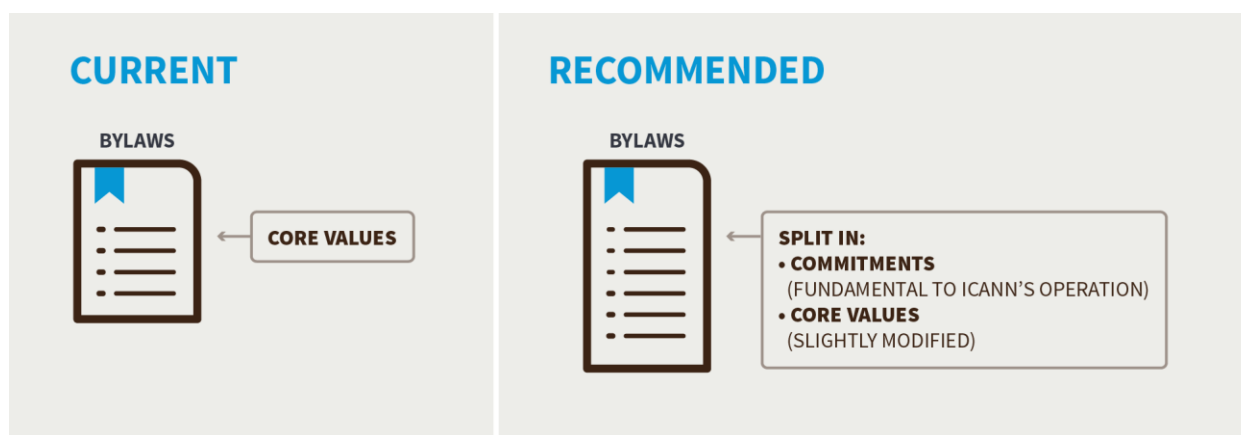


36 The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

- Clarify that ICANN's Mission with respect to naming is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.

- Clarify ICANN’s Mission with respect to numbering, protocol ports and parameters, and the DNS root name server system.
- Clarify that ICANN’s Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN’s powers are “enumerated.” Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN’s authority.
  - Note: This does not mean ICANN’s powers can never evolve, however it ensures that any changes will be deliberate and supported by the community.

## 37 Core Values



38 The CCWG-Accountability recommends the following changes to ICANN’s Core Values (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN’s existing Core Values provisions into Commitments and Core Values.
  - Incorporate ICANN’s obligation to “operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition” into the Bylaws.
  - Note: These obligations are currently contained in ICANN’s Articles of Incorporation.
- Designate certain Core Values as Commitments. ICANN’s Commitments will include the values that are fundamental to ICANN’s operation, and are intended to apply consistently and comprehensively.

Commitments will include ICANN’s obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
- Limit its activities to those within ICANN’s Mission that require or significantly benefit from global coordination.
- Employ open, transparent, bottom-up, multistakeholder processes.



- Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
  - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
  - Add an obligation to avoid capture.

### 39 **Balancing or Reconciliation Test**

40 The CCWG-Accountability recommends modification to the “balancing” language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

*These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.*

### 41 **Fundamental Bylaws Provisions**

42 The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

### 43 **Proposed Mission, Commitments and Core Values** **Mission**

44 The Mission of the Internet Corporation for Assigned Names and Numbers (ICANN) is to ensure the stable and secure operation of the Internet’s unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System (DNS). In this role, ICANN’s scope is to coordinate the development and implementation of policies:
  - a. For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and
  - b. That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet’s unique names systems.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol (IP) and Autonomous System (AS) numbers. In this role, ICANN provides registration services

and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.

4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

45 ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.

46 ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

47 ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments (PICs), with contracted parties in service of its Mission.

48 Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to note the following:

1. The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages.
2. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called "Picket Fence") are intended and understood to be within the scope of ICANN's Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is included for reference at the end of this Annex.
3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party's right to challenge the other party's interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.
4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

## 49 **Section 2. Commitments & Core Values**

50 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.

## 51 **Commitments**

1. In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:
2. Preserve and enhance its neutral and judgment free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
3. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;
4. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
5. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;
6. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment;
7. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

52 **Core Values**

53 In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. 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 and the roles of both ICANN's internal bodies and external expert bodies.
2. 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 to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
  - a. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
5. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that

governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.

6. Striving to achieve a reasonable balance between the interests of different stakeholders.

54 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.

55 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

56 In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

### 57 Comparison of Mission Statement in Current Bylaws, 3<sup>rd</sup> Draft Proposal and Final Proposal

58 Existing Bylaws	59 3 <sup>rd</sup> Draft Proposal 60 (Text in RED shows changes from Existing Bylaws)	61 Final Proposal 62 (Text in RED shows changes from 3 <sup>rd</sup> Draft Proposal)
63 The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:	64 The Mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to <del>coordinate, at the overall level, the global Internet's systems of unique identifiers and in particular</del> to ensure the stable and secure operation of the Internet's unique identifier systems <del>as described below. In particular, Specifically,</del> ICANN:	65 The Mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:
66 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are:	67 <del>1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are:</del> <i>NOTE: This language has been</i>	

		<i>modified and distributed over the specific functions. See below.</i>	
68 a. <i>[Coordinates the allocation and assignment of] Domain names (forming a system referred to as "DNS");</i>	69 1. Coordinates the allocation and assignment of <b>names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's Mission is to coordinate the development and implementation of policies:</b>  70 <b>For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability; and</b>  71 <b>That are developed through a bottom-up, consensus-based multi-stakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.</b>	72 Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's <b>Mission scope</b> is to coordinate the development and implementation of policies:  73 For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of <b>the DNS</b> ; and  74 That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.	
75 2. Coordinates the operation and evolution of the DNS root name server system.	76 2. Coordinates the operation and evolution of the DNS root name server system. <b>In this role, ICANN's Mission is to [to be provided by root server operators].</b>	77 <b>Facilitates coordination of the operation and evolution of the DNS root name server system. <del>In this role, ICANN's Mission is to [to be provided by RSSAC].</del></b>	
78 b. <i>[Coordinates the allocation and assignment of] Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and</i>	79 3. Coordinates the allocation and assignment <b>at the top-most level</b> of Internet Protocol ("IP") and Autonomous System ("AS") numbers. <b>ICANN's Mission is described in the ASO MoU between ICANN and RIRs.</b>	80 3. Coordinates the allocation and assignment at the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. <b>ICANN's Mission is described in the ASO MoU between ICANN and RIRs. In this role, ICANN provides registration services and open access for global number registries as</b>	

		<p>requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.</p>
<p>81 c. [Coordinates the allocation and assignment of] Protocol port and parameter numbers.</p>	<p>82 4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's Mission is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations, such as the Internet Engineering Task Force.</p>	<p>83 Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's <del>Mission scope</del> is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations, <del>such as the Internet Engineering Task Force.</del></p>
<p>84 3. Coordinates policy development reasonably and appropriately related to these technical functions.</p>	<p>85 <del>3. Coordinates policy development reasonably and appropriately related to these technical functions.</del></p> <p>86 <i>Note: The chapeau has been deleted and the remainder of the language has been distributed as shown above.</i></p>	
	<p>87 ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.</p> <p>88 ICANN shall not impose regulations on services (i.e., any software process that accepts connections from the Internet) that use the Internet's unique identifiers, or the content</p>	<p>90 ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.</p> <p>91 ICANN shall not impose regulations on services <del>(i.e., any software process that accepts connections from the Internet)</del> that use the Internet's unique identifiers, or the content</p>

	<p>89 that such services carry or provide. ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission.</p>	<p>92 that such services carry or provide. ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.</p>
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93 **COMMITMENTS & CORE VALUES: ANNOTATED COMPARISON OF CURRENT BYLAWS, 3RD DRAFT PROPOSAL, AND FINAL PROPOSAL**

94 <b>Current Bylaws</b>	95 <b>3<sup>rd</sup> Draft Proposal</b> 96 (Text in <b>RED</b> indicates changes from Existing Bylaws)	97 <b>Final Draft Proposal</b> 98 (Text in <b>RED</b> indicates changes from 3 <sup>rd</sup> Draft Proposal)
99 Section 2. CORE VALUES  100  101 In performing its mission, the following core values should guide the decisions and actions of ICANN:	102 Section 2. COMMITMENTS & CORE VALUES  103 In carrying out its Mission, <del>the following core values should guide the decisions and actions of</del> ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.	104 Section 2. COMMITMENTS & CORE VALUES  105 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.
	106 COMMITMENTS 107 1. In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:	108 COMMITMENTS 109 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:
110 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.	111 2. Preserve and enhance <del>the neutral and judgment free operation of the DNS,</del> and the operational stability, reliability, security, global interoperability, resilience, and openness	112 1. Preserve and enhance <del>its</del> neutral and judgment free <del>operation</del> <del>administration</del> of the <del>technical</del> DNS, and the operational stability, reliability, security, global



	of the DNS and the Internet;	interoperability, resilience, and openness of the DNS and the Internet;
113	114 3. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;	115 2. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;
116 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.	117 4. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;	118 3. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
119 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.	120 5. Employ open, transparent and <b>bottom-up, multistakeholder</b> policy development processes, <b>led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities, that (i) seek input from the public, for whose benefit ICANN shall in all events act,</b> (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;	121 4. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities, that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;
122 8. Making decisions by applying documented policies neutrally and	125 6. Make decisions by applying documented policies consistently,	126 5. Make decisions by applying documented policies consistently,

<p>objectively, with integrity and fairness.</p> <p>123 (From ARTICLE II, Section 3. NON-DISCRIMINATORY TREATMENT)</p> <p>124 ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.</p>	<p>neutrally, <del>objectively, and fairly with integrity and fairness, without singling out any particular party for discriminatory treatment;</del></p>	<p>neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment;</p>
<p>127 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.</p>	<p>128 7. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.</p>	<p>129 6. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.</p>
	<p>130 CORE VALUES</p>	<p>131 CORE VALUES</p>
	<p>132 1. In performing its Mission, the following core values should also guide the decisions and actions of ICANN:</p>	<p>133 In performing its Mission, the following core values should also guide the decisions and actions of ICANN:</p>
<p>134 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.</p>	<p>135 2. 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 <del>and the roles of both ICANN's internal bodies and external expert bodies;</del></p>	<p>136 1. 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 and the roles of both ICANN's internal bodies and external expert bodies;</p>
<p>137 4. Seeking and supporting broad, informed participation</p>	<p>138 3. Seeking and supporting broad, informed participation reflecting the</p>	<p>139 2. Seeking and supporting broad, informed participation</p>

	reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.	functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making <b>to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;</b>	reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
140	5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.	141 4. Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market;	142 3. <b>Where feasible and appropriate,</b> depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market;
143	6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.	144 5. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest <b>as identified through the bottom-up, multistakeholder policy development process;</b>	145 4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
146	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.	147 6. Operate with efficiency and excellence, in a fiscally responsible and accountable manner and <b>acting with</b> at a speed that is responsive to the needs of the <b>global Internet community while, as part of the decision-making process, obtaining informed input from those entities most affected.</b>	148 5. Operate with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community;

<p>149 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.</p>	<p>150 7. While remaining rooted in the private sector, <del>including business stakeholders, civil society, the technical community, academia, and end users,</del> recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.</p>	<p>151 6. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.</p>
	<p>152 8. Striving to achieve a reasonable balance between the interests of different stakeholders.</p>	<p>153 7. Striving to achieve a reasonable balance between the interests of different stakeholders.</p>
<p>154 These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances.</p> <p>155 Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on</p>	<p>157 <del>These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances.</del></p> <p>158 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.</p> <p>159 <del>Because they are not narrowly prescriptive</del> The specific way in which Core Values apply, individually and collectively, to each new situation <del>will</del></p>	<p>161 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.</p> <p>162 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot</p>

<p>many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.</p> <p>156 Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.</p>	<p><del>necessarily may</del> depend on many factors that cannot be fully anticipated or enumerated. <del>and because they are statements of principle rather than practice,</del> Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.</p> <p>160 <del>Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.</del> In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.</p>	<p>be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.</p> <p>163 In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.</p>
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## 5. Stress Tests Related to this Recommendation

- ST17: respond to formal advice from ACs (i.e., SSAC)
- ST23 (enforcement / contracts)

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

164 **Support and enhance the multistakeholder model.**

- Ensuring the multistakeholder model accountability mechanisms cannot be modified without the Empowered Community's approval.
- 

165 **Maintain the security, stability and resiliency of the Internet DNS.**

- Establishing "Fundamental Bylaws" that provide additional protections to ICANN Bylaws that are critical to the organization's stability and operational continuity.
- 

166 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- N/A
- 

167 **Maintain the openness of the Internet.**

- N/A
- 

168 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A
- 

## 8. Additional Material

169 **Comparison of Registrar Accreditation Agreement (2013) Specification 4 vs. Registry Agreement (New gTLDs) Specification 1**

170 (the text in RED shows changes between the two agreements)

<b>Registrar Accreditation Agreement (2013) Specification 4</b>	<b>Registry Agreement (New gTLDs) Specification 1</b>
<p>Consensus Policies.</p> <p>1.1. "Consensus Policies" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.</p> <p>1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including registrars. Consensus Policies shall relate to one or more of the following:</p> <p>1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, <b>Registrar Services, Registry Services</b>, or the Domain Name System ("DNS");</p> <p>1.2.2. functional and performance specifications for the provision of Registrar [and Registry] Services;</p> <p>2.3. registrar policies reasonably necessary to</p>	<p>Consensus Policies.</p> <p>1.1. "<i>Consensus Policies</i>" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this Specification. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.</p> <p>1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:</p> <p>1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");</p> <p>1.2.2 functional and performance specifications for the provision of Registry Services;</p> <p><b>1.2.3 Security and Stability of the registry database for the TLD;</b></p> <p>1.2.4 registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;</p>

<p>implement Consensus Policies relating to a gTLD registry;</p> <p>1.2.4. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, <b>but including where such policies take into account use of the domain names</b>); or</p> <p>1.2.5. restrictions on cross-ownership of registry operators and registrars or Resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or Reseller are affiliated.</p> <p>1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:</p> <p>1.3.1. principles for allocation of registered names in a TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);</p> <p>1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;</p> <p>1.3.3. reservation of registered names in a TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration);</p> <p>1.3.4. maintenance of and access to accurate and up-to-date</p>	<p>1.2.5 resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or</p> <p>1.2.6 restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.</p> <p>1.3. Such categories of issues referred to in Section 1.2 of this Specification shall include, without limitation:</p> <p>1.3.1 principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);</p> <p>1.3.2 prohibitions on warehousing of or speculation in domain names by registries or registrars;</p> <p>1.3.3 reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and</p> <p>1.3.4 maintenance of and access to accurate and up-to-date information concerning <b>domain name registrations</b>; and</p>
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<p>information concerning <b>Registered Names and name servers;</b></p> <p>1.3.5. procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility <b>among continuing registrars of the Registered Names sponsored in a TLD by a registrar losing accreditation;</b> and</p> <p><b>1.3.6. the transfer of registration data upon a change in registrar sponsoring one or more Registered Names.</b></p> <p>1.4. In addition to the other limitations on Consensus Policies, they shall not:</p> <p>1.4.1. prescribe or limit the price of Registrar Services;</p> <p>1.4.2. modify the limitations on Temporary Policies (defined below) or Consensus Policies;</p> <p>1.4.3. modify the provisions in the <b>Registrar Accreditation Agreement regarding terms or conditions for the renewal, termination or amendment of the Registrar Accreditation Agreement or fees paid by Registrar to ICANN;</b> or</p> <p>1.4.4. modify ICANN's obligations to <b>not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and to not single out Registrar for disparate treatment unless justified by substantial and reasonable cause, and</b></p>	<p>1.3.5 procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for <b>servicing registered domain names in a TLD affected by such a suspension or termination.</b></p> <p>1.4. In addition to the other limitations on Consensus Policies, they shall not:</p> <p>1.4.1 prescribe or limit the price of Registry Services;</p> <p><b>1.4.2 modify the terms or conditions for the renewal or termination of the Registry Agreement;</b></p> <p>1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;</p> <p>1.4.4 modify the provisions in the <b>registry agreement regarding fees paid by Registry Operator to ICANN;</b> or</p> <p>1.4.5 modify ICANN's obligations to <b>ensure equitable treatment of registry operators and act</b> in an open and transparent manner.</p>
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<p>exercise its responsibilities in an open and transparent manner.</p>	
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# Annex 06 – Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

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## 1. Summary

- 01 The subject of including a commitment to respect Human Rights in the ICANN Bylaws has been extensively discussed by the CCWG-Accountability.
- 02 The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA Functions Contract between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), ICANN's specific Human Rights obligations could be called into question. It was found that, upon termination of the contract, there would be no significant impact on ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a commitment to respect Human Rights should be included in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet.
- 03 This proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its Core Values, and would clarify ICANN's commitment to respect Human Rights.
- 04 Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent Mission expansion or "Mission creep," and under the proposed draft Bylaw, ICANN commits to respect internationally recognized Human Rights "within its Core Values."
- 05 The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.
- 06 The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until a Framework of Interpretation on Human Rights (FOI-HR) is developed and approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).
- 07 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights.

## 2. CCWG-Accountability Recommendations



- Include a Bylaw with the following intent in Work Stream 1 recommendations:

“Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations’ approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”

- Note: This proposed draft Bylaw will be reviewed by both CCWG-Accountability’s lawyers and ICANN’s legal department and then submitted to the CCWG-Accountability for approval before its submission to the Board for approval.
- Include the following in Work Stream 2 activities:
  - Develop an FOI-HR for the Human Rights Bylaw.
  - Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
  - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
  - Consistent with ICANN’s existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
  - Consider what effect, if any, this Bylaw will have on ICANN’s consideration of advice given by the Governmental Advisory Committee (GAC).
  - Consider how, if at all, this Bylaw will affect how ICANN’s operations are carried out.
  - Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

### 3. Detailed Explanation of Recommendations

- 08 As part of the discussion of the inclusion of a draft Bylaw on Human Rights, the CCWG-Accountability requested analysis from its legal counsel about whether, upon the termination of the IANA Functions Contract between ICANN and the NTIA, ICANN's specific Human Rights obligations could be called into question. The key aspects are as follows:
- Only nation states have direct Human Rights obligations under international law. However, private sector organizations are required to comply with all applicable laws, including those related to Human Rights.
  - Upon termination of the Contract, there would be no significant impact on ICANN's Human Rights obligations.<sup>1</sup>
- 09 However, the CCWG-Accountability reasoned that a commitment to respect Human Rights **should be included** in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet. These criteria include free expression and the free flow of information.
- 10 Further, the CCWG-Accountability emphasized that adding a commitment to respect Human Rights to the ICANN Bylaws should not lead to an expansion of ICANN's Mission or scope. While there was general agreement that ICANN should commit to respect Human Rights within the limited scope of its Core Values, any type of external enforcement or regulatory activity would be wholly out of scope.
- 11 The CCWG-Accountability also disagreed with any attempt to single out any specific Human Right (such as "freedom of expression") in the proposed draft Bylaw text on the basis that Human Rights cannot be selectively mentioned, emphasized, or applied since they are universal, indivisible, interdependent, and interrelated.
- 12 The CCWG-Accountability considered comments received during the third public comment period, which were overall in favor of including Human Rights language. There remained a few not in favor of the inclusion, including the ICANN Board.
- 13 The CCWG-Accountability engaged with the ICANN Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- 14 The CCWG-Accountability developed compromise text based on a proposal by its legal advisors, which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns, but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- 15 The Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which was accepted by the CCWG-Accountability.

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<sup>1</sup> See the 29 July 2015 memorandum here:

[https://community.icann.org/download/attachments/53783718/Memo\\_%20%20%20ICANN%20%20Human%20Rights%20Obligations.pdf?version=1&modificationDate=1438504619000&api=v2](https://community.icann.org/download/attachments/53783718/Memo_%20%20%20ICANN%20%20Human%20Rights%20Obligations.pdf?version=1&modificationDate=1438504619000&api=v2). All other legal documents provided are available at <https://community.icann.org/x/OiQnAw>.

- 16 This proposed draft Bylaw on Human Rights reaffirms ICANN’s existing obligations within its Core Values and clarifies ICANN’s commitment to respect Human Rights.
- 17 Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent Mission expansion or “Mission creep”, and under the proposed draft Bylaw, ICANN commits to respect internationally recognized Human Rights “within its Core Values.”
- 18 The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.
- 19 The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until an FOI-HR is developed and approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).
- 20 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN’s commitment to respect Human Rights, including the development of an FOI-HR.

### 21 **Draft Bylaw on Human Rights**

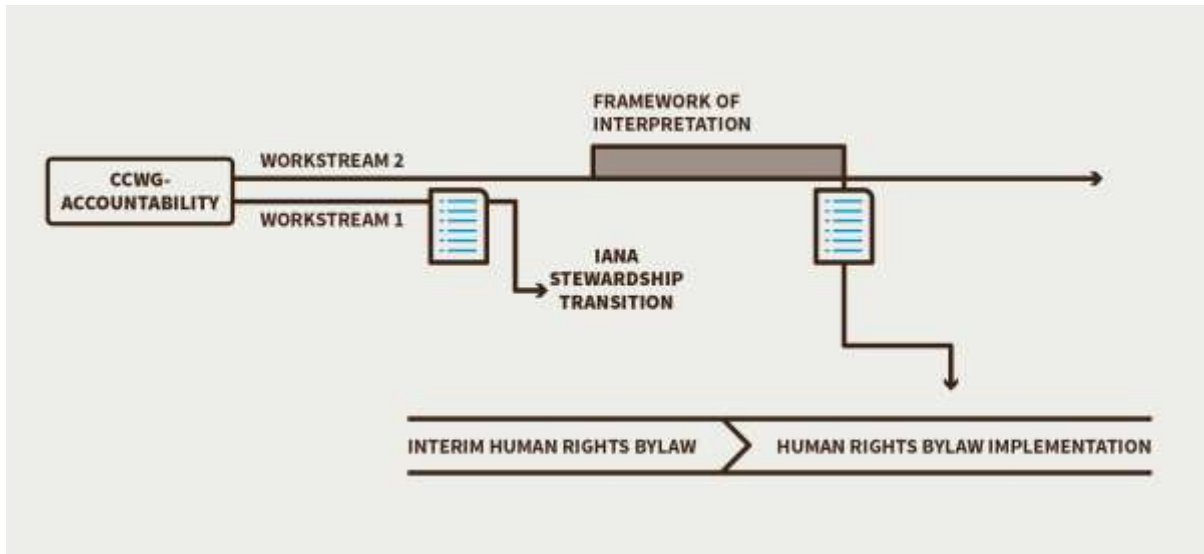
22 Responding to public comments received on the Third Draft Proposal, the CCWG-Accountability presents the following proposed draft Bylaw for consideration:

23 “Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations’ approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”

### 24 **Operationalizing the Commitment to Respect Human Rights**

- 25 To ensure that these Work Stream 2 activities are implemented, the CCWG-Accountability requires that a Bylaw be adopted as part of Work Stream 1. The Bylaw proposed for adoption as part of Work Stream 1 will not enter into force until the FOI-HR is approved.
- 26 The CCWG-Accountability has identified several activities that it recommends be undertaken as part of Work Stream 2 that will fully operationalize ICANN’s commitment to respect Human Rights. Work Stream 2 focuses on accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

27



28 The Human Rights-related activities to be addressed in Work Stream 2 are:

- Developing an FOI-HR for the Bylaw.
- Considering which specific Human Rights conventions or other instruments should be used by ICANN in interpreting and implementing the Bylaw.
- Considering the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
- Considering how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process, consistent with ICANN's existing processes and protocols.
- Considering what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the GAC.
- Considering how, if at all, this Bylaw will affect how ICANN's operations are carried out once an FOI-HR is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.
- Considering how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- The CCWG-Accountability considered comments received during the third public comment period, which were overall in favor of including Human Rights language with a few exceptions which included the ICANN Board.
- The CCWG-Accountability engaged with the ICANN Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- The CCWG-Accountability developed compromise text based on a proposal by its legal advisors, which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns, but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- The ICANN Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which were accepted by the CCWG-Accountability.

## 5. Stress Tests Related to this Recommendation

- N/A

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

29 **Support and enhance the multistakeholder model.**

- N/A
- 

30 **Maintain the security, stability and resiliency of the Internet DNS.**

- N/A



31 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- The global customers and partners of the IANA services have expectations with respect to Human Rights. The implementation of these recommendations will partially address these expectations.
- 

32 **Maintain the openness of the Internet.**

- Recommendation #6 is instrumental to meeting this requirement
- 

33 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A
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# Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process

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## 1. Summary

- 01 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
- 02 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.
- 03 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:
  - Transparent, efficient and accessible (both financially and from a standing perspective).
  - Designed to produce consistent and coherent results that will serve as a guide for future actions.
- 04 The CCWG-Accountability also proposes that the IRP:
  - Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
  - Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
  - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
  - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community’s legal expenses.
  - Be subject to certain exclusions relating to the results of an SO’s policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.

## 2. CCWG-Accountability Recommendations

- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
  - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
  - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
  - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
  - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
  - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
  - Size of Panel:
    - Standing Panel: Minimum of seven panelists.
    - Decisional Panel: Three panelists.
  - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
  - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- **Standing:** Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- **Community Independent Review Process:** The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community’s legal expenses.
- **Standard of Review:** The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- **Accessibility and Cost:** The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN’s Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

### 3. Detailed Explanation of Recommendations

- 05 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for an IRP that was binding rather than merely advisory, and also strongly urged that the process be:
- Transparent, efficient and accessible (both financially and from a standing perspective).

- Designed to produce consistent and coherent results that will serve as a guide for future actions.

## 06 **Purpose of the Independent Review Process**

07 The purpose of the IRP is to ensure that ICANN does not exceed the scope of its limited technical Mission, and otherwise complies with its Articles of Incorporation and Bylaws. The IRP should:

- Empower the community and affected individuals/entities to prevent “Mission creep,” and enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable, accessible expert review of ICANN actions or inaction.
- Ensure that ICANN is accountable to the community and individuals/entities for actions or inaction outside its Mission or that otherwise violate its Articles of Incorporation or Bylaws.
- Reduce disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation.
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

## 08 **Role of the Independent Review Process**

09 The role of the IRP will be to:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
  - Per the CWG-Stewardship Final Proposal, ICANN will enter into a contract with PTI that grants PTI the rights and obligations to serve as the IANA Functions Operator for the IANA naming functions, sets forth the rights and obligations of ICANN and PTI, and includes service level agreements for the IANA naming functions.
  - The ICANN Bylaws will require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work, to ensure that PTI complies with its contractual obligations. ICANN’s failure to enforce material obligations will constitute a Bylaws violation and be grounds for an IRP by the Empowered Community.
  - The ICANN Bylaws will provide that PTI service complaints of direct customers of the IANA naming functions that are not resolved through mediation may be appealed by way of the IRP, in both cases as provided for in the CWG-Stewardship Final Proposal Annex I, Phase 2.
    - Note that CWG-Stewardship Final Proposal Annex I, Phase 2 also permits PTI Direct Customers to pursue “other applicable legal recourses that may

be available.” ICANN must modify Registry Agreements with gTLD Operators to expand the scope of arbitration available thereunder to cover PTI service complaints and potential inclusion of optional arbitration under agreements with ccTLD registries if developed through the appropriate processes or the development of another alternative dispute resolution mechanism.

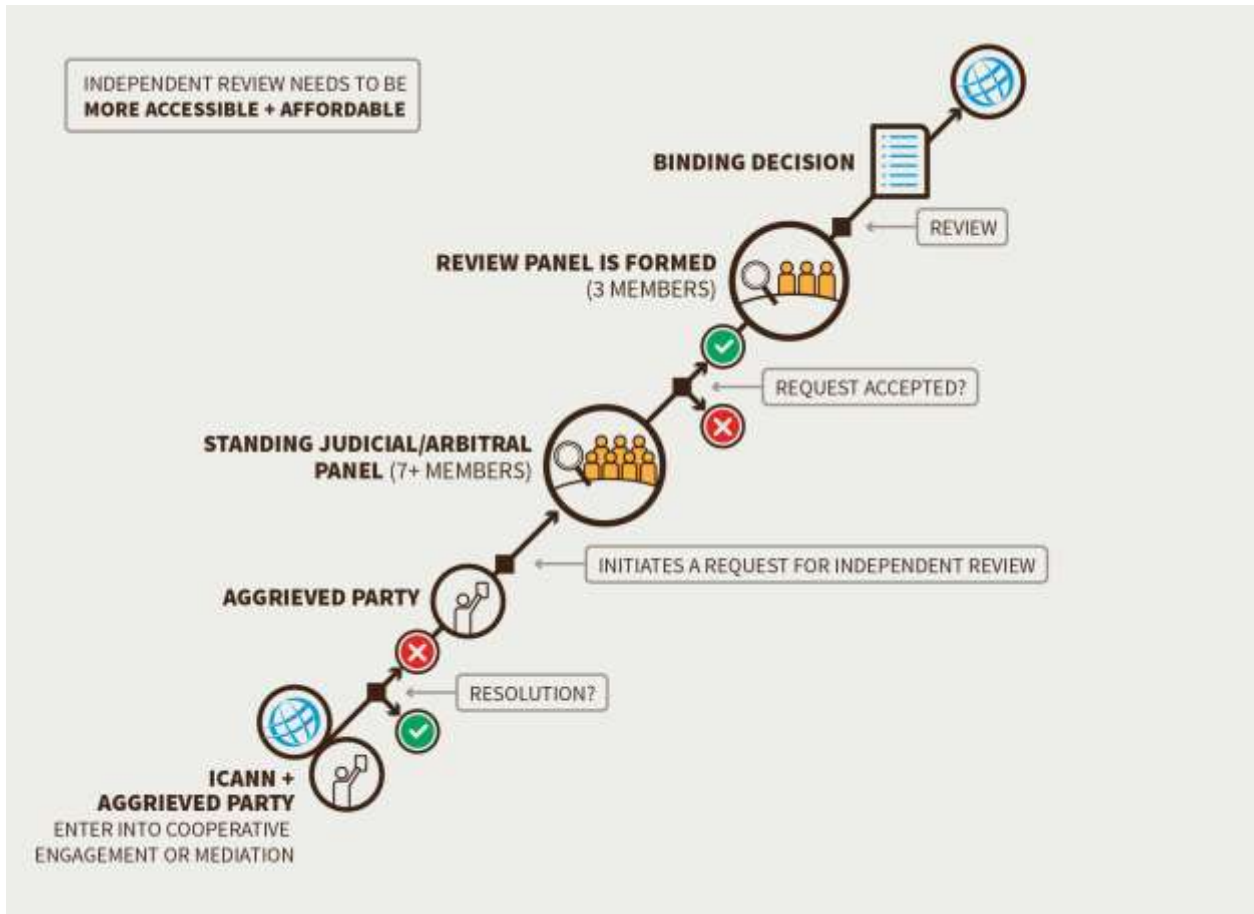
- The standard of review for PTI cases will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.
- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

## 10 **Standing Panel**

- 11 The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought forward by individuals, entities, and/or the community who have been materially affected by ICANN’s action or inaction in violation of the Articles of Incorporation and/or Bylaws.

## 12 **Initiation of the Independent Review Process**

- 13 An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN’s Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in ICANN’s Articles of Incorporation or Bylaws.
- 14 When the Empowered Community has decided to pursue an IRP, the decision would be implemented by the chairs of the SOs and ACs who supported the proposal. The chairs of the SOs and ACs who supported the decision to file a community IRP would constitute a “Chairs Council” that would act subject to the direction of those SOs and ACs of the Empowered Community that supported the proposal. The Chairs Council would, by majority vote, act on behalf of the Empowered Community in taking any reasonably necessary ministerial steps to implement the decision to pursue the community IRP, and to delegate and oversee tasks related to the community IRP, including but not limited to, engagement of legal counsel to represent the Empowered Community in the community IRP, approval of court filings, or enforcement of a community IRP award in court if ultimately necessary.



15 **Possible Outcomes of the Independent Review Process**

16 An IRP would result in a declaration that an action/failure to act *complied* or *did not comply* with ICANN’s Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions shall be binding on ICANN.

- Decisions of a three-member Decisional Panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented by way of the IRP Subgroup process, which will be developed.
- This balance between the limited right of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.
- The limited right to appeal is further balanced by the seven Community Powers, relevant policy development processes, and advice from ACs, each as set forth in the Bylaws.
- IRP panelists shall consider and give precedential effect to prior decisions of other Independent Review Processes that address similar issues.
- Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff actions where a complainant can demonstrate each of the following factors:

- Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken.
- Whichever:
  - A likelihood of success on the merits.
  - Sufficiently serious questions going to the merits.
  - A balance of hardships tipping decidedly toward the party seeking the relief.

17 **Standing**

- 18 Any person, group or entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.
- 19 They must do so within a certain number of days (to be determined by the IRP Subgroup) after becoming aware of the alleged violation and how it allegedly affects them. The Empowered Community has standing to bring claims involving its rights under the Articles of Incorporation and ICANN Bylaws.
- 20 The ICANN Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected. Issues relating to joinder and intervention will be determined by the IRP Subgroup, assisted by experts and the initial Standing Panel, based on consultation with the community.

21 **Community Independent Review Process**

- 22 The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel (see Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Power). In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community’s legal expenses, although the IRP Subgroup may recommend filing or other fees to the extent necessary to prevent abuse of the process.

23 **Exclusions:**

24 **Challenges the result(s) of a Supporting Organization’s Policy Development Process (PDP)**

- 25 Notwithstanding the foregoing and notwithstanding any required threshold for launching a community IRP, no community IRP that challenges the result(s) of an SO’s PDP may be launched without the support of the SO that approved the policy recommendations from the PDP or, in the case of the result(s) of a Cross Community Working Group (CCWG) chartered by more than one SO, without the support of the SOs that approved the policy recommendations from that CCWG.

26 **Country Code Top-Level Domain Delegation/Redelegation**



27 In its letter dated 15 April 2015, the CWG-Stewardship indicated that “any appeals mechanism developed by the CCWG-Accountability should not cover country code top-level domain delegation/redelegation issues as these are expected to be developed by the country code top-level domain community through the appropriate processes.”

28 As requested by the CWG-Stewardship, decisions regarding country code top-level domain delegations or redelegations would be excluded from standing, until the country code top-level domain community, in coordination with other parties, has developed relevant appeals mechanisms.

### 29 **Numbering Resources**

30 The Address Supporting Organization (ASO) has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN Address Supporting Organization Memorandum of Understanding<sup>1</sup>. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

### 31 **Protocol Parameters**

32 The Internet Architecture Board (IAB) has likewise indicated that disputes related to protocol parameters should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN / IANA - IETF MoU. As requested, decisions regarding resources for protocol parameters would be excluded from standing.

### 33 **Standard of Review**

34 The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN’s Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN’s Mission and/or violates ICANN’s Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist’s assessment of the merits of the claimant’s case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.

35 With respect to PTI cases, the standard of review will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

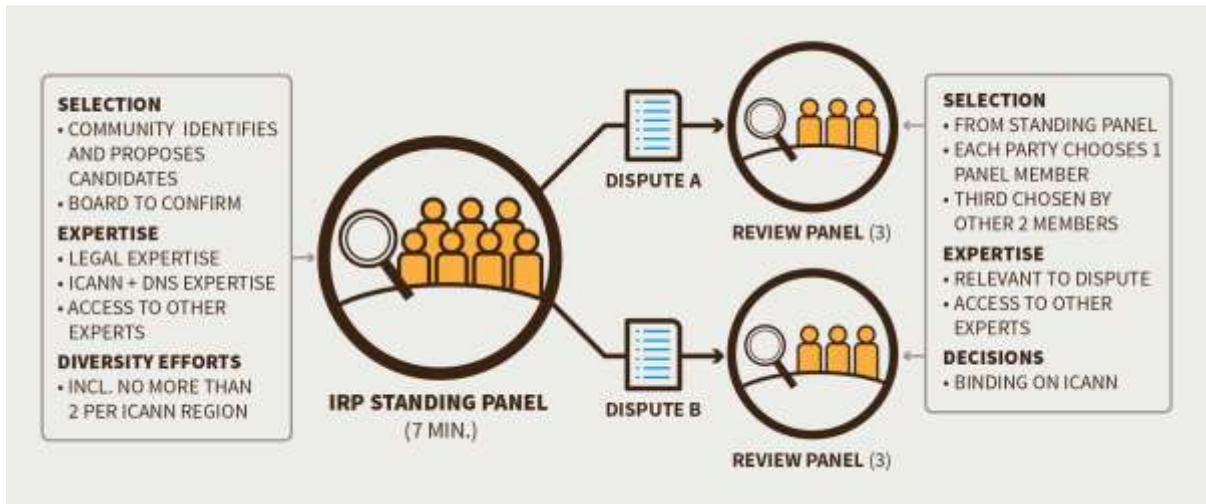
### 36 **Composition of Panel and Expertise**

37 Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration, is necessary. Panelists should either already possess expertise about the DNS and ICANN’s policies, practices, and procedures, or commit to develop an expertise through training, at a minimum, on the workings and management of the DNS. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that

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<sup>1</sup> <https://archive.icann.org/en/aso/aso-mou-29oct04.htm>

individual Panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.



38 **Diversity**

39 English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).

40 **Size of Panel**

- Standing Panel: Minimum of seven panelists.
- Decisional Panel: Three panelists.

41 **Independence**

42 Panel members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term. To ensure independence, term limits should apply (five years, no renewal), and post-term appointment to the ICANN Board, Nominating Committee, or other positions within ICANN will be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs, ACs, or any other party in an IRP. Panelists will be supported by a clerk’s office that is separate from ICANN.

43 **Selection and Appointment**

44 The selection of panelists would follow a four-step process:

1. ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for the IRP, beginning by consulting the community on a draft tender document.

2. ICANN will then issue a call for expressions of interest from potential panelists, work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity, conduct an initial review and vetting of applications, and work with ICANN and community to develop operational rules for IRP.
3. The community would nominate a slate of proposed panel members.
4. Final selection is subject to ICANN Board confirmation.

#### 45 **Recall**

46 Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by the IRP subgroup.

#### 47 **Settlement Efforts**

48 Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.

49 Parties may cooperatively engage informally, but either party may inject an independent dispute resolution facilitator (mediator) after an initial Cooperative Engagement Process (CEP) meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after a specified period, that party concludes in good faith that further efforts are unlikely to produce agreement.

50 The process must be governed by clearly understood and prepublished rules applicable to both parties and be subject to strict time limits. In particular, the CCWG-Accountability will review the CEP as part of Work Stream 2.

#### 51 **Decision-Making**

52 In each case, a three-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the third. The CCWG-Accountability anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.

53 Panel decisions will be based on each IRP Panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and made public, and will reflect a well-reasoned application of the standard to be applied.

#### 54 **Decisions**

55 Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.

56 The CCWG-Accountability recommends that IRP decisions be precedential, meaning that IRP Panelists shall consider and give precedential effect to prior IRP decisions. By conferring precedential weight on panel decisions, the IRP can provide valuable guidance for future actions and inaction by ICANN decision-makers. It also reduces the chances of inconsistent treatment of

one claimant over another, based on the specific individuals making up the Decisional Panel in particular cases.

57 The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment.

58 It is intended that judgments of a Decisional Panel or the Standing Panel would be enforceable in the court of the United States and other countries that accept international arbitration results.

### 59 **Accessibility and Cost**

60 The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants, and other complainants that would otherwise be excluded from utilizing the process.

