

Annex 09 – Recommendation #9: Incorporating ~~of~~ the Affirmation of Commitments in ICANN’s Bylaws

SECOND READING CONCLUSIONS

Please find the main conclusions of our discussions during call #80.

1. CCWG-Accountability lawyers advised clarifying “diversity” in paragraph 54, regarding composition of AoC Review Teams. CCWG-Accountability notes that “diversity” considerations could ~~consider~~ 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.
2. 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 below. 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 being 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.

Board Comment (received 26-Jan):

“As noted in its comments on the third draft proposal, the Board supports the incorporation of the AOC reviews into the Bylaws, while noting the importance of maintaining operational standards for reviews outside of the Bylaws. While the Board agrees that operational standards should be in alignment with the provisions of the Bylaws, the Board views operational standards as a more suitable place to address multiple review-related operational items that do not belong in the Bylaws.

There are a few specific areas that the Board is flagging in relation to the operational standards -

a) The Board is concerned about potential constraints that may limit flexibility and effectiveness in the operational standards and that certain CCWG-Accountability recommendations may not be aligned with best practices or industry standards, including:

o Fixed numbers of total Review Team members, as well as a fixed allocation among SO/ACs, without consideration of specific issues and required expertise for a given review.”

Reply: This ~~regards~~ relates to paragraph 54 in Annex 9.

CCWG-Accountability proposed that “chairs of participating SOs and ACs will select a group of up to 21 Review Team members.” The phrase is “up to 21”, so we are not actually proposing a fixed number of Review Team members. “Fixed” has been replaced with “limited” in paragraph 54 below.

We are proposing a maximum of 21 members, based on community experience with previous reviews and data provided by staff on the number of members proposed by the community.

We proposed 21 in order to accommodate each of the 7 ACs/SOs having up to 3 members. We anticipate that some ACs and SOs will not offer 3 names, and have given the AC/SO chairs flexibility to give those member slots to an AC/SO that had higher interest and offered more than 3 candidates (per a comment from GNSO CSG).

o "Unlimited number of participants, in addition to the appointed Review Team members, potentially affecting the team's productivity."

Reply: This ~~regards~~ relates to paragraph 54 in Annex 9, where CCWG-Accountability proposed an "open number of participants". Levels of community interest and the principle of transparency argue ~~for~~ that meetings, calls, and email lists for cross-community working groups and Review Teams be open to the community. We note that chair(s) of the Review Team could restrict posting privileges and consensus calls to appointed members of the Review Team, and thereby manage the team's productivity. CCWG-Accountability proposed this to ensure that Review Teams work in a predictable method that is consistent with cross community working groups in the ICANN context.

o "Exact trigger points for the commencement of reviews without taking into account the Community bandwidth, or the state of pending implementation activities."

Reply: This ~~regards~~ relates to the following a paragraph proposed Bylaw provision for ~~en~~ each of the 4 AoC reviews: "This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened." CCWG-Accountability took into account community bandwidth concerns when we proposed that AoC reviews occur every 5 years — instead of the 3 year interval required in the AoC. We phrased the proposal to give flexibility for reviews to occur sooner than 5 year intervals. But we felt strongly that reviews need an interval requirement in order to ensure the reviews are not deferred indefinitely.

"b) To accommodate differing needs of reviews, the Board recommends leaving the number of Review Team members to the selectors of a specific Review Team, as to prescribing a specific formula for composition. This could leave to the selectors the flexibility, for example, to include more members from a specific SO or AC that is more impacted by a specific review, without hardcoding numbers into the Bylaws that might need to be changed later."

Reply: We are proposing a maximum of 21 members, based on community experience with previous reviews and data provided by staff on the number of members proposed by the community. We proposed 21 in order to accommodate each of the 7 ACs/SOs having up to 3 members. We anticipate that some ACs and SOs will not offer 3 names, and have given the AC/SO chairs flexibility to give those member slots to an AC/SO that had higher interest and offered more than 3 candidates (per a comment from GNSO CSG).

"c) The Board is concerned with the CCWG-Accountability's recommendations on determinations of how consensus is applied."

Reply: This comment ~~regards~~ relates to paragraph 57 in Annex 9: "If consensus cannot be reached among the participants, consensus will be sought among the members. In the event a consensus cannot be found among the members, a majority vote of the members may be taken." CCWG-Accountability proposed this text to ensure that Review Teams work in a predictable method that is consistent with cross community working groups in the ICANN context.

"Imposing Bylaws requirements on allowing participants and observers, or requiring consensus calls are other examples where trying to hardcode specific requirements for reviews now might actually develop reviews that are less efficient, more resource intensive, and detract from the responsibilities of the Review Teams.

The Board notes that the ICANN community would benefit from a review schedule that would take into consideration community bandwidth and ICANN resources in developing a staggered or phased review schedule. These factors should determine what a workable number of concurrent reviews would be and ensure that no more than that number of reviews are scheduled at the same time.

Finally, the Board would like to highlight the work that has been underway within ICANN towards improving review effectiveness so that the CCWG and the community may factor this work in the development of operational standards. Work has been underway on the development of Operational Standards since last year, originating from ATRT2 recommendation 11 to improve effectiveness of Reviews together with Board Resolution 2015.07.28.14. In July 2015, after factoring public comments, the Board endorsed the proposed process and operational improvements designed to simplify and increase the effectiveness of Reviews. The Organizational Effectiveness Board Committee is currently working to finalize Policies, Procedures and Guidelines for the Organizational Reviews mandated by the Bylaws."

Reply: We note that the drafting being done by the ~~b~~Board is for ~~O~~rganizational reviews — not the AoC reviews. Still, CCWG-Accountability is open to consider the ~~b~~Board's specific operational improvements as part of the implementation of CCWG-Accountability's proposal. If possible, could you circulate to CCWG-Accountability the current draft of these policies, procedures, and guidelines?

FIRST READING CONCLUSIONS

1. The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
2. All AoC reviews (+ IFR and Special IFR) should be incorporated into the Bylaws.
3. 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).
4. The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal. (paragraph 54).
5. The Board amendment on WHOIS/future registration Directory Services policy"~~"~~ (paragraph 113~~—page 14~~) should be included.
6. 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 ~~T~~he ICANN Bylaws ~~AoC should will remain be classified as a Standard Bylaw~~ (see paragraph 5). ~~—since ICANN's US presence is already in regular bylaws as well as the Articles of Incorporation — where changes shall require approval by the empowered community.~~
7. The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that ~~specific~~-Recommendation #9 would be respected and that this text would address implementation details only (see paragraph 8, and the above responses to the 26-Jan ~~b~~Board comments)

1. Summary

- 1 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), in ICANN's Bylaws. This will ensure that community reviews remain a central aspect of ICANN's accountability and transparency framework.
- 2 Specifically, the CCWG-Accountability proposes to:
 - Add the relevant ICANN Commitments from the Affirmation of Commitments to ~~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 its 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.
- 3 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.

Comment [w1]: Several comments noted that these processes and policies should be derived from the bottom-up and as such, opposes the inclusion of AoC provisions. The ATRT process is flagged as an exception. SSAC, meanwhile, expressed support for the SSR review

2. CCWG-Accountability Recommendations



- 4 The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the section, "Detailed Explanation of Recommendations" section below). To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:

5 **Preserve in ~~T~~he ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments¹**

- 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 ~~The~~ ICANN Bylaws.
- Part of ~~T~~he content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN's principal office) is already covered by ~~The~~ 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 8b.
- Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ~~The~~ ICANN Bylaws.

Comment [AJ2]: First reading conclusion: It should remain a standard Bylaw.

Comment [w3]: IPC requests that this provision be a Fundamental Bylaw

6 **Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws**

7 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 its existing policy relating to WHOIS, subject to applicable laws.
- Preserving security, stability, and resiliency of the DNS.
- Promoting competition, consumer trust, and consumer choice.

8 After these elements of the Affirmation of Commitments are adopted in the ~~t~~he 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 ~~R~~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, the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP) ~~Review Team~~.
- 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.

¹ 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.

- 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 Counsel.

Comment [AJ4]: First reading conclusion: include on understanding that specific Recommendation #9 would be respected and that this text would address implementation details only

9 **IANA Function Review & Special IANA Function Review**

- 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.

Comment [w5]: Suggested addition (pasted from ICANN Board comment)

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 ~~elimination~~ termination since it would be the last remaining aspect of a unique U.S. Government role with ICANN.

~~Elimination~~ 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 just 120-days' notice. The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments in Stress Test 14, as described below.

10	Stress Test #14: ICANN or NTIA chooses to terminate the Affirmation of Commitments.	
11	Consequence(s): ICANN would no longer be held to its <u>the</u> Affirmation of <u>Ce</u> commitments, including the conduct of community reviews and required implementation of Review Team recommendations.	
	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
12	The Affirmation of Commitments can be	45 <u>16</u> One proposed mechanism would give the

<p>terminated by either ICANN or NTIA with 120 days' notice.</p> <p>13 As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the Affirmation of Commitments.</p> <p>14 But as a result of the IANA sStewardship tTransition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain isthe Affirmation of Commitments.</p> <p>14<u>15</u> <u>Note: none of the proposed measures could prevent NTIA from canceling the Affirmation of Commitments.</u></p>	<p>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>16<u>17</u> Another proposed measure is to import Affirmation of Commitments provisions into the 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>17<u>18</u> 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>18<u>19</u> If any of the AoC commitments or review processes were classified as Fundamental Bylaws, changes would require approval by the Empowered Community.</p> <p>19 <u>Note: none of the proposed measures could prevent NTIA from canceling the Affirmation of Commitments.</u></p>
<p>CONCLUSIONS:</p> <p>20 Existing measures are inadequate after NTIA or ICANN terminates the IANA contract.</p>	<p>21 Proposed measures in combination are adequate.</p>

22 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.