61 The panel should complete work expeditiously, issuing a scheduling order early in the process and in the ordinary course, and should issue decisions within a standard time frame (six months). The panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

### 62 **Implementation**

63 The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.

### 64 **Transparency**

65 The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing the ICANN Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

66 All IRP proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- The scope of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN’s failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN’s Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- Exclusion: The IRP will not be applicable to protocols parameters.
- Exclusion: An IRP cannot be launched that challenges the result(s) of an SO’s policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- Limitation: An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN’s Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

## 5. Stress Tests Related to this Recommendation

- ST3 & 4
- ST5, 6, 7, 8
- ST11
- ST14
- ST19, 20
- ST10, 16, 24
- ST13
- ST22
- ST23
- ST25
- ST26
- ST29, 30

## 6. How does this meet the CWG-Stewardship Requirements?

- 67 The recommendations as outlined above meet the CWG-Stewardship requirements by:
- Creating the IRP directly meets the requirement of the CWG-Stewardship for an IRP.
  - Excluding ccTLD delegation/re-delegation from the IRP.
  - As requested by the CWG-Stewardship, decisions regarding country code top-level domains delegations or re-delegations would be excluded from standing, until the country code top-level domains community, in coordination with other parties, has developed relevant appeals mechanisms.
  - Excluding Number Resources from the IRP. The ASO has indicated that disputes related to Internet Number Resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

## 7. How does this address NTIA Criteria?

68 **Support and enhance the multistakeholder model.**

- By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered.
- 

69 **Maintain the security, stability and resiliency of the Internet DNS.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
- 

70 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
- 

71 **Maintain the openness of the Internet.**

- The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.
- 

72 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A



# Annex 08 – Recommendation #8: Improving ICANN’s Request for Reconsideration Process

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## 1. Summary

- 01 Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in [Article IV, Section 2 of ICANN's Bylaws](#).
- 02 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:
  - Expanding the scope of permissible requests.
  - Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
  - Narrowing the grounds for summary dismissal.
  - Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
  - Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.
- 03 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:
  - Recordings/transcripts of Board discussion should be posted at the option of the requestor.
  - An opportunity to rebut the Board Governance Committee’s (BGC’s) final recommendation before a final decision by the ICANN Board should be provided.
  - Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.
- 04 ICANN’s Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

## 2. CCWG-Accountability Recommendations

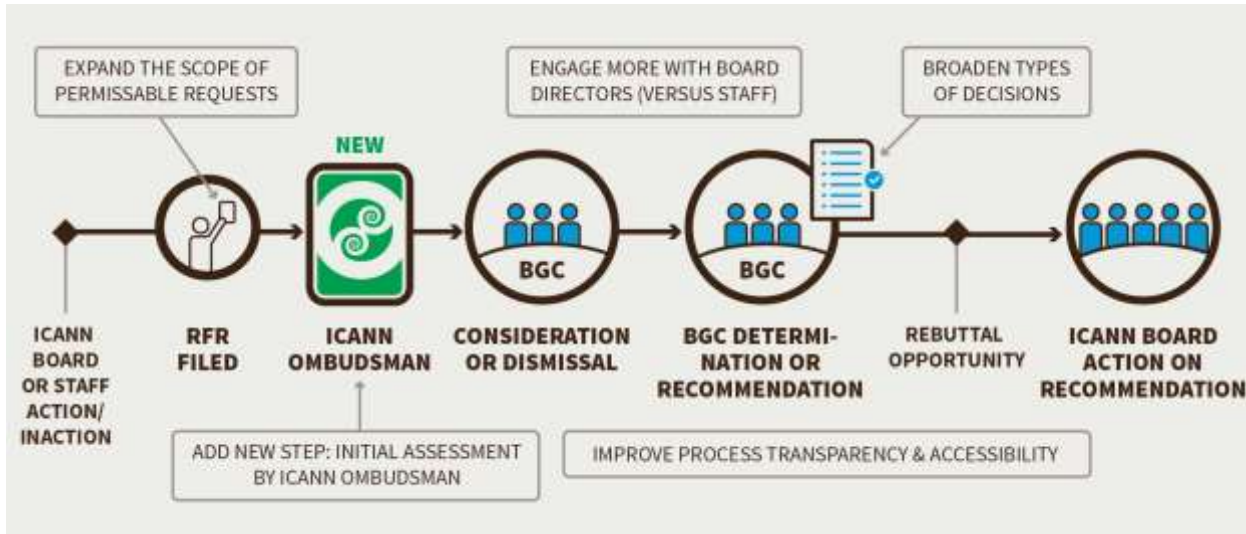
- 05 Modify [Article IV, Section 2 of ICANN's Bylaws](#) to reflect the following changes:
  - Expanding the scope of permissible requests.
  - Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
  - Narrowing the grounds for summary dismissal.



- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

### 3. Detailed Explanation of Recommendations

- 06 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff, and which is provided for in Article IV, Section 2 of ICANN's Bylaws.
- 07 The key reforms proposed include:
- The scope of permissible requests should be expanded to include Board/staff actions or inactions that contradict ICANN's Mission, Commitments, and/or Core Values and for reconciling conflicting/inconsistent "expert opinions."
  - The time for filing a Request for Reconsideration should be extended from 15 to 30 days.
  - The grounds for summary dismissal should be narrowed and the ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues).
  - ICANN's Ombudsman should make the initial substantive evaluation of the requests to aid the BGC in its recommendation.
  - Requestors should be provided an opportunity to rebut the BGC's recommendation before a final decision by the entire ICANN Board.
  - More transparency requirements and firm deadlines should be added for issuing of determinations.



08 **Standing**

09 The CCWG-Accountability recommends amending "who" has proper standing to file a Request for Reconsideration to widen its scope by including Board/staff actions/inactions that contradict ICANN’s Mission, Commitments, and/or Core Values (was only policies before). It is noted that under the existing ICANN Bylaws, paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Request for Reconsideration.

10 ICANN’s Bylaws could be revised (added text in red below, text to be removed is in strike-through):

1. ICANN shall have in place a process by which any person or entity materially affected by an action **or inaction** of **the ICANN Board or staff** may request the review or reconsideration of that action **or inaction** by the Board.
2. Any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction to the extent that he, she, or it has been adversely affected by:
  - a. One or **more ICANN Board or staff** actions or inactions that contradict established ICANN policy/policies, **its Mission, Commitments, and/or Core Values**; or
  - b. One or more actions or inactions of the ICANN Board/staff that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. One or more actions or inactions of the ICANN Board/staff that are taken as a result of the Board's reliance on false or inaccurate ~~material~~ **relevant** information.

11 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Bylaws.

12 In a letter dated 15 April 2015, the CWG-Stewardship request indicated, “As such, any appeal mechanism developed by the CCWG-Accountability should not cover Country Code Top Level Domain (ccTLD) delegation/redelegation issues as these are expected to be developed by the ccTLD community through the appropriate processes.” As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or redelegations would be excluded from standing until

relevant appeals mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

- 13 Disputes related to Internet number resources, protocols and parameters are out of scope of the Request for Reconsideration process.

## 14 **Goals**

- 15 The CCWG-Accountability recommendations aim to:

- Broaden the types of decisions that can be re-examined to include Board/staff action/inaction that contradicts ICANN's Mission, Commitments, and/or Core Values (as stated in Bylaws/Articles) and for the purpose of reconciling conflicting/inconsistent expert panel opinions.
- Provide more transparency in the dismissal and reconsideration processes.
- Provide the Board Governance Committee (BGC) with the reasonable right to dismiss frivolous requests, but not solely on the grounds that the complainant failed to participate in a relevant policy development or Public Comment Period or that the request is vexatious or querulous.
- Propose to amend paragraph nine on BGC summary dismissal as follows:
  - The Board Governance Committee shall review each Request for Reconsideration upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Request for Reconsideration if:
    - (i) The requestor fails to meet the requirements for bringing a Reconsideration Request; or
    - (ii) It is frivolous, ~~querulous or vexatious~~(iii) ~~the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable.~~

The Board Governance Committee's summary dismissal of a Request for Reconsideration shall be **documented and promptly** posted on the website.

## 16 **Composition**

- 17 The CCWG-Accountability determined there is a need to rely less on the ICANN legal department (which holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More ICANN Board Director engagement is needed in the overall decision-making process.
- 18 Requests should no longer go to ICANN's lawyers (in-house or external legal counsel) for the first substantive evaluation. Instead, the Requests for Reconsideration should go to ICANN's Ombudsman, who will make the initial recommendation to the BGC because the CCWG-Accountability believes that the Ombudsman may have more of an eye for fairness to the community in reviewing requests. Note that the ICANN Bylaws charge the BGC with these duties, which means the BGC would utilize the Ombudsman instead of its current practice of using ICANN's lawyers to aid the BGC in its initial evaluation.
- 19 All final determinations of Requests for Reconsideration (other than requests that have been summarily dismissed by the BGC as discussed above) are to be made by the ICANN Board (not only requests about Board actions as is the current practice).

20 Amend paragraph 3:

3. The Board has designated the BGC to review and consider any such Request for Reconsideration. The BGC shall have the authority to:

- Evaluate requests for review or reconsideration.
- Summarily dismiss insufficient or frivolous requests.
- Evaluate requests for urgent consideration.
- Conduct whatever factual investigation is deemed appropriate.
- Request additional written submissions from the affected party or from other parties.
- ~~Make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors;~~
- Make a recommendation to the Board of Directors on the merits of the request, as necessary.

21 Delete paragraph 15, because the Board will make all final decisions regarding requests related to staff action/inaction.

## 22 **Decision-Making**

23 Transparency improvements are needed regarding the information that goes into the ICANN Board's decision-making process and the rationale for why decisions are ultimately taken. Recordings and transcripts should be posted of the substantive Board discussions at the option of the requestor.

24 A rebuttal opportunity to the BGC's final recommendation (although requestors cannot raise new issues in a rebuttal) needs to be provided before the full Board finally decides.

25 Hard deadlines to the process are to be added, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

26 It is proposed that the rules for a Request for Reconsideration be amended as follows:

*The Board Governance Committee (BGC) shall make a final recommendation to the Board with respect to a Request for Reconsideration within 30 days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the request. The requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the Board for its evaluation.*

*The Board shall not be bound to follow the recommendations of the BGC. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the BGC within 45 days of receipt of the recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this*

*timeframe must be identified and posted on ICANN's website. In any event, the Board's final decision shall be made within 135 days of receipt of the request. The final decision shall be promptly posted on ICANN's website.*

27 **Accessibility**

28 The CCWG-Accountability recommends that the time deadline for filing a Request for Reconsideration be extended from 15 to 30 days from when requestor learns of the decision/inaction, except as otherwise described below.

29 Amend paragraph 5 so that it reads:

5. All Requests for Reconsideration must be submitted to an email address designated by the BGC within 30 days after:
  - a) For requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or
  - b) For requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c) For requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

30 **Due Process**

31 ICANN's DIDP is an important issue to be addressed in Work Stream 2 and should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

32 All briefing materials supplied to the Board should be provided to the requestor so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality and privilege requirements).

33 Final decisions should be issued sooner. Changes will include an affirmative goal that final determinations of the Board should be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

34 Requestors should be provided more time to learn of action/inaction and to file the request.

35 Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

## 4. Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

## 5. Stress Tests Related to this Recommendation

- N/A

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

### 36 **Support and enhance the multistakeholder model.**

- By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered.
- 

### 37 **Maintain the security, stability and resiliency of the Internet DNS.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
- 

### 38 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
- 

### 39 **Maintain the openness of the Internet.**

- The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.
- 

### 40 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A

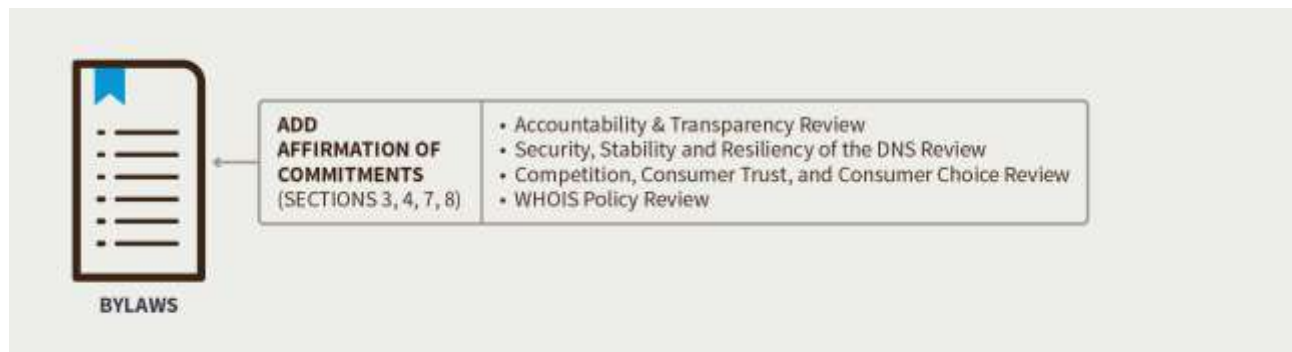


# Annex 09 – Recommendation #9: Incorporating the Affirmation of Commitments in ICANN’s Bylaws

## 1. Summary

- 01 Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), into the ICANN Bylaws. This will ensure that community reviews remain a central aspect of ICANN’s accountability and transparency framework.
- 02 Specifically, the CCWG-Accountability proposes to:
  - Add the relevant ICANN Commitments from the Affirmation of Commitments into the ICANN Bylaws.
  - Add the four review processes specified in the Affirmation of Commitments to the ICANN Bylaws, including:
    - Ensuring accountability, transparency, and the interests of global Internet users.
    - Enforcing ICANN’s existing policy relating to WHOIS, subject to applicable laws.
    - Preserving security, stability, and resiliency of the Domain Name System (DNS).
    - Promoting competition, consumer trust, and consumer choice.
- 03 In addition, to support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community’s needs.

## 2. CCWG-Accountability Recommendations





- 04 The CCWG-Accountability evaluated the contingency of ICANN or NTIA unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the “Detailed Explanation of Recommendations” section, below).
- 05 To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:
- Preserve in the ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments<sup>1</sup>
    - This includes Sections 3, 4, 7, and 8 of the Affirmation of Commitments. Sections 3, 4, 8a, and 8c would be included in the Core Values section of the ICANN Bylaws.
    - Part of the content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN’s principal office), is already covered by ICANN Bylaws Article XVIII. Article XVIII is to be classified as a Standard Bylaw and is not to be moved into the Core Values section with material derived from Affirmation of Commitments Sections 8a and 8c.
    - Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.
  - Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws
    - The following four reviews will be preserved in the reviews section of the Bylaws:
      - Ensuring accountability, transparency, and the interests of global Internet users.
      - Enforcing ICANN’s existing policy relating to WHOIS, subject to applicable laws.
      - Preserving security, stability, and resiliency of the DNS.
      - Promoting competition, consumer trust, and consumer choice.
- 06 After these elements of the Affirmation of Commitments are adopted in the ICANN Bylaws, the following should take place:
- ICANN and NTIA should mutually agree to terminate the Affirmation of Commitments.
  - New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules.
  - Through its Work Party IRP Implementation Oversight Team (WP-IRP IOT), the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP).
  - To support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community,

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<sup>1</sup> Sections 3, 4, 7, and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.

ICANN staff, and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.

- These operational standards should include issues such as: composition of Review Teams, Review Team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to legal counsel.

07 A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws and will be classified as Fundamental Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

### 3. Detailed Explanation of Recommendations

#### Background

The Affirmation of Commitments is a 2009 bilateral agreement between the U.S. Government and ICANN. After the IANA agreement is terminated, the Affirmation of Commitments will become the next target for termination since it would be the last remaining aspect of a unique U.S. Government role with ICANN.

Termination of the Affirmation of Commitments as a separate agreement would be a simple matter for a post-transition ICANN, since the Affirmation of Commitments can be terminated by either party with a 120-day notice. The CCWG-Accountability evaluated the contingency of ICANN or NTIA unilaterally withdrawing from the Affirmation of Commitments in Stress Test #14, as described below.

08 <b>Stress Test #14:</b> ICANN or NTIA chooses to terminate the Affirmation of Commitments.	
09 Consequence(s): ICANN would no longer be held to the Affirmation of Commitments, including the conduct of community reviews and required implementation of Review Team recommendations.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
10 The Affirmation of Commitments can be terminated by either ICANN or NTIA with 120 days' notice.	14 One proposed mechanism would give the Empowered Community standing to challenge a Board decision by referral to an IRP with the power to issue a binding decision. If ICANN cancelled the Affirmation
11 As long as NTIA controls the IANA contract,	

<p>ICANN feels pressure to maintain the Affirmation of Commitments.</p> <p>12 But as a result of the IANA Stewardship Transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain the Affirmation of Commitments.</p> <p>13 Note: none of the proposed measures could prevent NTIA from canceling the Affirmation of Commitments.</p>	<p>of Commitments, the IRP could enable reversal of that decision.</p> <p>15 Another proposed measure is to import Affirmation of Commitments provisions into the ICANN Bylaws, and dispense with the bilateral Affirmation of Commitments with NTIA. Bylaws would be amended to include Affirmation of Commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9.</p> <p>16 If ICANN's Board proposed to amend the AoC commitments and reviews that were added to the Bylaws, another proposed measure would empower the Empowered Community to veto that proposed Bylaws change.</p> <p>17 If any of the AoC commitments or review processes were classified as Fundamental Bylaws, changes would require approval by the Empowered Community.</p>
<p><b>CONCLUSIONS:</b></p> <p>18 Existing measures are inadequate after NTIA or ICANN terminates the IANA contract.</p>	<p>19 Proposed measures in combination are adequate.</p>

20 If the Affirmation of Commitments were to be terminated without a replacement, ICANN would no longer be held to these important affirmative commitments, including the related requirement to conduct community reviews. If this were allowed to occur, it would significantly diminish ICANN's accountability to the global multistakeholder community. This consequence is avoided by adding the Affirmation of Commitments reviews and commitments to ICANN's Bylaws.

21 **Objectives of the Recommendations**

22 Suggestions gathered during comment periods in 2014 on ICANN accountability and the IANA Stewardship Transition suggested several ways the Affirmation of Commitments reviews should be adjusted as part of incorporating them into the ICANN Bylaws:

- Ability to sunset reviews, amend reviews, and create new reviews.
- Community stakeholder groups should appoint their own representatives to Review Teams. Regarding composition and size of Review Teams, based on composition of prior Review Teams, 21 Review Team members from Supporting Organizations (SOs) and Advisory Committees (ACs) would be more than needed.
- Give Review Teams access to ICANN internal documents.

- Require the ICANN Board to consider approval and begin implementation of Review Team recommendations, including from previous reviews.

23 The CCWG-Accountability concluded that some Review Team recommendations could be rejected or modified by ICANN, for reasons such as feasibility, time, or cost. If the community disagreed with the Board’s decision on implementation, it could invoke a Request for Reconsideration or IRP to challenge that decision, with a binding result in the case of an IRP. In addition, the CCWG-Accountability independent legal counsel advised that the ICANN Bylaws could not require the Board to implement all Review Team recommendations because some could conflict with the Board’s fiduciary duties or other Bylaws obligations.

In Bylaws Article IV, a new section will be added for periodic review of ICANN Execution of Key Commitments, with an overarching framework for the way these reviews are conducted and then one subsection for each of the four current Affirmation of Commitments reviews.

24 **Recommended Changes to the ICANN Bylaws**

*Note: Legal counsel has not reviewed the proposed Bylaw revisions at this stage. The proposed language for Bylaw revisions is conceptual in nature; once there is consensus about direction, legal counsel will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.*

25 There are four areas of change required to the ICANN Bylaws to enshrine the Affirmation of Commitments reviews, as described below.

26 **Principle language to be added to Bylaws:**

ICANN Commitments in the Affirmation of Commitments	As expressed in the ICANN Bylaws
<p>27 3. This document affirms key commitments by the Department of Commerce (DOC) and ICANN, including commitments to:</p> <p>28 (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent;</p> <p>29 (b) preserve the security, stability, and resiliency of the DNS;</p> <p>30 (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and</p> <p>31 (d) facilitate international participation in DNS technical coordination.</p>	<p>32 Proposed revision to ICANN Core Values:</p> <p>33 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 to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;</p> <p>34 Proposed Bylaw requiring Affirmation of Commitments review of Promoting Competition, Consumer Trust, and Consumer Choice:</p> <p>35 ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency,</p>

ICANN Commitments in the Affirmation of Commitments	As expressed in the ICANN Bylaws
	malicious abuse issues, sovereignty concerns, and rights protection.
<p>36 4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability, and resiliency of the DNS.</p>	<p>37 Proposed new Section 8 in Bylaws Article III Transparency:</p> <p>38 ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability, and resiliency of the DNS.</p>
<p>39 7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and Strategic and Operating Plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.</p>	<p>40 Proposed revision to ICANN Commitments:</p> <p>41 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.</p> <p>42 Proposed revision to ICANN Core Values:</p> <p>43 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 to ensure that the bottom-up, multistakeholder policy development process is</p>

<b>ICANN Commitments in the Affirmation of Commitments</b>	<b>As expressed in the ICANN Bylaws</b>
	<p>used to ascertain the global public interest and that those processes are accountable and transparent;</p> <p>44 Proposed requirement for annual report, to be included in Bylaws section on required reviews:</p> <p>45 ICANN will produce an annual report on the state of improvements to Accountability and Transparency. ICANN will be responsible for creating an annual report that details the status of implementation on all reviews defined in this section. This annual review implementation report will be opened for a public review and comment period that will be considered by the ICANN Board and serve as input to the continuing process of implementing the recommendations from the Review Teams defined in this section.</p> <p>46 Proposed new Section 9 in Bylaws Article III Transparency:</p> <p>47 ICANN shall adhere to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and Strategic and Operating Plans.</p>

<b>ICANN Commitments in the Affirmation of Commitments</b>	<b>As expressed in the ICANN Bylaws</b>
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<b>ICANN Commitments in the Affirmation of Commitments</b>	<b>As expressed in the ICANN Bylaws</b>
48 9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical Mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:	49 See next section for proposed Bylaws to preserve ICANN commitments to perform the Affirmation of Commitments regular reviews.

50 The Bylaws will provide a framework for all periodic reviews.

51 The left-hand column of the following chart shows proposed Bylaws language for periodic reviews (subject to revision by legal counsel during actual drafting), with comments on the right:

<b>PROPOSED BYLAW TEXT</b>	<b>COMMENT</b>
<p>52 ICANN will produce an annual report on the state of improvements to Accountability and Transparency.</p> <p>53 ICANN will be responsible for creating an annual report that details the status of implementation on all reviews defined in this section. This annual review implementation report will be opened for a public review and comment period that will be considered by the ICANN Board and serve as input to the continuing process of implementing the recommendations from the Review Teams defined in this section.</p>	54 This is a new recommendation based on one in Accountability and Transparency Review Team 2 (ATRT2) and is more important as reviews are spread further apart.
55 Review Teams are established to include both a limited number of members and an open number of observers. Each SO and AC participating in the review may suggest up to seven prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, allocating at least three members from each participating SO and AC that suggests three or more prospective members. In addition, the ICANN Board may designate one Director as a member of the Review Team.	<p>56 The Affirmation of Commitments has no specific requirements for the number of members from each SO and AC.</p> <p>57 The Affirmation of Commitments lets the Board and GAC Chairs designate Review Team members, and has no diversity requirement.</p>
58 In the event a consensus cannot be found	59 While showing a preference for consensus,

PROPOSED BYLAW TEXT	COMMENT
<p>among the members, a majority vote of the members may be taken. In this case, both a majority recommendation and a minority response should be provided in the final report of the Review Team.</p>	<p>a resolution procedure should be defined. It is important to avoid both tyranny of the majority and capture by a minority.</p>
<p>60 Review Teams may also solicit and select independent experts to render advice as requested by the Review Team, and the Review Team may choose to accept or reject all or part of this advice.</p>	<p>61 This was not stated in the Affirmation of Commitments, but experts have been appointed to advise some Affirmation of Commitments Review Teams.</p>
<p>62 Each Review Team may recommend termination or amendment of its respective review.</p>	<p>63 This is new. A recommendation to amend or terminate an existing review would be subject to public comment, and the Empowered Community would have power to reject a change to Standard Bylaws and approve a change to Fundamental Bylaws.</p>
<p>64 Confidential Disclosure to Review Teams: 65 To facilitate transparency and openness regarding ICANN's deliberations and operations, the Review Teams, or a subset thereof, shall have access to ICANN internal information and documents. If ICANN refuses to reveal documents or information requested by the Review Team, ICANN must provide a justification to the Review Team. If the Review Team is not satisfied with ICANN's justification, it can appeal to the Ombudsman and/or the ICANN Board for a ruling on the disclosure request. 66 For documents and information that ICANN does disclose to the Review Team, ICANN may designate certain documents and information as not for disclosure by the Review Team, either in its report or otherwise. If the Review Team is not satisfied with ICANN's designation of non-disclosable documents or information, it can appeal to the Ombudsman and/or the ICANN Board for a ruling on the non-disclosure designation. 67 A confidential disclosure framework shall be published by ICANN. The confidential disclosure framework shall describe the process by which documents and information are classified, including a description of the levels of classification that</p>	<p>71 New ability to access internal documents, with non-disclosure provisions.</p>



PROPOSED BYLAW TEXT	COMMENT
<p>documents or information may be subject to, and the classes of persons who may access such documents and information.</p> <p>68 The confidential disclosure framework shall describe the process by which a Review Team may request access to documents and information that are designated as classified or restricted access.</p> <p>69 The confidential disclosure framework shall also describe the provisions of any non-disclosure agreement that members of a Review Team may be asked to sign.</p> <p>70 The confidential disclosure framework must provide a mechanism to escalate and/or appeal the refusal to release documents and information to duly recognized Review Teams.</p>	
<p>72 The draft report of the Review Team should describe the degree of consensus reached by the Review Team.</p>	<p>73 From public comments.</p>
<p>74 The Review Team should attempt to assign priorities to its recommendations.</p>	<p>75 Board requested prioritization of recommendations.</p>
<p>76 The draft report of the review will be published for public comment. The Review Team will consider such public comment and amend the review, as it deems appropriate before issuing its final report and forwarding the recommendations to the Board.</p>	
<p>77 The final output of all reviews will be published for public comment. The final report should include an explanation of how public comments were considered. Within six months of receipt of a recommendation, the Board shall consider approval and promptly either begin implementation or publish a written explanation for why the recommendation was not approved.</p>	<p>78 Affirmation of Commitments requires the Board to “take action” within six months. In practice, the Board has considered review recommendations and either approved or explained why it would not approve each recommendation.</p>

79 **Proposed Bylaws text for this Affirmation of Commitments review:**

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES

<p>80 <b>1. Accountability &amp; Transparency Review.</b></p> <p>81 The Board shall cause a periodic review of ICANN’s execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.</p>	<p>82 The commitment to do a review now becomes part of the ICANN Bylaws.</p> <p>83 The second part of this sentence (“its commitment to maintain...”) clarifies an ICANN commitment that would also become part of the Bylaws.</p>
<p>84 Issues that may merit attention in this review include:</p> <p>85 (a) assessing and improving ICANN Board governance, which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;</p>	<p>86 Public commenter suggested making this a suggestion instead of a mandated list of topics.</p>
<p>87 (b) assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;</p> <p>88 (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);</p> <p>89 (d) assessing the extent to which ICANN’s decisions are embraced, supported, and accepted by the public and the Internet community;</p> <p>90 (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and</p> <p>91 (f) assessing and improving the Independent Review Process.</p>	<p>92 Rephrased to avoid implying a review of GAC’s effectiveness.</p>
<p>93 The Review Team shall assess the extent to which prior Accountability and Transparency review recommendations have been implemented.</p>	<p>94 Affirmation of Commitments required ATRT to assess all Affirmation of Commitments reviews.</p>

<p>95 The Review Team may recommend termination or amendment of other periodic reviews required by this section, and may recommend additional periodic reviews.</p>	<p>96 This is new. A recommendation to amend or terminate an existing review would be subject to public comment, and the Empowered Community would have power to reject a change to Standard Bylaws and approve a change to Fundamental Bylaws.</p>
<p>97 This Review Team should complete its review within one year of convening its first meeting.</p>	<p>98 New.</p>
<p>99 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.</p>	<p>100 The Affirmation of Commitments required this review every three years.</p>

<p><b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b></p>	<p><b>NOTES</b></p>
<p>101 <b>2. Preserving Security, Stability, and Resiliency.</b></p> <p>102 The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.</p> <p>103 In this review, particular attention will be paid to:</p> <p>104 (a) security, stability, and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;</p> <p>105 (b) ensuring appropriate contingency planning; and</p> <p>106 (c) maintaining clear processes.</p> <p>107 Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability, and resiliency of the Internet DNS, consistent with ICANN's limited technical Mission.</p>	<p>108 The new ICANN Mission Statement will include the following revision to reflect the incorporation of this AoC review into the Bylaws:</p> <p>109 <b>In this role, with respect to domain names, ICANN's Mission is to coordinate the development and implementation of policies:</b></p> <p>110 <b>- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and</b></p>

111 The Review Team shall assess the extent to which prior review recommendations have been implemented.	112 Make this explicit.
113 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.	114 Affirmation of Commitments required this review every three years.

<b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b>	<b>NOTES</b>
<p>115 3. Promoting Competition, Consumer Trust, and Consumer Choice.</p> <p>116 ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.</p>	117 This review includes a commitment that becomes part of the ICANN Bylaws, regarding future expansions of the TLD space.
<p>118 The Board shall cause a review of ICANN's execution of this commitment after any batched round of new gTLDs have been in operation for one year.</p> <p>119 This review will examine the extent to which the expansion of gTLDs has promoted competition, consumer trust, and consumer choice, as well as effectiveness of:</p> <p>120 (a) the gTLD application and evaluation process; and</p> <p>121 (b) safeguards put in place to mitigate issues involved in the expansion.</p>	122 Re-phrased to cover future new gTLD rounds. "Batched" is used to designate a batch of applications, as opposed to continuous applications.
123 The Review Team shall assess the extent to which prior review recommendations have been implemented.	124 Make this explicit.
125 For each of its recommendations, this Review Team should indicate whether the recommendation, if accepted, must be implemented before opening subsequent rounds of gTLD expansion.	126 Board proposal, accepted by CCWG-Accountability as Option B in Dublin.

127 These periodic reviews shall be convened no less frequently than every five years, measured from the date the previous review was convened.	128 AoC also required this review 2 years after the 1st year review.
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<b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b>	<b>NOTES</b>
129 4. Reviewing effectiveness of WHOIS/future Registration Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust.	130 Changed title to reflect likelihood that WHOIS will be replaced by new Registration Directory Services.
131 ICANN commits to enforcing its policy relating to the current WHOIS and any future Generic Top Level Domain (gTLD) Directory Service, subject to applicable laws, and working with the community to explore structural changes to improve accuracy and access to gTLD registration data, as well as consider safeguards for protecting data.  132 This review includes a commitment that becomes part of the ICANN Bylaws, regarding enforcement of the current WHOIS and any future gTLD Directory Service policy requirements.	133 This review includes a commitment that becomes part of the ICANN Bylaws, regarding enforcement of existing policy relating to WHOIS requirements, as proposed by the ICANN Board (1 September 2015).
134 The Board shall cause a periodic review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement, promotes consumer trust, and safeguards data.	135 Per Board proposal (1 September 2015).
136 This review will consider the Organization for Economic Co-operation and Development (OECD) guidelines regarding privacy, as defined by the OECD in 1980 and amended in 2013.	137 New. A public comment submission noted that OECD guidelines do not have the force of law.

138 The Review Team shall assess the extent to which prior review recommendations have been completed, and the extent to which implementation has had the intended effect.	139 Per Board proposal (1 September 2015).
140 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.	141 The Affirmation of Commitments required this review every three years.

142 **Bylaws to add an IANA Function Review and Special IANA Function Review:**

<b>IANA FUNCTION REVIEW AND SPECIAL IANA FUNCTION REVIEW</b>	
143	The CWG-Stewardship recommends that Post-Transition IANA's (PTI's) performance against the ICANN-PTI contract and the Statement of Work (SOW) be reviewed as part of the IANA Function Review (IFR). The IFR would be obliged to take into account multiple input sources including community comments, IANA Customer Standing Committee (CSC) evaluations, reports submitted by the PTI, and recommendations for technical or process improvements. The outcomes of reports submitted to the CSC, reviews, and comments received on these reports during the relevant time period will be included as input to the IFR. The IFR will also review the SOW to determine if any amendments should be recommended. The IFR mandate is strictly limited to evaluation of PTI performance against the SOW and does not include any evaluation relating to policy or contracting issues that are not part of the IANA Functions Contract between ICANN and PTI or the SOW. In particular, it does not include issues related to policy development and adoption processes, or contract enforcement measures between contracted registries and ICANN.
144	The first IFR is recommended to take place no more than two years after the transition is completed. After the initial review, the periodic IFR should occur at intervals of no more than five years.
145	The IFR should be outlined in the ICANN Bylaws and included as a Fundamental Bylaw as part of the work of the CCWG-Accountability and would operate in a manner analogous to an Affirmation of Commitments review. The members of the IANA Function Review Team (IFRT) would be selected by the SOs and ACs and would include several liaisons from other communities. While the IFRT is intended to be a smaller group, it will be open to participants in much the same way as the CWG-Stewardship is.
146	While the IFR will normally be scheduled based on a regular cycle of no more than five years in line with other ICANN reviews, a Special IANA Function Review (Special IFR) may also be initiated when CSC Remedial Action Procedures (as described in the CWG-Stewardship Proposal) are followed and fail to correct the identified deficiency and the IANA Problem Resolution Process (as described in the CWG-Stewardship Proposal) is followed and fails to correct the identified deficiency. Following the exhaustion of these escalation mechanisms, the ccNSO and GNSO will be responsible for checking and reviewing the outcome of the CSC process, and the IANA Problem Resolution Process and for determining whether or not a Special IFR is necessary. After consideration, which may include a public comment period and must include meaningful consultation with other SOs and ACs, the Special IFR could be triggered. In order to trigger a Special IFR, it would require a vote of both of the ccNSO and GNSO Councils (each by a supermajority vote according to their normal procedures for determining supermajority).

147 The Special IFR will follow the same multistakeholder cross community composition and process structure as the periodic IFR. The scope of the Special IFR will be narrower than a periodic IFR, focused primarily on the identified deficiency or problem, its implications for overall IANA performance, and how that issue is best resolved. As with the periodic IFR, the Special IFR is limited to a review of the performance of the IANA Functions operation, including the CSC, but should not consider policy development and adoption processes or the relationship between ICANN and its contracted TLDs. The results of the IFR or Special IFR will not be prescribed or restricted and could include recommendations to initiate a separation process, which could result in termination or non-renewal of the IANA Functions Contract between ICANN and PTI among other actions.

148 **Composition of Review Teams for various reviews to date:**

149 <b>ATRT1</b> (14 people; 12 from AC & SOs):	157 <b>ATRT2</b> (15 people; 11 from AC & SOs)
150 1 ALAC	158 2 ALAC
151 2 GAC	159 3 GAC
152 1 ASO	160 1 SSAC
153 3 ccNSO	161 1 ASO
154 5 GNSO	162 2 ccNSO
155 ICANN Board Chair or designee	163 2 GNSO
156 Assistant Secretary for NTIA	164 2 Experts
	165 ICANN Board Chairman or designee
	166 Assistant Secretary for NTIA
167 <b>SSR</b> (15 people; 12 from AC & SOs):	177 <b>WHOIS</b> (13 people; 9 from AC & SOs):
168 1 ALAC	178 2 ALAC
169 1 GAC	179 1 GAC
170 2 SSAC	180 1 SSAC
171 1 RSSAC	181 1 ASO
172 2 ASO	182 1 ccNSO
173 3 ccNSO	183 3 GNSO
174 2 GNSO	184 3 Experts/Law Enforcement
175 2 Experts	185 ICANN CEO or designated nominee
176 ICANN CEO or designee	

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
- All AoC reviews (and the IFR and Special IFR) should be incorporated into the Bylaws.

- The WP-IRP IOT will examine the suggestion to include a mid-term review of the IRP. The ATRT scope will be expanded to suggest a review of the IRP (paragraph 89).
- The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal (paragraph 54).
- The Board amendment on WHOIS/future Registration Directory Services policy (paragraph 127) should be included.
- The ICANN Articles of Incorporation address ICANN's state of incorporation (or corporate domicile), and the ICANN Bylaws (Article XVIII) address the separate issue of the location of ICANN's principal office. Article XVIII of the ICANN Bylaws will be classified as a Standard Bylaw (see paragraph 5).
- The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that Recommendation #9 would be respected and that this text would address implementation details only (see paragraph 8).
- CCWG-Accountability lawyers advised clarifying "diversity" in paragraph 54 regarding composition of AoC Review Teams. CCWG-Accountability notes that "diversity" considerations could include geography, skills, gender, etc., and that chairs of participating ACs and SOs should have flexibility in their consideration of factors in selecting Review Team members.
- CCWG-Accountability lawyers suggested "the group of chairs can solicit additional nominees or appoint less than 21 members to avoid potential overrepresentation of particular ACs or SOs if some nominate less than 3 members." The CCWG-Accountability proposed "up to 21", so it is not actually proposing a fixed number of Review Team members. "Fixed" has been replaced with "limited" in paragraph 54. CCWG-Accountability purposely allowed AC/SO chairs to select additional Review Team members from ACs/SOs that had offered more than 3 candidates. This is to accommodate ACs/SOs that had greater interest in a review, such as the GNSO, which would be the most concerned with reviews of new gTLDs and WHOIS/Directory Services. Therefore, the representation and number of seats on the Review Team will remain unchanged from the Third Draft Proposal.
- Replaced "participants" with "observers" in paragraph 54.

## 5. Stress Tests Related to this Recommendation

- ST9, 11, 17
- ST3, 4
- ST 14
- ST20, 22



## 6. How does this meet the CWG-Stewardship Requirements?

- The CWG-Stewardship has proposed an IFR and Special IFR that should be added to the ICANN Bylaws as a Fundamental Bylaw. The CCWG-Accountability's recommendations include this as part of the reviews to be added to the ICANN Bylaws.

## 7. How does this address NTIA Criteria?

### 186 **Support and enhance the multistakeholder model.**

- Reinforcing multistakeholder nature of the organization by incorporating into its principles the commitment to remaining a nonprofit, public benefit corporation that operates under transparent and bottom-up, multistakeholder policy development processes; includes business stakeholders, civil society, the technical community, academia, and end users; and seeks input from the public for whose benefit ICANN shall in all events act.
  - Reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process fully addresses this criterion.
- 

### 187 **Maintain the security, stability and resiliency of the Internet DNS.**

- Maintaining nonprofit public benefit corporation status and headquarters in the U.S.
  - Adding Bylaw requirement that ICANN produce an annual report on the state of improvements to Accountability and Transparency.
  - Publishing analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability, and resiliency of the DNS.
  - Including the commitment to preserve and enhance the neutral and judgment-free operation of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
  - Incorporating Affirmation of Commitments reviews into Bylaws and, in particular, the security, stability, and resiliency of the DNS review.
- 

### 188 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Transferring Affirmation of Commitments that ICANN preserve and enhance the neutral and judgment free operation of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet as well maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet.

- Solidifying commitment to maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet. The criteria is also addressed through the Bylaw addition: ICANN will ensure that as it expands the TLD space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.
  - Visibility in finance and accountability reporting.
- 

189 **Maintain the openness of the Internet.**

- Convening a Community Forum where all would be welcome to participate as a potential step.
  - All are welcome to participate in the consultation process that organized to elaborate these key documents.
- 

190 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- Adding commitment to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
  - Producing an annual report on the state of improvements to Accountability and Transparency and adhering to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making.
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# Annex 10 – Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

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## 1. Summary

- 01 The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:
- In Work Stream 1: Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
  - In Work Stream 2: Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.

## 2. CCWG-Accountability Recommendations

- 02 Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations.
- 03 The CCWG-Accountability recommends the following.

### 04 **Work Stream 1:**

- 05 Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews that are performed on a regular basis.
- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
  - This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:

*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 periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work

Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

*assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

06 **Work Stream 2:**

07 Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.

- Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and, if viable, undertake the necessary actions to implement it.<sup>1</sup>
- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.
- Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

### 3. Detailed Explanation of Recommendations

08 As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using those powers. In other words, “Who watches the watchers?”

09 In response to these concerns, the CCWG-Accountability:

- Identified the existing accountability mechanisms in place for SOs and ACs.
- Reviewed existing mechanisms in order to assess whether and how they address the concerns expressed by the community during the First Public Comment Period.
- Built a list of steps to enhance SO and AC accountability that should be addressed in Work Stream 1 and Work Stream 2.

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<sup>1</sup> CCWG-Accountability Advisor Willie Currie introduced a short description of the mutual accountability roundtable: *The idea of mutual accountability is that multiple actors are accountable to each other. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new Community Powers construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets at each ICANN meeting, perhaps replacing the current Public Forum. The form would be a roundtable of the Board, CEO, and all Supporting Organizations and Advisory Committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year who would be responsible for facilitating each Mutual Accountability Roundtable. Each Roundtable may pick one or two key topics to examine. Each participant could give an account of how his or her constituency addressed the issue, indicating what worked and didn't work. This could be followed by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.*

10 A review of existing ICANN documentation shows that the provisions that oblige SOs and ACs to be held accountable to their Constituents or the larger Internet community with regard to their actions, decisions, or advice, are limited in number and scope.

11 The reviewed documents were:

1. [ICANN Bylaws](#)

ICANN Bylaws state that each SO and AC shall establish its own charter and procedural documents. Further research needs to be done at the SO and AC level to verify existing accountability mechanisms put in place for each SO and AC.

It is also important to review whether SOs and ACs should be added to specific sections in the Bylaws as subject to provisions applicable to ICANN as a corporation. For example, it should be reviewed and discussed if Core Values should be applicable not only to the corporation's actions, but also to SO and AC activities.

2. [The Affirmation of Commitments](#)

The Affirmation of Commitments includes some key commitments that while oriented to ICANN as an organization, should also apply to the SOs and ACs that form the wider ICANN organizational structure as defined in ICANN's Bylaws.

The identified mechanisms or criteria in the Affirmation of Commitments by which SOs and ACs should conduct their work in relation to the DNS are: paragraph 3 and paragraph 9.

3. [ATRT 1 Recommendations](#) and [ATRT 2 Recommendations](#)

The Accountability and Transparency Reviews have made no direct recommendations with regard to SO and AC transparency or accountability.

4. [Operational Rules and Procedures of the Various Supporting Organizations and Advisory Committees](#)

Having inventoried the existing mechanisms related to SO and AC accountability in light of the new responsibilities associated with the Work Stream 1 Proposals, it became clear that the current framework for SO and AC accountability needed to be enhanced.

The aim of the enhancements is to ensure that SOs and ACs are accountable not only to their current members but also to the wider communities that these bodies are designed to represent.

12 Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations.

13 The CCWG-Accountability recommends the following.

14 **Work Stream 1:**

- 15 Include the review of SO and AC accountability mechanisms in the independent periodic structural reviews that are performed on a regular basis.
- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
  - This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:  
*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 periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:  
*assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*
- 16 **Work Stream 2:**
- 17 Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.
- Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and, if viable, undertake the necessary actions to implement it.<sup>2</sup>
  - Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.
  - Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

## 4. Changes Made Since the Third Draft Proposal

- Added: The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following

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<sup>2</sup> See the short description of the mutual accountability roundtable provided by CCWG-Accountability Advisor Willie Currie in footnote 1, above.

among the issues that merit attention in the review:

*assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

- In Work Stream 2 recommendations, added: Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

## 5. Stress Tests Related to this Recommendation

- ST12
- ST33
- ST34

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

### 18 **Support and enhance the multistakeholder model.**

- Enhancements of ICANN's accountability are all enhancements to ICANN's overall multistakeholder model. Greater accountability of SOs and ACs to their members and stakeholders is a part of enhancing the wider multistakeholder model of ICANN.

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### 19 **Maintain the security, stability and resiliency of the Internet DNS.**

- N/A

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### 20 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- N/A

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21 **Maintain the openness of the Internet.**

- N/A

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22 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.**

- The proposals for enhanced SO and AC accountability are based on mutual accountability enhancements, instead of accountability towards a government-led or intergovernmental organization. Governments are recognized as key stakeholders, especially in their role with regard to public policy.
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# Annex 11 – Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18)

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## 1. Summary

- 1 Currently, Governmental Advisory Committee (GAC) advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:

*j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*
- 2 Stress Test #18 considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters.
- 3 In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to so participate), some stakeholders believe that this could increase government influence over ICANN.
- 4 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice.

## 2. CCWG-Accountability Recommendations

- 5 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2 (emphasis added):
- 6 *j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of***

**adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of 60% of the Board**, and the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

- 7 This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must “try to find a mutually acceptable solution,” as required in ICANN’s current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.
- 8 The GAC has the autonomy to refine its operating procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- 9 The CCWG-Accountability recommends inserting a requirement that all ACs provide a rationale for their advice. A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN’s Bylaws.
- 10 To address concerns regarding GAC advice that is inconsistent with the ICANN Bylaws, the CCWG-Accountability recommends adding this clarification for legal counsel to consider when drafting Bylaws language:

*ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.*

- 11 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

## 3. Detailed Explanation of Recommendations

### 12 Background

- 13 Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the Empowered Community (if the GAC chooses to so participate), some stakeholders believe this could inappropriately increase government influence over ICANN.
- 14 The goal of the recommendation is also to reflect the principles, derived from the [GAC Dublin Communiqué](#), and agreed upon by the CCWG-Accountability when investigating further on Stress Test #18:
- The GAC may define its own rules.
  - The GAC is committed to working by consensus.
  - The GAC will not work on the basis of a simple majority for GAC advice.
  - The Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution.
  - GAC advice needs to provide clear direction and provide a rationale.

## Process and Considerations Leading Up to the Recommendation

- 15 The Second Draft Proposal drew a significant number of comments, with a majority in support of the proposed Bylaws change and with objections from several governments. After the close of the second round of public comments, other governments expressed their concerns regarding the proposed Bylaws change.
- 16 The CCWG-Accountability also received communication from the GAC after its Dublin meeting, as part of its communiqué, which stated:

*“The discussions on Stress Test #18 have helped the Governmental Advisory Committee to have a better understanding of the different views on the issue. In assessing the different rationales presented so far related to Stress Test #18, the Governmental Advisory Committee considered:*

- The need that each and every AC ensures that the advice provided is clear and reflects the consensus view of the Committee.
- The need that each and every AC should preserve its own autonomy in its definition of consensus.
- The value the Board attributes to receiving consensus advice.
- The recommendation of the Board-GAC Recommendation Implementation Working Group, as reiterated by the Accountability and Transparency Review Team 2 (ATRT2), to set the threshold for the ICANN Board to reject GAC advice to a 2/3 majority voting, consistent with the threshold established for rejection of Country Code Names Supporting Organization and Generic Names Supporting Organization Policy Development Process recommendations.”

- 17 Following the Second Public Comment Period, and the input received from the GAC Communiqué in Dublin, the CCWG-Accountability organized a specific Subgroup to:
- Assess existing options, and areas of agreement/disagreement.
  - Provide the full CCWG-Accountability with a brief summary of views and options.
  - Report to the CCWG-Accountability so that consensus can be assessed around how to respond to Stress Test #18, which identified the risk that GAC could change its decision-making rule and thereby require the ICANN Board to arbitrate among sovereign governments.
- 18 Within this Subgroup, the following conclusions were agreed upon:
- The GAC may define its own rules.
  - The GAC is committed to working by consensus.
  - The GAC will not work on the basis of a simple majority for GAC advice.
  - The Board has the ability to disagree with GAC advice, after trying to find a mutually acceptable solution.
  - GAC advice needs to provide clear direction and provide a rationale.

19 **Alternative options considered and rejected**

20 Within this group, several options were introduced and considered.

21 Brazil introduced a proposal with the following Bylaw changes:

*[...] Where the ICANN Board is obliged to pay due deference to advice from Advisory Committees and where that advice, if not followed, requires finding mutually agreed solutions for implementation of that advice, the Advisory Committee will make every effort to ensure that the advice provided is clear and reflects the consensus view of the committee. In this context, each Advisory Committee has the right to determine its particular definition of consensus.” [...]*

*[...] Any Governmental Advisory Committee Advice approved by a Governmental Advisory Committee consensus may only be rejected by a vote of more than two-thirds (2/3) of the Board. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. [...]*

22 After discussions within the Subgroup, and concerns raised by some stakeholders that the Brazil proposal would create stronger obligations for the ICANN Board while not providing enough guarantees that the GAC decision-making would remain strongly focused on consensus, a proposal based on initial drafting by Denmark and enhanced by a group of European GAC members, was considered (emphasis added):

*“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.*

*In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.*

*Any Governmental Advisory Committee advice approved by a **full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of two-thirds of the Board.***

*Any advice approved by the Governmental Advisory Committee by consensus with objections only from a very small minority of Governmental Advisory Committee members, may be rejected by a majority vote of the Board.*

*In both instances, the Governmental Advisory Committee and the ICANN Board will try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”*

- 23 Several stakeholders supported an amendment to this proposal to remove the words “Any advice approved by the Governmental Advisory Committee by consensus with objections only from a very small minority of Governmental Advisory Committee members, may be rejected by a majority vote of the ICANN Board.” It was met with support as well as resistance, with the argument that this would not address the concerns expressed during the Second Public Comment Period about the lack of flexibility regarding GAC decision-making procedures.
- 24 As some participants remained concerned about the introduction of the 2/3 decision-making threshold for the ICANN Board, a compromise proposal was introduced as such (emphasis added):

*“j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.*

*In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.*

*Governmental Advisory Committee **advice which enjoys broad support of Governmental Advisory Committee members in the absence of significant objection** may be rejected by a majority vote of the Board.*

*In this case, the Governmental Advisory Committee and the ICANN Board will try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution”.*

- 25 This compromise proposal was submitted to the CCWG-Accountability on 24 November 2015. After thorough discussion, while some stakeholders expressed their willingness to accept the proposal as a compromise, significant objections remained. The co-Chairs assessed that the level of support was insufficient to call rough consensus on this proposal.
- 26 When discussing the way forward within the CCWG-Accountability on 26 November 2015, the group took stock of the past discussions and noted the [statement by Larry Strickling of NTIA](#) from 25 November about Stress Test #18. A proposal was introduced jointly by Denmark and Keith Drazek (ICG Liaison).
- 27 After being unable to reach consensus on the two-thirds proposal, in January 2016 the CCWG-Accountability re-launched the discussions to identify a consensus position for Recommendation #11. In early February, the CCWG-Accountability concluded that the consensus position should include the clarifications made to the version of Recommendation #11 in the Third Draft Proposal (no new obligations, rationale and conformity with ICANN Bylaws) and change the 2/3 threshold to 60%. Additionally, as part of the compromise, an exception was added in

Recommendations #1 and #2 that the GAC, should it decide to be a Decisional Participant in the Empowered Community, would not be able to participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge the ICANN Board’s implementation of GAC consensus advice; however, the GAC would be able to participate in an advisory capacity in all other aspects of the escalation process.

28 **The Stress Test which encompasses this is now:**

29	<b>Stress Test #18:</b> Governments in ICANN’s Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board	
30	<b>Consequence(s):</b> Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory Committee advice.	
	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
31	Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.	35 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where
32	Today, Governmental Advisory Committee adopts formal advice according to its Operating Principle 47: <i>“consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”</i>	Governmental Advisory Committee advice was supported by full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.
33	The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.	36 The proposed accountability measure recognizes that the decision not to follow GAC consensus advice would require a 60% majority of the ICANN Board.
34	The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.	37 The Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.
		38 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the Governmental Advisory Committee could specify how objections are raised and considered.

39 **Why is the CCWG-Accountability Recommending This?**

40 Stress Test #18 was among the plausible scenarios that could test how and whether the ICANN community could challenge actions taken by the ICANN Board. The rationale to develop this stress test involves two factors:

1. ICANN community members were aware that some GAC members had expressed a desire to change the GAC's historical method of using consensus for its decision-making, where "consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection." Moreover, it would take only a simple majority of GAC members to change its decision-making methods to a lesser standard.
  2. The CCWG-Accountability realized that ICANN's present Bylaws obligate the ICANN Board to try to find "a mutually acceptable solution" if it decided not to follow GAC advice. That level of required deference is unique to the GAC and not required for advice from other SOs and ACs. Importantly, the ICANN Board's obligation to seek a mutually acceptable solution applies to all GAC advice, even if that advice was not supported by GAC consensus or was opposed by a significant minority of GAC members.
- 41 For these reasons, the CCWG-Accountability added Stress Test #18 to the First Draft Proposal, and the Stress Test Working Party concluded that existing accountability measures were not adequate to let the community hold the ICANN Board accountable for its actions if the Board were obliged to seek a negotiated solution with the GAC.
- 42 In order to address Stress Test #18, the CCWG-Accountability proposed an amendment to the ICANN Bylaws regarding the ICANN Board's obligations with respect to GAC advice. The amendment would preserve the requirement for the ICANN Board to seek a mutually acceptable solution, but only for GAC advice that was supported by consensus among GAC members.
- 43 The GAC advice that is opposed by a significant minority of governments should not trigger the ICANN Board's obligation to enter bi-lateral negotiations with the GAC on a matter that affects the global Internet community. A negotiation between the ICANN Board and the GAC should be mandatory only for resolving differences between ICANN and governments, not to resolve differences among governments themselves.
- 44 As a corollary to the importance of consensus GAC advice, the proposal includes a requirement that the Board would need a 60% majority to decide not to follow consensus GAC advice.
- 45 To avoid any ambiguity, when transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection among GAC members.
- 46 The proposed Bylaws change is aligned with the practice presently used by the GAC, which uses the following consensus rule for its decisions:
- "Consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection."*
- 47 The proposed Bylaws change recognizes that the GAC may, at its discretion, amend its [Operating Principle 47](#) regarding "Provision of Advice to the ICANN Board." Similar rules for consensus policy and advice are already present in the ICANN Bylaws, which require supermajority support for policy recommendations coming from GNSO and ccNSO.
- 48 The proposed Bylaws change for Stress Test #18 does not interfere with the GAC's method of decision-making. The GAC has the autonomy to refine its operating procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection).
- 49 If the GAC decided to adopt advice by methods other than a consensus process, ICANN would still be obligated to give GAC advice due consideration: "advice shall be duly taken into account, both in the formulation and adoption of policies."

- 50 Moreover, ICANN would still have to explain why it chose not to follow GAC advice: “In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice”.
- 51 The only effect of this Bylaws change is to limit the kind of advice where ICANN is obligated to “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.” That delicate and sometimes difficult consultation requirement would only apply for GAC advice that was approved by consensus among GAC members.
- 52 It is important to note that although this was the only proposal that would allow the CCWG-Accountability to achieve consensus on this topic, it was not unanimously supported. A number of dissenters amongst members and participants thought this proposal was overly restrictive and discriminatory toward the GAC, while others thought that if the GAC wanted to keep its privileged AC status, then it should not be allowed to be a Decisional Participant.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC “carve out”.

## 5. Stress Tests Related to this Recommendation

- Stress Test #18: Governments in ICANN’s GAC can amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board.

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

- NTIA gave specific requirements for this transition, including advice that Stress Test #18 is a direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. The proposed Bylaws change is therefore an important part of the Proposal.



- 
- By ensuring that the provision of GAC advice remains a consensus-driven decision, the Proposal provides a safeguard against the possibility of a large group of governments trying to overly influence the ICANN Board.
- 

- At the same time, the Proposal would enable the GAC, if it ever came to a point where a single government would abuse its ability to formally object to veto public policy advice, to amend its operating principles to address this contingency. The principles adopted would however be required to fit with the consensus requirement stated in the Bylaws.
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# Annex 12 – Recommendation #12: Committing to Further Accountability Work in Work Stream 2

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## 1. Summary

- 01 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.
- 02 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:
  - Considering improvements to ICANN’s standards for diversity at all levels.
  - Staff accountability.
  - Supporting Organizations and Advisory Committee accountability.
  - Improving ICANN’s transparency with a focus on:
    - Enhancements to ICANN’s existing Documentary Information Disclosure Policy (DIDP).
    - Transparency of ICANN’s interactions with governments.
    - Improvements to the existing whistleblower policy.
    - Transparency of Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN’s Human Rights commitment and proposed Draft Bylaw.
  - Addressing jurisdiction-related questions, namely: “Can ICANN’s accountability be enhanced depending on the laws applicable to its actions?” The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
  - Considering enhancements to the Ombudsman’s role and function.
- 03 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN55 Meeting](#) in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.
- 04 The community raised concerns that after the IANA Stewardship Transition, there may be a lack of incentive for ICANN to implement the proposal arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. In a [letter](#) dated 13 November 2015, the ICANN

Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

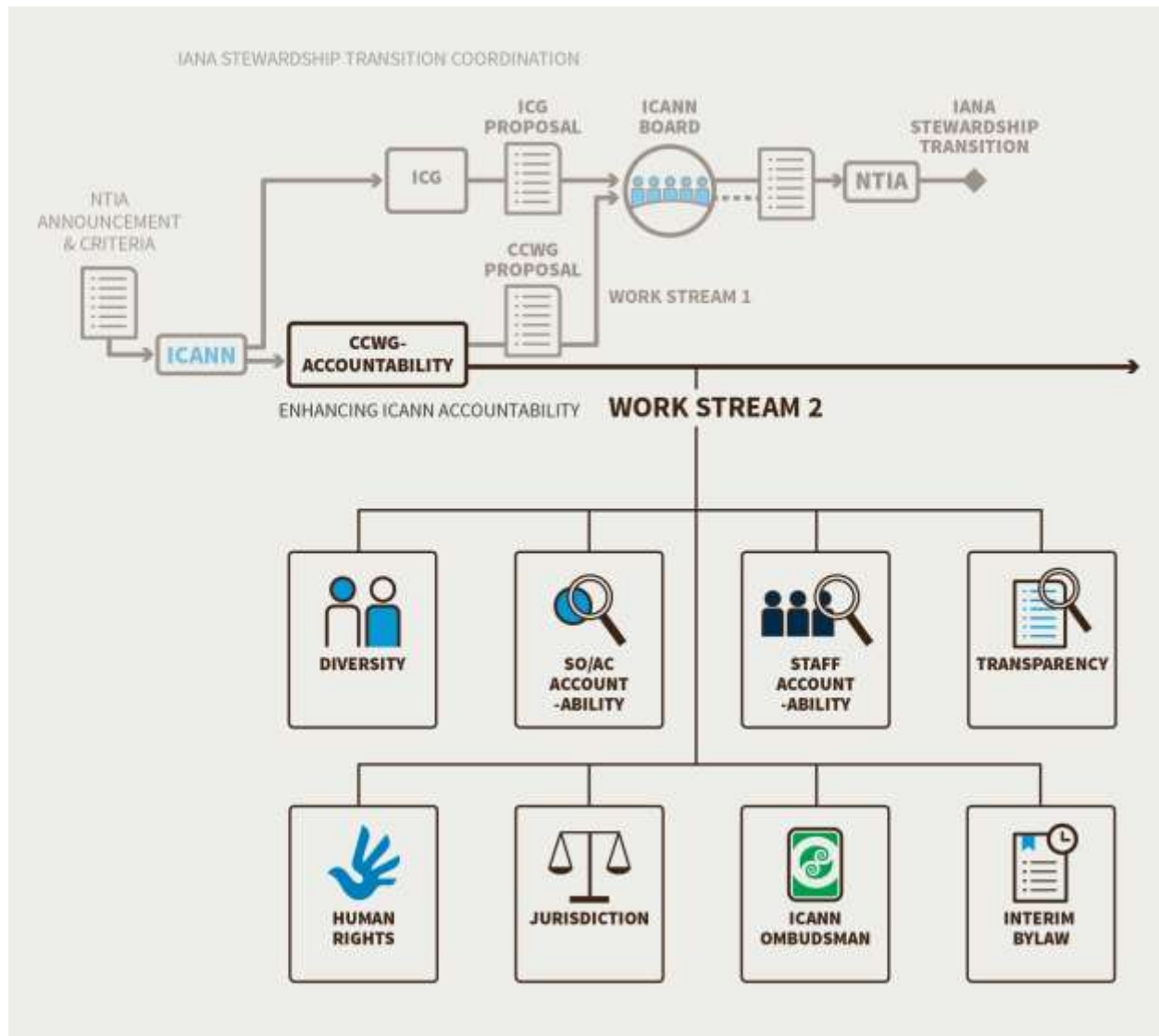
## 2. CCWG-Accountability Recommendations

05 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
  - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
  - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
  - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
  - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing DIDP.
  - Transparency of ICANN's interactions with governments.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

The CCWG-Accountability notes that further enhancements to ICANN accountability can be accommodated through the accountability review process (see Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees) or through specific, ad hoc, cross community working group initiatives.

### 3. Detailed Explanation of Recommendations



06 Commenters made the observation that general accountability requirements, such as diversity and Supporting Organization (SO) and Advisory Committee (AC) accountability, were not fully addressed. Specific criteria were developed for these two key parameters, as described below.

07 **Diversity**

08 Comments received on prior drafts asked that concrete steps to ensure the diversity of the views, origins, and interests of the global Internet community be adequately represented through a multidimensional approach, specifically as the community becomes more empowered. While acknowledging the importance of diversity in the accountability mechanisms, commenters have

also expressed the view that any diversity requirement should not prevail over skills or experience requirements.

- 09 The CCWG-Accountability acknowledges the specific advice received from the Public Expert Group Advisors which stresses the importance of such diversity enhancements. Maximum participation and transparent deliberations by all affected stakeholders are necessary in order to capture the diversity of views that constitute the (global) public interest in a given instance.
- 10 In assessing diversity, the CCWG-Accountability identified that existing mechanisms were in place for entities constituting the ICANN ecosystem. Requirements stemming from the following initiatives and governance documents were evaluated:
- [ICANN Bylaws.](#)
  - [The Affirmation of Commitments.](#)
  - [ATRT 1 Recommendations.](#)
  - [ATRT 2 Recommendations.](#)
  - Documents from each of ICANN's SOs and ACs.
- 11 Analysis of the above documents determined that improvements are needed. During its discussions, the CCWG-Accountability considered a non-exhaustive list of criteria and sought input on the following suggestions:
- Expanding ATRT reviews into Accountability, Transparency, and Diversity reviews.
  - Establishing threshold regarding composition of each body.
  - Incorporating the Structural Reviews into Structural Accountability, Transparency, and Diversity Reviews of SOs and ACs, under the Board's supervision.
- 12 Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency Reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN's effectiveness in promoting diversity:
- Including diversity as an important element for the creation of any new structure, such as the Independent Review Process (IRP) – for diversity requirements for the panel – and the ICANN Community Forum.
  - Adding Accountability, Transparency, and Diversity reviews of SOs and ACs to structural reviews as part of Work Stream 2.
  - Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program, and other ICANN outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity.
  - Identifying the possible structures that could follow, promote and support the strengthening of diversity within ICANN.
  - Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2.

- Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions.

### 13 **Staff Accountability**

14 In general, management and staff work for the benefit of the community and in line with ICANN's purpose and Mission. While it is obvious that they report to and are held accountable by the ICANN Board and the President and CEO, the purpose of their accountability is the same as that of the organization:

- Complying with ICANN's rules and processes.
- Complying with applicable Bylaws.
- Achieving certain levels of performance, as well as security.
- Making their decisions for the benefit of the community and not in the interest of a particular stakeholder or set of stakeholders or ICANN the organization alone.

15 Having reviewed and inventoried the existing mechanisms related to staff accountability, areas for improvement include clarifying expectations from staff, as well as establishing appropriate redress mechanisms. The CCWG-Accountability recommends as part of its Work Stream 2:

- The CCWG-Accountability work with ICANN to develop a document that clearly describes the role of ICANN staff vis-à-vis the ICANN Board and the ICANN community. This document should include a general description of the powers vested in ICANN staff by the ICANN Board of Directors that need, and do not need, approval of the ICANN Board of Directors.
- The CCWG-Accountability work with ICANN to consider a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by staff in relation to their interactions with all stakeholders, establish regular independent (internal and community) surveys and audits to track progress and identify areas that need improvement, and establish appropriate processes to escalate issues that enable both community and staff members to raise issues. This work should be linked closely with the Ombudsman enhancement item of Work Stream 2.

### 16 **Supporting Organizations and Advisory Committee Accountability**

17 As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using new Community Powers, i.e., "who watches the watcher."

18 The CCWG-Accountability reviewed existing accountability mechanisms for SOs and ACs as well as governance documents (see above). Analysis revealed that mechanisms are limited in quantity and scope. Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community.

19 The CCWG-Accountability recommends the following.

20 **As part of Work Stream 1:**

- Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews performed on a regular basis. These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, and Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently states: “The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (1) whether that organization has a continuing purpose in the ICANN structure, and (2) if so, whether any change in structure or operations is desirable to improve its effectiveness.”

21 **As part of Work Stream 2:**

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
- Evaluate the proposed “Mutual Accountability Roundtable” to assess viability and, if viable, undertake the necessary actions to implement it.
- Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
- Assess whether the IRP would also be applicable to SO and AC activities.

22 **Transparency**

23 Transparency is considered quintessential to the viability of community empowerment and its associated legal framework. As such, the CCWG-Accountability recommends reviewing the following to ensure appropriate safeguards are in place:

- Improving ICANN’s transparency with a focus on:
  - Enhancements to ICANN’s existing DIDP: The CCWG-Accountability sets an objective to review and update ICANN’s DIDP within two years, with the goal of justifying denials with a specific harm and limiting the scope of non-disclosure.
  - ICANN’s interactions with governments: The CCWG-Accountability is considering if ICANN should be required to compile and publicly post a quarterly report providing: the names of individuals acting on ICANN’s behalf who have been in contact with a government official; the names and titles of such government officials; and the date, nature, and purpose of those government contacts. In addition, it considers that a line item accounting of the amount ICANN spent on government engagement activities should be reported.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.

## Human Rights

24 To ensure that adding the proposed Human Rights Bylaw provision into the ICANN Bylaws does not lead to an expansion of ICANN's Mission or scope, the CCWG-Accountability will develop a Framework of Interpretation for Human Rights (FOI-HR) as a consensus recommendation in Work Stream 2 to be approved by the ICANN Board using the same process and criteria as for Work Stream 1 recommendations, and the Bylaw provision will not enter into force before the FOI-HR is in place. The CCWG-Accountability will consider the following as it develops the FOI-HR:

- Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- Consider what effect, if any, this Bylaw would have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

## 25 **Jurisdiction**

26 Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN is incorporated under the laws of the U.S. State of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.

27 The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight<sup>1</sup> of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.

28 ICANN's Bylaws (Article XVIII) also state that its principal offices shall be in California.

29 The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

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<sup>1</sup> 8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community**; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.



- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence.
- Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.
- Meeting NTIA requirements.

30 At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated:

- Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:
  - Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.
  - Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.
  - Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.

31 A specific Subgroup of the CCWG-Accountability will be formed to undertake this work.

## 32 **Considering Enhancements to the Ombudsman's Role and Function**

33 Through the enhanced Request for Reconsideration process (see Recommendation #8: Improving ICANN's Request for Reconsideration Process), the CCWG-Accountability has given increased responsibility to the Ombudsman.

34 The Ombudsman can perform a critical role in ensuring that ICANN is transparent and accountable, preventing and resolving disputes, supporting consensus-development, and protecting bottom-up, multistakeholder decision-making at ICANN. ICANN's Office of Ombudsman must have a clear charter that reflects, supports, and respects ICANN's Mission, Commitments and Core Values, and must have sufficient authority and independence to ensure that it can perform these important roles effectively. As part of Work Stream 2, the CCWG-Accountability will evaluate the current Ombudsman charter and operations against industry best practices and recommend any changes necessary to ensure that the ICANN Ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders.

## 35 **Interim Bylaw**

- 36 The CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Interim Bylaw would task the group with creating further enhancements to ICANN's accountability related to the Work Stream 2 list of issues, according to process and procedures similar to those of Work Stream 1: openness to all participants, transparency of deliberations, public comment inputs.
- 37 This Interim Bylaw must be incorporated in the ICANN Bylaws as part of Work Stream 1, prior to the IANA Stewardship Transition. This Interim Bylaw has been proposed to address concerns that after the IANA Stewardship Transition, an absence of incentives may lead to the ICANN Board dismissing the CCWG-Accountability's proposed Work Stream 2 recommendations. However, in a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.
- 38 Enshrining the commitment to Work Stream 2 as an Interim (transitional) Bylaw provides stronger guarantees compared to an approach that would rely on a Board resolution. A Board resolution could indeed be changed by the Board itself at any time, and the composition of the Board changes over time. Also, enshrining the process and conditions within a Bylaw (even if it is a transitional provision) triggers the ability for IRP challenge if the CCWG-Accountability or the Board did not comply with the process or conditions described in the Bylaw.
- 39 The language of this Interim Bylaw provision should provide that the CCWG-Accountability Work Stream 2 recommendations, when supported by full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering Organizations, be considered in a similar status to Work Stream 1 recommendations. The ICANN Board's actions or inaction would be subject to challenge through enhanced Request for Reconsideration and Independent Review Processes.
- 40 The Interim Bylaw would be consistent with the language described in the CCWG-Accountability Charter, and explicitly mention the NTIA criteria as a reference for the recommendations, as well as the requirement that recommendations are based on consensus.
- 41 The Bylaw would also describe the process outlined in the ICANN Board's resolution of 16 October 2014 (see <https://www.ICANN.org/resources/board-material/resolutions-2014-10-16-en#2.d>), such as:
- The requirement for Work Stream 2 recommendations to be consensus recommendations, endorsed by the Chartering Organizations.
  - The requirement to initiate a specific dialogue in case the Board believes it is not in the global public interest to implement a recommendation, as well as the description of the steps of this dialogue.
  - The requirement of a 2/3 majority of the Board to determine that implementing a recommendation is not in the global public interest.

## 42 **Timeline**

- 43 The initial plan includes the following key milestones:
- March 2016 (ICANN55): Definition of scope of work and organization into subgroups.

- March 2016 to end of June 2016: Drafting of Proposals by Subgroup, under supervision by CCWG-Accountability.
- June 2016 till early October 2016: 40-day Public Comment Period, including discussions during ICANN56 and/or ICANN57.
- October – mid-January 2017: Refinement of Proposals by Subgroups, under supervision of the CCWG-Accountability or other CCWG as appropriate.
- Mid-January – March 2017: Second 40-day Public Comment Period, including discussions during ICANN58.
- By end of June 2017: Finalize Proposals and deliver to Chartering Organizations.
- Obtain approval and deliver Proposals to ICANN Board at ICANN59.

#### **4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Interim Bylaws clarifications to address Board’s concerns by highlighting that Work Stream 2 will be following similar rules as Work Stream 1: consensus recommendations, endorsement by Chartering Organizations, ability for the Board to engage in special dialogue, 2/3 threshold for such Board decision, etc.
- Edits to the documents will include focus on fact that Work Stream 2 deliberations will be open to all (similar to Work Stream 1).
- List of Work Stream 2 items is “limited to” instead of “related to.” A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG-Accountability.
- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.
- Agreed to incorporate Public Experts Group (PEG) Advisor input to strengthen the diversity requirement.
- Enhancing the Ombudsman role and function is confirmed as a Work Stream 2 item.
- Re-inserted staff accountability requirement.

#### **5. Stress Tests Related to this Recommendation**

- ST1
- ST2
- ST11

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

### 44 **Support and enhance the multistakeholder model.**

- In-depth review of diversity and SO and AC accountability is planned for Work Stream 2.
  - Addition of an Interim Bylaw will secure Work Stream 2 towards enhancing the general accountability framework.
- 

### 45 **Maintain the security, stability and resiliency of the Internet DNS.**

- Accountability of SO and AC structures and their components will help ensure that one entity cannot singlehandedly change or block a process.
  - Addressing the question of applicable law for contracts and dispute settlements.
- 

### 46 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Analysis of transparency will help contribute to ensuring that visibility is given into operations of ICANN.
  - Development of a Framework of Interpretation for Human Rights Bylaw will help maintain limited scope of ICANN's Mission.
- 

### 47 **Maintain the openness of the Internet.**

- Consolidating, enhancing diversity and SO and AC accountability.
- 

### 48 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution**

- Transparency of interactions with governments is flagged as a topic to explore further.
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# Annex 13 – CWG-Stewardship Requirements of the CCWG-Accountability

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## 1. Summary and References to the CCWG-Accountability Proposal

- 01 The CCWG-Accountability Work Stream 1 recommendations address each of the CWG-Stewardship dependencies as follows:
  - 02 The ability for the community to approve or veto the ICANN or IANA budget after it has been approved by the ICANN Board but before it comes into effect.  
See Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.
  - 03 The ability for the community to appoint and remove ICANN Board Directors and to recall the entire ICANN Board.  
See Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.
  - 04 The ability for the community to review and approve ICANN Board decisions with respect to recommendations resulting from an IANA Function Review (IFR) or Special IANA Function Review (Special IFR).  
See Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.
  - 05 The ability for the community to approve amendments to ICANN's Fundamental Bylaws.  
See Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.
  - 06 The creation of an IFR that is empowered to conduct periodic and special reviews of the IANA functions. IFR and Special IFR Reviews will be incorporated into the Affirmation of Commitments-mandated reviews set forth in the ICANN Bylaws.
  - 07 See Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws.
  - 08 The creation of a Customer Standing Committee (CSC) that is empowered to monitor the performance of the IANA functions and escalate non-remediated issues to the

Country Code Names Supporting Organization (ccNSO) and Generic Names Supporting Organization (GNSO). The ccNSO and GNSO should be empowered to address matters escalated by the CSC.

See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

- 09 The empowerment of the Special IFR Review to determine that a separation process is necessary and, if so, to recommend that a Separation Cross-Community Working Group (SCCWG) be established to review the identified issues and make recommendations.

See Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws.

- 10 An appeal mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions.

See Recommendation #7: Strengthening ICANN's Independent Review Process.

- 11 All of the foregoing mechanisms are to be provided for in the ICANN Bylaws as Fundamental Bylaws.

See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

- 12 Governance provisions related to PTI are to be incorporated into the ICANN Bylaws as Fundamental Bylaws.

See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

## 2. Recommendations from the CWG-Stewardship Final Report

- 13 The CWG-Stewardship Final Proposal can be found at: <https://community.icann.org/x/aJ00Aw> (Section III.A.i. Proposed Post-Transition Structure).

- 14 The CWG-Stewardship proposal is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) as described below. The co-chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability recommendations, if implemented as envisaged, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability.

- 15 If any element of these ICANN level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship proposal, this CWG-Stewardship proposal will require revision. Specifically, the proposed legal structure and overall CWG-Stewardship proposal requires ICANN accountability in the following respects:

- 16 1. ICANN Budget and IANA Budget.

17 The ability for the community to approve or veto the ICANN budget after it has been approved by the ICANN Board but before it comes into effect. The community may reject the ICANN Budget based on perceived inconsistency with the purpose, mission and role set forth in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community. The CWG-Stewardship recommends that the IFO's comprehensive costs should be transparent and ICANN's operating plans and budget should include itemization of all IANA operations costs to the project level and below as needed. An itemization of IANA costs would include "Direct Costs for the IANA department", "Direct Costs for Shared resources" and "Support functions allocation". Furthermore, these costs should be itemized into more specific costs related to each specific function to the project level and below as needed. PTI should also have a yearly budget that is reviewed and approved by the ICANN community on an annual basis. PTI should submit a budget to ICANN at least nine months in advance of the fiscal year to ensure the stability of the IANA services. It is the view of the CWG-Stewardship that the IANA budget should be approved by the ICANN Board in a much earlier timeframe than the overall ICANN budget. The CWG (or a successor implementation group) will need to develop a proposed process for the IANA-specific budget review, which may become a component of the overall budget review.

## 18 2. Community Empowerment Mechanisms

19 The empowerment of the multistakeholder community to have the following rights with respect to the ICANN Board, the exercise of which should be ensured by the related creation of a stakeholder community / member group:

- a. The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;
- b. The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA functions) by reviewing and approving (i) ICANN Board decisions with respect to recommendations resulting from an IANA Function Review or Special IANA Function Review and (ii) the ICANN budget; and
- c. The ability to approve amendments to ICANN's "Fundamental Bylaws," as described below.

## 20 3. IANA Function Review

21 The creation of an IANA Function Review that is empowered to conduct periodic and special reviews of the IANA functions. IANA Function Reviews and Special IANA Function Reviews will be incorporated into the Affirmation of Commitments mandated reviews set forth in the ICANN Bylaws.

## 22 4. Customer Standing Committee

23 The creation of a Customer Standing Committee that is empowered to monitor the performance of the IANA functions and escalate non-remediated issues to the Country Code Names Supporting Organization and Generic Names Supporting Organization. The Country Code Names Supporting Organization and Generic Names Supporting Organization should be empowered to address matters escalated by the Customer Standing Committee.

## 24 5. Separation Process



- 25 The empowerment of the Special IANA Function Review to determine that a separation process is necessary and, if so, to recommend that a Separation Cross-Community Working Group be established to review the identified issues and make recommendations.
- 26 **6. Appeals mechanism**
- 27 An appeal mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions. For example, direct customers with non-remediated issues or matters referred by Country Code Names Supporting Organization or Generic Names Supporting Organization after escalation by the Customer Standing Committee will have access to an Independent Review Panel. The appeal mechanism will not cover issues relating to country code top-level domains delegation and re-delegation, which mechanism is to be developed by the country code top-level domains community post-transition.
- 28 **7. Fundamental Bylaws**
- 29 All of the foregoing mechanisms are to be provided for in the ICANN bylaws as “Fundamental Bylaws.” A “Fundamental Bylaw” may only be amended with the prior approval of the community and may require a higher approval threshold than typical bylaw amendments (for example, a supermajority vote).
- 30 **8. Post-Transition IANA (PTI)**
- 31 The CWG-Stewardship Final Proposal contemplates the formation of a PTI as a new legal entity. PTI will have ICANN as its sole member and PTI will therefore be a controlled affiliate of ICANN. As a result, the ICANN Bylaws will need to include governance provisions related to PTI, in particular as it relates to ICANN’s role as the sole member of PTI.

# Annex 14 – Meeting NTIA’s Criteria for the IANA Stewardship Transition

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- 1 On March 14, 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition stewardship of key Internet Domain Name System functions to the global multistakeholder community. NTIA also asked ICANN to convene an inclusive, global discussion that involved the full range of stakeholders to collectively develop a proposal for the transition.
- 2 To guide this global discussion, NTIA provided ICANN with a clear framework for the transition proposal. The CCWG-Accountability has outlined how its Work Stream 1 Recommendations to enhance ICANN’s accountability meet these requirements below:
- 3 **Support and enhance the multistakeholder model**
  - Decentralizing power within ICANN through an Empowered Community.
  - Solidifying consultation processes between the ICANN Board and Empowered Community into the ICANN Bylaws.
  - Establishing a Community Forum, in which all are welcome to participate, to ensure that all voices and perspectives are heard before execution of a Community Power.
  - Decision-making based on consensus.
  - Enhancing ICANN’s appeals mechanisms and binding arbitration processes to be more accessible and transparent.
  - Protecting representation of global public interest by engraving it into ICANN’s Mission, Commitments and Core Values; now considered a “Fundamental Bylaw.”
  - Ensuring that ICANN Board Directors can be held accountable to the Empowered Community through recall mechanisms.

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- 4 **Maintain the security, stability, and resiliency of the Internet DNS**
  - Accountability measures do not affect any operational activities of ICANN which could directly or indirectly affect the security, stability, and resiliency of the Internet DNS.
  - Maintain ICANN’s Bylaws commitment to the security, stability, and resiliency of the Internet DNS.
  - Binding IRP that allows users or the Empowered Community to challenge ICANN if it is not operating as per its Mission and Bylaws.
  - Revising ICANN’s Mission, Commitments and Core Values to prevent “mission creep” or expansion of the Mission beyond its original goals.
  - Implementing Fundamental Bylaws that require a higher threshold for approval by the Board.