23 **Objectives of the Recommendations**

24 Suggestions gathered during comment periods in 2014 on ICANN accountability and the IANA Stewardship Transition suggested several ways the Affirmation of Commitments ~~R~~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.²⁵
- 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.

25 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 ~~t~~he ICANN Bylaws could not require the Board to implement all Review Team recommendations because ~~that~~ some could conflict with the Board’s fiduciary duties or other Bylaws obligations.

In Bylaws Article IV, ~~add~~ 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 ~~R~~eviews.

26 **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.

27 There are four areas of change required to the ICANN Bylaws to enshrine the Affirmation of Commitments reviews:

- Principle language to be added to Bylaws:

ICANN Commitments in the Affirmation of Commitments	As expressed in T he ICANN Bylaws
28 3. This document affirms key commitments by the Department of Commerce (DOC) and ICANN, including commitments to: 29 (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; 30 (b) preserve the security, stability, and resiliency of the DNS;	33 Proposed revision to ICANN Core Values: 34 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; 35 Proposed b <u>e</u> ylaw requiring Affirmation of

²⁵

ICANN Commitments in the Affirmation of Commitments	As expressed in T he ICANN Bylaws
<p>31 (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and</p> <p>32 (d) facilitate international participation in DNS technical coordination.</p>	<p>Commitments review of Promoting Competition, Consumer Trust, and Consumer Choice:</p> <p>36 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>
<p>37 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>38 Proposed new Section 8 in Bylaws Article III Transparency:</p> <p>39 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>40 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</p>	<p>41 Proposed revision to ICANN Commitments:</p> <p>42 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>

ICANN Commitments in the Affirmation of Commitments	As expressed in The ICANN Bylaws
<p>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>43 Proposed revision to ICANN Core Values:</p> <p>44 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>45 Proposed requirement for annual report, to be included in Bylaws section on required reviews:</p> <p>46 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>47 Proposed new Section 9 in Bylaws Article III Transparency:</p> <p>48 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>

ICANN Commitments in the Affirmation of Commitments	As expressed in the ICANN Bylaws
49 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:	50 See next section for proposed b Bylaws to preserve ICANN commitments to perform the Affirmation of Commitments regular reviews.

- The Bylaws will ~~to~~ provide a framework for all periodic reviews. 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:

PROPOSED BYLAW TEXT	COMMENT
51 ICANN will produce an annual report on the state of improvements to Accountability and Transparency. 52 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 C omment P eriod 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.	53 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.
54 Review Teams are established to include both a limited number of members and an open number of participants. 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.	55 The Affirmation of Commitments has no specific requirements for <u>the</u> number of members from each SO and AC. 56 The Affirmation of Commitments lets the Board and GAC Chairs designate Review Team members, and has no diversity requirement.
57 If consensus cannot be reached among the	58 While showing a preference for consensus,

Comment [w6]: Several gNSO stakeholders submitted comments asking for increased gNSO participation to gTLD reviews. Some mentioned mandatory participation of specific stakeholder groups.

PROPOSED BYLAW TEXT	COMMENT
<p>participants, consensus will be sought among the members. In the event a consensus cannot be found 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>59 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>60 This was not stated in the Affirmation of Commitments, but experts have been appointed to advise some Affirmation of Commitments Review Teams.</p>
<p>61 Each Review Team may recommend termination or amendment of its respective review.</p>	<p>62 This is new. A recommendation to amend or terminate an existing review would be subject to public comment, and the community-Empowered Community would have power to reject a change to Standard Bylaws and approve a change to Fundamental Bylaws.</p>
<p>63 Confidential Disclosure to Review Teams: 64 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. 65 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. 66 A confidential disclosure framework shall be published by ICANN. The confidential</p>	<p>70 New ability to access internal documents, with non-disclosure provisions.</p>

PROPOSED BYLAW TEXT	COMMENT
<p>disclosure framework shall describe the process by which documents and information are classified, including a description of the levels of classification that documents or information may be subject to, and the classes of persons who may access such documents and information.</p> <p>67 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>68 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>69 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>71 The draft report of the Review Team should describe the degree of consensus reached by the Review Team.</p>	<p>72 From Public Comments.</p>
<p>73 The Review Team should attempt to assign priorities to its recommendations.</p>	<p>74 Board requested prioritization of recommendations.</p>
<p>75 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>76 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>77 Affirmation of Commitments requires <u>the</u> 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>