- Accountability measures that require Empowered Community approval of changes to Fundamental Bylaws.
  - Accountability measures that allow the Empowered Community to reject Standard Bylaws changes that could affect security, stability, and resiliency of the Internet DNS.
  - Accountability measures which allow the Empowered Community to reject budgets and strategic/operating plans which could affect security, stability, and resiliency of the Internet while ensuring the protection of the Post-Transition IANA Functions Budget and the availability of a caretaker budget for ICANN activities.
  - Accountability measures which allow the Empowered Community to remove the Board if its actions threaten the security, stability, and resiliency of the Internet.
  - Bylaws changes which can require the review of Post-Transition IANA operations.
  - Bylaws changes which provide for the separation of Post-Transition IANA and the reallocation of IANA functions if the actions or inactions of Post-Transition IANA are threatening the security, stability, and resiliency of the Internet.
  - Accountability measures that allow the Empowered Community to force ICANN to accept IANA Function Review recommendations and the separation of Post-Transition IANA.
  - Reviews which will ensure the components of the community effectively represent the views of their stakeholders.
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5 **Meet the needs and expectation of the global customers and partners of the IANA services**

- Accountability recommendations implement all the requirements of the CWG-Stewardship.
  - Accountability recommendations do not affect ICANN’s day-to-day operational or policy development processes.
  - Accountability requirements allow for multiple paths to resolve issues before using Community Powers.
  - Legally enforceable powers.
  - Revising ICANN’s Mission, Commitments and Core Values to prevent “mission creep” or expansion of the mission beyond its original goals.
  - Adoption of stronger commitments to respect Human Rights by ICANN.
  - Effective accountability powers which are open to all parts of the community and require action by the Empowered Community.
  - Appeals mechanisms to be reviewed and improved. The Independent Review Process is strengthened by binding ICANN to IRP outcomes and by being more accessible to the community. The CCWG-Accountability also makes recommendations to have a more effective and transparent Reconsideration process.
  - Maintaining Bylaw Article XVIII, which states that ICANN has its principal office in Los Angeles, California, USA.
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6 Maintain the openness of the Internet

- Executing “stress tests” to assess the sufficiency of existing and proposed accountability mechanisms available to the ICANN community against plausible and problematic scenarios.
  - Establishing a public Community Forum to ensure that all voices and perspectives are heard before execution of a Community Power.
  - Establishing later commitments to:
    - Improving the accountability of ICANN’s Supporting Organizations and Advisory Committees.
    - Reviewing and updating ICANN’s Documentary Information Disclosure and Whistleblower policies.
    - Enhancing ICANN’s diversity standards.
    - Improving staff accountability.
  - Reinforcing ICANN’s commitment to respect Human Rights in the ICANN Bylaws.
  - Preserving policies of open participation in ICANN’s Supporting Organizations and Advisory Committees.
- 

7 NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution

- To the extent the Government Advisory Committee (GAC) wishes to participate in decision-making by the Empowered Community, which the GAC has the flexibility to determine, it would be one of five Decisional Participants. In addition, the GAC will not participate as a decision-maker in community deliberations involving a challenge to the Board’s implementation of GAC consensus advice. This “carve out”, combined with the safeguards in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18), leads the CCWG-Accountability to believe that this NTIA requirement is met, even when considering the increased threshold from 50 to 60% for the Board to reject GAC consensus advice.
  - Enabling all interested stakeholders to join consultations through SOs and ACs or through the Community Forum.
  - Establishing a later commitment to investigating options for increasing the transparency of ICANN’s relationships with governments.
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# Annex 15 – Stress Testing

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## 1. Overview

- 1 An essential part of the CCWG-Accountability Charter calls for stress testing to evaluate proposed accountability enhancements.
- 2 ‘Stress Testing’ is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. In the financial industry for example ‘stress testing’ is routinely run to evaluate the strength of institutions.
- 3 The CCWG-Accountability Charter calls for stress testing of accountability enhancements in Work Streams 1 and 2. Among the deliverables listed in the charter is the following:

*Identification of contingencies to be considered in the stress tests: Review of possible solutions for each Work Stream including stress tests against identified contingencies.*

- 4 The purpose of the stress tests was to determine the stability of ICANN in the event of consequences and/or vulnerabilities, and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community.
- 5 **The CCWG-Accountability ran a total of 37 Stress Test scenarios.**

## 2. Purpose and Methodology

### 6 **Methodology**

- 7 The CCWG-Accountability considered the following methodology for stress tests:
  - Analyze potential weaknesses and risks.
  - Analyze existing accountability mechanisms and their robustness.
  - Analyze additions and modifications to accountability mechanisms.
  - Describe how the proposed accountability measures would mitigate the risk of contingencies and enable the community to challenge ICANN actions taken in response to the contingencies.
- 8 The CCWG-Accountability Stress Test Work Party documented contingencies identified in prior public comment rounds. The Stress Test Work Party then prepared a draft document showing how these stress tests are useful in evaluating existing and proposed accountability measures.
- 9 The exercise of applying stress tests identified changes to the current ICANN Articles of Incorporation and Bylaws that might be necessary to enable the CCWG-Accountability to evaluate proposed accountability mechanisms as adequate to meet the challenges identified.

### 10 **Purpose**

- 11 The purpose of the stress tests was to determine the stability of ICANN in the event of consequences and/or vulnerabilities, and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community.
- 12 The CCWG-Accountability Charter does not ask that probability estimates be assigned for contingencies. Probabilities are not needed to determine whether the community has adequate means to challenge ICANN's reactions to the contingency.
- 13 In its initial phases of work, the CCWG-Accountability gathered an [inventory](#) of contingencies identified in prior public comments. The Work Team responsible for this then consolidated the inventory into five 'stress test categories' as listed below, and prepared draft documents showing how these stress tests are useful to evaluate ICANN's existing, and CCWG-Accountability's proposed, accountability measures.

### 3. Stress Test Categories

#### 14 I. Financial Crisis or Insolvency (Stress Tests #5, 6, 7, 8 and 9)

- 15 **Scenario:** ICANN becomes fiscally insolvent, and lacks the resources to adequately meet its obligations. This could result from a variety of causes, including financial crisis specific to the Domain Name industry, or the general global economy. It could also result from a legal judgment against ICANN, fraud or theft of funds, or technical evolution that makes Domain Name registrations obsolete.

#### 16 II. Failure To Meet Operational Expectations (#1, 2, 11, 17, and 21)

- 17 **Scenario:** ICANN fails to process change or delegation requests to the IANA Root Zone, or executes a change or delegation despite objections of stakeholders, such as those defined as '[Significantly Interested Parties](#)'.

#### 18 III. Legal/Legislative Action (#3, 4, 19 and 20)

- 19 **Scenario:** ICANN is the subject of litigation under existing or future policies, legislation, or regulation. ICANN attempts to delegate a new TLD, or re-delegate a non-compliant existing TLD, but is blocked by legal action.

#### 20 IV. Failure Of Accountability (#10, 12, 13, 16, 18, 22, 23, 24 and 26)

- 21 **Scenario:** Actions (or expenditure of resources) by one or more ICANN Board Directors, the President and CEO, or other Staff, are contrary to ICANN's Mission or Bylaws. ICANN is "captured" by one stakeholder segment, including governments via the GAC, which either is able to drive its agenda on all other stakeholders, or abuse accountability mechanisms to prevent all other stakeholders from advancing their interests (veto).

#### 22 V. Failure Of Accountability To External Stakeholders (#14, 15 and 25)

- 23 **Scenario:** ICANN modifies its structure to avoid obligations to external stakeholders, such as terminating the Affirmation of Commitments, terminating its presence in a jurisdiction where it faces legal action, or moving contracts or contracting entities to a favorable jurisdiction. ICANN delegates, subcontracts or otherwise, abdicates its obligations to a third party in a manner that is

inconsistent with its Bylaws or otherwise not subject to accountability. ICANN merges with or is acquired by an unaccountable third party.

#### 24 **Stress Tests Suggested by NTIA**

25 The CCWG-Accountability added four stress test items that were suggested by NTIA in Secretary Larry Strickling's [statement](#) issued on 16 June 2015:

- **NTIA-1:** Test preservation of the multistakeholder model if individual ICANN Supporting Organizations and/or Advisory Committees choose not to be Decisional Participants in the Empowered Community.
- **NTIA-2:** Address the potential risk of internal capture. ST 12 and 13 partly address capture by external parties, but not for capture by internal parties in a Supporting Organization and/or Advisory Committee.
- **NTIA-3:** Barriers to entry for new participants.
- **NTIA-4:** Unintended consequences of “operationalizing” groups that to date have been advisory in nature (e.g. Governmental Advisory Committee).

#### 26 **Stress Tests Related to Transition of the IANA Naming Functions Contract**

27 Note that several stress tests can specifically apply to the work of the CWG-Stewardship regarding transition of the IANA naming functions contract (see Stress Tests #1 & 2, 11, 17, 19, 20, 21, 25).

28 Across all of the Stress Test categories, this exercise demonstrates that CCWG-Accountability's Work Stream 1 recommendations significantly enhance the community's ability to hold the ICANN's Board and management accountable, relative to present accountability measures. For Stress Tests that explore risks of “capture” of an Advisory Committee or Supporting Organization, the proposed Community Powers preserve the ability for aggrieved parties to challenge and block ICANN actions based on inappropriate Advisory Committee or Supporting Organization behavior.

#### 29 **Stress Test #21 to be addressed by ccNSO**

30 Stress Test #21, regarding appeals of country code top-level domains revocations and assignments, has not been adequately addressed in either the CWG-Stewardship or CCWG-Accountability proposals. Instead, the Country Code Naming Related Functions is undertaking policy development work pursuant to the Framework of Interpretation approved in 2014.

## 4. Outcomes of Stress Testing

31 The following section gives a short overview of the stress test scenarios and outlines whether existing accountability measures and proposed accountability measures are adequate to mitigate the potential risks and enable the community to challenge ICANN actions taken in response to the scenarios.





## Stress test category I: Financial Crisis or Insolvency

<p>32 <b>Stress Test #5:</b> Domain industry financial crisis.</p> <p>33 <b>Stress Test #6:</b> General financial crisis.</p> <p>34 <b>Stress Test #7:</b> Litigation arising from private contract, e.g., breach of contract.</p> <p>35 <b>Stress Test #8:</b> Technology competing with DNS.</p>	
<p>36 <b>Consequence(s):</b> Significant reduction in domain sales generated revenues and significant increase in registrar and registry costs, threatening ICANN's ability to operate; loss affecting reserves sufficient to threaten business continuity.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>37 ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community.</p> <p>38 The community has input in ICANN's budgeting and the Strategic Plan.</p> <p>39 Registrars must approve ICANN's variable registrar fees. If not, registry operators pay the fees.</p> <p>40 ICANN's reserve fund could support operations in a period of reduced revenue. The reserve fund is independently reviewed periodically.</p>	<p>41 One proposed measure would empower the community to veto ICANN's proposed operating plan and annual budget. This measure enables the community to block a proposal by ICANN to increase its revenues by adding fees on registrars, registries, and/or registrants.</p> <p>42 Another proposed measure is community challenge to a Board decision using a reconsideration request and/or referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a revenue or expenditure decision, the new IRP could reverse that decision.</p>
<p><b>CONCLUSIONS:</b></p> <p>43 Existing measures would be adequate, unless the revenue loss was extreme and sustained.</p>	<p>44 Proposed measures are helpful, but might not be adequate if revenue loss was extreme and sustained.</p>

45 <b>Stress Test #9:</b> Major corruption or fraud.	
46 <b>Consequence(s):</b> Major impact on corporate reputation, significant litigation and loss of reserves.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>47 ICANN has an annual independent audit that includes testing of internal controls designed to prevent fraud and corruption.</p> <p>48 ICANN maintains an anonymous hotline for employees to report suspected fraud.</p> <p>49 ICANN Board can dismiss the CEO and/or executives responsible.</p> <p>50 The community has no ability to force the Board to report or take action against suspected corruption or fraud.</p>	<p>51 One proposed measure is to empower the community to force ICANN's Board to consider a recommendation from an Accountability and Transparency Review Team (ATRT). An ATRT could make recommendations to avoid conflicts of interest. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>52 Another proposed measure would empower the community to veto ICANN's proposed annual budget. This measure enables blocking a budget proposal that is tainted by corruption or fraud.</p> <p>53 If ICANN's Board were involved, or if the Board did not act decisively in preventing corruption or fraud (e.g., by enforcing internal controls or policies), a proposed measure empowers the community to remove individual directors or recall the entire Board.</p>
<p><b>CONCLUSIONS:</b></p> <p>54 Existing measures would not be adequate if litigation costs or losses were extreme and sustained.</p>	<p>55 Proposed measures are helpful, but might not be adequate if litigation costs and losses were extreme and sustained.</p>

## 7.6 Stress test category II: Failure to Meet Operational Expectations

56	<b>Stress Test #1:</b> Change authority for the root zone ceases to function, in part or in whole.		
57	<b>Stress Test #2:</b> Delegation authority for the root zone ceases to function, in part or in whole.		
58	<b>Consequence(s):</b> Interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.		
EXISTING ACCOUNTABILITY MEASURES		PROPOSED ACCOUNTABILITY MEASURES	
59	Under the present IANA functions contract, NTIA can revoke ICANN's authority to perform IANA functions and re-assign this role to different entity/entities.	61	The CWG-Stewardship proposal includes various escalation procedures to prevent degradation of service, as well as a framework (operational) for the transition of the IANA function.
60	After NTIA relinquishes the IANA functions contract, this measure will no longer be available.	62	The CWG-Stewardship proposes that IANA naming functions be legally transferred to a new Post-Transition IANA entity (PTI) that would be an affiliate controlled by ICANN.
		63	The CWG-Stewardship proposes a multistakeholder IANA Function Review (IFR) to conduct reviews of PTI. Results of IFR are not prescribed or restricted and could include recommendations to initiate a separation process which could result in termination or non-renewal of the IANA Functions Contract with PTI, among other actions.
		64	The CWG-Stewardship proposes the ability for the multistakeholder community to require, if necessary and after other escalation mechanisms and methods have been exhausted, the selection of a new operator for the IANA functions.
		65	Suggestions for Work Stream 2: Require annual external security audits and publication of results, and require certification per international standards (ISO 27001) and publication of results.

<p><b>CONCLUSIONS:</b></p> <p>66 Existing measures would be inadequate after NTIA terminates the IANA contract.</p>	<p>67 Proposed measures are, in combination, adequate to mitigate this contingency.</p>
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68 <b>Stress Test #11:</b> Compromise of credentials.	
69 <b>Consequence(s):</b> Major impact on corporate reputation, significant loss of authentication and/or authorization capacities.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>70 Regarding compromise of internal systems:</p> <p>71 Based upon experience of the recent security breach, it is not apparent how the community holds ICANN management accountable for implementation of adopted security procedures.</p> <p>72 It also appears that the community cannot force ICANN to conduct an after-action report on a security incident and reveal that report.</p> <p>73 Regarding DNS security:</p> <p>74 Beyond operating procedures, there are credentials employed in DNSSEC.</p> <p>75 ICANN annually seeks SysTrust Certification for its role as the Root Zone KSK manager.</p> <p>76 The IANA Department has achieved EFQM Committed to Excellence certification for its Business Excellence activities.</p> <p>77 Under C.5.3 of the IANA Functions Contract, ICANN has undergone annual independent audits of its security provisions for the IANA functions.</p>	<p>78 Regarding compromise of internal systems:</p> <p>79 The proposed IRP measure could challenge ICANN's Board or management for any action or inaction that conflicts with Bylaws. An IRP challenge might therefore be able to force ICANN to conduct an after-action report and disclose it to the community.</p> <p>80 Through the IRP measure, the community might also be able to force ICANN management to execute its stated security procedures for employees and contractors.</p> <p>81 Regarding DNS security:</p> <p>82 One proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an Affirmation of Commitments Review such as Security Stability and Resiliency. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>83 A proposed Bylaws change would require ICANN's Board to respond to formal advice from advisory committees such as SSAC and RSSAC. If the Board took a decision to reject or only partially accept formal AC advice, the community could challenge that Board decision with an IRP.</p> <p>84 Suggestions for Work Stream 2:</p> <p>85 · Require annual external security audits and publication of results.</p> <p>86 · Require certification per standards (ISO 27001) and publication of results.</p>
CONCLUSIONS:	
87 Existing measures would not be adequate.	88 Proposed measures, in combination, would

	be helpful to mitigate effects of this scenario. Work Stream 2 suggestions could add risk prevention measures.
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89 **Stress Test #17:** ICANN attempts to add a new top-level domain in spite of security and stability concerns expressed by the technical community or other stakeholder groups.

90 **Consequence(s):** DNS security and stability could be undermined, and ICANN actions could impose costs and risks upon external parties.

EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
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<p>91 In 2013-14, the community demonstrated that it could eventually prod ICANN management to attend to risks identified by SSAC. For example: dotless domains (SAC 053); security certificates and name collisions such as .mail and .home (SAC 057)</p> <p>92 NTIA presently gives clerical approval for each delegation to indicate that ICANN has followed its processes. NTIA could delay a delegation if it finds that ICANN has not followed its processes. It is not clear if that would/could have been a finding if ICANN attempted to delegate a new TLD such as .mail or .home.</p>	<p>93 One proposed measure is to empower the community to force ICANN’s Board to consider recommendations from an Affirmation of Commitments Review such as a Review of Security, Stability, and Resiliency. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>94 A proposed Bylaws change would require ICANN Board to respond to formal advice from advisory committees such as SSAC and RSSAC. If the Board took a decision to reject or only partially accept formal AC advice, the community could challenge that Board decision with an IRP.</p>
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<p><b>CONCLUSIONS:</b></p> <p>95 Existing measures were adequate to mitigate the risks of this scenario.</p>	<p>96 Proposed measures enhance community’s power to mitigate the risks of this scenario.</p>
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<p>97 <b>Stress Test #21:</b> A government official demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD manager.</p> <p>98 However, the IANA functions manager is unable to document voluntary and specific consent for the revocation from the incumbent ccTLD manager. Also, the government official demands that ICANN assign management responsibility for a ccTLD to a designated manager.</p> <p>99 But the IANA functions manager does not document that: significantly interested parties agree; that other stakeholders had a voice in selection; the designated manager has demonstrated required capabilities; there are not objections of many significantly interested parties.</p> <p>100 This stress test examines the community’s ability to hold ICANN accountable to follow established policies. It does not deal with the adequacy of policies in place.</p>	
<p>101 <b>Consequence(s):</b> Faced with this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>102 Under the present IANA contract with NTIA, the IANA Department issues a boiler-plate report to the ICANN Board, which approves this on the Consent Agenda and forwards to NTIA, which relies on the Board’s certification and approves the revocation, delegation or transfer.</p> <p>103 There is presently no mechanism for the incumbent ccTLD Manager or the community to challenge ICANN’s certification that process was followed properly.</p> <p>104 See GAC Principles for delegation and administration of ccTLDs. GAC Advice published in 2000 and updated in 2005 specifically referenced to Sections 1.2 &amp; 7.1.</p> <p>105 See Framework of Interpretation, 20-Oct-2014.</p>	<p>106 From the CWG-Stewardship final proposal: “CWG-Stewardship recommends not including any appeal mechanism that would apply to ccTLD delegations and re-delegations in the IANA Stewardship Transition proposal.”</p> <p>107 From CWG-Stewardship co-chair correspondence on 15-Apr-2015: “As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes.”</p> <p>108 Regarding CCWG-Accountability proposed measures:</p> <p>109 One proposed CCWG-Accountability measure could give the community standing to request Reconsideration of management’s decision to certify the ccTLD change. Would require a standard of review that is more specific than amended ICANN Mission, Commitments and Core Values.</p> <p>110 Another proposed CCWG-Accountability mechanism is community challenge to a Board decision, referring it to an Independent Review Panel (IRP) with the</p>

	<p>power to issue a binding decision. If ICANN took action to revoke or assign management responsibility for a ccTLD, the IRP mechanism might be enabled to review that decision. Would require a standard of review.</p>
<p><b>CONCLUSIONS:</b>                  111 Existing measures would not be adequate.</p>	<p>112 Proposed measures do not adequately empower the community to address this scenario. ccNSO is developing policy pursuant to the Framework of Interpretation.</p>



## 7.7 Stress test category III: Legal/Legislative Action

113 <b>Stress Test #3:</b> Litigation arising from existing public policy, e.g., antitrust suit. In response, ICANN Board would decide whether to litigate, concede, settle, etc.	
114 <b>Consequence(s):</b> Significant interference with existing policies and/or policy development relating to relevant activities.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>115 The community could develop new policies that respond to litigation challenges.</p> <p>116 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use the IRP.</p> <p>117 Reconsideration looks at process but not the substance of a decision.</p> <p>118 ICANN must follow orders from courts of competent jurisdiction.</p>	<p>119 After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>120 The community could develop new policies that respond to litigation challenges.</p> <p>121 Another measure would give the community standing to file for Reconsideration or file an IRP challenging ICANN action or inaction that is inconsistent with the Articles, Bylaws (including Mission, Commitments and Core Values) and ICANN's established policies.</p> <p>122 However, it is highly unlikely that Reconsideration or an IRP could be used by the community to reopen a settlement reached with a third party or cause ICANN to act contrary to the decision of a court or regulator.</p> <p>123 Note also that generally the community will not be able to use an IRP to reopen matters that are within the core powers and fiduciary judgment of the ICANN Board.</p> <p>124 An Advisory Committee or Affirmation of Commitments review team could develop recommendations to address this scenario. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
CONCLUSIONS:	
125 Existing measures are inadequate.	126 Proposed measures would help the community hold ICANN accountable, but might not be adequate to stop interference with ICANN policies.



<p>127 <b>Stress Test #4:</b> New regulations or legislation.</p> <p>128 For example, a government could cite anti-trust or consumer protection laws and find unlawful some rules that ICANN imposes on TLDs. That government could impose fines on ICANN, withdraw from the GAC, and/or force ISPS to use a different root, thereby fragmenting the Internet.</p> <p>129 In response, ICANN’s Board would decide whether to litigate, concede, settle, etc.</p>	
<p>130 <b>Consequence(s):</b> Significant interference with existing policies and/or policy development relating to relevant activities.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>131 The community could develop new policies that respond to new regulations.</p> <p>132 An ICANN Board decision on how to respond to the regulation (litigate or change policy/implementation) could not be challenged by the community at-large, which lacks standing to use the IRP.</p> <p>133 Reconsideration looks at the process but not the substance of a decision.</p> <p>134 ICANN must follow orders from courts of competent jurisdiction.</p>	<p>135 After ICANN’s Board responded to the regulation (litigate or change policy/implementation), the community would have several response options:</p> <p>136 The community could develop new policies that respond to the regulation.</p> <p>137 Another measure would give the community standing to file for Reconsideration or file an IRP challenging ICANN action or inaction that is inconsistent with the Articles, Bylaws, and ICANN’s established policies. However, it is highly unlikely that Reconsideration or an IRP could be used by the community to cause ICANN to act contrary to the decision of a court or regulator. Note also that generally the community will not be able to use an IRP to reopen matters that are within the core powers and fiduciary judgment of the ICANN Board.</p> <p>138 An Advisory Committee or Affirmation of Commitments review team could develop recommendations to address this scenario. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
CONCLUSIONS:	
<p>139 Existing measures are inadequate.</p>	<p>140 Proposed measures would be an improvement but might still be inadequate.</p>

<p>141 <b>Stress Test #19:</b> ICANN attempts to re-delegate a gTLD because the registry operator is determined to be in breach of its contract, but the registry operator challenges the action and obtains an injunction from a national court.</p> <p>142 In response, the ICANN Board would decide whether to litigate, concede, settle, etc.</p>	
<p>143 <b>Consequence(s):</b> The entity charged with root zone maintenance could face the question of whether to follow ICANN's re-delegation request or to follow the court order.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>144 Under the present agreement with NTIA, the entity performing root zone maintenance is protected from lawsuits since it is publishing the root per a contract with the US Government.</p> <p>145 However, the IANA Stewardship Transition might result in root zone maintainer not operating under USG contract, so would not be protected from lawsuits.</p> <p>146 A separate consideration:</p> <p>147 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>148 Reconsideration looks at the process but not the substance of a decision.</p> <p>149 ICANN must follow orders from courts of competent jurisdiction.</p>	<p>150 ICANN could indemnify the root zone maintainer against liability, so long as the RZM was performing under the scope of contract and not in breach.</p> <p>151 While it would not protect the root zone maintainer from lawsuits, one proposed mechanism is community challenge of ICANN decision to re-delegate. This challenge would take the form of a Reconsideration or IRP. However, it is highly unlikely that Reconsideration or an IRP could be used by the community to reopen a settlement reached with a third party or cause ICANN to act contrary to the decision of a court or regulator. Note also that generally the community will not be able to use an IRP to reopen matters that are within the core powers and fiduciary judgment of the ICANN Board.</p> <p>152 After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the decision could be challenged via Reconsideration or IRP, based on the standard of review in the Bylaws. However, it is highly unlikely that the community could cause ICANN to reopen a settlement reached with a third party, or act contrary to a court decision.</p>
CONCLUSIONS:	
<p>153 Existing measures are not adequate.</p>	<p>154 Proposed measures are adequate to allow the community to challenge and reject</p>

	certain decisions of ICANN Board and management.
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<p>155 <b>Stress Test #20:</b> A court order is issued to block ICANN’s delegation of a new TLD, because of a complaint by existing TLD operators or other aggrieved parties.</p> <p>156 For example, an existing gTLD operator might sue to block delegation of a plural version of the existing string.</p> <p>157 In response, the ICANN Board would decide whether to litigate, concede, settle, etc.</p>	
<p>158 <b>Consequence(s):</b> ICANN’s decision about how to respond to court order could bring liability to ICANN and its contract parties.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>159 Before delegation, the community lacked standing to object to string similarity decisions. Reconsideration requests look at the process but not at substance of the decision.</p> <p>160 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use an IRP.</p> <p>161 Reconsideration looks at the process but not the substance of a decision.</p> <p>162 ICANN must follow orders from courts of competent jurisdiction, and may consider such factors as the as cost of litigation and insurance.</p>	<p>163 Preventive: At the conclusion of policy development, the community would have standing to challenge ICANN Board decisions about policy implementation.</p> <p>164 A future new gTLD Guidebook could give the community standing to file objections.</p> <p>165 Remedial: After the ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>166 One measure would give the community standing to file for Reconsideration or an IRP challenging ICANN action or inaction that is inconsistent with the Articles, Bylaws, and ICANN’s established policies. However, it is highly unlikely that Reconsideration or an IRP could be used by the community to reopen a settlement reached with a third party or cause ICANN to act contrary to the decision of a court or regulator. Note also that generally the community will not be able to use an IRP to reopen matters that are within the core powers and fiduciary judgment of the ICANN Board. The IRP could assess ICANN’s response to the court decision, although it would not alter the court’s decision.</p> <p>167 One proposed measure empowers the community to force ICANN’s Board to consider a recommendation arising from an Affirmation of Commitments Review – namely, Consumer Trust, Choice, and Competition. An ICANN Board decision</p>

	against those recommendations could be challenged with a Reconsideration and/or IRP.
<b>CONCLUSIONS:</b> 168 Existing measures would be inadequate.	169 Proposed measures would be an improvement but might still be inadequate.

## 7.8 Stress test category IV: Failure of Accountability

<p>170 <b>Stress Test #10:</b> Chairman, CEO, or Officer acting in a manner inconsistent with the organization’s mission.</p> <p>171 <b>Stress Test #24:</b> An incoming Chief Executive institutes a “strategic review” that arrives at a new, extended mission for ICANN. Having just hired the new CEO, the Board approves the new mission / strategy without community consensus.</p>	
<p>172 Consequence(s): The community ceases to see ICANN as the community’s mechanism for limited technical functions, and views ICANN as an independent, sui generis entity with its own agenda, not necessarily supported by the community. Ultimately, the community questions why ICANN’s original functions should remain controlled by a body that has acquired a much broader and less widely supported Mission. This creates reputational problems for ICANN that could contribute to capture risks.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>173 As long as NTIA controls the IANA functions contract, ICANN risks losing IANA functions if it were to expand its scope too broadly.</p> <p>174 The Community has some input in ICANN budgeting and the Strategic Plan, and could register objections to plans and spending on extending ICANN’s Mission.</p> <p>175 California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation. California’s Attorney General could intervene where misuse or misspending of substantial charitable assets is alleged.</p>	<p>176 One proposed measure empowers the community to veto ICANN’s proposed strategic plan or annual budget. This measure could block a proposal by ICANN to increase its expenditure on extending its Mission beyond what the community supported.</p> <p>177 Another proposed measure is empowering the community to challenge a Board decision, referring it to an IRP with the power to issue a binding decision, consistent with the fiduciary duties of the directors. The IRP decision would be based on a standard of review in the amended Mission Statement, including “ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission”.</p>
CONCLUSIONS:	
<p>178 Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>179 Proposed measures in combination are adequate.</p>



180 <b>Stress Test #12:</b> Capture of ICANN processes by one or several groups of stakeholders.	
181 <b>Consequence(s):</b> Major impact on trust in multistakeholder model, prejudice to other stakeholders.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>182 Regarding capture by governments, the GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN Bylaws (Article XI, Section 2, item 1j) nonetheless require the Board to try “to find a mutually acceptable solution”.</p> <p>183 The community has no standing to challenge a Board decision to accept GAC advice, thereby allowing GAC to capture some aspects of ICANN policy implementation.</p> <p>184 Regarding internal capture by stakeholders within an AC or SO, see Stress Test 33.</p>	<p>185 CCWG-Accountability proposals for community empowerment rely upon consensus among ACs/SOs, requiring a minimum threshold of support and no more than one AC/SO objecting. These consensus requirements are an effective prevention of capture by one or a few groups.</p> <p>186 Each AC/SO/SG may need improved processes for accountability, transparency, and participation that are helpful to prevent capture from those outside that community. These improvements may be explored in WS2.</p>
CONCLUSIONS:	
187 Existing measures would be inadequate.	188 Proposed measures would be adequate.

189 <b>Stress Test #13:</b> One or several stakeholders excessively rely on accountability mechanism to “paralyze” ICANN.	
190 <b>Consequence(s):</b> Major impact on corporate reputation, inability to take decisions, instability of governance bodies, loss of key staff.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>191 Current redress mechanisms might enable one stakeholder to block implementation of policies. But these mechanisms (IRP, Reconsideration, Ombudsman) are expensive and limited in scope of what can be reviewed.</p> <p>192 There are no present mechanisms for a ccTLD operator to challenge a revocation decision.</p>	<p>193 CCWG-Accountability proposals for community empowerment rely upon consensus among ACs/SOs participating in the Empowered Community as Decisional Participants, requiring a minimum threshold of support and no more than one AC/SO objecting. These consensus requirements are an effective prevention of paralysis by one AC/SO.</p> <p>194 Proposed CCWG-Accountability redress mechanisms (Reconsideration and IRP) are more accessible and affordable to individual stakeholders, increasing their ability to block implementation of policies and decisions. However, proposed Reconsideration and IRP enhancements include the ability to dismiss frivolous or abusive claims and to limit the duration of proceedings.</p>
CONCLUSIONS:	
195 Existing measures seem to be adequate.	196 Improved access to Reconsideration and IRP could allow individuals to impede ICANN processes, although this risk is mitigated by dismissal of frivolous or abusive claims.

<p>197 <b>Stress Test #16:</b> ICANN engages in programs not necessary to achieve its limited technical Mission. For example, ICANN uses fee revenue or reserve funds to expand its scope beyond its technical Mission, giving grants for external causes.</p>	
<p>198 <b>Consequence(s):</b> ICANN has the power to determine fees charged to TLD applicants, registries, registrars, and registrants, so it presents a large target for any Internet-related cause seeking funding sources.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>199 As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to expand scope without community support. But as a result of the IANA stewardship transition, ICANN would no longer need to limit its scope in order to retain the IANA contract with NTIA.</p> <p>200 The community was not aware of the ICANN Board’s secret resolution to initiate negotiations to create NetMundial. There was no apparent way for the community to challenge/reverse this decision.</p> <p>201 The community has input in ICANN budgeting and the Strategic Plan.</p> <p>202 Registrars must approve ICANN’s variable registrar fees, though Registrars do not view this as an accountability measure.</p> <p>203 California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation. California’s Attorney General could intervene where misuse or mispending of substantial charitable assets is alleged.</p>	<p>204 One proposed measure is empowering the community to veto ICANN’s proposed strategic plan and budget. This measure could block a proposal by ICANN to increase its expenditure on initiatives the community believed were beyond ICANN’s limited Mission. However, the entire ICANN budget would have to be rejected since there is no proposal for line-item veto.</p> <p>205 Another proposed mechanism is a challenge to a Board decision, made by an aggrieved party or the community as a whole. This would refer the matter to an IRP with the power to issue a binding decision. If ICANN made a commitment or expenditure outside the annual budget process, the IRP mechanism enables reversal of that decision.</p> <p>206 Another proposal is to amend ICANN Bylaws to prevent the organization from expanding its scope beyond ICANN’s amended Mission, Commitments and Core Values.</p> <p>207 If ICANN’s Board proposed to amend/remove these Bylaws provisions, another measure would empower the community to veto a proposed Standard Bylaws change. For Fundamental Bylaws or the Articles of Incorporation, the Board would need to adopt changes by a 3/4 supermajority, and the community must approve the changes adopted by the Board before they could become legally effective.</p>
<p><b>CONCLUSIONS:</b></p>	

208 Existing measures are inadequate.	209 Proposed measures in combination may be adequate.
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210 <b>Stress Test #18:</b> Governments in ICANN’s Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s Board.	
211 <b>Consequence(s):</b> Under current Bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory Committee advice.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>212 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>213 Today, GAC adopts formal advice according to its Operating Principle 47: “<i>consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</i>”<sup>[1]</sup></p> <p>214 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.</p> <p>215 The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.</p>	<p>216 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where Governmental Advisory Committee advice was supported by full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</p> <p>217 The proposed accountability measure recognizes that the decision not to follow GAC consensus advice would require a 60% majority of the ICANN Board.</p> <p>218 The Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.</p> <p>219 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the Governmental Advisory Committee could specify how objections are raised and considered.</p>
CONCLUSIONS:	
220 Existing measures are inadequate.	221 Proposed measures are adequate.

222 **Stress Test #22:** ICANN Board fails to comply with Bylaws and/or refuses to accept the

<sup>1</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

decision of a redress mechanism constituted under the Bylaws.	
223 <b>Consequence(s):</b> Community loses confidence in multistakeholder structures to govern ICANN.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>224 As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to ignore Bylaws or an IRP decision. But as a result of the IANA Stewardship Transition, ICANN would no longer need to follow its Bylaws in order to retain the IANA contract with NTIA.</p> <p>225 Aggrieved parties can ask for Reconsideration of Board decisions, but this is currently limited to questions of whether process was followed.</p> <p>226 Aggrieved parties can file an IRP, but decisions of the panel are not binding on ICANN.</p> <p>227 California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation. California’s Attorney General could intervene where misuse or mispending of substantial charitable assets is alleged.</p>	<p>228 One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged.</p> <p>229 Another proposed measure empowers the community to force ICANN’s Board to consider a recommendation arising from an Affirmation of Commitments Review such as an Accountability and Transparency Review. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>230 One proposed measure is empowering the community to challenge a Board decision, referring it to an IRP with the power to issue a binding decision. If ICANN failed to comply with its Articles of Incorporation, Bylaws or policies, the proposed IRP enables a reversal of that decision.</p> <p>231 If the ICANN Board were to ignore binding IRP decisions, the Empowered Community could seek enforcement in any court respecting international arbitration results.</p> <p>232 Another proposed measure empowers the community to recall the entire ICANN Board.</p>
<p><b>CONCLUSIONS:</b></p> <p>233 Existing measures are inadequate.</p>	<p>234 Proposed measures in combination are adequate because the community has power to recall the Board.</p>

<p>235 <b>Stress Test #23:</b> ICANN uses RAA or Registry contracts to impose requirements on third parties, outside the scope of ICANN Mission. (e.g. registrant obligations.)</p> <p>236 Affected third parties, not being contracted to ICANN, have no effective recourse.</p> <p>237 Contracted parties, not affected by the requirements, may choose not to use their ability to</p>
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<p>challenge ICANN’s decision.</p> <p>238 This issue occurs in policy development, implementation, and compliance enforcement.</p>	
<p>239 <b>Consequence(s):</b> ICANN may be seen as a monopoly leveraging power in one market (domain names) into adjacent markets.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>240 During policy development, affected third parties may participate and file comments.</p> <p>241 Affected third parties may file comments on proposed changes to registry and registrar contracts.</p> <p>242 Affected third parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies.</p> <p>243 Affected third parties (e.g. registrants and users) have no standing to challenge ICANN’s management and Board on how it has implemented approved policies.</p> <p>244 If ICANN changes its legal jurisdiction, that might reduce the ability of third parties to sue ICANN.</p>	<p>245 A proposed measure to empower an aggrieved party (e.g. registrants and users) to challenge a Board decision, referring it to an IRP with the power to issue a binding decision, based on standard for review in the amended Mission, Commitments and Core Values, or in established policies.</p> <p>246 Another proposed measure is empowering the community to challenge a Board decision, referring it to an IRP with the power to issue a binding decision.</p> <p>247 That IRP decision would be based on a standard of review in the amended Mission statement, including “ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission. ”</p>
<b>CONCLUSIONS:</b>	
<p>248 Existing measures are inadequate.</p>	<p>249 Proposed measures would be adequate.</p>

<p>250 <b>Stress Test #26:</b> During implementation of a properly approved policy, ICANN staff substitutes their preferences and creates processes that effectively change or negate the policy developed. Whether staff does so intentionally or unintentionally, the result is the same.</p>	
<p>251 Consequence(s): Staff capture of policy implementation undermines the legitimacy conferred upon ICANN by established community based policy development processes.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>252 The reconsideration review mechanism allows for appeal to the Board of staff actions that contradict established ICANN policies. However, reconsideration looks at the process but not the substance of a decision.</p> <p>253 An ICANN Board decision could not be challenged by the community at-large, which lacks standing to use the IRP.</p>	<p>254 A proposed measure would allow the Empowered Community to challenge a Board decision by reconsideration or referral to an IRP with the power to issue a binding decision. The standard of review would look at the revised ICANN Bylaws, including Core Values requiring "open, transparent and bottom-up, multistakeholder policy development processes".</p>
CONCLUSIONS:	
<p>255 Existing measures are inadequate.</p>	<p>256 Proposed measures would be adequate.</p>



## Stress test category V: Failure of Accountability to External Stakeholders

257 <b>Stress Test #14:</b> ICANN or NTIA chooses to terminate the Affirmation of Commitments.	
258 Consequence(s): ICANN would no longer be held to the Affirmation of Commitments, including the conduct of community reviews and required implementation of review team recommendations.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>259 The Affirmation of Commitments can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>260 As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the Affirmation of Commitments.</p> <p>261 But as a result of the IANA Stewardship Transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain the Affirmation of Commitments.</p> <p>262 Note: none of the proposed measures could prevent NTIA from canceling the Affirmation of Commitments.</p>	<p>263 One proposed mechanism would give the Empowered Community standing to challenge a Board decision by referral to an IRP with the power to issue a binding decision. If ICANN cancelled the Affirmation of Commitments, the IRP could enable reversal of that decision.</p> <p>264 Another proposed measure is to import Affirmation of Commitments provisions into the ICANN Bylaws, and dispense with the bilateral Affirmation of Commitments with NTIA. Bylaws would be amended to include Affirmation of Commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9.</p> <p>265 If ICANN’s Board proposed to amend the AoC commitments and reviews that were added to the Bylaws, another proposed measure would empower the community to veto that proposed Bylaws change.</p> <p>266 If any of the AoC commitments were designated as Fundamental Bylaws, changes would require approval by the Empowered Community.</p> <p>267</p>
CONCLUSIONS:	
268 Existing measures are inadequate after NTIA or ICANN terminates the IANA contract.	269 Proposed measures in combination are adequate.

<p>270 <b>Stress Test #15:</b> ICANN terminates its legal presence in a nation where Internet users or domain registrants are seeking legal remedies for ICANN’s failure to enforce contracts, or other actions.</p>	
<p>271 <b>Consequence(s):</b> Affected parties might be prevented from seeking legal redress for commissions or omissions by ICANN.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>272 As long as NTIA controls the IANA contract, ICANN could risk losing IANA functions if it were to move in order to avoid legal jurisdiction.</p> <p>273 Paragraph 8 of the Affirmation of Commitments requires ICANN to remain headquartered in the US, but the Affirmation of Commitments can be terminated by ICANN at any time.</p> <p>274 As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the Affirmation of Commitments.</p> <p>275 ICANN is incorporated as a California nonprofit public benefit corporation, and Article XVIII of ICANN Bylaws provides that ICANN’s “principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.”. But the ICANN Board alone can change the Articles and the Bylaws, and can approve a dissolution or merger of the corporation, and the community has no binding power to block the changes.</p>	<p>276 Under the Articles of Incorporation, ICANN has been formed as a California nonprofit public benefit corporation. Unless dissolved or merged into another entity, it will remain as such and will be subject to California law and regulatory oversight, regardless of where it maintains a physical presence.</p> <p>277 Article XVIII of ICANN Bylaws provides that ICANN’s “principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.”</p> <p>278 If ICANN’s Board proposed to amend the Articles of Incorporation or sell or otherwise dispose of all or substantially all of ICANN’s assets, the action would require supermajority Board approval (3/4) as well as approval by the Empowered Community.</p> <p>279 If Bylaws Article XVIII were designated as a Fundamental Bylaw, changes to ICANN’s principal office would similarly require supermajority Board approval (3/4) as well as approval by the Empowered Community.</p> <p>280 Any change to the Standard Bylaws could be vetoed by the Empowered Community.</p>
CONCLUSIONS:	
<p>281 Existing measures are inadequate once NTIA terminates IANA contract.</p>	<p>282 Proposed measures improve upon existing measures, and may be adequate.</p>

283 <b>Stress Test #25:</b> ICANN delegates or subcontracts its obligations under a future IANA functions operator agreement to a third party. Would also include ICANN merging with or allowing itself to be acquired by another organization.	
284 <b>Consequence(s):</b> Responsibility for fulfilling the IANA functions could go to a third party that was subject to national laws that interfered with its ability to execute IANA functions.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>285 The present IANA contract (link) at C.2.1 does not allow ICANN to sub-contract or outsource its responsibilities to a 3rd party without NTIA’s consent.</p> <p>286 NTIA could exert its control over ICANN’s decision as long as it held the IANA contract but would not be able to do so after it relinquishes the IANA contract.</p> <p>287 Nor would NTIA’s required principles for transition be relevant after transition occurred.</p>	<p>288 The CWG-Stewardship “recommends that an ICANN Fundamental Bylaw be created to define a separation process that can be triggered by a Special IFR if needed.” There is no allowance in the CWG-Stewardship proposal to allow ICANN to sub-contract or outsource its IANA responsibilities to a 3rd party other than to PTI. If a separation process were initiated a new IANA functions operator could be selected only with involvement of the empowered community.</p> <p>289 The CCWG-Accountability is proposing to empower the community to challenge a Board decision, referring it to an IRP with the power to issue a binding decision. If ICANN failed to follow Bylaws requirements to have the community define public interest, the IRP enables a reversal of that decision. The standard of review would look at the revised ICANN Bylaws, including Core Values requiring “open, transparent and bottom-up, multistakeholder policy development processes”.</p> <p>290 Note: This would not cover re-assignment of the Root Zone Maintainer role, which NTIA is addressing in a parallel process.</p>
<b>CONCLUSIONS:</b>	
291 Existing measures would not be adequate after NTIA relinquishes the IANA contract.	292 Proposed measures are adequate to allow the community to challenge ICANN decisions in this scenario.

- 293 After publication of the CCWG-Accountability first draft proposal, new stress tests were suggested in the CCWG-Accountability discussion list and in the public comments received. Below are new stress tests added for publication in the CCWG-Accountability's second draft proposal.
- 294 Stress Tests were suggested by a scenario that might give ultimate authority to a state-based American court and allow it to make binding and precedent setting decisions about the interpretation of ICANN's mission. Two stress tests (27 and 28) were designed for this scenario.

<p>295 <b>Stress Test #27:</b> Board refuses to follow community recommendation, triggering a “member” to sue ICANN in the California courts.</p> <p>296 For example, an ATRT (Accountability and Transparency Review Team) recommends a new policy for implementation but the ICANN Board decides to reject the recommendation.</p>	
<p>297 <b>Consequence(s):</b> Gives ultimate authority to an American court, allowing it to make binding and precedent setting decisions about the interpretation of ICANN’s mission.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>298 This scenario assumes that ICANN converts to a model where members acquire statutory rights to pursue relief in California courts.</p> <p>299 Member access to court relief is not available under ICANN’s present structure.</p>	<p>300 CCWG’s proposal does not create member status for the Empowered Community. The CCWG-Accountability proposal does not give any of the ACs or SOs the power to force ICANN’s Board to accept and implement the ATRT recommendation. This is intentional, since the ICANN Board could cite cost or feasibility in deciding not to implement part of a Review Team recommendation.</p> <p>301 If the ICANN Board refused to implement the ATRT recommendation, the Empowered Community could challenge the Board decision with an IRP. An IRP panel of 3 international arbitrators (not a Court) could hold that the ATRT recommendation does not conflict with “substantive limitations on the permissible scope of ICANN’s actions”. The IRP decision cancels the Board decision to reject the ATRT recommendation. Any court recognizing arbitration results could enforce the IRP decision.</p> <p>302 If the ICANN Board continued to ignore the IRP decision and court orders to enforce it, the community has 2 more options:</p> <p>303 The Empowered Community could recall the Board.</p> <p>304 The Empowered Community could block the very next budget or operating plan if it did not include the ATRT recommendation.</p>
CONCLUSIONS:	
<p>305 Not applicable to ICANN’s existing</p>	<p>306 If a court were asked to enforce an IRP</p>

<p>accountability measures.</p>	<p>ruling, it would examine whether IRP procedures were properly followed and whether those procedures comply with fundamental notions of due process, but the court would not interpret ICANN's mission. Proposed measures are therefore adequate.</p>
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<p>307 <b>Stress Test #28:</b> Board follows community recommendation, but is reversed by IRP decision, triggering a “member” to sue ICANN in California courts.</p> <p>308 For example, an ATRT (Accountability and Transparency Review Team) recommends a new policy for implementation. ICANN Board decides to accept the recommendation, believing that it does not conflict with ICANN’s limited Mission Statement in the amended Bylaws</p>	
<p>309 <b>Consequence(s):</b> Gives ultimate authority to an American court, allowing it to make binding and precedent setting decisions about the interpretation of ICANN’s mission.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>310 This scenario assumes that ICANN converts to a model where members acquire statutory rights to pursue relief in California courts.</p> <p>311 Member access to court relief is not available under ICANN’s present structure.</p>	<p>312 CCWG’s proposal does not create member status for the Empowered Community. An aggrieved party or the Empowered Community could challenge Board’s decision with an IRP. An IRP panel (not a court) could determine that the ATRT recommendation does conflict with “substantive limitations on the permissible scope of ICANN’s actions”. The IRP panel could thereby cancel the Board decision to accept and implement the ATRT recommendation.</p> <p>313 If the Board ignored the IRP ruling and continued to implement its earlier decision, parties to the IRP could ask courts to enforce the IRP decision. Judgments of the IRP Panel would be enforceable in any court that accepts international arbitration results.</p> <p>314 If the ICANN Board continued to ignore the IRP decision and court orders to enforce it, the community has 2 more options:</p> <p>315 The Empowered Community could recall the Board.</p> <p>316 The Empowered Community could block the very next budget or operating plan if it did not include the ATRT recommendation.</p>
CONCLUSIONS:	
<p>317 Not applicable to ICANN’s existing accountability measures.</p>	<p>318 If a court were asked to enforce an IRP ruling, it would examine whether IRP procedures were properly followed and whether those procedures comply with fundamental notions of due process, but the</p>

	court would not interpret ICANN's mission. Proposed measures are therefore adequate.
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319 Public commenters requested two additional stress tests regarding enforcement of contract provisions that exceed the limited mission of ICANN.

<p>320 <b>Stress Test #29:</b> (Similar to #23) ICANN strongly enforces the new gTLD registrar contract provision to investigate and respond to reports of abuse, resulting in terminations of some name registrations.</p> <p>321 ICANN also insists that legacy gTLD operators adopt the new gTLD contract on renewal.</p>	
<p>322 <b>Consequence(s):</b> ICANN’s enforcement of registry and registrar contract terms might be blocked by an IRP ruling citing Mission and Core Values.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>323 The GNSO could initiate a policy development process to define registrar obligations. A new Consensus Policy would apply to all Registry contracts and RAA.</p> <p>324 Affected registrants may file comments on the proposed gTLD contract renewals.</p> <p>325 Affected registrants could challenge ICANN’s termination decisions with Reconsideration or IRP, but could not cite Mission and Core Values, because the current IRP only considers whether ICANN followed process.</p>	<p>326 The GNSO could initiate a policy development process to define registrar obligations. A new Consensus Policy would apply to all Registry contracts and RAA.</p> <p>327 The proposed IRP allows any aggrieved party to challenge ICANN’s enforcement actions, resulting in a binding decision. An IRP challenge could assert that an RAA provision was not the result of consensus policy and/or violates ICANN’s Mission Statement, Commitments and Core Values in amended Bylaws.</p> <p>328 The new IRP standard of review would look at revised ICANN Bylaws, including Core Values requiring “open, transparent and bottom-up, multistakeholder policy development processes”.</p>
<p><b>CONCLUSIONS:</b></p> <p>329 Existing measures would not be adequate to challenge ICANN enforcement decision.</p>	<p>330 Proposed measures would be adequate to challenge ICANN enforcement actions, but it is unlikely that IRP panels would block enforcement of contract terms and consensus policies</p>

<p>331 <b>Stress Test #30:</b> (Similar to #23 and #29) ICANN terminates registrars for insufficient response to reports of copyright abuse on registered domains.</p>	
<p>332 <b>Consequence(s):</b> ICANN’s enforcement of registry and registrar contract terms might be blocked by an IRP ruling citing Mission and Core Values.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>333 The GNSO could initiate a policy development process to define registrar obligations. A new Consensus Policy would apply to all Registry contracts and RAA.</p> <p>334 Affected registrars could challenge ICANN’s termination decisions with Reconsideration or IRP, but could not cite Mission and Core Values, because the current IRP only considers whether ICANN followed process.</p> <p>335 Affected registrants and users have no standing to use IRP to challenge ICANN decision.</p>	<p>336 The GNSO could initiate a policy development process to define registrar obligations. A new Consensus Policy would apply to all Registry contracts and RAA.</p> <p>337 The proposed IRP allows any aggrieved party to challenge ICANN’s enforcement actions, resulting in a binding decision. An IRP challenge could assert that RAA provision was not the result of consensus policy and/or violates the Mission, Commitments and Core Values in amended Bylaws.</p> <p>338 The IRP standard of review would look at revised ICANN Bylaws, including Core Values requiring “open, transparent and bottom-up, multistakeholder policy development processes”.</p>
CONCLUSIONS:	
<p>339 Existing measures might be adequate for a registrar, but would not be adequate for a registrant to challenge ICANN enforcement decision.</p>	<p>340 Proposed measures would be adequate to challenge ICANN enforcement actions, but it is unlikely that IRP panels would block enforcement of contract terms and consensus policies</p>

341 Several individuals requested evaluation of a stress test scenario where the individual designated by an AC/SO failed to follow their AC/SO instructions when communicating AC/SO decisions for any of the Community Powers proposed by CCWG-Accountability.

342 <b>Stress Test #31:</b> “Rogue” voting, where an AC/SO vote on a community power is not exercised in accord with the express position of the AC/SO.	
343 <b>Consequence(s):</b> Decisions on exercising a community power would be challenged as invalid, and the integrity of decisions could be questioned more broadly.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
344 AC/SO community powers are not available under ICANN’s Bylaws.	<p>345 An AC/SO could develop internal processes to ensure that any vote communicated would match the AC/SO decision instructions.</p> <p>346 If an AC/SO vote communicator voted against the instructions of their AC/SO, the decision rules for Empowered Community could specify procedures to invalidate a vote:</p> <p>347 If any elected AC/SO officer is aware that the person designated to communicate the AC/SO vote did not follow AC/SO instructions, an AC/SO officer could publicize this issue to ICANN staff and to all other AC/SO communities.</p> <p>348 After notice, the results of the Empowered Community’s exercise of a Community Power would be set aside, pending correction of the problem by the AC/SO. Correction might involve giving more explicit instructions to the vote communicator, or replacing the person in that role.</p> <p>349 After the problem has been remedied, another round of decision would occur.</p>
<b>CONCLUSIONS:</b>	
350 Not applicable to ICANN’s existing accountability measures.	351 Proposed measures would be adequate to avoid “rogue voting” problems.

352 There are four stress test items suggested in NTIA Secretary Larry Strickling’s statement of 16-Jun-2015 ([link](#)):

353 **NTIA-1:** Test preservation of the multistakeholder model if individual ICANN ACs/SOs choose not to be Decisional Participants in the Empowered Community.

354 **NTIA-2:** Address the potential risk of internal capture. ST 12 and 13 partly address capture by external parties, but not for capture by internal parties in an AC/SO.

355 **NTIA-3:** Barriers to entry for new participants.

356 **NTIA-4:** Unintended consequences of “operationalizing” groups that to date have been advisory in nature (e.g. GAC)

Each of these NTIA stress tests is shown below.

<p>357 <b>Stress Test #32:</b> (NTIA-1) Several ACs/SOs choose not to be Decisional Participants in the Empowered Community that is responsible for exercising Community Powers (e.g., blocking budget, blocking strategic/operating plan, blocking changes to Bylaws, approving changes to Fundamental Bylaws, recalling Board members)</p>	
<p>358 <b>Consequence(s):</b> ICANN’s multistakeholder model would be in question if multiple stakeholders did not participate in Community Powers.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>359 AC/SO community powers are not available under ICANN’s Bylaws.</p>	<p>360 In the true spirit of ICANN’s multistakeholder model, CCWG proposes inviting all ACs/SOs to exercise Community Powers. The only restriction would be if the GAC decided to be a Decisional Participant in the Empowered Community, in which case it would not be able to participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge the ICANN Board’s implementation of GAC consensus advice. The GAC would, however, be able to participate in an advisory capacity in all other aspects of the escalation process.</p> <p>361 The SSAC and RSSAC said they don’t intend to be Decisional Participants in the Empowered Community. That does not remove these ACs from ICANN’s multistakeholder process. The SSAC and RSSAC would continue advising the Board and community on matters relevant to them. Other ACs/SOs can ask for SSAC/RSSAC</p>

	<p>advice before they exercise Community Powers.</p> <p>362 The SSAC and RSSAC could later decide to become Decisional Participants in the Empowered Community as set forth in the Bylaws, or request Bylaws amendments to enable this.</p> <p>363 If fewer than 3 ACs/SOs participate as Decisional Participants in an Empowered Community decision process, the minimum thresholds for consensus would not be reached.</p> <p>364</p>
<p><b>CONCLUSIONS:</b></p> <p>365 Not applicable to ICANN's existing accountability measures.</p>	<p>366 ICANN's multistakeholder model would be preserved, even if multiple ACs/SOs decided not to exercise the new community powers.</p>

<p>367 <b>Stress Test #33:</b> (NTIA-2) Participants in an AC/SO could attempt to capture an AC/SO, by arranging over-representation in a working group, in electing officers, or making a decision.</p>	
<p>368 <b>Consequence(s):</b> Internal capture, whether actual or perceived, would call into question ICANN’s credibility in applying the multistakeholder model.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>369 ICANN’s Bylaws require periodic reviews of each AC/SO, where protections against internal capture could be recommended for adoption.</p> <p>370 ACs/SOs can revise their charters and operating procedures if they see the need to protect against internal capture. However, capture might inhibit adoption of AC/SO charter amendments.</p> <p>371 If a ‘captured’ AC/SO sent advice /policy to the Board, it is not clear how disenfranchised AC/SO members could challenge the Board decision to follow that advice/policy.</p>	<p>372 ICANN’s Bylaws require periodic reviews of each AC/SO, where protections against internal capture could be recommended for adoption.</p> <p>373 ACs/SOs can revise their charters and operating procedures if they see a need to protect against internal capture. However, capture might inhibit adoption of AC/SO charter amendments.</p> <p>374 If a ‘captured’ AC/SO sent advice /policy to the Board, a disenfranchised AC/SO could challenge the Board decision to follow that advice/policy, using reconsideration or IRP. The standard of review would be ICANN’s Articles of Incorporation and amended Bylaws, including Core Values requiring “open, transparent and bottom-up, multistakeholder policy development processes”.</p>
CONCLUSIONS:	
<p>375 Existing accountability measures are not likely to be adequate.</p>	<p>376 Proposed accountability measures would be adequate, provided that the Bylaws requirement for open, transparent, bottom-up, multistakeholder process is interpreted by the Board and IRP panelists to include assessment of how decisions were reached in an AC or SO.</p>

<p>377 <b>Stress Test #34:</b> (NTIA-3) Stakeholders who attempt to join an ICANN AC/SO encounter barriers that discourage them from participating.</p>	
<p>378 <b>Consequence(s):</b> Barriers to entry, whether actual or perceived, would call into question ICANN’s credibility in applying the multistakeholder model.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>379 ICANN’s Bylaws require periodic reviews of each AC/SO, where barriers to entry could be assessed and could generate recommended changes.</p> <p>380 Affirmation of Commitments requires period reviews of Accountability and Transparency, including “(d) assessing the extent to which ICANN’s decisions are embraced, supported and accepted by the public and the Internet community;”</p> <p>381 ICANN’s Ombudsman might help new entrants to join ACs/SOs.</p>	<p>382 ICANN’s Bylaws require periodic reviews of each AC/SO, where barriers to entry could be assessed and could generate recommended changes.</p> <p>383 Affirmation of Commitments requires periodic reviews of Accountability and Transparency, including “(d) assessing the extent to which ICANN’s decisions are embraced, supported and accepted by the public and the Internet community;”</p> <p>384 ICANN’s Ombudsman might help new entrants to join ACs/SOs.</p> <p>385 CCWG proposes a new Core Value in ICANN’s Bylaws requiring “open, transparent and bottom-up, multistakeholder policy development processes”.</p> <p>386 This would be the standard of review for IRPs that could be brought by anyone encountering barriers to entry to an AC/SO.</p>
CONCLUSIONS:	
<p>387 Existing accountability reviews can help erode barriers to entry, though not in real-time.</p>	<p>388 Proposed changes to Core Values and IRP could provide faster solutions to barriers encountered by new entrants.</p>

<p>389 <b>Stress Test #35:</b> (NTIA-4) Unintended consequences of “operationalizing” groups that formerly only gave advice to the ICANN Board (for example, the GAC).</p>	
<p>390 <b>Consequence(s):</b> An AC that previously gave only advice on a narrow scope of issues could affect decisions on Community Powers that extend beyond that narrow scope.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>391 Advisory Committees (ACs) have no community powers or decisional rights under ICANN’s Bylaws.</p> <p>392 That said, ICANN has given significant deference to GAC advice in the new gTLD program, resulting in significant effects on operations for new gTLD registries and registrars.</p>	<p>393 In the true spirit of ICANN’s multistakeholder model, CCWG proposes inviting all ACs/SOs to participate in decisions about exercising community powers.</p> <p>394 All ACs can thereby expand beyond their present advisory roles. To address concerns that the GAC could gain undue influence over ICANN, CCWG notes proposed changes that reduce GAC’s ability to affect ICANN operations:</p> <p>395 Per Stress Test 18 and the proposed Bylaws change, the Board would be obligated to try to “find a mutually acceptable solution” for GAC consensus advice (i.e., approved “by general agreement in the absence of any formal objection”). Moreover, should the GAC decide to be a Decisional Participant in the Empowered Community, it would not be able to participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge the ICANN Board’s implementation of GAC consensus advice, although the GAC would be able to participate in an advisory capacity in all other aspects of the escalation process.</p> <p>396 Proposed Core Values require “open, transparent and bottom-up, multistakeholder policy development processes”. This would allow the community to challenge an ICANN decision to implement any GAC advice that was not supported by the bottom-up process.</p> <p>397 In Core Value #5, CCWG proposes adding that policy development must be “led by the private sector”.</p> <p>398 In Core Values, CCWG restricts ICANN’s</p>



	<p>scope of activities.</p> <p>399 The new IRP gives the community ability to overturn a Board decision to implement GAC advice that goes against the Mission and Core Values in the amended Bylaws. A carve-out is proposed for community decision-making, to avoid having the GAC block a community challenge to Board action based upon GAC advice.</p> <p>400 For the Affirmation of Commitments reviews, the GAC Chair would no longer approve/appoint review team members.</p>
<p><b>CONCLUSIONS:</b></p> <p>401 Existing accountability measures have already given Advisory Committees significant influence over ICANN operations.</p>	<p>402 Proposed accountability measures would treat ACs as multi-equal stakeholders in exercising Community Powers, while also reducing the GAC’s ability to affect ICANN operations.</p>

- 403 The ICANN Board sent a letter on 20-Jun-2015 with 156 questions regarding impact and implementation testing of CCWG proposals. ([link](#)) Two questions included requests for stress testing the CCWG proposal for a membership-based model:
- 404 What unintended consequences may arise from empowering (e.g., approval rights, etc.) entities/individuals who are not required to act in the best interest of ICANN (and who may have their own business, financial or personal interests), other members or the community as a whole and have stress tests been conducted for each of these consequences?
- 405 What are the risks associated with empowering members to bring lawsuits against ICANN, each other and other parties and have stress tests been conducted for reach of these situations?
- 406 Both scenarios are addressed in Stress Test 36:

<p>407 <b>Stress Test #36:</b> Unintended consequences arising from empowering entities/individuals who are not required to act in the best interest of ICANN (and who may have their own business, financial or personal interests), other members, or the community as a whole.</p>	
<p>408 <b>Consequence(s):</b> An entity could exercise statutory powers accorded to members under California law, and pursue legal actions that would harm interests of the ICANN community.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>409 ACs and SOs have no joint community powers or decisional rights under ICANN's Bylaws.</p> <p>410 ICANN's Bylaws do not recognize any members as defined under California Nonprofit Public Benefit Corporation law.</p>	<p>411 CCWG proposes that each AC and SO may participate in the decision process on whether to exercise an enumerated Community Power (except for the GAC, with respect to the exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice). No other individuals or entities could exercise these powers. Exercise of these powers requires consensus, which prevents any one AC/SO from advancing its interests against the interests of the broader community.</p> <p>412 CCWG proposes to have the Empowered Community be given the role of sole designator of ICANN's Directors and will have the ability to enforce directly or indirectly the Community Powers. A designator does not acquire all of the statutory powers of a member under California law.</p> <p>413 Only the Empowered Community would have legal status and statutory right of a designator and would be given rights under the Bylaws to exercise Community Powers. Consequently, legal action would only be brought if supported by the ACs and SOs participating in the Empowered Community, and a high threshold of consensus is required.</p> <p>414 Individuals and entities – including ACs and SOs – would not become designators and would not be directly given any rights under the Bylaws to exercise Community Powers. They could not acquire statutory rights given to members or designators under California</p>

	law.
<b>CONCLUSIONS:</b> 415 Not applicable to ICANN's existing accountability measures.	416 Proposed Empowered Community measures are adequate to avoid this scenario.

417 After publication of the CCWG-Accountability second draft proposal, one new stress test was suggested in public comments received. ELIG (a law firm) suggested stress testing on a “deadlock” over approving changes to Fundamental Bylaws, and blocking changes to regular Bylaws: “We believe that it would be helpful to also explain the details of the legislation procedures in case of a deadlock during the amendment/enactment of a Bylaw.” See Stress Test 37 below.

418 <b>Stress Test #37:</b> The Empowered Community blocks a Board-proposed change to a regular Bylaw, or withholds its approval of a Board-proposed change to a Fundamental Bylaw.	
419 <b>Consequence(s):</b> A “deadlock” between the ICANN Board and the Empowered Community, where the Board-proposed Bylaws change is not enacted.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>420 ICANN’s present Bylaws allow the Board alone to amend Bylaws: “the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.”</p> <p>421 There is no requirement for community consultation or public comment for Bylaws changes.</p> <p>422 There is no present power for the community to block or approve Bylaws changes.</p>	<p>423 The Empowered Community is intentionally given the power to block a Board-adopted change to a Standard Bylaw.</p> <p>424 In addition, the Empowered Community is intentionally given the power to withhold its approval of a Board-adopted change to a Fundamental Bylaw.</p> <p>425 Such outcomes might be characterized as “deadlock” by advocates of the Bylaws change. But this would reflect the consensus decision of ACs/SOs representing the community that ICANN is designed to serve.</p> <p>426 This outcome would motivate the Board to understand the concerns of the community over proposed Bylaws changes. The Board could then persuade the community that its concerns were unfounded, or modify its proposed Bylaws change to accommodate concerns expressed.</p>
CONCLUSIONS:	
427 Existing accountability mechanisms prevent “deadlock” because the community has no power to affect Board-proposed Bylaws changes.	428 Proposed community powers enable “deadlock” over Board-proposed Bylaws changes, but only if that is the consensus decision of the community.

# Appendix A – Documenting Process of Building Consensus

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- 01 The Supplemental Final Proposal on Work Stream 1 Recommendations was developed in a bottom-up, multistakeholder approach, which included multiple “readings” of each recommendation. Each draft was posted publicly and open to comment by CCWG-Accountability members and participants.
- 02 To finalize its report, the CCWG-Accountability established a structured process to ensure input was being accurately discussed and reflected, as appropriate. Step 1 consisted in circulating key discussion items to the list based on public comment received. Following a first reading held on a call, the CCWG-Accountability leadership would circulate conclusions of the first reading along with edits to prepare for the second reading. This process would conclude with the distribution of second reading conclusions. Additional readings and discussions were scheduled and continued on the list depending on difficulties in reaching consensus. Documents prepared for readings can be found [here](#).
- 03 Following the final reading and legal review, finalized recommendations were sent to the CCWG-Accountability for a 48-hour period to note any errors, comments, or statements for the record.
- 04 [The CCWG-Accountability is pleased to provide its Chartering Organizations with the enhancements to ICANN's accountability framework it has identified as essential to happen or be committed to before the IANA Stewardship Transition takes place \(Work Stream 1\) for consideration and approval as per its Charter.](#)
- 05 The Supplemental Proposal on Work Stream 1 Recommendations is the result of extensive work by the CCWG-Accountability’s 28 members, 172 participants and a team of highly qualified legal advisors over the past year, which included over 221 calls or meetings, three public consultations and more than 13,900 email messages. It represents a carefully crafted balance between key requirements, specific legal advice and significant compromises by all who participated. It also includes diligent attention to the input received through the public comment proceedings.
- 06 The final proposal has received the consensus support of the CCWG-Accountability. Minority viewpoints were recorded through 17:00 UTC on 25 February 2016<sup>1</sup>. These viewpoints are provided below for Chartering Organization consideration.
- 07 **Minority statements are published in the order in which they were received.**

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<sup>1</sup> The co-Chairs of the CCWG-Accountability gave members a final opportunity to revise, retract or add minority statements to the Supplemental Final Report based on a compromise reached on the morning of 23 February 2016. A revised Appendix A was published and distributed to Chartering Organizations on 25 February 2016.

## Minority Statements

08 **Minority Statement by Eberhard W Lisse**

09 **CCWG-Accountability Member, ccNSO**

10 Dear Co-Chairs

11 I am Managing Director of Namibian Network Information Center (Pty) Ltd, the country code Top Level Domain (“ccTLD”) Manager of .NA. I created .NA and have 24 years uninterrupted service and corresponding experience as the ccTLD Manager for .NA.

12 I am appointed by ICANN’s country code Names Supporting Organization (“ccNSO”) as a Member to the Cross Community Working Group on Enhancing ICANN Accountability (“CCWG Accountability”).

13 The CCWG Accountability submits a “Final Proposal on Work Stream 1 Recommendations” (“Final Proposal”) which in terms of its Charter (“Charter”) must focus on

*[...] mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.*

14 The Final Proposal does **not** do so.

15 Accordingly I do not agree with and hereby formally record my Objection to the Final Proposal:

1. I still have serious concerns regarding the proposed increase to the powers of Advisory Committees (“AC”) and their proposed elevation to similar status and powers as Supporting Organizations (“SO”).
2. The Final Proposal is entirely silent on accountability measures for ICANN relating to its dealing with ccTLD managers.  
This omission is fatal.
3. I still have very strong concerns about the way the CCWG Accountability has dealt with ICANN’s Accountability to Human Rights.

The Final Report must state, at a minimum, that:

*Within its mission and in its operations, ICANN will respect fundamental human rights, inter alia the exercise of free expression, free flow of information, due process and the right to property*

without **any** qualifications.

4. The questions
  - under what statutory powers this transfer will occur,
  - what in fact it is that is transferred, and
  - what is not transferred

remain unanswered.

And they **must** be answered in order for any transfer of the functions and/or the root zone<sup>2</sup> to occur.

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<sup>2</sup> see also [http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-09-22 CEG Cruz Goodlatte Issa to GAO \(Report on ICANN Oversight Transfer\).pdf](http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-09-22%20CEG%20Cruz%20Goodlatte%20Issa%20to%20GAO%20(Report%20on%20ICANN%20Oversight%20Transfer).pdf), last accessed 2016-02-24

5. I have previously placed on record my observations regarding the legitimacy of the way in which the CCWG has conducted itself during its deliberations which has been, more often than not, in violation of its own Charter.

The latest example, occasioning this revision of this Minority report, previously submitted 2016-02-16, is so egregious that it requires some detail:

- (a) The ICANN Board voiced objections against a provision (74) in Recommendation #2 (on which Consensus had been reached), **after** the Final Proposal had been completed.
- (b) Two of the Co-Chairs (in the absence of the third) then re-opened the deliberations culminating in a teleconference on 2016-02-23 where they put the issue to a vote when no Consensus was reached either way.
- (c) Besides that the Charter is **not** silent on voting it is noteworthy that the Co-Chairs permitted the ICANN Staff Liaison, and 11 ICANN Board Members (two of which were not even registered<sup>3</sup> as Participants to the CCWG Accountability (Ms Hemrajani and Mr Chehadé) to vote on the issue.
- (d) The Co-Chairs then sent out an email stating that, as a broad majority had been in favor of removing the contentious provision, the provision was removed from the Final Proposal.
- (e) I have been unable to find “*Broad Majority*” in the Charter, only “*Full Consensus*” and “*Consensus*”, from which follows anything else is “*No Consensus*”.
- (f) The now Really Final Proposal was then transmitted to the Charting Organizations, without any period of Public Comment, nor waiting for updates to the existing Minority Statements or new Minority Statements being submitted, which was to be done within 48 hours.

I renew my Objection against this exclusionary process.<sup>4</sup>

6. The entire proposal has been cobbled together in extreme haste.

We (the representative Members of the CCWG) have been subjected to an arbitrary, self-imposed and entirely unrealistic timetable and deadline.

7. Regrettably, the Final Proposal bears the fruit of this extreme haste.

It is overly complex, hard to understand even by many of the members and participants of the CCWG Accountability themselves. During the telephone conference on 2016-02-23<sup>5</sup> it took 22 minutes just to give a summary of the issue at hand.

8. The **drastic** shortening of public comment periods is another example of the apparently intentional exclusivity of the process.

Even if the previous fatal flaws did not exist, this would, in itself, be fatal to the legitimacy of the CCWG process and the Final Proposal.

Fortunately the Final Proposal, if any, can still be subjected to a proper public comment period.

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<sup>3</sup> <https://community.icann.org/pages/viewpage.action?pageId=50823968>, last accessed 2016-02-24

<sup>4</sup> I renew my Objection to the previous “Draft Recommendations” from 2015-06-03, the “Draft Proposal” from 2015-07-30 and the “Third Draft Proposal” from 2015-12-02 and incorporate them by reference herein.

<sup>5</sup> 5a to 5f on this page



9. I submit that the Final Proposal simply adds additional layers of bureaucracy without achieving much, if anything.
10. The IANA transition involves novel and unsettled questions that may impact the interests of a wide array of entities. This includes both the public and private sector and engages both domestic US and international interests.

The CCWG Accountability should be result driven and provide its considered views on the important issues presented by the transition in a more reasoned and full discussion instead of rushing to produce something to meet a self-imposed deadline for which there is simply no justification.

11. Repeatedly the NTIA found it necessary to advise, and did so in no uncertain terms, that the CCWG was not meeting the terms of reference set by the NTIA.

I submit that the Final Proposal still does not meet these.

12. I note Minority Statements by the Appointed Members Olga Cavalli (GAC), Tijani Ben Jemaa (ALAC), Izumi Okutani (ASO), and Robin Gross (GNSO) and join Ms Gross' Minority Statement.

I need to point out that the Charter foresees Minority Statements only in cases of disagreement. One Appointed Member of each Chartering Organization disagreeing is **not** a small minority.

It follows that the Final Proposal does **not** have Consensus.

- 16 I **strongly** urge ccTLD Managers to reject this Final Proposal and the NTIA not to accept it as is.
- 17 I submit this Minority Statement to be added to the Final Proposal as required by the Charter.



- 18 Eberhard W Lisse

19 **Minority Statement by Olga Cavalli**

20 **CCWG-Accountability Member, GAC**

21 Dear co-chairs,

22 After many months of hard work, CCWG has delivered a final proposal to be accepted by the community and then submitted to the ICANN board and NTIA. The negotiations leading to the delivery of this proposal have been very intense, and sometimes disappointing. More specifically, the attempts of some stakeholders to take advantage of the IANA transition in order to reduce the ability of governments to be part of the – to be enhanced – community, have jeopardized the success of the overall process, and more broadly, have put at risk our trust in what has brought us all here in the first place: the multi-stakeholder approach.

23 **The role of governments in the multi-stakeholder community**

24 The idea that governments threaten the multi-stakeholder community or benefit from a “special status” in the current ICANN structure is a misconception:

- Governments only have an advisory role in ICANN, through the Governmental Advisory Committee (GAC), whereas other constituencies exercise a decisional role, for instance through the drafting of policy recommendations.
- Governments do not participate in the ICANN Nominating Committee (NomCom) for the selection of ICANN’s leadership positions in the Board, ccNSO, GNSO and ALAC, unlike other AC/SOs within ICANN.
- Governments do not participate to the ICANN board, whereas all other AC/SOs can elect members of the board, directly and through the Nominating Committee. GAC can only appoint a non-voting liaison to the board.
- The ICANN board can easily reject GAC advice, even if the advice was approved without any formal objection. If “the ICANN board determines to take an action that is not consistent with the Governmental Advisory Committee advice” and fails to “find a mutually acceptable solution” (an obligation which does not only apply to GAC advice<sup>6</sup>), then the only obligation of the board is to “state in its final decision the reasons why the Governmental Advisory Committee advice was not followed”<sup>7</sup>. On the other hand, a PDP approved by 66% of GNSO can only be rejected by a 2/3 majority of the board<sup>8</sup>.

25 On the contrary, we believe that governments are an essential part of the community:

- GAC is the most geographically diverse entity in the community. This element should not be underestimated, given that the internationalization of ICANN has been a recurring issue since its inception in 1998.
- Governments bring a unique perspective on public policy issues and remain the most legitimate stakeholders when it comes to protecting public interest.

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<sup>6</sup> *ICANN Bylaws, Annex B, Section 15.b*: “The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN. (...)The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”

<sup>7</sup> *ICANN Bylaws, Article XI, Section 2*.

<sup>8</sup> *ICANN Bylaws, Annex A, Section 9*: “Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN.”

- An ICANN with no or very little governmental involvement would be even more subject to a risk of capture by special interests or narrow corporate interests.

26 **Proposed solutions to the so-called Stress-Test 18 leading to changes in Recommendation 1, 2 and 11**

27 In particular, we are extremely disappointed by and object to the latest “compromise” solution regarding Stress Test 18-related issues, which led to changes in Recommendations 1, 2 and 11.

28 According to the “CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations”, Stress Test 18 “considers a scenario where ICANN’s GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board”. In this scenario, GAC would therefore align its decision-making process to what is already the rule for ALAC, GNSO and CCNSO. However, some CCWG participants seem to believe that preventing GAC from adopting the decision making process used by other stakeholders is necessary to make ICANN more accountable.

29 Many rationales were circulated to justify Stress Test 18-related measures, including ones that involved NTIA. However, the proposed solutions to the issues raised by Stress Test 18 were never part of the initial conditions required for the acceptance of the IANA transition by NTIA. In March 2014, when NTIA announced the transition, four principles were singled out:

- Support and enhance the multi-stakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services;
- Maintain the openness of the Internet.

30 In its press release, NTIA also stated it would “not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution”. To our knowledge, the current ICANN structure does not qualify as a government-led organization, especially since the governments only have an advisory role, through the Governmental Advisory Committee. Therefore, status quo would meet the NTIA requirements.

31 Despite the strong concerns of many governments regarding the proposed solutions to Stress Test 18, and their doubts about the impact of such solutions on ICANN’s accountability, **GAC has agreed to a consensus package** during the Dublin meeting, as reflected in the Dublin GAC Communiqué, **showing its willingness to reach a compromise** in order to achieve the IANA transition. This compromise was based, inter alia, on a 2/3 threshold for the ICANN board to reject GAC advice and on the preservation of GAC’s autonomy in defining consensus.

32 Recommendation 11 of the 3rd CCWG report proposed a very narrow definition of consensus, as “general agreement in the absence of any formal objection”, which represented a major shift from the principles agreed in the GAC Dublin communiqué, therefore triggering the rejection of Recommendation 11 by some GAC members. However, the 3rd draft report proposed a 2/3 threshold for the board to reject GAC consensus advice, aligned with the GAC Dublin Communiqué.

33 The “compromise” solution proposed in the “CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations” published in February is as follows:

- Maintain a very narrow definition of consensus as “the absence of any formal objection”;
- Set the threshold for board rejection of GAC full consensus advice at 60% instead of 2/3;

- Limit the ability of GAC to participate in the empowered community mechanisms if they aim at challenging the board’s implementation of GAC advice – this proposal has never been discussed in CCWG before, and hardly relates to the initial issues raised by Stress Test 18.
- 34 We fail to understand how these new proposals address the concerns expressed by many GAC members in the public comment period, for instance relatively to the ability of one government to block a draft advice approved by an overwhelming majority of governments. Even though consensus should remain the GAC’s ultimate objective, the requirement to reach full consensus for each and every issue considered might lead, in some cases, to paralysis. Any hypothetical advice reflecting less than full consensus (including 100% minus one - which in our view would be basically as representative as full consensus) could indeed be dismissed by a simple majority vote of the board. As a result, the ability of GAC to participate to a discussion considered as relevant by most of its members would be very limited and decisions could theoretically be made without any significant GAC input. To prevent this, we believe governments shall not be bound by one single rule of decision-making, particularly if potentially controversial topics are to be considered
- 35 We note that GAC is once again asked to lower its ability to be involved in the post-IANA transition ICANN. Regarding the ability of GAC to participate in the empowered community mechanisms, we believe such a decision should be carefully reviewed and should not be imposed under pressure in a very short timeframe. More specifically:
- We do not understand why the “two bites at the apple” problem should only apply to GAC, and not to all SO/ACs which could participate in a community power challenging the board’s implementation of their advice or policy recommendation.
  - It is GAC’s sole responsibility to determine if it wishes to participate in a decisional capacity to the community mechanisms.
  - It would be contradictory to limit GAC’s ability to participate to the community powers only to those cases involving public policy / legal aspects, while preventing GAC to participate to community powers involving the board’s implementation of its advice.
- 36 Governments have shown impressive flexibility and tried to reach a compromise in many ways, as reflected in the Dublin GAC communiqué. However, only the demands of part of the community representatives were met, at the expense of GAC; therefore, rather than “compromise”, “winner takes all” would actually be a more accurate description of what is proposed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations.
- 37 Olga Cavalli
- 38 This statement is supported by the governments of Argentina, Benin, Brazil, Chile, Commonwealth of Dominica, France, Guinea, Mali, Nigeria, Paraguay, Peru, Portugal, Russian Federation, The Democratic Republic of Congo, Uruguay, Venezuela

39 **Minority Statement by Tijani BEN JEMAA**

40 **CCWG-Accountability Member, ALAC**

41 As a CCWG-Accountability member, I would like to make this minority statement regarding Recommendation 2 (Adjusting the threshold of support to exercise the community powers) and Recommendation 6 (Human Rights):

42 **Rec 2, Para 73:**

43 With 5 SO/ACs composing the empowered community, we are told that we don't represent the whole Internet community. With less, our representativeness will be seriously affected. So, reducing the threshold in case of the community becomes composed of less than 5 SO/ACs is not acceptable, not only because of the representativeness, but also because we will exercise the community powers with only 2 SO/ACs supporting the decision for most of them. Less than 5 SO/ACs will make the whole accountability process to be reviewed.

44 **Rec 6:**

45 I express my concern that in the proposed text, it is not made clear that the ICANN obligation to respect Human Rights covers the issues included in the ICANN mission only and not be expended to cover other aspects such as the content.

46 Tijani BEN JEMAA

47 **Minority Statement by Izumi Okutani**

48 **CCWG-Accountability Member, ASO**

49 The ASO notes that the Internet Numbering Community is not relying on the CCWG-ACCT WS1 proposal to fulfill our expectations of ICANN accountability. Instead we will rely primarily on a contractual agreement (or “SLA”) between the RIRs and ICANN, as defined within the CRISP and ICG proposals, to provide the required accountability mechanisms.

50 In order to serve this purpose, the proposed SLA must be in place at the time of the IANA Transition. However, the agreement contains “condition precedent” language such that, even if it is signed immediately, it will only come into effect when ICANN is actually released from its related duties under the NTIA contract.

51 Negotiation of the Numbers Community SLA is nearly complete, and we expect to reach agreement in the near future. We propose to then promptly sign the agreed SLA with ICANN, in the same timeframe as implementation of the CCWG recommendations. By having both components in place at that time, we will be satisfied that all ICANN accountability matters are properly resolved.

52 Best Regards,

53 Izumi on behalf of the ASO

54 **Minority Statement by Robin Gross**

55 **CCWG-Accountability Member, GNSO**

56 **Dissenting Opinion of Individual Member Robin Gross on the Issue of GAC Over-Empowerment, Marginalization of Supporting Organizations**

57 While the majority of recommendations included in the CCWG-Accountability Report for Work Stream 1 mark significant and laudable improvements for ICANN's accountability processes, the proposal remains flawed in one important respect: it would allow for fundamental changes to the nature of ICANN's Governmental Advisory Committee (GAC) by endorsing its inclusion in the Empowered Community as a Decisional Participant. If the GAC chooses to become a Decisional Participant, it would transform its traditional function in ICANN from an "advisory" role to a "decisional" role over ICANN's policies, operations, and corporate governance matters. Additionally, the proposal raises the threshold in ICANN's bylaws for its Board to refuse to follow GAC consensus advice, in a separate concession to the GAC that has enhanced its power in ICANN's corporate structure relative to the other Advisory Committees and Supporting Organizations.

58 The proposal to elevate the GAC is a mistake for a number of different reasons.

59 The first concern is the opaque nature of the GAC. GAC is under no obligation to be transparent or bottom-up in its deliberations nor its operation. It has no obligation nor practice of upholding ICANN's legal duty under its bylaws and articles to act openly, transparently, and in a bottom-up multi-stakeholder manner. Empowering a nontransparent constituent body in such a way risks conflicting with other provisions in ICANN's articles and bylaws which promise open, transparent, equitable, and bottom-up decision making and operations as ICANN carries out its duty and mission.

60 The second concern is that empowering the GAC goes against the express wishes of the majority of the ICANN community. Specifically, when previously proposed in 2014, the community overwhelmingly rejected increasing the Board threshold required to reject GAC advice, yet that is exactly what this proposal does.<sup>9</sup> Similar objections were voiced in public comments to the various CCWG-Accountability proposals, which raised significant concerns about the threshold for Board rejection of GAC advice. For many concerned commentators, the distinction between a Board threshold of 50%-60%-66% is a "distinction without a difference", because it is the underlying principle at stake of limiting governmental control over the Internet via ICANN. A positive element of the CCWG-Accountability proposal is that it provides greater certainty and clarity regarding the definition of GAC's deferential "consensus advice". However the community should not be forced to concede greater power to GAC over ICANN's governance in exchange for that needed clarity and certainty over the kind of GAC advice requiring deferential Board treatment. It is a "trade-off" the community should not have to make for ICANN accountability improvements and a timely IANA transition to be able to go forward.

61 Third, GAC participation in the Empowered Community is controversial in the ICANN community and within the GAC itself. Providing the GAC an equal vote to the Supporting Organizations and the At Large Advisory Committee over ICANN's governance would grant the GAC new, greatly enhanced authority in ICANN's decision-making process and governance structure. While the "GAC carve-out" which disallows GAC from voting on board decisions taken as a result of GAC consensus advice, is an improvement in a narrow and specific instance, it does not address the underlying problem of providing national governments with a decisional role over ICANN's governance. Nor would it limit the ability of GAC to participate in decisions to remove board

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<sup>9</sup> <https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en>

- members, reject budgets and strategic plans, decide IANA separation questions, or any of the other new community powers granted to the Empowered Community under this proposal.
- 62 Importantly, GAC has not stated that it wants this fundamental change in its role or that it wants this increase in power over ICANN's Board. On the contrary, GAC stated it could not come to consensus on those controversial recommendations in the CCWG proposal. Unfortunately, a small minority of vocal GAC representatives participating in the CCWG-Accountability discussions took advantage of the community's desire for a speedy IANA transition and were able to hold the accountability reform process hostage in order to obtain greater power over ICANN's governance than what GAC has under ICANN's existing corporate structure.
- 63 Finally, enhancing the power of governments in ICANN puts U.S. support for the transition in jeopardy. If the U.S. Congress or NTIA objects to this proposal, it is dead on arrival. The U.S. Congress and NTIA have sent a number of clear signals that governmental influence should not be expanded in the IANA transition process.<sup>10</sup> By proposing to increase the influence of governments over ICANN as CCWG-Accountability has done, it invites rejection from precisely the parties who must sign-off on it and places the entire transition at risk.
- 64 The CCWG-Accountability proposal includes a number of important and long over-due accountability reforms including improvements to ICANN's Independent Review Process (IRP), Reconsideration Request process, board removal rights, and a noteworthy bylaws commitment to respect human rights in ICANN's operation, among other truly laudable accountability reform measures. However, the long-term harm to a free and open Internet from the proposal's shifting the traditional balance of power over ICANN in favor of governments and away from the Supporting Organizations and the private sector is a monumental mistake.

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<sup>10</sup> At ICANN #51 in Los Angeles 2014, U.S. Secretary of Commerce Penny Pritzker stated that the U.S. would oppose at every turn "proposals to put governments in charge of Internet governance". Also, U.S. Senator John Thune and U.S. Senator Marco Rubio, letter to Dr. Stephen Crocker, Chairman ICANN Board of Directors, July 31, 2014, <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf> (emphasis added):

"First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that "[r]eplacing NTIA's role with another governmental organization would be disastrous and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN's Board, limiting government participation to advisory roles, such as through the Government Advisory Committee (GAC), and amending ICANN's bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. *The IANA transition should not provide an opportunity for governments to increase their influence.*"



# Appendix B: Charter

To download a PDF version of the Charter document, see [here](#).

## Cross Community Working Group (CCWG) Charter

<b>WG NAME:</b>	<b>CROSS COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY</b>	
<b>Section I: Cross Community Working Group Identification</b>		
<b>Chartering Organizations:</b>	ASO, GAC, ccNSO, ALAC, GNSO, SSAC	
<b>Charter Approval Date:</b>	The CCWG charter was circulated for adoption on 3 November. Since then, the following organizations have adopted the charter: <ul style="list-style-type: none"><li>• GNSO on 13 November 2014</li><li>• ALAC on 18 November 2014</li><li>• ccNSO on 20 November 2014</li><li>• GAC on 8 December 2014</li><li>• ASO on 9 December 2014</li><li>• SSAC on 9 July 2015</li></ul>	
<b>Name of WG Chair(s):</b>	Mathieu Weill, Thomas Rickert, León Sanchez	
<b>CCWG Workspace URL:</b>	<a href="https://community.icann.org/display/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability">https://community.icann.org/display/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability</a>	
<b>CCWG Mailing List:</b>	accountability-cross-community@icann.org	
<b>Resolutions adopting the charter:</b>	Title:	
	Ref # & Link:	
<b>Section II: Problem Statement, Goals &amp; Objectives and Scope</b>		
<i>Problem Statement</i>		
The National Telecommunications and Information Administration (NTIA) has requested		

that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role” with regard to the IANA Functions and related root zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context is defined, according to the [NETmundial multistakeholder statement](#), as the existence of mechanisms for independent checks and balances as well as for review and redress.

The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations. Recent statements made by various stakeholders suggest that current accountability mechanisms need to be reviewed and, if need be, improved, amended, replaced, or supplemented with new mechanisms (see for instance ATRT recommendations) in light of the changing historic contractual relationship with the U.S. Government. Considering that the NTIA has stressed that it is expecting community consensus regarding the transition, a failure to meet stakeholder expectations with regards to accountability may create a situation where NTIA does not accept the IANA transition proposal as meeting its conditions. Thus reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process.

### *Goals and Objectives*

The CCWG-Accountability is expected to deliver proposals that would enhance ICANN's accountability towards all stakeholders.

The term stakeholder should be considered for the CCWG-Accountability in its wider acceptance, for instance by relying on the definition provided by the [European Framework for Quality Management \(EFQM\)](#): a person, group or organization that has a direct or indirect stake or interest in the organization because it can either affect the organization or be affected by it. This includes but is not limited to all ICANN SOs and ACs.

The goal is for the transition proposal regarding the IANA functions to be communicated to NTIA in a timeframe which is consistent with the expiration date of the current IANA Functions Contract, which is set at 30th September 2015. The CCWG-Accountability will therefore work as expeditiously as possible to identify those mechanisms that must be in place or committed to before the IANA Stewardship Transition in light of the changing historical contractual relationship with the U.S. Government (Work Stream 1) and those mechanisms for which a timeline for implementation may extend beyond the IANA

## Stewardship Transition (Work Stream 2).

In order to facilitate evaluation and adoption of its proposals, the CCWG-Accountability is expected to provide a detailed description on how its proposals would provide an adequate level of resistance to contingencies (“stress tests”), within the scope of each Work Stream.

Further, Work Stream 1 may identify issues that are important and relevant to the IANA stewardship transition but cannot be addressed within this time frame, in which case, there must be mechanisms or other guarantees that can ensure that the work would be completed in a timely manner as soon as possible after the transition.

## *Scope*

The CCWG-Accountability will investigate accountability mechanisms regarding all of the functions provided by ICANN.

In the discussions around the accountability process, the CCWG-Accountability will proceed with two Work Streams:

- **Work Stream 1:** focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition;
- **Work Stream 2:** focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

The CCWG-Accountability will allocate issues to Work Stream 1 and Work Stream 2. Some issues may span both Work Streams.

Suggested questions to be considered as part of Work Stream 1 include, but are not limited to:

- What would be the impact of NTIA’s transition of the IANA Functions Contract in ensuring ICANN’s accountability and what potential accountability concerns could this cause?
- What enhancements or reforms are required to be implemented or committed to before the NTIA Stewardship Transition?
- If the implementation of enhancements or reforms are to be deferred, how can the community be assured they will be implemented?
- How will these enhancements or reforms be stress-tested?
- What enhancements or reforms must be committed to before the NTIA Stewardship Transition, but could be implemented after.
- How will these enhancements or reforms be stress-tested?
- Suggested questions to be considered as part of Work Stream 2 include, but are not limited to:
- What enhancements or reforms can be addressed after the NTIA Stewardship Transition?
- If there are enhancements or reforms that can be addressed after NTIA disengages, what new or existing processes ensure they will be addressed and implemented?

- How will these enhancement or reforms be stress-tested?
- Suggested questions to be considered as part of both Work Stream 1 and 2 include, but are not limited to:
- What mechanisms are needed to ensure ICANN’s accountability to the multi-stakeholder community once NTIA has disengaged from its stewardship role?
- What enhancements or reforms are needed to ICANN’s existing accountability mechanisms?
- What new accountability reforms or mechanisms are needed?
- If accountability enhancements and reforms are made through changes to ICANN’s Articles of Incorporation or By-Laws, how can the community be assured that those changes will be permanent, or not subject to unilateral amendment by the ICANN Board at a later date?

Other topics within scope of the work of the CCWG-Accountability include, but are not limited to [ATRT2 Recommendation 9, and more specifically 9.2.](#)

**Link with scope of Cross Community Working Group (CWG) to Develop an IANA Stewardship Transition Proposal on Naming Related Functions, and other groups developing the IANA Stewardship Transition proposal:**

This process on Enhancing ICANN Accountability is taking place alongside a parallel and related process on the transition of the stewardship of the IANA functions through the CWG to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (hereinafter CWG-Stewardship). The CWG-Stewardship’s scope is focused on the arrangements required for the continuance of IANA functions in an accountable and widely accepted manner after the expiry of the IANA Functions Contract. Accountability for the administration of the IANA functions (i.e., implementation and operational accountability) is not within the scope of the CCWG-Accountability as it is being dealt with by the CWG-Stewardship. Nevertheless, the two processes are interrelated and interdependent and should appropriately coordinate their work.

Other groups’ (i.e. the numbers and protocol parameters communities, as outlined in the ICG Request for Proposals) proposals are intended to cover accountability issues related to the IANA Stewardship Transition, as well as issues already being considered by RIRs and IETF communities related in their respective areas in their engagement with ICANN. These issues are outside of scope of the CCWG-Accountability. The CCWG-Accountability will communicate with these groups to ensure that the CCWG-Accountability does not cover issues going beyond its scope.

**Section III: Deliverables, Timeframes, and Reporting**

***Deliverables***

In working towards its deliverables, the CCWG-Accountability will, as a first step, establish and adopt a high-level work plan and tentative associated schedule, which should be publicly available. Both work plan and associated schedule, should take into account and be on activities under Work Stream 1 and Work Stream 2, and align the timelines for Work Stream 1 with the CWG-Stewardship and ICG timelines. In addition, the work plan and schedule should include time frames and methods for public

consultation and expected date for submission of Draft Proposal(s) and Final Proposal(s) and revisions thereof for Work Stream 1 and 2, and should establish an expected date for submission of a Board Reports. In those cases where there are incompatibilities, these should be informed to the CWG-Stewardship and/or ICG and discuss ways to address the incompatibilities.

In the course of its work the CCWG-Accountability should update and refine its work plan and schedule regularly, and make the amended work plan and associated schedule publicly available.

The following non-exhaustive list of areas of work shall guide the working group in establishing a work plan. The CCWG-Accountability may add additional tasks at its sole discretion:

- Review of the guidelines given in this charter
- A definition/description of what differentiates a Work Stream 1 issue from a Work Stream 2 issue
- Identify which issues to go into Work Stream 1 and which issue to go into Work Stream 2
- Provide timeline of key dates and target date of proposal(s) for each Work Stream
- Review of existing accountability mechanisms, including a review of their efficiency based on prior work such as ATRT reviews and proposals for changes, enhancements, and additional mechanisms
- Identification of contingencies to be considered in the stress tests
- Analysis of core issues based on the current situation analysis, in relation to the CCWG-Accountability's goal and the IANA Stewardship Transition
- Identification of priorities to focus work on such issues with highest potential to enhance ICANN's accountability
- Review and analyze statements, responses and questions provided by the U.S. Department of Commerce
- Review of possible solutions for each Work Stream including stress tests against identified contingencies. The CCWG-Accountability should consider the following methodology for stress tests
  - Analysis of potential weaknesses and risks
  - Analysis existing remedies and their robustness
  - Definition of additional remedies or modification of existing remedies
  - Description how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies
  - CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) its results being analyzed timely before the transition.

Examples of individual items to be looked at may include:

- Affirmation of Commitments (see <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>)
- Expert Panel (ASEP) as one basis for its discussions
- 2013 Report of the Accountability & Transparency Review Team (see <https://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec13->

[en.pdf](#))

- Operation and Viability of current Reconsiderations process
- Operation and Viability of the CEP (cooperative engagement process) within the Independent Review
- Independent Review Process (IRP) criteria
- Possible solutions including
- Input received in relation to solutions as part of earlier public comment periods (see <https://www.icann.org/en/system/files/files/proposed-solutions-25aug14-en.pdf>)
- Input received in CCWG-Accountability comment periods

### ***Reporting***

The co-chairs of the CCWG-Accountability will brief the chartering organizations on a regular basis as well as their representatives on the ICG (particularly in relation to Work Stream 1).

## **Section IV: Membership, Staffing and Organization**

### ***Membership Criteria***

Membership in the CCWG-Accountability, and in sub-working groups should these be created, is open to members appointed by the chartering organizations. To facilitate scheduling meetings and to minimize workloads for individual members, it is highly recommended that individual members participate in only one sub-working group, should sub-working groups be created. Each of the chartering organizations shall appoint a minimum of 2 and a maximum of 5 members to the working group in accordance with their own rules and procedures. Best efforts should be made to ensure that individual members:

- Have sufficient expertise to participate in the applicable subject matter (see for example <https://www.icann.org/resources/pages/enhancing-accountability-faqs-2014-08-22-en#12> for areas identified for expertise);
- Commit to actively participate in the activities of the CCWG-Accountability on an ongoing and long-term basis; and
- Where appropriate, solicit and communicate the views and concerns of individuals in the organization that appoints them.

In appointing their members, the chartering organizations should note that the CCWG-Accountability's decision-making methodologies require that CCWG-Accountability members act by consensus, and that polling will only be used in rare instances and with the recognition that such polls do not constitute votes.

Chartering organizations are encouraged to use open and inclusive processes when selecting their members for this CCWG-Accountability. Best efforts should also be made to ensure that the CCWG-Accountability and any sub-working groups, if created, have representation from each of ICANN's five regions.

In addition, the CCWG-Accountability will be open to any interested person as a participant. Participants may be from a chartering organization, from a stakeholder group not represented in the CCWG-Accountability, or may be self-appointed. Participants will be able to actively participate in and attend all CCWG-Accountability meetings, work groups and sub-work groups. However, should there be a need for a consensus call or decision, such consensus call or decision will be limited to CCWG-Accountability members appointed by the chartering organizations.

All members and participants will be listed on the CCWG-Accountability's Wiki. The mailing list of CCWG-Accountability will be publicly archived. All members and participants in this process are required to submit a Statement of Interest (SOI) following the procedures of their chartering organization or, where that is not applicable the GNSO procedures may be followed or alternatively a statement should be provided which at a minimum should include name, whether the participant is representing a certain organization or company as part of his/her participation in this effort, areas of specific interest in relation to this effort, material relationship with other parties affected by ICANN and primary country of residence.

Volunteer co-chairs appointed by the chartering organizations, should a chartering organization decide to appoint a co-chair to the CCWG-Accountability, will preside over CCWG-Accountability deliberations and ensure that the process is bottom-up, consensus-based and has balanced multistakeholder participation. ICANN is expected to provide day-to-day project administration and secretariat support and, upon request of the CCWG-Accountability co-chairs, professional project facilitators or expert assistance.

In addition to the working relationship between groups developing the IANA Stewardship Transition proposal which is detailed in a subsequent section, the CCWG-Accountability will include a liaison from the ICANN Board, who would be an active member of the CCWG-Accountability, bringing the voice of the Board and Board experience to activities and deliberations. The CCWG-Accountability will also include an ICANN Staff representative to provide input into the deliberations and who is able to participate in this effort in the same way as other members of the CCWG-Accountability. Should there be a need for any consensus call(s), neither the Board liaison nor the Staff representative would participate in such a consensus call.

### ***Group Formation, Dependencies and Dissolution***

Each of the chartering organizations shall appoint members to the CCWG-Accountability in accordance with their own rules and procedures.

### ***Working Relationship With the ICG, the CWG, and Other Groups Developing the IANA Stewardship Transition Proposal***

The co-chairs of the CCWG-Accountability will discuss and determine, along with representatives of the ICG, the CWG-Stewardship, and other groups developing the IANA Stewardship proposal, the most appropriate method of sharing information and communicating progress and outcomes, particularly in relation to Work Stream 1. This could, for example, be done through regular Chairs calls. In particular, the co-chairs will agree the method by which the final Work Stream 1 deliverable of the CCWG-

Accountability, the “Enhanced ICANN Accountability Related to the IANA Stewardship Transition Proposal” will be provided from the CCWG-Accountability to the ICG and CWG-Stewardship. The delivery of this Work Stream 1 Proposal is expected to occur following approval of the ICANN Board as outlined in Section V of this charter (see also <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d>).

### *Expert Advisors*

In addition to input from the community, the CCWG-Accountability is expected to solicit and consider the input from the up to seven Advisors selected by the [Public Experts Group \(PEG\)](#) to provide independent advice, research and identify best practices, at an early stage of its deliberations. In addition to input that is specifically solicited by the CCWG-Accountability, the CCWG-Accountability is also expected to give due consideration to any additional advice or input that the Advisors provide as part of the CCWG-Accountability deliberations. The Advisors are expected to contribute to the dialogue similar to other CCWG-Accountability participants. However, should there be a need for any consensus call(s), the Advisors would not participate in such a call.

In addition to the advisors selected by the PEG, the CCWG-Accountability may also identify additional advisors or experts to contribute to its deliberations in a similar manner as the Advisors selected by the PEG. Should additional costs be involved in obtaining input from additional advisors or experts, prior approval must be obtained from ICANN. Such a request for approval should at a minimum include the rationale for selecting additional advisors or experts as well as expected costs.

The CCWG-Accountability should integrate one Accountability and Transparency Review Team (ATRT) past participant to bring perspective and avoid duplication of work. Should there be a need for any consensus call(s), the ATRT Expert would not participate in such a consensus call (unless the ATRT Expert is also selected as a member by one of the chartering organizations).

### *Staffing and Resources*

The ICANN Staff assigned to the CCWG-Accountability will fully support the work of the CCWG-Accountability as requested by the co-chairs, including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate by the CCWG-Accountability. ICANN will provide access to relevant experts and professional facilitators as requested by the CCWG-Accountability Chairs. ICANN staff, in a coordinated effort with the CCWG-Accountability, will also ensure that there is adequate outreach to ensure that the global multistakeholder community is aware of and encouraged to participate in the work of the CCWG-Accountability.

Staff assignments to the Working Group: ICANN will provide sufficient staff support to support the activities of the CCWG-Accountability.

The CCWG-Accountability is encouraged to identify any additional resources beyond the staff assigned to the group it may need at the earliest opportunity to ensure that such resources can be identified and planned for.



## Section V: Rules of Engagement

### *DECISION-MAKING METHODOLOGIES*

In developing its Proposal(s), work plan and any other reports, the CCWG-Accountability shall seek to act by consensus. Consensus calls should always make best efforts to involve all members (the CCWG-Accountability or sub-working group). The Chair(s) shall be responsible for designating each position as having one of the following designations:

- a) Full Consensus - a position where no minority disagrees; identified by an absence of objection
- b) Consensus – a position where a small minority disagrees, but most agree

In the absence of Full Consensus, the Chair(s) should allow for the submission of minority viewpoint(s) and these, along with the consensus view, shall be included in the report.

In a rare case, the chair(s) may decide that the use of a poll is reasonable to assess the level of support for a recommendation. However, care should be taken in using polls that they do not become votes, as there are often disagreements about the meanings of the poll questions or of the poll results.

Any member who disagrees with the consensus-level designation made by the Chair(s), or believes that his/her contributions are being systematically ignored or discounted should first discuss the circumstances with the relevant sub-group chair or the CCWG-Accountability co-chairs. In the event that the matter cannot be resolved satisfactorily, the group member should request an opportunity to discuss the situation with the Chairs of the chartering organizations or their designated representatives.

#### **SO and AC support for the Draft Proposal(s)**

Following submission of the Draft Proposal(s), each of the chartering organizations shall, in accordance with their own rules and procedures, review and discuss the Draft Proposal(s) and decide whether to adopt the recommendations contained in it. The chairs of the chartering organizations shall notify the co-chairs of the WG of the result of the deliberations as soon as feasible.

#### **Supplemental Draft Proposal**

In the event that one or more of the participating SO's or AC's do(es) not adopt one or more of the recommendation(s) contained in the Draft Proposal(s), the Co-Chairs of the CCWG-Accountability shall be notified accordingly. This notification shall include at a minimum the reasons for the lack of support and a suggested alternative that would be acceptable, if any. The CCWG-Accountability may, at its discretion, reconsider, post for public comments and/or submit to the chartering organizations a Supplemental Draft Proposal, which takes into accounting the concerns raised.

Following submission of the Supplemental Draft Proposal, the chartering organizations shall discuss and decide in accordance with its own rules and procedures whether to adopt the recommendations contained in the Supplemental Draft Proposal. The Chairs of the chartering organizations shall notify the Co-Chairs of the CCWG-Accountability of

the result of the deliberations as soon as feasible.

### **Submission Board Report**

After receiving the notifications from all chartering organizations as described above, the Co-Chairs of the CCWG-Accountability shall, within 10 working days after receiving the last notification, submit to the Chair of the ICANN Board of Directors and Chairs of all the chartering organizations the CCWG-Accountability Board Report, which shall include at a minimum:

- a) The (Supplemental) Proposal as adopted by the CCWG-Accountability; and
- b) The notifications of the decisions from the chartering organizations
- c) Documentation of the process that was followed, including, but not limited to documenting the process of building consensus within the CCWG-Accountability and public consultations.

In the event one or more of the chartering organizations do(es) not support (parts of) the (Supplemental) Proposal(s), the Board Report shall also clearly indicate the part(s) of the (Supplemental) Final Proposal(s) which are fully supported and the parts which not, and which of the chartering organizations dissents, to the extent this is feasible.

Board consideration and interaction with CCWG-Accountability and chartering organizations

It is assumed that after submission of the Board Report, the ICANN Board of Directors will consider the Proposal(s) contained in this Report in accordance with the process outlined in its resolution of 16 October 2014 (see <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d>):

*Resolved (2014.10.16.17), the Board commits to following the following principles when considering the Cross Community Working Group Recommendations on Enhancing ICANN Accountability and Governance:*

- 1. These principles apply to consensus-based recommendations from the Cross Community Working Group on Enhancing ICANN Accountability and Governance.*
- 2. If the Board believes it is not in the global public interest to implement a recommendation from the Cross Community Working Group on Enhancing ICANN Accountability and Governance (CCWG Recommendation), it must initiate a dialogue with the CCWG. A determination that it is not in the global public interest to implement a CCWG Recommendation requires a 2/3 majority of the Board.*
- 3. The Board must provide detailed rationale to accompany the initiation of dialogue. The Board shall agree with the CCWG the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*
- 4. The CCWG will have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.*
- 5. If a recommendation is modified through the CCWG, it is returned back to the Board for further consideration. The CCWG is to provide detailed rationale on*

*how the modification addresses the concerns raised by the Board.*

6. *If, after modification, the Board still believes the CCWG Recommendation is not in the global public interest to implement the CCWG Recommendation, the Board may send the item back to the CCWG for further consideration, again requiring a 2/3 vote of the Board for that action. Detailed rationale for the Board's action is again required. In the event the Board determines not to accept a modification, then the Board shall not be entitled to set a solution on the issue addressed by the recommendation until such time as CCWG and the Board reach agreement.*

Before submitting a modified recommendation to the ICANN Board of Directors, as envisioned under 5. of the Board resolution, the CCWG-Accountability will submit a Draft Supplemental Board Report to the chartering organizations containing:

- a) The modified recommendations, and associated detailed rationale,
- b) The Board decision, and associated detailed rationale
- c) The recommendation as contained in the Board Report

Following submission of the Draft Supplemental Board Report, the chartering organizations shall discuss and decide in accordance with their own rules and procedures whether to adopt the modified recommendations contained in the report. The Chairs of the chartering organizations shall notify the co-chairs of the CCWG-Accountability of the result of the deliberations as soon as feasible.

After receiving the notifications from all chartering organizations, the co-Chairs of the CCWG-Accountability shall, within 10 working days after receiving the last notification, submit to the Chair of the ICANN Board of Directors and Chairs of all the chartering organizations the CCWG-Accountability Supplemental Board Report, which shall include at a minimum:

- a) The modified recommendations, and associated detailed rationale.
- b) The notifications of the decisions from the chartering organizations.
- c) Documentation of the process that was followed, including, but not limited to documenting the process of building consensus within the CCWG-Accountability and consultations with the chartering organizations.

If, in accordance with 6., the Board determines not to accept a modified recommendation, the CCWG-Accountability shall follow the procedure regarding the Supplemental Board Report, as just described, to reach agreement with the Board.

## ***MODIFICATION OF THE CHARTER***

In the event this charter does not provide guidance and/or the impact of the charter is unreasonable for conducting the business of the CCWG-Accountability, the co-chairs have the authority to determine the proper actions. Such action may, for example, consist of a modification to the Charter in order to address the omission or its unreasonable impact, in which case the Co-Chairs may propose such modification to the chartering organizations. A modification shall only be effective after adoption of the amended Charter by all chartering organizations, in accordance with their own rules and procedures.

### ***PROBLEM/ISSUE ESCALATION & RESOLUTION PROCESSES***

All participants are expected to abide by the [ICANN Expected Standards of Behavior](#).

The co-chairs are empowered to restrict the participation of someone who seriously disrupts the working group. Generally, the participant should first be warned privately, and then warned publicly before such a restriction is put into place; in extreme circumstances, this requirement may be bypassed. This restriction is subject to the right of appeal as outlined above.

In the event that no consensus is reached by the CCWG-Accountability, the co-chairs of the CCWG-Accountability will submit a Report to the chartering organizations. In this Report the co-chairs shall document the issues that are considered contentious, the process that was followed and will include suggestions to mitigate prevention of consensus. If, after implementation of the mitigating measures consensus can still not be reached, co-chairs shall prepare a Final Report documenting the processes followed, including requesting suggestions for mitigating the issues that are preventing consensus from the chartering organizations. The Final Report will be submitted to the ICANN Board and the chartering organizations requesting closure of the CCWG-Accountability by the chartering organizations.

### ***CLOSURE & WORKING GROUP SELF-ASSESSMENT***

The CCWG-Accountability will consult with their chartering organizations to determine when it can consider its work completed. The CCWG-Accountability and any sub-working groups shall be dissolved upon receipt of the notification of the Chairs of the chartering organizations or their designated representatives.

# Appendix C – Background & Methodology

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This section includes an overview of the Enhancing ICANN Accountability process, and its foundation in the IANA Stewardship Transition.

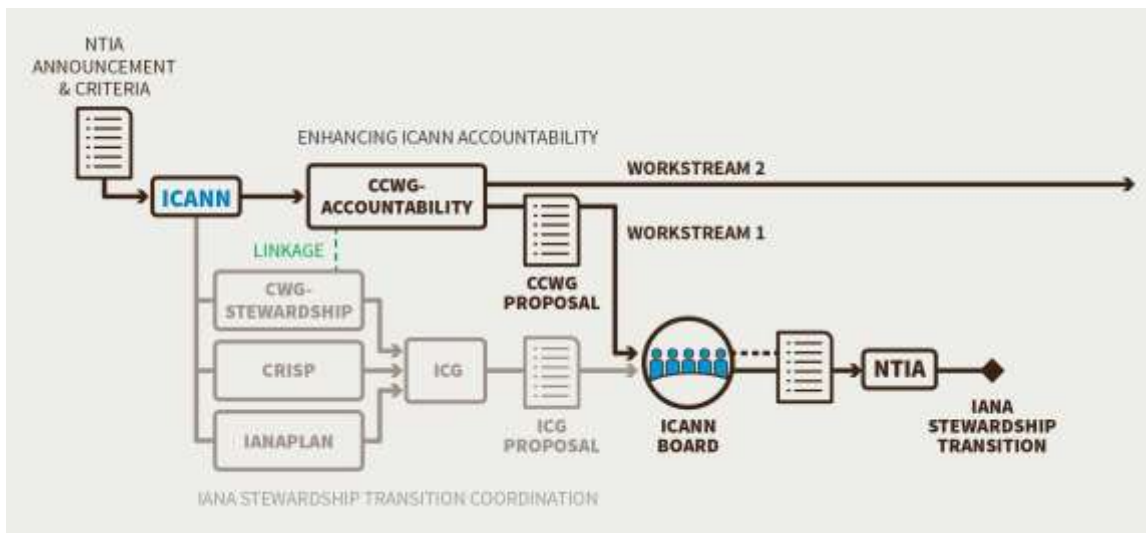
## Background On The IANA Stewardship Transition

- 1 On 14 March 2014 the National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions and related root zone management to the global multistakeholder community. NTIA asked ICANN to convene a multistakeholder process to develop a proposal for the transition.
- 2 In making its announcement, NTIA specified that the transition proposal must have broad community support and meet the following principles:
  - Support and enhance the multistakeholder model;
  - Maintain the security, stability, and resiliency of the Internet DNS;
  - Meet the needs and expectation of the global customers and partners of the IANA services;
  - Maintain the openness of the Internet.
- 3 NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.
- 4 The IANA Stewardship Transition Coordination Group (ICG) was formed in July 2014 to assemble and deliver through the ICANN Board to NTIA a transition proposal consistent with the key principles outlined in the NTIA announcement. The ICG is made up of 30 individuals representing 13 communities of both direct and indirect stakeholders of the IANA functions. Direct stakeholders are "direct customers" of the IANA functions, e.g. top-level domain registry operators, while indirect stakeholders are all those who benefit from performance of the IANA functions, e.g., businesses and end users.
- 5 In September 2014, the ICG published a Request for Proposals to the three communities. The three operational communities with direct operational or service relationships with the IANA functions i.e. Domain Names, Number Resources and Protocol Parameters were asked to provide a formal response to the ICG regarding its community's use of the IANA functions, its existing, pre-transition arrangements, proposed post-transition oversight and accountability arrangements, and any anticipated transition implications.
- 6 Each of the three operational communities formed working groups to develop a proposal:
  - **Domain Names:** Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship)
  - **Number Resources:** Consolidated Regional Internet Registries IANA Stewardship Proposal Team (CRISP Team); and

- **Protocol Parameters:** IANAPLAN Working Group (IANAPLAN WG)
- 7 In January 2015, the ICG received a proposal from the Protocol Parameters community and a proposal from the Numbering Resources community; the Domain Names community finalized its proposal for the ICG in June 2015.
  - 8 Following submissions from the three communities, the ICG assessed the respective outputs and assembling a complete proposal for the transition. Following a 30-day public comment period that ended on September 8 2015, the ICG received more than 150 comments from a wide variety of stakeholders all over the world. The majority of the comments expressed support for the proposal. In some cases that support was qualified by suggestions, questions, and criticism that the ICG is working hard to synthesize and address as appropriate.
  - 9 Following discussions at ICANN54 in Dublin in October 2015, the ICG announced that it finalized the IANA Stewardship Transition Proposal, with one exception of the conditionality between the CWG-Stewardship portion of the proposal and the ICANN-level accountability mechanisms currently under development in the CCWG-Accountability. Before sending this proposal to the NTIA via the ICANN Board, the ICG will secure confirmation from the CWG-Stewardship that its accountability requirements have been met.

## Introduction To The Enhancing ICANN Accountability Process

- 10 As initial discussions of the IANA Stewardship Transition were taking place, the ICANN community raised the broader topic of the impact of the transition on ICANN's current accountability mechanisms. From this dialogue, the Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN realize a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government. This contractual relationship has been perceived as a backstop with regard to ICANN's organization-wide accountability since 1998.
- 11 Informed by community discussions held in March 2014 at ICANN's public meeting in Singapore, ICANN published a proposed process on Enhancing ICANN Accountability, with an opportunity for public dialogue and community feedback from 6 May – 27 June 2014, in addition to the comments received during the dedicated Enhancing ICANN Accountability session held on 26 June 2014 at the ICANN 50 meeting in London. The comments related to the development of the process were considered in the refinement of the second iteration of the process published on 14 August 2014. In response to community requests for additional time to review proposals and post questions and comments, ICANN provided an additional 21-day comment period from 6-27 September 2014.
- 12 The final Revised Enhancing ICANN Accountability: Process and Next Steps includes considering how ICANN's broader accountability mechanisms should be strengthened in light of the transition, including a review of existing accountability mechanisms such as those within the ICANN Bylaws and the Affirmation of Commitments.



## Formation of the CCWG-Accountability

- 13 Following public comment periods and discussions on accountability, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened, designed and approved by a Drafting Team composed of five ICANN community groups. Further information, including document drafts and meeting transcripts of the Drafting Team that developed the CCWG-Accountability Charter (see Appendix B), is available on the CCWG-Accountability Wiki site.
- 14 The CCWG-Accountability Charter was circulated for adoption on 3 November. Since then, the following organizations have adopted the Charter:
  - Generic Names Supporting Organization (GNSO) on 13 November 2014
  - At-Large Advisory Committee (ALAC) on 18 November 2014
  - Country Code Names Supporting Organization (ccNSO) on 20 November 2014
  - Governmental Advisory Committee (GAC) on 8 December 2014
  - Address Supporting Organization (ASO) on 9 December 2014
  - Security and Stability Advisory Committee (SSAC) on 6 July 2015

## Composition of the CCWG-Accountability

The CCWG-Accountability consists of 201 people, organized as 28 members, appointed by and accountable to the CCWG-Accountability chartering organizations, 173 participants, who participate as individuals, and 109 mailing list observers. Each of the Chartering Organizations may appoint a minimum of 2 and a maximum of 5 members to the working group in accordance with their own rules and procedures.

15 **THE CCWG-ACCOUNTABILITY ALSO INCLUDES:**

- 1 ICANN Board liaison who brings the voice of the Board and Board experience to activities and deliberations;
  - 1 ICANN staff representative who provides input into the deliberations;
  - 1 former ATRT member who serves as a liaison and brings perspective and ensures that there is no duplication of work;
  - ICG members who participate in the CCWG-Accountability, including 2 who serve as liaisons between the two groups.
- 16 Seven Advisors have also been appointed by a Public Experts Group (PEG) to contribute research and advice, and to bring perspectives on global best practices to enrich the CCWG-Accountability discussion, all while engaging with a broader network of accountability experts from around the world.
- 17 The CCWG-Accountability is open to all: anyone interested in the work of the CCWG-Accountability can join as a participant or observer. Participants may be from a chartering organization, from a stakeholder group or organization not represented in the CCWG-Accountability or currently active within ICANN, or self-appointed. For those who are merely interested to monitor the CCWG-Accountability conversations, there is the possibility to sign up as a mailing list "observer" which offers read-only access to the mailing list.
- 18 The group first met in December 2014 and has held weekly meetings since. It operates in a transparent environment: its mailing-lists discussions, meeting archives, drafts and correspondence are documented on a [public wiki space](#).

19 **Work Streams**

- 20 Per the CCWG-Accountability Charter, the work of the CCWG-Accountability would proceed in two Work Streams defined as follows:
- **Work Stream 1:** focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition
  - **Work Stream 2:** focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition

## Methodology

- 21 This section describes the methodology through which the CCWG-Accountability developed and completed the Work Stream 1 proposal.

22 **Defining Requirements for Work Stream 1**

- 23 The primary goal of the CCWG-Accountability is to deliver proposals that would enhance ICANN's accountability towards all stakeholders. The first step in achieving this goal was to understand and describe the status quo. To do this efficiently, the CCWG-Accountability established four initial Work Areas:



- **Work Area 1:** Existing Accountability Mechanisms (including the Affirmation of Commitments reviews on accountability)
- **Work Area 2:** Review Input from Public Comment and Categorize Items into Work Streams 1 & 2 (Work Stream 1 & Work Stream 2)
- **Work Area 3:** Review Issues Identified by CWG-Stewardship
- **Work Area 4:** Identify Contingencies (especially in relation to Work Stream 1)

24 The four areas were populated with volunteer CCWG-Accountability members and participants who had dedicated mailing lists and wiki spaces to advance their work.

## 25 **Work Area 1: Inventory of Existing Accountability Mechanisms**

26 One of the first deliverables within the CCWG-Accountability was an inventory of existing accountability mechanisms on 15 December 2014, delivered just one week after the CCWG-Accountability first met. The inventory was the starting point of CCWG-Accountability's discussions, about which ICANN accountability mechanisms should be enhanced to address the risks the group had identified, and where gaps would remain and the group would need to develop new mechanisms to mitigate against those risks.

## 27 **Work Area 2: Assessment of Comments to Date**

28 Another area of initial CCWG-Accountability work focused on a review of the collection of comments received during the development of the Enhancing ICANN Accountability process and assessed whether they were issues to address as part of Work Stream 1 or Work Stream 2. The group categorized the comments based on the following rationale:

- Work Stream 1 is designated for accountability enhancement mechanisms that must be in place or committed to, before IANA transition occurs.
- Work Stream 1 mechanisms are those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance ICANN's accountability would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity.
- All other consensus items could be in Work Stream 2, provided the mechanisms in Work Stream 1 are adequate to force implementation of Work Stream 2 items despite resistance from ICANN management and Board.

29 In addition to categorizing the comments, the ATRT Expert reviewed the comments and noted, where relevant, a reference to ATRT recommendations. Work Area 2 was complete as of 15 January 2015.

## 30 **Work Area 3: Interrelation with the CWG-Stewardship Work**

31 The CCWG-Accountability also reviewed the accountability elements identified by the CWG-Stewardship. In light of the clear linkage between the works of the two groups, the CWG-Stewardship and CCWG-Accountability Co-Chairs agreed that it would be valuable for the CWG-Stewardship to provide the CCWG-Accountability with a list of issues it identified during its

deliberations where the work of both groups may overlap. A robust collaboration was built between the two groups including leadership coordination call and exchange of letters.

32 In January 2015, the CCWG-Accountability extensively discussed the CWG-Stewardship list of issues, offered input and indicated that these avenues of work would be one of the focuses of CCWG-Accountability attention.

33 While the work was completed in March 2015, the collaboration was maintained throughout the end of their respective mandates.

#### 34 **Work Area 4: Stress Test and Contingencies Work Party**

35 A final area of focus was on the identification the main stress tests and contingencies that the CCWG-Accountability would use to test the proposed mechanisms and solutions, once elaborated.

36 The goal of this group was to identify the main contingencies that CCWG-Accountability should use to test proposed mechanisms and solutions once they are elaborated. The group defined contingencies as consisting of:

- An event (threat) to the IANA Functions Contract;
- Its consequence, such as creating significant interference with existing policy or the policy development processes; and
- What contingency plan, if any, is known to exist.

37 21 broad scenarios were initially identified, including for example, the impact of financial crisis in the domain name industry, capture by one or more stakeholders, and termination of the Affirmation of Commitments. A full list is available from the Work Area 4 webpage.

38 The group also received inputs from the ICANN Board Risk Committee on enterprise-wide risks identified within ICANN, as an input to its work. Furthermore, details of strategic risks that ICANN may face are identified in "ICANN Strategic Plan for fiscal years 2016-2020".

39 This work continues through the **Stress Tests Work Party (ST-WP)**: During the Istanbul Meeting of the CCWG, bundled the stress testing into 5 Categories (Financial Crisis or Insolvency, Failure to meet Operational Obligations, Legal / Legislative Actions, Failure in Accountability and Failure in Accountability to External Stakeholders) ; Post Istanbul, the ST-WP continued with regular review of the existing Stress Tests and continued with its identification of stress tests and their application. In reviewing the first public comment, there were an additional nine stress tests identified and included in the 2nd draft for public comment. Section 10 of this proposal details the 'to date' and ongoing work of the Stress Test Work Party.

#### 40 **Restructuring into Work Parties**

41 The Frankfurt face-to-face meeting on 19-20 January 2015 was a key turning point for the CCWG-Accountability: the group moved from an assessment phase into a development phase. As part of this development phase, the CCWG-Accountability mapped out Work Stream 1 requirements leading to a restructure of the group into Work Parties.

42 Work Party 1 and Work Party 2 were formed following the Frankfurt meeting in January 2015:

- Work Party 1: Community Empowerment (WP1) was formed to consider proposed is considering powers for the community to hold ICANN to account, and to develop a consensus on the most appropriate mechanisms to allow the community to exercise these

powers. WP1 will set out the necessary changes that would be required (e.g. Bylaws changes) to deliver these. Powers and mechanisms were defined as follows:

- Powers are actions the community should be able to take to maintain and improve ICANN's accountability;
  - Mechanisms are the structures or processes by which the community exercises its powers.
- Work Party 2: Review and Redress (WP2) was tasked with considering enhancements to existing accountability mechanisms and the creation of new accountability mechanisms to allow for review and redress for those affected by ICANN's failure to carry out its mission statement, and to hold ICANN accountable for carrying out its mission in compliance with agreed-upon standards. Work Party 2 articulated the following principles to guide its work:
    - Ensure that ICANN actions relate to issues that are within its stated mission and require ICANN to act consistent with clearly articulated principles;
    - Ensure that the ICANN Board can be held to its Bylaws;
    - Ensure that ICANN carries out its mission consistent with a binding statement of values/principles;
    - Prevent scope/mission creep through bylaws changes, policy, policy implementation, contracts and/or other mechanisms.
- 43 Work Party 3 Emerging Issues (WP3) was formed in July 2015 and tasked with reviewing the feedback received in the first public comment period (May-June 2015) with regards to issues flagged by the community as not being already addressed by the discussions and the draft proposal published by the CCWG-Accountability. Three topics were identified as emerging from feedback after the first public comment period:
- Enhancement of SO/AC accountability as the first draft document was perceived to be centered in Board accountability only.
  - Enhancement of Staff accountability so that the mechanisms being discussed might also be applicable to Staff's action or inaction.
  - Enhancement of diversity within ICANN and especially with regards to that of the newly created bodies being proposed.
- 44 Work Party 4 Human Rights (WP4) was created in August 2015 following extensive discussions within the CCWG-Accountability on inclusion of a potential Human Rights commitment into ICANN's Mission and Bylaws.
- 45 Work Party – IRP Implementation Oversight Team (WP-IOT) began its activities in January 2016. The Team responsible for reviewing the outcome produced by the legal counsel on IRP and to report back to the CCWG-Accountability. Its activities will be maintained as the group moves to Work Stream 2. It is composed of CCWG-Accountability experts in the field as well as representatives from the CCWG-Accountability's legal counsel and ICANN.
- 46 In addition, a Stress Test 18 Work Party (ST18-WP) was convened in November 2015 to draft consensus text on a proposed Bylaw to address Stress Test 18 (regarding the ICANN Board's consideration of advice from the Government Advisory Committee (GAC)). See Annex 11 – Board Obligations with regards to Governmental Advisory Committee Advice (Stress Test 18) for more information.

47 All Work Parties operated in a transparent environment, conducting their work on publicly archived mailing lists, on recorded calls and documenting progress and drafts on a [public wiki](#). Conclusions reached by Work Parties were confirmed by the full CCWG-Accountability.

### 48 **Building Blocks**

49 In February 2015, the CCWG-Accountability identified four building blocks that would form the accountability mechanisms required to improve accountability.

#### 50 **Drawing a state analogy:**

- Empowered community refers to the powers that allow the community i.e. the people to take action should ICANN breach the principles.
- Principles form the Mission, Commitments and Core Values of the organization i.e. the Constitution.
- ICANN Board represents the executive entity the community may act against, as appropriate.
- Independent Review Mechanisms, i.e. the judiciary, confers the power to review and provide redress, as needed.

51 The accountability framework was compared to a cookbook populated with recipes for which the CCWG-Accountability would need to identify ingredients. A distinction was made between triggered actions i.e. triggered by the community and non-triggered i.e. part of a normal ICANN processes. The CCWG-Accountability developed a set of criteria to frame discussions.

52 From its building blocks, the CCWG-Accountability defined requirements that it established as a roadmap to follow during its discussions. The 12 recommendations embody the requirements.

### **Legal Advice**

53 The CCWG-Accountability engaged two law firms to receive expertise on feasibility of its proposed frameworks and mechanisms, Adler & Colvin and Sidley Austin LLP. The legal advice was key to the CCWG-Accountability in formulating its recommendations.

54 The CCWG-Accountability Legal Subteam's rules of engagement and working methodologies are described in Appendix C.

55 After a successful first phase lead by the Legal Subteam, and in response to the need for increased agility in the interaction between the external lawyers and the working parties, it was decided that the Legal Subteam should be dissolved in order to provide a more agile and direct interaction with the independent counsel. Rules of engagement changed: the Co-Chairs are in charge of certifying the assignments for the lawyers, but the rest of the general procedural rules stand and all interactions with counsel continue to be recorded on the [public wiki](#).

## **Definitions & Scoping**

56 The CCWG-Accountability scoped out and elaborated a problem statement along with definitions to help refine its understanding of the task it was entrusted with. The group endeavored to produce a definition of what accountability is, listed transparency, consultation, review mechanisms and redress mechanisms as criteria of accountability mechanisms.

- 57 As a general concept, the group proposed that accountability encompassed processes whereby an actor answers to others for the effects on them of its actions and omissions. For the CCWG-Accountability, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programs.
- 58 The group proposed that accountability is comprised four dimensions:
- 1) **Transparency** means that an actor (ICANN) is answerable to its stakeholders by being open and visible to them.
  - 2) **Consultation** means that the actor (ICANN) continually takes input from and explains its positions to the stakeholders.
  - 3) **Review** means that the actor's actions, policies and programs are subject to outside monitoring and evaluation.
  - 4) **Redress** means that the accountable actor makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.
- 59 Independence and checks and balances were identified as two key qualities of any accountability mechanism. The group defined "checks and balances mechanisms" as a series of mechanisms put in place to adequately address the concerns from the various interested parties in the discussion and decision process, as well as to ensure that the decision is made in the interest of all stakeholders. The group investigated two different non-exclusive views in order to assess independence: independence of persons participating in the decision process, and independence of a specific accountability mechanism with regards to other mechanisms.
- 60 The group flagged to whom should ICANN be accountable as an important component, and assembled a list of stakeholders which distinguished between affected parties and parties affecting ICANN. The following principles were agreed to guide the activities of the CCWG-Accountability:
- ICANN accountability requires that it comply with its own rules and processes (part of "due process", as a quality of fairness and justice);
  - ICANN accountability requires compliance with applicable legislation, in jurisdictions where it operates;
  - ICANN should be accountable to achieving certain levels of performance as well as security;
  - ICANN should be accountable to ensure that its decisions are for the benefit of the public, not just in the interests of a particular set of stakeholders or ICANN the organization.

# Appendix D – Engagement and Participation Summaries: Documenting Public Consultations

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- 1 Throughout the development of its Work Stream 1 Recommendations, the CCWG-Accountability has sought feedback, confirmations and input from the Internet’s global multistakeholder community. The channels through which consultation was conducted include (but are not limited to):
  - Organizing and providing engagement sessions at ICANN meetings
  - Relaying regular updates to Supporting Organizations and Advisory Committees through membership representation
  - Holding multi-lingual webinars
  - Posting versions of the Work Stream 1 Recommendations for public comment (described in more depth below)
- 2 This outreach plan was carefully developed to ensure that the work to enhance ICANN’s accountability was being adequately considered by the entire ICANN community. In addition, the CCWG-Accountability posted blogs, communiqués and multilingual videos to document its progress and establish resources for further engagement.
- 3 The CCWG-Accountability organized two public comment periods that were key in defining and refining its Work Stream 1 recommendations:
  - **First Public Comment Period (4 May-12 June 2015)**

The CCWG-Accountability requested community feedback on its Initial Draft Proposal for Public Comment of the enhancements to ICANN’s accountability it had identified as essential or necessary to take place or be committed to before the IANA Stewardship Transition to help improve its proposal and inform next steps. A set of [focused questions](#) were provided to help guide the feedback the CCWG-Accountability would need for next steps.

    - Contributions received in response to this call for input can be read [here](#).
    - A staff summary of the comments received can be found [here](#).
  - **Second Public Comment Period (3 August-12 September 2015)**

Similar to the first Public Comment Period, the second call for input was released to seek confirmation of the CCWG-Accountability’s Work Stream 1 Recommendations and identify levels of support and any outstanding concerns with the mechanisms developed. Framing questions and a summary of changes between the first and second reports were provided to facilitate community’s reading of the report.

    - Contributions received in response to this call for input can be read [here](#).
    - Work Party and staff summaries of this second call for input can be read [here](#).

- **Third Public Comment Period (30 November-21 December 2015)**

The CCWG-Accountability sought the six Chartering Organizations' support for their Work Stream 1 recommendations in this Draft Proposal. Although relaying comments through a Chartering Organization was the recommended approach, individuals were also welcome to submit comments separately. A survey was issued to frame the input received and established the level of support for each recommendation. Comments and suggestions were also encouraged. Similar to the Second Public Comment, summaries of changes between the first and second reports were provided to facilitate community's reading of the report.

- Contributions received in response to this call for input can be read [here](#).
- Work Party and staff summaries of this third call for input can be read [here](#).

Following the release of the [staff report](#) and the [summary of public comments](#), the CCWG-Accountability determined that the majority of revisions needed to the Third Draft Report would relate to specificities of implementation rather than content. As such, the group determined that an additional public comment period would not be necessary before approval by the Chartering Organizations.

To incorporate necessary changes, the CCWG-Accountability developed a "Supplemental" Final Report, developed through an open and transparent process. This Supplemental Final Report was distributed on 23 February 2016, and is to be considered by the six Chartering Organizations for approval and submission to the ICANN Board.

## Appendix D -- Engagement and Participation Statistics: Summary

Statistics as of 9 February 2016

### CCWG-Accountability

<b>Members/Participants:</b>	<b>200</b>
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	In Attendance	Hours	Total Working Hours
Meeting #1	51	1.75	89.25
Meeting #2	27	2	54
Meeting #3	34	2	68
Meeting #4	42	1.75	73.5
Meeting #5	63	2	126
Meeting #6	35	2	70
Meeting #7 Session 1	41	2	82
Meeting #7 Session 2	48	2	96
Meeting #7 Session 3	47	1.5	70.5
Meeting #7 Session 4	44	1.75	77
Meeting #8 Session 1	39	2	78
Meeting #8 Session 2	48	2	96
Meeting #8 Session 3	48	1	48
Meeting #8 Session 4	48	1	48
Meeting #9	40	1.75	70
Meeting #10	42	1.25	52.5
Meeting #11 (ICANN 52)	35	3	105
Meeting #12 (ICANN 52)	45	3	135
Meeting #13	37	2	74
WP1 Meeting #1	16	1.25	20
Meeting #14	39	2	78
WP1 Meeting #2	20	1.5	30
WP2 Meeting #1	14	1	14
WP2 Meeting #2	17	1	17
Meeting #15	44	2	88
WP1 Meeting #3	24	1.5	36
WP2 Meeting #3	18	1	18
Meeting #16	37	2	74
Legal SubTeam Meeting #2	13	1.5	19.5
Stress Tests SubTeam Meeting #1	13	1.25	16.25
WP1 Meeting #4	20	1.5	30
Legal SubTeam Meeting #3	8	0.5	4
Legal SubTeam Meeting #4	9	0.75	6.75
Meeting #17	43	2	86
Stress Tests SubTeam Meeting #2	7	1.75	12.25
Legal SubTeam Meeting #5	9	0.5	4.5



WP1 Meeting #5	23	1.5	34.5
Legal SubTeam Meeting #6	6	1	6
F2F Istanbul - Day 1 Session 1	45	1.5	67.5
F2F Istanbul - Day 1 Session 2	50	2	100
F2F Istanbul - Day 1 Session 3	57	2	114
F2F Istanbul - Day 1 Session 4	57	1.5	85.5
F2F Istanbul - Day 2 Session 1	47	2	94
F2F Istanbul - Day 2 Session 2	49	1.75	85.75
F2F Istanbul - Day 2 Session 3	57	2	114
F2F Istanbul - Day 2 Session 4	50	2	100
WP2 Meeting #4	20	1.5	30
Legal SubTeam Meeting #7	10	1	10
Meeting #20	40	2	80
Legal SubTeam Meeting #8	27	1	27
WP1 Meeting #6	15	1.25	18.75
Legal SubTeam Meeting #9	16	0.75	12
Meeting #21	47	1	47
Stress Tests SubTeam Meeting #3	11	1	11
Legal SubTeam Meeting #10	27	2.5	67.5
WP1 Meeting #7	29	1.5	43.5
WP1 Meeting #8	16	1.75	28
WP1 Meeting #9	26	0.75	19.5
Meeting #22	55	2	110
Stress Tests SubTeam Meeting #4	9	1	9
Legal SubTeam Meeting #11	21	1.75	36.75
WP1 Meeting #10	25	2	50
WP1 Meeting #11	20	2	40
Meeting #23	58	2	116
Legal SubTeam Meeting #12	18	2	36
Legal SubTeam Meeting #13	22	1	22
Meeting #24 (Intensive Work Days)	35	2	70
Meeting #25 (Intensive Work Days)	42	1	42
Meeting #26 (Intensive Work Days)	43	3	129
Meeting #27 (Intensive Work Days)	39	2	78
Meeting #28 (Intensive Work Days)	45	1	45
Meeting #29 (Intensive Work Days)	45	3	135
Meeting #30	37	2	74
Stress Tests SubTeam Meeting #5	26	2	52
Meeting #31	29	2	58
Meeting #32	40	2	80
Meeting with the Board	56	1.5	84
Meeting #33	28	2	56
Meeting #34	40	2	80
Meeting #35	39	2	78
Meeting #36	35	3	105
Meeting #37	32	1	32

Leadership and Lawyers #1	4	1	4
Stress Tests SubTeam Meeting #6	6	1.5	9
Stress Tests SubTeam Meeting #7	5	1.5	7.5
WP1 Meeting #12	13	2	26
WP2 Meeting #5	7	0.75	5.25
WP2 Meeting #6	10	1.5	15
WP1 Meeting #13	10	1.5	15
WP1 Meeting #14	10	1.75	17.5
Stress Tests SubTeam Meeting #8	4	1	4
Working Session 1 (ICANN53)	56	10	560
Meeting with the Board (ICANN53)	21	1	21
Working Session 2 (ICANN53)	46	3	138
Working Session 3 (ICANN53)	44	1.5	66
Meeting #38	32	2	64
WP1 Meeting #15	15	1	15
Leadership and Lawyers #2	2	1	2
WP1 Meeting #16	18	1.5	27
WP3 Meeting #1	28	1	28
Meeting #39	41	2	82
Stress Tests SubTeam Meeting #9	10	1	10
WP1 Meeting #17	11	2	22
WP3 Meeting #2	25	1.5	37.5
WP2 Meeting #7	9	1.5	13.5
WP3 Meeting #3	15	1	15
WP1 Meeting #18	12	2	24
WP3 Meeting #4	29	1.5	43.5
WP2 Meeting #8	14	1.5	21
WP1 Meeting #19	15	2	30
Meeting #40	41	2	82
WP3 Meeting #5	20	1	20
Stress Tests SubTeam Meeting #10	5	1	5
F2F Paris - Day 1 Session 1	74	2	148
F2F Paris - Day 1 Session 2	74	1.5	111
F2F Paris - Day 1 Session 3	76	2	152
F2F Paris - Day 1 Session 4	78	3	234
F2F Paris - Day 2 Session 1	71	1.75	124.25
F2F Paris - Day 2 Session 2	72	2	144
F2F Paris - Day 2 Session 3	69	1.5	103.5
F2F Paris - Day 2 Session 4	70	3.25	227.5
WP2 Meeting #9	17	1.5	25.5
Meeting #43	28	2	56
WP2 Meeting #10	12	1.5	18
WP3 Meeting #6	13	1.5	19.5
WP1 Meeting #20	17	2	34
Meeting #44	42	2	84
WP2 Meeting #11	14	1.5	21

WP1 Meeting #21	21	2	42
Meeting #45	51	2	102
WP1 Meeting #22	16	1.5	24
Meeting #46	48	2	96
Meeting #47	37	2	74
Meeting #48	39	2	78
Meeting #49	35	2	70
Meeting #50	34	2	68
WP4 Meeting #1	8	1	8
Meeting with the Advisors	30	1	30
Briefing to the Board	36	1.5	54
Meeting #51	44	2	88
WP4 Meeting #2	12	1	12
Board Dialogue Call	45	3	135
Meeting #52	38	2	76
WP4 Meeting #3	14	1	14
WP1 Meeting #23	17	2	34
Meeting #53	34	2	68
WP4 Meeting #4	9	1	9
Meeting #54	54	2	108
F2F Los Angeles - Day 1 (Meeting #55)	75	10	750
F2F Los Angeles - Day 2 (Meeting #56)	68	10	680
Meeting #57	64	2	128
WP1 Meeting #24	21	1.5	31.5
WP2 Meeting #12	15	2	30
WP4 Meeting #5	14	1.5	21
WP1 Meeting #25	23	2	46
WP2 Meeting #13	11	2	22
Meeting #58	45	2	90
WP1 Meeting #26	26	2	52
WP1 Meeting #27	23	1.5	34.5
WP1 Meeting #28	24	1.5	36
WP1 Meeting #29	24	2	48
WP1 Meeting #30	34	1.5	51
Stress Tests Meeting #11	13	1	13
Stress Tests Meeting #12	10	1	10
ST18 WG Meeting #1	26	1	26
ST18 WG Meeting #2	22	1	22
ST18 WG Meeting #3	28	1.5	42
WP3 Meeting #7	11	1	11
WP3 Meeting #8	14	1	14
WP4 Meeting #6	10	1.5	15
WP4 Meeting #7	12	1.5	18
WP4 Meeting #8	19	1.5	28.5
WP4 Meeting #9	19	1.5	28.5
Legal SubTeam Meeting #14	16	2	32

Legal SubTeam Meeting #15	9	1	9
Meeting #59	56	2.25	126
Meeting #60 ICANN54	83	8.5	705.5
Meeting #61 ICANN54	73	3.5	255.5
Meeting #62 ICANN54	80	2.75	220
Meeting #63 ICANN54	75	2	150
Meeting #64	47	1	47
Meeting #65	44	2	88
Meeting #66	51	1.5	76.5
Meeting #67	34	1.5	51
Meeting #68	55	2	110
SubTeam Breakout Session ICANN54	55	3.5	192.5
F2F Dublin - Meeting #61	73	4.5	328.5
F2F Dublin - Meeting #62	80	3	240
F2F Dublin - Meeting #63	75	2.5	187.5
Meeting #64	47	2	94
WP4 Meeting #8	19	1.5	28.5
WP1 Meeting #29	24	2	48
WP4 Meeting #9	19	1.5	28.5
WP1 Meeting #30	34	2	68
Meeting #65	44	2	88
Meeting #66	51	2	102
Meeting #67	34	2	68
ST-18 Meeting #1	26	1	26
Meeting #68	55	2	110
ST-18 Meeting #2	22	1	22
ST-18 Meeting #3	28	1.5	42
WP1 Meeting #31	10	2	20
WP1 Meeting #32	7	2	14
ST-18 Meeting #4	36	1.5	54
Meeting #69	53	2	106
Meeting #70	64	2	128
Meeting #71	50	2	100
Meeting #72	40	2	80
Meeting #73	55	2	110
Meeting #74	63	3	189
Meeting #75	61	3	183
WP2 Meeting #15	40	1	40
Meeting #76	56	3	168
Meeting #77	52	3	156
WP-IOT Meeting #1	12	1	12
Meeting #78	67	3	201
Meeting #79	67	3	201
Meeting #80	68	3	204
Meeting #81	66	3	198
Meeting #82	59	2	118

Rec #11 Meeting	52	1.5	78
Rec #11 Meeting	56	1.5	84
Meeting #83	65	2	130

<b>Total Working Hours</b>	<b>17368.25</b>		
<b>Total Calls/Meetings</b>	<b>221</b>		
<b>Total Meeting Hours</b>	<b>419.75</b>		

**Mailing List Archives**

**accountability-cross-community**

August	2
September	10
November	4
December	338
January	651
February	357
March	640
April	684
May	502
June	547
July	1141
August	234
September	824
October	1411
November	1249
December	643
January	1091
February	541

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**10869**

**ccwg-accountability1**

December	39
January	25
February	7
June	1
July	1
September	1
October	2
December	1

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**77**

**ccwg-accountability2**

December	33
January	24
February	1
December	1

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**59**

**ccwg-accountability3**

December	7
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January	11
February	4
December	1

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**23**

**ccwg-accountability4 (ST-WP)**

December	25
January	62
February	20
March	26
April	24
May	7
June	9
July	10
September	1
October	12

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**196**

**ccwg-accountability5 (Legal)**

January	5
February	35
March	53
April	345
May	70
June	26
July	3
August	1
September	18
October	16
November	60

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**632**

**wp1 (Comm. Empowerment)**

February	54
March	137
April	149
May	5
June	56
July	242
August	12
September	30
October	191
November	60

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**936**

**wp2 (Review/Redress)**

February	27
March	50
April	49
May	1

	June	35
	July	232
	October	42
	November	3
		<b>439</b>
<b>wp2-compactmission</b>		
	March	59
	April	10
		<b>69</b>
<b>wp2-ombudsman</b>		
	March	5
	April	4
	June	5
		<b>14</b>
<b>wp2-reconsideration</b>		
	March	12
	April	6
		<b>18</b>
<b>wp2-independentreview</b>		
	March	51
	April	32
	May	1
	June	1
		<b>85</b>
<b>wp3 (Emerging Issues)</b>		
	July	75
	October	9
		<b>84</b>
<b>wp4 (Human Rights)</b>		
	August	70
	September	40
	October	149
	November	27
	December	10
		<b>296</b>
<b>ST18</b>		
	November	105
		<b>105</b>

<b>Total Mailing List Exchanges</b>	<b>13902</b>
<b>Number of Mailing Lists</b>	<b>15</b>

# Appendix E: Work Area 1 Outcome

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## Inventory of Existing ICANN Accountability Mechanisms

### ICANN Bylaws and Bylaws-Mandated Redress Mechanisms

ICANN Bylaws specifically provide four avenues for review:

- **Reconsideration Process (Art. IV, Sec. 2):** mechanism to challenge staff action taken against ICANN policies, or Board actions taken without consideration of material information or based upon false or inaccurate information.
- **Independent Review Process (IRP) (Art. IV, Sec. 3):** allows for claims that the ICANN Board acted in a manner inconsistent with its Bylaws or Articles of Incorporation to be considered by an independent panel of neutrals.
- **Organizational Reviews (Art. IV, Sec. 4):** As required by the Bylaws, periodic reviews of the performance and operation of each Supporting Organization, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee are organized to determine whether that organization has a continuing purpose in the ICANN structure, and, if so, whether any change in structure or operations is desirable to improve its effectiveness. These regular reviews allow an examination of the continuing efficacy of ICANN's component entities.
- **Office of the Ombudsman (Art. V):** reviews claims of unfairness by ICANN or its constituent entities. The Ombudsman framework is consistent with international standards. Office of Ombudsman publishes on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns.

### Policy Consideration Requirements: Bylaws-Based Advisory Mechanisms

Bylaws define ICANN's relationships to its component entities, including its Supporting Organizations (GNSO, ccNSO, and ASO) and Advisory Committees (SSAC, GAC, ALAC, and RSSAC). The Bylaws include detailed requirements for how the Board considers community-developed policies and receives advice. Some of these relationships are further defined through more detailed documentation, such as the Memorandum of Understanding with the Address Supporting Organization.

### Affirmation Of Commitments

Signed with the United States Department of Commerce (DoC) on 30 September 2009, the Affirmation of Commitments contains joint commitments relating to ICANN's technical coordination role of the Internet Domain Name System. The commitments uphold the multi-stakeholder model, commit to operate in a transparent manner and in the global public interest, and, among other things, to undertake community-led, regular reviews relating to accountability and transparency as well as on three other



fundamental organizational objectives. More information about the Accountability and Transparency Reviews are outlined below.

## Headquarters

ICANN, as a California Not-for-Profit Public Benefit Corporation, is obligated to follow the laws of the State of California. ICANN is also subject to both California and U.S. laws and regulations regarding ICANN's tax-exempt, public benefit status, which each require ICANN to act in furtherance of its stated public benefit purposes. These laws, as well as the laws of other places where ICANN has a presence, carry with them obligations. For example, under law, all ICANN Directors hold a fiduciary duty to act in the best interests of ICANN, and not for their own personal (or business) benefit. ICANN has the ability to sue and be sued for its actions and to be held responsible in a court of proper jurisdiction for its dealings with the global community.

## Accountability and Transparency Review Teams 1 and 2 Recommendations

Periodic assessments of ICANN's progress toward ensuring accountability, transparency and the interests of global Internet users are undertaken by community-led Review Teams. The first accountability and transparency review, conducted in 2010 by the Accountability and Transparency Review Team 1 (ATRT1), resulted in a set of recommendations. A second review was launched in 2013 - in compliance with the Affirmation of Commitments timeframe. Pursuant to the Affirmation of Commitments, the Second Accountability and Transparency Review Team (ATRT2) assessed the extent to which the ICANN board and staff implemented the recommendations arising of the ATRT1, in addition to the core scope, and issued a set of recommendations.

## Contractual Requirements

ICANN enters into a variety of contractual arrangements through which it takes on obligations. While meeting these requirements are a matter of contractual compliance for ICANN, at times the contracts also include broader accountability requirements as well. Some of these contracts include:

- The IANA Functions Contract with the NTIA, which incorporates, for example, a customer complaint resolution process at c.2.9.2.g as well as requirements for how ICANN is to consider delegation requests for ccLTDs (C.2.9.2.c) and gTLDs (C2.9.2.d).
- Registry Agreements and Registrar Accreditation Agreements (see <https://www.icann.org/resources/pages/agreements-policies-2012-02-25-en> and <https://www.icann.org/resources/pages/registries/registries-agreements-en>) Through these agreements, there are escalation paths set out in the event of disagreement between ICANN and the Registry or Registrar, in each case leading to the ultimate reference to arbitration if needed
  - Both Registry and Registrar Contracts include a requirement to follow “Consensus Policies”, which are policies developed through the ICANN multistakeholder process and approved with high thresholds of support. Most commercial contracts do not include the ability to insert new

obligations in this way, and so the requirements on the ICANN Board and the ICANN community in developing and approving these policies are high and must be followed.

- The consensus policies may only cover specific issues that are specified within the agreements, and may not touch on other specific areas (such as pricing terms). Historically, this has been referred to as the “picket fence” around where ICANN could mandate registry and registrar compliance with obligations that are not specifically included within the contracts.
- Detailed topics subject to "Consensus Policy" are defined in the gTLD Registry and Registrar Agreements.

## ICANN Board of Directors Documentation

Documents relating to the Board of Directors include briefing materials, resolutions, preliminary reports and minutes. Since 2010, the ICANN Board has provided a rationale for its decisions, which are published in both Resolutions and Minutes. All resolutions of the Board are tracked in a searchable tool, with information on how the mandate within each resolution was achieved. The Board also makes public how it addresses the advice it receives from the Advisory Committees, with both a GAC Register of Advice as well as the new Advice tracking tool.

## General ICANN Operational Information

Financial information includes an annual budgeting process developed with community input, the posting of quarterly financial reports (following the practice of listed companies), as well as the annual posting of ICANN's Audited Financial Statements, and the annual Form 990 tax filing. For tracking of ICANN's operational activities, information about current projects across the organization is posted. ICANN also maintains the Documentary Information Disclosure Policy (DIDP) for members of the public to request the release of information within ICANN that is not already publicly available.

## ICANN Board Selection Process

The selection of voting Board Directors occurs through different community processes. The Nominating Committee appoints eight Directors, ICANN's Supporting Organizations appoint six Directors (specifically, the Address Supporting Organization the Country-Code Names Supporting Organization (ccNSO) and the Generic Names Supporting Organization (GNSO) each appoint two Directors), and the At-Large Community appoints one Director. Directors serve staggered terms enabling some annual renewal of the Board. Mechanisms for the removal of Directors and Non-Voting liaisons are described in ICANN Bylaws. The President and CEO of ICANN, who is appointed by the Board, also serves a Board member.

# Appendix E: Work Area 2 Outcome

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## Input Gathered from the Community: Required Community Powers

As indicated in Section 2, the CCWG-Accountability reviewed the collection of public comments received during the development of the Enhancing ICANN Accountability process and categorized them as Work Stream 1 and Work Stream 2. Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanisms necessary to enhance ICANN's accountability within the timeframe of the IANA Stewardship Transition would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity.

### The mechanisms were divided into three sections:

1. **Mechanisms giving the ICANN community ultimate authority over the ICANN corporation:** Most of these were initially designated as Work Stream 1, since community Members need the leverage of the IANA Stewardship Transition to obtain these Bylaws changes.
2. **Mechanisms to restrict actions of the ICANN Board of Directors and management of the ICANN corporation:** Most of these were initially designated as Work Stream 2, since the Members could reverse ICANN Board or management decisions if Members are empowered in Work Stream 1 (see 1 above).
3. **Mechanisms to prescribe actions of the ICANN corporation:** Most of these were initially designated as Work Stream 2, since the Members could reverse ICANN Board or management decisions if Members are empowered in Work Stream 1 (above). For example, a bottom-up consensus process to change ICANN bylaws might be rejected by the ICANN Board, but the Members could then reverse that decision and force the change.

In addition, the CWG-Stewardship co-Chairs detailed, in a correspondence dated 15 April 2015, the expectations from their group with regards to CCWG-Accountability Work Stream 1 recommendations. These expectations are:

- **ICANN budget:** The CWG supports the ability for the community to “veto” a budget;
- **Community empowerment mechanisms:** The CWG-Stewardship will be relying on the community empowerment and accountability mechanisms that the CCWG-Accountability is currently considering and developing as a part of Work Stream 1. In particular, mechanisms such as: the ability to review ICANN Board decisions relating to periodic or ad-hoc reviews of the IANA functions undertake through the IANA Review Function (PRF or possibly IRF); the ability to approve or reject board decisions on PRF as well as the related creation of a stakeholder

community / member group in order ensure the ability to trigger these kinds of abilities;

- **Review and redress mechanisms:** The CWG-Stewardship would like to have the assurance that an IANA Periodic Review (or related ad-hoc review) could be incorporated as part of the Affirmation of Commitments mandated reviews integration into ICANN's Bylaws.
- **Appeal mechanisms (especially with regard to ccTLD related issues):** The CWG-Stewardship recommends that the CCWG-Accountability be mindful of the recommendations of the CWG-Stewardship in relation to an appeals mechanism for ccTLDs in delegation and re-delegation. The CWG-Stewardship has conducted a survey among the ccTLDs as part of the work of our Design Team B, and the results led to a recommendation which notes that ccTLDs may decide to develop their own appeals mechanism regarding re/delegation at a later date (post-transition). As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes. However, the CWG-Stewardship does want to emphasize the importance and need for an appeal mechanism to cover any other issues that may involve IANA, and notes that this is option is expected to be specifically called out as one of the possible escalation mechanisms<sup>1</sup> in the draft transition proposal.

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<sup>1</sup> As a note of clarification, the CWG-Stewardship has been referring previously to this appeals mechanism as IAP (Independent Appeals Panel) but understands that the CCWG-Accountability is referring to this mechanism as Independent Review Mechanism (IRP), which would also include the option for appeal. As such the CWG-Stewardship will be updating its references.

# Appendix F – Legal Counsel

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- 1 The CCWG-Accountability engaged two external law firms to provide advice and counsel on their Work Stream 1 Recommendations.
  - **Adler & Colvin** is the primary source of advice on California corporate governance and nonprofit corporate law, unincorporated association law, and charitable trust law.
  - **Sidley Austin LLP** advises on corporate governance, international law and jurisdiction issues, alternate dispute resolution issues, antitrust, and other topics as deemed appropriate. Sidley Austin serves as the coordinating law firm.
- 2 During initial engagement, the CCWG-Accountability created a Legal Subteam to coordinate the work of the firms. Methodology of the Legal Subteam can be found below for full reference.
- 3 Following the release of the Initial Draft Report in May 2015, the Legal Subteam was disbanded and the relationship with the law firms was redesigned. Moving forward, the CCWG-Accountability Co-Chairs, not the Legal Subteam, were designated as direct points of contact with the firms and given the authority to review and certify legal requests from the group. This new method of engagement allowed for more direct consultation between the leadership and improved ability to track costs.
- 4 All legal requests and responses are [documented](#) on the CCWG-Accountability Wiki.

## Rules of Engagement

- 5 The Legal Subteam put together the following set of rules of engagement to frame the legal counsel's work and cooperation between law firms.
- 6 **Law firms' coordination**
- 7 Sidley Austin will be the coordinating firm. Both firms are expected to work on the different issues assigned to them but Sidley Austin will coordinate how the complementary and collaborative work will be developed by the firms. It is of the essence for the success of the group to avoid having duplicate work that may impact in duplicate billable hours.
- 8 Private coordination meetings between lawyers would be acceptable and desirable. Information should flow freely between law firms.
- 9 **Legal advice**
- 10 While recognizing that Sidley Austin will be coordinating the work of both law firms with the aim of having a harmonized voice, law firms should state any differing views they may have on any particular issue where this difference happens. Furthermore, should this difference in views happen, each law firm will be required to provide the rationale for its differing view.
- 11 During face-to-face meetings/calls, high-level legal advice should come in real time in reply to anyone raising a question within the Charter's scope.

- 12 Lawyers' involvement with Work Parties of the CCWG-Accountability is key as it is the Work Parties that are building the proposals that will be subject to public comment. Therefore, the Legal Subteam and the law firms should be able to provide these Work Parties with the tools they need to build feasible and legally viable proposals.
- 13 The law firms analyzed different templates of powers and mechanisms and provided advice on whether those powers and mechanisms are legally viable in the first place and if not, which would be the alternatives. The law firms have also advised on how these mechanisms and powers may be implemented in a holistic view of the accountability enhancement process.

## Legal Subteam Methodology

- 14 When the Legal Subteam was active, the following methodology and working methods applied:

### 15 **Legal Subteam and law firms' coordination**

- 16 Law firms report to the CCWG-Accountability and receive instructions from the Legal Executive Subteam only. Legal Executive Subteam Members include: León Sánchez (lead); Athina Fragkouli; Robin Gross; David McAuley; Sabine Meyer; Edward Morris; Greg Shatan and Samantha Eisner (support).
- 17 Should there be the need for a call between the available members of the Legal Executive Subteam and any of the law firms in order to address urgent matters without the ability to setup a public call, it will always be required to provide proper debrief to the open list in a timely fashion. This method will be exceptional.
- 18 A single mailing list will be used. Legal Subteam members who are not listed in the Legal Executive Subteam have viewing rights to help streamline communications. Posting privileges should carry request privileges.
- 19 The mailing list remains open to any observers.
- 20 Activities and requests will be documented on the [dedicated CCWG-Accountability wiki page](#).

### 21 **Mailing list**

- 22 All formal requests, including follow-up clarifications, are made in writing and communicated through the public mailing list [ccwg-accountability5@icann.org](mailto:ccwg-accountability5@icann.org) ([Public archives](#)).

### 23 **Conference calls**

- 24 All weekly calls are to be recorded, transcribed and archived in the [public CCWG-Accountability wiki](#).
- 25 Legal Subteam and law firms coordination call will be held on Wednesdays: 14:00-15:00 UTC  
Legal Subteam only - 15:00-16:00 UTC Legal Subteam and lawyers.
- 26 Calls are open to anyone.

27 **Requests for advice**

- 28 No individual outside the Legal Executive Subteam should send requests to law firms.
- 29 Law firms are to alert the Legal Executive Subteam of any requests made by individuals outside the Legal Executive Subteam.
- 30 Only tasks assigned by memorandum will be subject for lawyers work. It is important that both law firms continue to follow the calls of the CCWG-Accountability and the discussion in the mailing lists as there might be important topics or questions raised over the different discussions that might provide context to the assignments made by the Legal Subteam.
- 31 Questions will continue to be gathered and compiled in a single document by the Legal Subteam to keep track of the different concerns and questions raised within the larger group and they will be triaged in order to then be assigned formally to the lawyers.
- 32 On each assignment, the Legal Subteam will do its best effort to provide as much context as possible to better guide the lawyers on the needs that the particular assignment is trying to address.
- 33 Requests for legal advice should be numbered consecutively for reference purposes.
- 34 All requests are archived in [the public CCWG-Accountability wiki](#).

## Appendix G – Legal Documents

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- 1 In their role as counsel to the CCWG-Accountability the law firms Sidley Austin and Adler & Colvin have provided a number of memoranda, charts, and legal reviews of report text. In this Appendix, the group presents key advice – presented in documents, emails, and on audio during CCWG-Accountability meetings – that was essential in the process of producing the Final Report and each of its interim draft iterations. These are presented below in a compiled version from each of the prior drafts.
- 2 There were over one hundred requests for advice submitted to the CCWG-Accountability’s Legal Counsel, all of which were mapped in a table on the [public CCWG-Accountability wiki](#).

### Key Advice – Final Report (18 February 2016)

- [Indemnification and Advancement of Expenses](#) – 10 February 2016
- [Memo on Questions Relating to GAC Decision-Making](#) – 9 February 2016
- [Assessment on Bylaw language \(“duly taken into account”\)](#) – 25 January 2016
- [Litigation Risk and Bylaws Provisions on Human Rights](#) – 14 January 2016
- [Memo on Director Independence](#) – 16 December 2015

### Key Advice – Third Draft Report (30 November 2015)

- [Sole Designator/Community Enforcement Vehicle Implementation](#) – 6 November 2015
- [Community Enforcement Vehicle Implementation](#) – 2 November 2015
- [Comparison of Enforcement Mechanisms between Models](#) – 16 October 2015
  - [Summary Comparison of Enforcement Mechanisms between Models](#) – 16 October 2015
  - [Three-Column Summary Comparison of Enforcement Mechanisms between Models](#) – 16 October 2015
- [Community Powers with Opportunity for Future Governance Review](#) – 16 October 2015
- [Current Corporate Status of ICANN under California Law](#) – 12 October 2015



## Key Advice – Second Draft Report (3 August 2015)

- [Chart of Mandatory Statutory Member Rights Relevant to the Community Mechanism as Sole Member](#) – 30 July 2015
- [Options for Board Replacement in the Event of Full Board Recall](#) – 18 July 2015
- [Empowered SO/AC Membership & Designator Models with Community Mechanism as Sole Member Model](#) – 17 July 2015
- [Description and Comparison of Empowered SO/AC Membership and Designator Model](#) – 07 July 2015
- [Updated Legal Assessment: Revised Summary Chart and Governance Chart](#) – 16 June 2015
- [Use of Unincorporated Associations in ICANN Governance](#) – 03 May 2015
- [Overview of Community Powers](#) – 24 April 2015
- [Response to Questions Re: Unincorporated Associations](#) – 23 April 2015
- [Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart](#) – 23 April 2015
- [Updated Sidley Austin, Adler & Colvin Joint Preliminary Analysis](#) – 10 April 2015

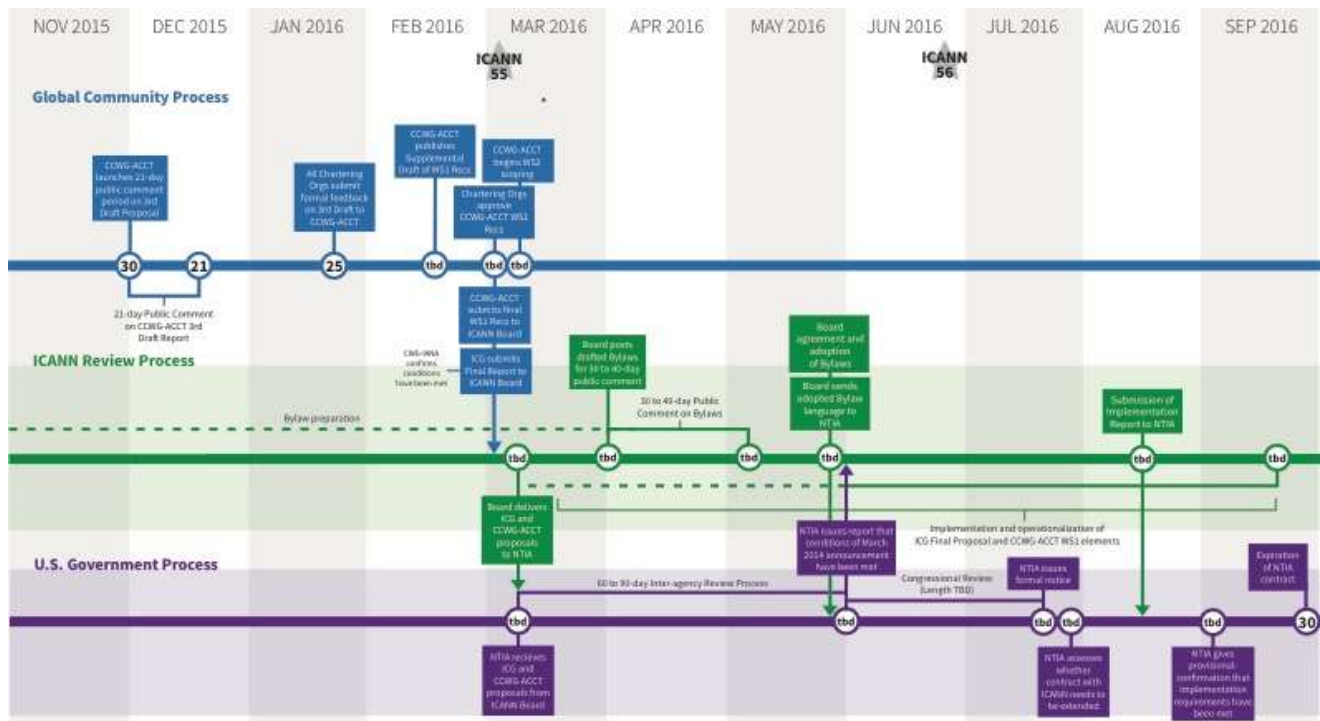
## Key Advice – First Draft Report (4 May 2015)

- [Use of Unincorporated Associations in ICANN Governance](#) – 03 May 2015
- [Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart](#) – 23 April 2015
- [Legal Assessment: Proposed Accountability Mechanisms Preliminary Response to Legal Subteam Templates \(Work Stream 2\)](#) – 20 April 2015
- [Legal Scoping Document](#) – 19 March 2014

# Appendix H – Bylaws Drafting Process & Implementation Timeline

- 1 The CCWG-Accountability views the oversight of Work Stream 1 implementation as a key obligation of the group. The final Work Stream 1 accountability changes will have to be implemented or committed to before the IANA Stewardship Transition can occur. Implementation efforts are being coordinated through ICANN, with several concurrent tracks, some of which will require multiple public comment periods.
- 2 The implementation plan of the CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations is outlined in this section.

## Timeline



- 3 A detailed IANA Stewardship Transition and Enhancing ICANN Accountability timeline is available [here](#).
- 4 To ensure timely implementation, the CCWG-Accountability has initiated a Bylaws drafting process (in coordination with ICANN) to incorporate the requirements of the CCWG-Accountability proposal into the ICANN Bylaws. This includes incorporating the Affirmation of Commitments reviews and the CWG-Stewardship dependencies, as appropriate. Once a draft of the ICANN Bylaws is completed, it will be posted for public comment. ICANN Board approval and adoption of the Bylaws will take place after the public comment process has been completed and after the National Telecommunications and Information Administration completes its review of the proposals.

- 5 It is expected that the National Telecommunications and Information Administration will complete its review process in approximately 60-90 days. The adoption of the ICANN Bylaws is expected to occur shortly after completion of this review.

## Implementation Plan

- 6 A significant number of CCWG-Accountability Work Stream 1 recommendations involve updating the ICANN Bylaws. With exception of enhancements to the Independent Review Process,<sup>1</sup> most of the Work Stream 1 recommendations will be implemented through changes to the ICANN Bylaws.
- 7 As a result, the CCWG-Accountability and ICANN have developed a Bylaws drafting process based on the following requirements:
  - All final decisions about Bylaws proposed to the ICANN Board would be approved by the CCWG-Accountability and/or the relevant CCWG-Accountability subgroup.
  - The CCWG-Accountability's decisions and those of its subgroups would be informed by external legal advice.
  - ICANN legal staff provides legal advice to the ICANN Board.
  - The drafting process will be based on a collaborative effort between the CCWG-Accountability's legal counsel, ICANN legal staff, and the CCWG-Accountability.

## Bylaw Drafting Process

1. Specifications for revised Bylaws will be developed based on the CCWG-Accountability's final proposal.
2. The CCWG-Accountability will be responsible for approving the specification and initiating the Bylaws drafting process.
3. Initial Bylaws drafting and refining based on the specification will be undertaken by ICANN legal staff in collaboration with the CCWG-Accountability's legal counsel.
4. For initial draft review, the relevant CCWG-Accountability subgroup, supported by both ICANN legal staff and the CCWG-Accountability's legal counsel, will review the draft to ensure it meets the specification and intent of the CCWG-Accountability. The CCWG-Accountability subgroup will be responsible for approving the review.
5. The CCWG-Accountability's legal counsel will conduct a review to assess compliance with the specification and ensure the absence of any unintended consequences. ICANN legal staff may also review.
6. The CCWG-Accountability subgroup will review the advice and will make adjustments as necessary. The draft Bylaws and advice will be shared with the CCWG-Accountability and with the ICANN Board.

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<sup>1</sup> Operationalization of the Independent Review Process enhancements beyond the relevant Bylaw changes will include selecting panelists, establishing the secretariat for the panel, and defining the rules of procedure.

7. The full CCWG-Accountability members and participants will be responsible for deciding on any conflict of interpretation, and will be responsible for approving the Bylaw change for inclusion in a proposal that the draft be presented for public comment. In the situation where there is a conflict of interpretation, the full CCWG-Accountability will send the draft Bylaw back to the CCWG-Accountability subgroup and legal counsel for further refinement.
8. The ICANN Board has final approval of the Bylaws, using its community-focused processes including a public comment period.

# Affirmation of Commitments

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1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce ("DOC") and the Internet Corporation for Assigned Names and Numbers ("ICANN"), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system (DNS)<sup>1</sup>, globally by a private sector led organization, the parties agree as follows:
2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet's success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet's underlying infrastructure - the DNS - is required to ensure interoperability.
3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.
4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.
5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

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<sup>1</sup> For the purposes of this Affirmation the Internet's domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair

of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate

issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.



FOR THE NATIONAL  
TELECOMMUNICATIONS  
INFORMATION ADMINISTRATION:

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Name: Lawrence E. Strickling  
Title: Assistant Secretary for  
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION  
AND FOR ASSIGNED NAMES AND  
NUMBERS:

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Name: Rod Beckstrom  
Title: President and CEO

Date: September 30, 2009

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# Glossary

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See also <https://www.icann.org/resources/pages/glossary-2014-02-03-en>.

<b>ADVISORY COMMITTEE (AC)</b>	<p>An Advisory Committee (“AC”) is a formal advisory body made up of representatives from the Internet community to advise ICANN on a particular issue or policy area. Several Advisory Committees are mandated by the ICANN Bylaws and others may be created as needed. Advisory Committees currently have no legal authority to act for ICANN, but report their findings and make recommendations to the ICANN Board.</p> <p>See also: <a href="https://www.icann.org/resources/pages/governance/bylaws-en/#XI">https://www.icann.org/resources/pages/governance/bylaws-en/#XI</a>.</p>
<b>AFFIRMATION OF COMMITMENTS (AoC)</b>	<p>The Affirmation of Commitments (“AoC”) is the 2009 agreement between ICANN and the NTIA under which ICANN reaffirmed its commitment to accountability and transparency, DNS security and stability, competition and consumer choice, international participation, periodic community reviews, and related activities. As part of the IANA Stewardship Transition, ICANN’s commitments under the AoC and the AoC Reviews will be incorporated into the ICANN Bylaws, and the AoC itself will be terminated.</p>
<b>AFFIRMATION OF COMMITMENTS REVIEWS (AoC REVIEWS)</b>	<p>The AoC Reviews are periodic community reviews required under the AoC to assess and report on ICANN's progress toward 1) ensuring accountability and transparency (see ATR below), 2) preserving security, stability and resiliency of the DNS, 3) promoting competition, consumer trust and consumer choice, and 4) enforcing WHOIS policy. As part of the IANA Stewardship Transition, the AoC Reviews will be incorporated into the ICANN Bylaws.</p>
<b>AT-LARGE ADVISORY COMMITTEE (ALAC)</b>	<p>The At-Large Advisory Committee (“ALAC”) is a body within the ICANN structure responsible for considering and providing advice on the activities of ICANN as they relate to the interests of individual Internet users (the "At-Large" community). Following the IANA Stewardship Transition, ALAC will participate as a Decisional Participant in the Empowered Community.</p> <p>See also: <a href="http://www.atlarge.icann.org/">http://www.atlarge.icann.org/</a>.</p>
<b>ADDRESS SUPPORTING ORGANIZATION</b>	<p>The Address Supporting Organization (“ASO”) advises the ICANN Board of Directors on policy issues relating to the allocation and management of IP addresses. Following the IANA Stewardship Transition, the ASO</p>

<p><b>(ASO)</b></p>	<p>will participate as a Decisional Participant in the Empowered Community.</p> <p>See also: <a href="https://aso.icann.org/">https://aso.icann.org/</a>.</p>
<p><b>ACCOUNTABILITY AND TRANSPARENCY REVIEW (ATR)</b></p>	<p>The Accountability and Transparency Review (“ATR”) is a periodic review required under the AoC to assess and report on ICANN’s progress toward ensuring accountability and transparency and to provide recommendations to enhance accountability and transparency activities throughout ICANN. As part of the IANA Stewardship Transition, the ATR and the other AoC Reviews will be incorporated into the ICANN Bylaws.</p>
<p><b>ACCOUNTABILITY AND TRANSPARENCY REVIEW TEAM (ATRT)</b></p>	<p>Each Accountability and Transparency Review is carried out by an Accountability and Transparency Review Team (“ATRT”).</p>
<p><b>BOARD GOVERNANCE COMMITTEE (BGC)</b></p>	<p>The Board Governance Committee (“BGC”) is an ICANN Board committee currently responsible for conducting periodic evaluations of the performance of the ICANN Board and each of its members.</p>
<p><b>BOTTOM-UP PROCESS</b></p>	<p>A fundamental principle of ICANN’s decision-making process is that policy analysis and decisions progress from a stakeholder level (made up of directly affected parties, Internet users, companies and anyone else who wishes to participate in the process) to the ICANN Board level. This “bottom-up process” provides the opportunity for open and equal participation at all levels, as practical and possible.</p>
<p><b>COUNTRY-CODE NAMES SUPPORTING ORGANIZATION (ccNSO)</b></p>	<p>The Country-Code Names Supporting Organization (“ccNSO”) is a body within the ICANN structure created for and by ccTLD managers. The ccNSO provides a forum for ccTLD managers to meet and discuss topical issues of concern to ccTLDs from a global perspective. The ccNSO provides a platform to nurture consensus, technical cooperation and skill building among ccTLDs and facilitates the development of voluntary best practices for ccTLD managers. It is also responsible for developing and recommending global policies to the ICANN Board for a limited set of issues relating to ccTLDs, such as the introduction of Internationalized Domain Name ccTLDs (“IDN ccTLDs”). Membership in the ccNSO is open to all ccTLD managers responsible for managing an International Organization for Standardization (“ISO”) 3166 ccTLD. Following the IANA Stewardship Transition, the ccNSO will participate as a Decisional Participant in the Empowered Community.</p>

	See also: <a href="http://ccnso.icann.org/">http://ccnso.icann.org/</a> .
<b>COUNTRY CODE TOP-LEVEL DOMAIN (ccTLD)</b>	A country code top-level domain (“ccTLD”) is an Internet top-level domain generally used or reserved for a country, a sovereign state, or a dependent territory.  See also: <a href="http://www.iana.org/cctld/cctld.htm">http://www.iana.org/cctld/cctld.htm</a> .
<b>CROSS COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY (CCWG-ACCOUNTABILITY)</b>	The Cross Community Working Group on Enhancing ICANN Accountability (“CCWG-Accountability”) was convened to design a proposal that ensures that ICANN's accountability and transparency commitments to the global Internet community are maintained and enhanced following the transition of the U.S. Government’s stewardship of the IANA functions.  See also: <a href="https://community.icann.org/display/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability">https://community.icann.org/display/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability</a> .
<b>COMMUNITY POWERS</b>	As part of the IANA Stewardship Transition, the following seven Community Powers will be vested in the Empowered Community, through Fundamental Bylaws, to enable the multi-stakeholder Internet community to hold ICANN accountable for its actions (or failure to act): <ul style="list-style-type: none"> <li>• The power to reject ICANN budgets, IANA budgets or ICANN strategic/operating plans;</li> <li>• The power to reject changes to ICANN's Standard Bylaws;</li> <li>• The power to approve changes to ICANN's Fundamental Bylaws or Articles of Incorporation, and to approve ICANN's sale or other disposition of all or substantially all of ICANN's assets;</li> <li>• The power to appoint and remove individual ICANN Board Directors;</li> <li>• The power to recall the entire ICANN Board of Directors;</li> <li>• The power to launch a binding community IRP or a non-binding Request for Reconsideration; and</li> <li>• The power to reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of any PTI separation process for the IANA naming functions.</li> </ul>
<b>COOPERATIVE ENGAGEMENT PROCESS</b>	As specified in Article IV, Section 3, of the ICANN Bylaws, prior to initiating an IRP, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought before the IRP Panel. It is contemplated that this “cooperative engagement process” will be initiated prior to the requesting party incurring any costs in the

	<p>preparation of a request for independent review. Cooperative engagement is expected to be between ICANN and the requesting party, without the participation of legal counsel.</p> <p>See also: <a href="https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf">https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf</a>.</p>
<b>CONSENSUS</b>	<p>Consensus is a form of decision-making employed by various SOs within ICANN. The method for establishing whether a “consensus” has been reached may differ among SOs. For example, the following method is used in the GNSO:</p> <p>“Full consensus” - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as Unanimous Consensus.</p> <p>“Consensus” - when only a small minority disagrees, but most agree.</p> <p>When the GAC provides consensus advice to the ICANN Board this is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</p>
<b>CONSOLIDATED RIR IANA STEWARDSHIP PROPOSAL (CRISP) TEAM</b>	<p>The Consolidated RIR IANA Stewardship Proposal (“CRISP”) Team was established by the Internet number community through the RIRs to produce a proposal for IANA activities related to the allocation of blocks of Internet Number Resources, the IANA Number Registries, administration of the special-purpose "IN-ADDR.ARPA" and "IP6.ARPA" DNS zones, and other related registry management tasks.</p> <p>See also: <a href="https://www.nro.net/nro-and-internet-governance/iana-oversight/consolidated-rir-iana-stewardship-proposal-team-crisp-team">https://www.nro.net/nro-and-internet-governance/iana-oversight/consolidated-rir-iana-stewardship-proposal-team-crisp-team</a>.</p>
<b>CONSTITUENCY GROUP</b>	<p>A Constituency Group is a group of stakeholders united around a particular common interest or perspective.</p>
<b>CUSTOMER STANDING COMMITTEE (CSC)</b>	<p>As part of the IANA Stewardship Transition, a Customer Standing Committee (“CSC”) will be established to perform the operational oversight previously performed by the NTIA as it relates to the monitoring of performance of the IANA naming functions. The CSC structure will be set forth in ICANN’s Fundamental Bylaws.</p>
<b>CROSS COMMUNITY WORKING GROUP TO DEVELOP AN IANA STEWARDSHIP TRANSITION PROPOSAL ON NAMING RELATED</b>	<p>The Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (“CWG-Stewardship”) was convened to produce a consolidated transition proposal for the elements of the IANA Stewardship Transition that directly affect the Internet naming community.</p> <p>See also: <a href="https://community.icann.org/x/37fhAg">https://community.icann.org/x/37fhAg</a>.</p>

<b>FUNCTIONS (CWG- STEWARDSHIP)</b>	
<b>DECISIONAL PARTICIPANTS</b>	<p>Following the IANA Stewardship Transition, the following five ICANN SOs and ACs will participate as the Decisional Participants in the Empowered Community: ALAC, ASO, ccNSO, GNSO and GAC (if the GAC chooses to do so). The Empowered Community will act at the direction of its Decisional Participants to exercise and enforce the Community Powers vested in the multi-stakeholder Internet community as part of the transition of the NTIA’s stewardship of the IANA functions. The GAC, however, will not be able to participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge a decision by the ICANN Board to implement GAC consensus advice. In such cases, the GAC will still be able to participate in an advisory capacity in the other aspects of the escalation process, but not as a decision-maker.</p>
<b>DIRECTORS</b>	<p>ICANN’s Board Directors are natural persons who direct the activities and affairs of ICANN as a California nonprofit public benefit corporation and have fiduciary duties with respect to exercise of corporate power. Directors are distinguished from observers and liaisons, who can attend ICANN Board meetings but cannot vote.</p> <p>See also: <a href="https://www.icann.org/resources/pages/governance/bylaws-en/#VI">https://www.icann.org/resources/pages/governance/bylaws-en/#VI</a>.</p>
<b>DOCUMENTARY INFORMATION DISCLOSURE POLICY (DIDP)</b>	<p>ICANN's Documentary Information Disclosure Policy (“DIDP”) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. A principal element of ICANN's approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN makes available on its website as a matter of course.</p>
<b>DOMAIN NAME SYSTEM (DNS)</b>	<p>The Domain Name System (“DNS”) helps users find their way around the Internet. Every computer on the Internet has a unique address – just like a telephone number – which is a rather complicated string of numbers. It is called its IP address. IP addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a mnemonic device that makes addresses easier to remember.</p>
<b>EMPOWERED COMMUNITY</b>	<p>The Empowered Community will be formed as a California unincorporated association through the ICANN Bylaws and will have the power as the sole designator under California law to appoint and remove individual Directors or to recall the entire Board of Directors and take</p>

	<p>other action as directed by the community to enforce Community Powers. The Empowered Community and the rules by which it will be governed will be constituted in ICANN's Fundamental Bylaws.</p>
<p><b>ICANN FIVE-YEAR OPERATING PLAN</b></p>	<p>ICANN's <a href="#">Five-Year Operating Plan</a> is a means of planning and executing portfolios of ICANN activities that align with the strategic objectives and goals articulated in ICANN's Five-Year <a href="#">Strategic Plan</a>. This operating plan links strategic objectives and goals with ICANN's Annual Operating Plan and Budget, setting out planned outcomes (key success factors), means of measuring progress (key performance indicators), operational risks, dependencies and resources needed to accomplish goals.</p>
<p><b>ICANN FIVE-YEAR STRATEGIC PLAN</b></p>	<p>ICANN's Five-Year Strategic Plan articulates ICANN's vision and long-term strategic goals, which are developed through a collaborative, bottom-up, multistakeholder process.</p>
<p><b>FUNDAMENTAL BYLAWS</b></p>	<p>As part of the IANA Stewardship Transition, ICANN's Bylaws will be classified as either Standard Bylaws or Fundamental Bylaws. The Fundamental Bylaws will be those Bylaws that are integral to ICANN's organization, purpose and accountability to the global Internet community. As such, the threshold of Board approval required for changes to Fundamental Bylaws will be higher than that required for changes to Standard Bylaws. If the ICANN Board proposes any change to the Fundamental Bylaws, the proposal will require approval from three-fourths (3/4) of all of the Directors on the Board and the affirmative consent of the Empowered Community in order for the change to take legal effect.</p>
<p><b>GOVERNMENTAL ADVISORY COMMITTEE (GAC)</b></p>	<p>The Governmental Advisory Committee ("GAC") is an Advisory Committee comprising appointed representatives of national governments, multi-national governmental organizations and treaty organizations, and distinct economies. Its function is to advise the ICANN Board on matters of concern to governments. The GAC operates as a forum for the discussion of government interests and concerns, including consumer interests. As an Advisory Committee, the GAC currently has no legal authority to act for ICANN, but reports its findings and recommendations to the ICANN Board. Following the IANA Stewardship Transition, the GAC will participate as a Decisional Participant in the Empowered Community if it chooses to do so, except in instances where the Empowered Community exercises a Community Power to challenge a decision by the ICANN Board to implement GAC consensus advice.</p> <p>See also:  <a href="https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee">https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee</a></p>

<b>GENERIC NAMES SUPPORTING ORGANIZATION (GNSO)</b>	<p>The Generic Names Supporting Organization (“GNSO”) is the successor to the responsibilities of the Domain Name Supporting Organization (“DNSO”) that relate to the generic top-level domains. The GNSO has six constituencies, as follows: the commercial and business constituency, the gTLD registry constituency, the Internet service provider constituency, the non-commercial users constituency, the registrar’s constituency, and the IP constituency. Following the IANA Stewardship Transition, the GNSO will participate as a Decisional Participant in the Empowered Community.</p> <p>See also: <a href="http://gns0.icann.org/en/">http://gns0.icann.org/en/</a>.</p>
<b>GENERIC TOP-LEVEL DOMAIN (gTLD)</b>	<p>A generic top-level domain (“gTLD”) is one of the categories of TLDs maintained by the IANA department of ICANN for use in the Domain Name System of the Internet. It is visible to Internet users as the suffix at the end of a domain name.</p>
<b>INTERNET ASSIGNED NUMBERS AUTHORITY (IANA)</b>	<p>ICANN has been performing the Internet Assigned Numbers Authority (“IANA”) functions on behalf of the global Internet community since 1998. The IANA functions include the maintenance of the registry of technical Internet protocol parameters, the administration of certain responsibilities associated with Internet DNS root zone, and the allocation of Internet numbering resources. See also: <a href="http://www.iana.org/">http://www.iana.org/</a>.</p>
<b>IANA FUNCTIONS BUDGET</b>	<p>The IANA Functions Budget is currently part of ICANN’s Annual Operating Plan and Budget. As part of the IANA Stewardship Transition, the IANA Functions Budget will be prepared and considered as a separate ICANN budget.</p>
<b>IANA FUNCTIONS CONTRACT</b>	<p>As part of the IANA Stewardship Transition, ICANN will enter into an IANA Functions Contract including a Statement of Work with PTI pursuant to which PTI will perform the IANA naming functions.</p>
<b>IANA FUNCTION REVIEW (IFR)</b>	<p>Following the IANA Stewardship Transition, periodic IANA Function Reviews (“IFRs”) of the performance of the IANA naming functions against the contractual requirements set forth in the IANA Functions Contract and Statement of Work will be carried out by an IANA Function Review Team. The procedures of IFRs will be set forth in ICANN’s Fundamental Bylaws.</p>
<b>IANA STEWARDSHIP TRANSITION</b>	<p>ICANN has been performing the IANA functions under contract with the NTIA. In March 2014, the NTIA announced its intent to transition the NTIA’s stewardship of the IANA functions to the global Internet community (the “IANA Stewardship Transition”) and requested proposals from the ICANN multistakeholder community for that transition.</p>



<b>IANA STEWARDSHIP TRANSITION COORDINATION GROUP (ICG)</b>	<p>The IANA Stewardship Transition Coordination Group (“ICG”) was formed to coordinate the development of a proposal among the communities affected by the transition of NTIA’s stewardship of the IANA functions. The creation of the ICG was initiated and facilitated by ICANN, and the membership of the ICG has been defined by the Internet communities participating in it. The group’s sole deliverable is a proposal to the NTIA recommending a transition plan of NTIA’s stewardship of the IANA functions to the global Internet community, consistent with the key principles outlined in the NTIA announcement on March 14, 2014.</p> <p>See also: <a href="https://www.icann.org/en/stewardship/">https://www.icann.org/en/stewardship/</a>.</p>
<b>IANAPLAN WORKING GROUP</b>	<p>The IETF established the IANAPLAN Working Group to produce a proposal for the transition of the NTIA’s stewardship of the IANA functions related to maintaining the codes and numbers contained in a variety of Internet protocols developed by the IETF.</p> <p>See also: <a href="http://www.ietf.org/iana-transition.html">http://www.ietf.org/iana-transition.html</a>.</p>
<b>INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)</b>	<p>The Internet Corporation for Assigned Names and Numbers (“ICANN”) is a California nonprofit public benefit corporation that operates internationally and has responsibility for IP address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. ICANN has been performing the IANA functions under contract with the NTIA; however, in March 2014, the NTIA announced its intent to transition the NTIA’s stewardship of the IANA functions and requested proposals from the ICANN multistakeholder community for that transition.</p> <p>As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition in the registration of domain names; to achieving broad representation of global Internet communities; and to coordinating the development and implementation of policies consistent with its Mission through bottom-up, consensus-based, multistakeholder processes.</p> <p>See also: <a href="https://www.icann.org/">https://www.icann.org/</a>.</p>
<b>ICANN ANNUAL OPERATING PLAN AND BUDGET</b>	<p>ICANN’s Annual Operating Plan and Budget currently includes the IANA Functions Budget. As part of the IANA Stewardship Transition, the IANA Functions Budget will be prepared and considered as a separate ICANN budget.</p>

<b>ICANN ARTICLES OF INCORPORATION</b>	<p>ICANN's Articles of Incorporation are the instrument under which ICANN was incorporated as a California nonprofit public benefit corporation. They define fundamental aspects of ICANN's organization and purpose and are ICANN's highest-level governing document. As such, following the IANA Stewardship Transition, the threshold of Board and Empowered Community approval required for changes to ICANN's Articles of Incorporation will be the same as that required for changes to Fundamental Bylaws.</p>
<b>ICANN BYLAWS</b>	<p>Subject to ICANN's Articles of Incorporation and applicable law, ICANN's Bylaws define the framework and rules for governance and operations within ICANN. As part of the IANA Stewardship Transition, ICANN's Bylaws will be classified as either Standard Bylaws or Fundamental Bylaws. The threshold of Board approval required for changes to the Fundamental Bylaws will be higher than the threshold of approval required for changes to the Standard Bylaws, and any proposed changes to Fundamental Bylaws will also require the approval of the Empowered Community for the change to take legal effect. Following Board approval of a change to the Standard Bylaws, the Empowered Community will have an opportunity to reject the change before it takes legal effect. Public consultations will be required on all proposed changes to ICANN Bylaws (Standard or Fundamental).</p>
<b>COMMUNITY FORUM</b>	<p>Following the IANA Stewardship Transition, to exercise and enforce Community Powers, the Empowered Community will first need to satisfy the appropriate escalation process for the particular Community Power. A Community Forum for interested stakeholders will be a component of the escalation process for the Community Powers (except with respect to the power to appoint Directors and the power to remove certain individual Directors). This discussion phase will provide a forum for the petitioning Decisional Participant(s) to share the rationale for, and answer questions about, the proposed use of a Community Power, and the discussion and information sharing among interested stakeholders will help the Empowered Community reach well-considered conclusions about exercising its new powers.</p>
<b>INTERNET ENGINEERING TASK FORCE (IETF)</b>	<p>The Internet Engineering Task Force ("IETF") is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. It is open to any interested individual. The IETF develops Internet standards and in particular the standards related to the Internet Protocol Suite (TCP/IP).</p> <p>See also: <a href="https://www.ietf.org/">https://www.ietf.org/</a></p>
<b>INDEPENDENT REVIEW PROCESS</b>	<p>ICANN's Independent Review Process ("IRP") is an appeals process that provides for independent third-party review of ICANN Board actions or inaction alleged by an affected party to be inconsistent with ICANN's</p>

<b>(IRP)</b>	Articles of Incorporation or Bylaws. As part of the IANA Stewardship Transition, the existing IRP will be strengthened to ensure that it is more accessible and transparent, and the scope of the IRP will be expanded to include claims relating to ICANN staff actions/inaction, certain PTI actions/inaction, expert panel decisions and DIDP decisions. The IRP Panel will also hear claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in ICANN's Articles of Incorporation or Bylaws. IRP Panel decisions will be binding and enforceable in any court that recognizes international arbitration results. These enhancements to the IRP will be set forth in ICANN's Fundamental Bylaws.
<b>INDEPENDENT REVIEW PROCESS PANEL (IRP PANEL)</b>	The Independent Review Process Panel ("IRP Panel") is an independent standing judicial/arbitral panel charged with reviewing and resolving claims brought by affected parties through the IRP.
<b>INTERNET PROTOCOL (IP)</b>	Internet Protocol ("IP") is the communications protocol underlying the Internet, which allows networks of devices to communicate over a variety of physical links. Each device or service on the Internet has at least one IP address that uniquely identifies it from other devices or services on the Internet. An IP address is the numerical address and DNS naming uses user-friendly names to locate the devices and services.
<b>MULTI-STAKEHOLDER APPROACH</b>	<p>The "multistakeholder approach" is an organizational framework or structure for governance and policymaking which aims to bring together all stakeholders to collaborate and participate in the dialogue, decision-making and implementation of solutions to identified problems or goals.</p> <p>The multistakeholder approach at ICANN is comprised of a diverse set of stakeholders with an interest in Internet numbering, naming and protocols from around the world who have organized into various Supporting Organizations, Constituent Groups and Advisory Committees, and agree to operate in an open, bottom-up, consensus-driven, and transparent manner.</p>
<b>NETMUNDIAL PRINCIPLES</b>	<p>The NETmundial meeting, which took place in Sao Paulo, Brazil on 23-24 April 2014, was the first multistakeholder-designed event to focus on the future of Internet governance. NETmundial identified a set of common principles and important values that contribute to an inclusive, multistakeholder, effective, legitimate, and evolving Internet governance framework, and recognized that the Internet is a global resource which should be managed in the public interest.</p> <p>See also: <a href="http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf">http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf</a>.</p>

<b>NOMINATING COMMITTEE (NOMCOM)</b>	<p>The Nominating Committee (“NomCom”) is an independent ICANN committee tasked with selecting eight members of the ICANN Board of Directors, five members of the ALAC, three members of the GNSO, and three members of the ccNSO.</p> <p>See also: <a href="https://www.icann.org/resources/pages/nomcom-2013-12-13-en">https://www.icann.org/resources/pages/nomcom-2013-12-13-en</a>.</p>
<b>U.S. DEPARTMENT OF COMMERCE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA)</b>	<p>The U.S. Department of Commerce National Telecommunications and Information Administration (“NTIA”) is the Executive Branch agency that is principally responsible for advising the President of the United States on telecommunications and information policy issues. NTIA maintains a contract with ICANN for the technical coordination of the Internet's domain name and addressing system. In March 2014, NTIA announced its intent to transition out of its contractual role with respect to the IANA functions and requested proposals from the ICANN multistakeholder community for that transition.</p> <p>See also: <a href="http://www.ntia.doc.gov/">http://www.ntia.doc.gov/</a>.</p>
<b>OMBUDSMAN</b>	<p>The ICANN Ombudsman investigates and addresses complaints brought by members of the ICANN community who believe that the ICANN Board, staff or an ICANN constituent body has treated them unfairly. The Ombudsman must maintain neutrality and independence and facilitate fair, impartial and timely resolution of community complaints . See also: <a href="https://www.icann.org/resources/pages/accountability/ombudsman-en">https://www.icann.org/resources/pages/accountability/ombudsman-en</a>.</p>
<b>POLICY DEVELOPMENT PROCESS (PDP)</b>	<p>The Policy Development Process (“PDP”) is a set of formal steps, as defined in the ICANN Bylaws, to guide the initiation, internal and external review, timing and approval of policies needed to coordinate the global Internet's system of unique identifiers.</p>
<b>POST-TRANSITION IANA ENTITY (PTI)</b>	<p>As part of the IANA Stewardship Transition, a new Post-Transition IANA entity (“PTI”) will be created to provide the IANA functions after the transition of oversight responsibilities from the NTIA. PTI will take the form of a California nonprofit public benefit corporation, and ICANN will be its sole member. PTI’s governance structure will be set forth in ICANN’s Fundamental Bylaws.</p>
<b>PRIVATE SECTOR</b>	<p>The “private sector” includes businesses, not-for-profit bodies, individual persons, non-governmental organizations, civil society and academic institutions.</p>
<b>REGIONAL AT-LARGE ORGANIZATIONS</b>	<p>The At-Large community is structured into five Regional At-Large Organizations (“RALOs”). These organizations serve as the communication forum and coordination point to promote and assure the</p>

<b>(RALOs)</b>	participation of regional Internet user communities within ICANN activities as well as enhance knowledge and capacity building.
<b>RECONSIDERATION PROCESS</b>	The Reconsideration Process is an internal ICANN appeals mechanism through which affected parties may request that certain actions or inaction of the ICANN Board of Directors or staff be submitted to the ICANN Board for review or reconsideration. As part of the IANA Stewardship Transition, there will be several enhancements to the Reconsideration Process including expanding the scope of permissible Requests for Reconsideration and extending the time period during which an affected party may file a Request for Reconsideration .
<b>REGISTRAR</b>	Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of the registrars that have been accredited by ICANN appears in the Directory of ICANN-Accredited Registrars( <a href="https://www.icann.org/registrar-reports/accredited-list.html">https://www.icann.org/registrar-reports/accredited-list.html</a> ).
<b>REGISTRY</b>	A "registry" is the authoritative, master database of all domain names registered in each Top-Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from TLDs anywhere in the world. Internet users don't interact directly with the registry operator; users can register names in TLDs including .biz, .com, .info, .net, .name, .org by using an ICANN-accredited registrar.
<b>REVIEW MECHANISM</b>	A "review mechanism" is a process to assess how a decision or policy is being put in place. ICANN has a series of review mechanisms mandated in its Bylaws to ensure its accountability and transparency.
<b>REGIONAL INTERNET REGISTRY (RIR)</b>	There are currently five Regional Internet Registries ("RIRs"): AfriNIC, APNIC, ARIN, LACNIC and RIPE NCC. These not-for-profit organizations are responsible for distributing and managing IP addresses on a regional level to Internet service providers and local registries.
<b>ROOT SERVERS</b>	The "root servers" contain the IP addresses of all the TLD registries – both the global registries such as .com, .org, etc. and the 244 country-specific registries such as .fr (France), .cn (China), etc. This is critical information. If the information is not 100% correct or if it is ambiguous, it might not be possible to locate a key registry on the Internet. In DNS parlance, the information must be unique and authentic.
<b>ROOT SERVER SYSTEM</b>	The Root Server System Advisory Committee ("RSSAC") advises the ICANN community and the ICANN Board on matters relating to the

<b>ADVISORY COMMITTEE (RSSAC)</b>	<p>operation, administration, security, and integrity of the Internet's root server system.</p> <p>See also: <a href="https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en">https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en</a>.</p>
<b>ROOT ZONE</b>	<p>The “root zone” is the central directory for the DNS, which is a key component in translating readable host names into numeric IP addresses.</p> <p>See also: <a href="http://www.iana.org/domains/root/files">www.iana.org/domains/root/files</a>.</p>
<b>SEPARATION PROCESS</b>	<p>A “separation process” means any process pursuant to which PTI may or will cease to perform the IANA naming functions under the IANA Functions Contract.</p>
<b>SPECIAL IFR</b>	<p>Following the IANA Stewardship Transition, Special IFRs may be initiated outside of the cycle for regular periodic IFRs to address certain deficiencies or issues relating to the performance of the IANA naming functions when the prescribed escalation mechanisms have been exhausted. The procedures for Special IFRs will be set forth in ICANN’s Fundamental Bylaws.</p>
<b>SUPPORTING ORGANIZATIONS (SOs)</b>	<p>The Supporting Organizations (“SOs”) are the three specialized policy developments bodies that currently provide the ICANN Board of Directors with policy recommendations on issues relating to domain names (GNSO and ccNSO) and IP addresses (ASO).</p>
<b>SPONSOR</b>	<p>A Sponsor is an organization which is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.</p>
<b>SECURITY AND STABILITY ADVISORY COMMITTEE (SSAC)</b>	<p>The Security and Stability Advisory Committee (“SSAC”) is the President's standing committee on the security and stability of the Internet's naming and address allocation systems. Their charter includes a focus on risk analysis and auditing. SSAC consists of approximately 20 technical experts from industry and academia as well as operators of</p>

	<p>Internet root servers, registrars, and TLD registries.</p> <p>See also: <a href="https://www.icann.org/groups/ssac">https://www.icann.org/groups/ssac</a>.</p>
<b>STAKEHOLDER</b>	<p>A “stakeholder” is any individual or group affected by the actions of ICANN. Stakeholders at ICANN include ccTLD registries; gTLD registries and registrars; regional Internet registries who manage the regional distribution of Internet number resources including IP address and Autonomous System Numbers; the thirteen root name server operators; commercial interests, including those representing large and small businesses, intellectual property interests and providers of Internet and other communications services; non-commercial interests, including non-commercial users and not-for-profit organizations; governmental interests, including national governments, multi-national governmental organizations and treaty organizations, and distinct economies; technical experts from industry and academia; and Internet users worldwide.</p>
<b>STAKEHOLDER GROUPS</b>	<p>ICANN “stakeholder groups” represent a wide variety of individuals that compose the ICANN community. Stakeholder groups function as caucuses and are intended to facilitate the creation of new constituencies as well as self-growth and expansion.</p>
<b>STANDARD BYLAWS</b>	<p>As part of the IANA Stewardship Transition, ICANN’s Bylaws will be classified as either Standard Bylaws or Fundamental Bylaws. The threshold of Board approval required for changes to Fundamental Bylaws will be higher than that required for changes to Standard Bylaws. If the ICANN Board proposes any change to the Standard Bylaws, the proposal will require approval from two-thirds (2/3) of all of the Directors on the Board. Following Board approval, the Empowered Community will have an opportunity to reject a change to the Standard Bylaws before the change takes legal effect.</p>
<b>STRESS TEST</b>	<p>A “stress test” is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. Stress tests have been used to analyze how certain ICANN and DNS ecosystem risks or contingencies can be mitigated by applying the accountability mechanisms available to the CCWG-Accountability.</p>
<b>TOP-LEVEL DOMAIN (TLD)</b>	<p>Top-Level Domains (“TLDs”) are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (rightmost) “.”, such as “net” in “www.example.net”. The administrator for a TLD controls what second-level names are recognized in that TLD. The administrators of the “root domain” or “root zone” control what TLDs are recognized by the DNS. Commonly used TLDs include .com, .net, .edu, .jp, .de, etc.</p>

<b>WORK STREAMS (WS)</b>	CCWG-Accountability Work Stream 1 (WS1) has focused on mechanisms to enhance ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition. Work Stream 2 (WS2) is focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.
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# Appendix K – Co-Chairs’ Special Appreciation of Staff and Rapporteur Efforts

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- 1 Developing the CCWG-Accountability Work Stream 1 Recommendations has been an unprecedented effort by the whole multistakeholder community. While we are proud of the tremendous, high-quality contributions and stamina dedicated by the volunteers, we would like to take this opportunity to give particular credit to a group of highly motivated, dedicated, patient and friendly individuals, without whom we could not have achieved the finalization of our report: *ICANN support Staff and CCWG Rapporteurs.*
  
- 2 **Thanks to our core Staff team:**
  - Brenda Brewer,
  - Alice Jansen,
  - Grace Abuhamad,
  - Hillary Jett,
  - Bernard Turcotte,
  - Adam Peake, and
  - Karen Mulberry.
  
- 3 **Thanks to the Rapporteurs:**
  - Becky Burr,
  - Cheryl Langdon Orr,
  - Steve DelBianco, and
  - Jordan Carter.
  
- 4 Also, we have benefited from flawless meeting support, always accommodating graciously our last minute requests. Thanks to Nancy Lupiano and the meetings team.
  
- 5 We are also grateful for the support and advice we received to prepare communications and correspondences from ICANN Communications department, as well as the outstanding graphics prepared by XPLANE.
  
- 6 From the daunting task of taking notes across hundreds of meeting hours to drafting to the incorporation of the various comments, Staff did all the heavy lifting across our four reports, as well as during and after the three public comment periods. They lived up to the very high transparency standards and always managed to deliver quality outcomes in the short times available. They have embodied the notion of accountability every minute. Beyond our appreciation of their efforts, we actually admired the skills, dedication and commitment from

Bernard Turcotte, Alice Jansen, Grace Abuhamad, Brenda Brewer, Hillary Jett, Karen Mulberry and Adam Peake. This appreciation also extends to the writers and other support teams who provided extra support during stretch times.

- 7 Finally, it is worth mentioning that beyond skills, beyond professional commitment, Work Stream 1 has been a wonderful team effort. Not only has our support Staff gained our deepest respect and appreciation, but they have also earned our trust and friendship, which we consider to be the greatest asset of all for the work that remains ahead of us.
- 8 León Sanchez, Thomas Rickert and Mathieu Weill
- 9 CCWG Accountability Co-chairs