- Proposed Bylaws text for this Affirmation of Commitments review:

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>78 1. Accountability & Transparency Review.</p> <p>79 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>80 The commitment to do a review now becomes part of The ICANN Bylaws.</p> <p>81 The second part of this sentence (“its commitment to maintain...”) clarifies an ICANN commitment that would also become part of the Bylaws.</p>
<p>82 Issues that may merit attention in this review include:</p> <p>83 (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>84 Public commenter suggested making this a suggestion instead of a mandated list of topics.</p>
<p>85 (b) assessing the role and effectiveness of GAC interaction with the Board <u>and with the broader ICANN community</u> 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>86 (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);</p> <p>87 (d) assessing the extent to which ICANN’s decisions are embraced, supported, and accepted by the public and the Internet community;</p> <p>88 (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and</p> <p>89 (f) assessing and improving the Independent Review Process; and</p>	<p>90 Rephrased to avoid implying a review of GAC’s effectiveness.</p>

Comment [w7]: Suggestion by CENTR, since this new piece of ICANN’s accountability is added to ICANN’s accountability framework

<p>91 The Review Team shall assess the extent to which prior Accountability and Transparency review recommendations have been implemented.</p>	<p>92 Affirmation of Commitments required ATRT to assess all Affirmation of Commitments Rreviews.</p>
<p>93 The Review Team may recommend termination or amendment of other periodic reviews required by this section, and may recommend additional periodic reviews.</p>	<p>94 This is new. A recommendation to amend or terminate an existing review would be subject to public comment, <u>and the Empowered Community would have power to reject a change to Standard Bylaws and approve a change to Fundamental Bylaws.</u> And the subsequent Bylaws change would be subject to the escalation and enforcement processes described in Recommendation #4.</p>
<p>95 This Review Team should complete its review within one year of convening its first meeting.</p>	<p>96 New.</p>
<p>97 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.</p>	<p>98 The Affirmation of Commitments required this Rreview every three years.</p>

<p>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</p>	<p>NOTES</p>
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<p>99 2. Preserving Security, Stability, and Resiliency.</p> <p>100 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>101 In this review, particular attention will be paid to:</p> <p>102 (a) security, stability, and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;</p> <p>103 (b) ensuring appropriate contingency planning; and</p> <p>104 (c) maintaining clear processes.</p> <p>105 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>106 The new ICANN Mission Statement will include the following revision to reflect the incorporation of this AoC review into the Bylaws:</p> <p>107 In this role, with respect to domain names, ICANN's Mission is to coordinate the development and implementation of policies:</p> <p>108 - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and</p>
<p>109 The Review Team shall assess the extent to which prior review recommendations have been implemented.</p>	<p>110 Make this explicit.</p>
<p>111 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.</p>	<p>112 Affirmation of Commitments required this Rreview every three years.</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
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<p>3. Promoting Competition, Consumer Trust, and Consumer Choice.</p> <p>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>	<p>This R₁review includes a commitment that becomes part of Fthe ICANN Bylaws, regarding future expansions of the TLD space.</p>
<p>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>This R₁review 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>(a) the gTLD application and evaluation process; and</p> <p>(b) safeguards put in place to mitigate issues involved in the expansion.</p>	<p>Re-phrased to cover future new gTLD rounds. "Batched" is used to designate a batch of applications, as opposed to continuous applications.</p>
<p>The Review Team shall assess the extent to which prior R₁review recommendations have been implemented.</p>	<p>Make this explicit.</p>
<p>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.</p>	<p>Board proposal, accepted by CCWG₂ <u>Accountability</u> as Option B in Dublin.</p>
<p>These periodic reviews shall be convened no less frequently than every five years, measured from the date the previous R₁review was convened.</p>	<p>AoC also required this R₁review 2 years after the 1st year R₁review.</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>113 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.</p>	<p>114 Changed title to reflect likelihood that WHOIS will be replaced by new Registration Directory Services.</p>

- Comment [w8]: Suggested change by ICANN Board
- Comment [AJ9]: First reading conclusion: edit should not be incorporated

<p>115 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.</p> <p>116 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.</p>	<p>117 This Review includes a commitment that becomes part of the ICANN Bylaws, regarding enforcement of existing policy WHOIS requirements, as proposed by the ICANN Board (1 September 2015).</p>
<p>118 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.</p>	<p>119 Per Board proposal (1 September 2015).</p>
<p>120 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.</p>	<p>121 New. A public comment submission noted that OECD guidelines do not have the force of law.</p>
<p>122 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.</p>	<p>123 Per Board proposal (1 September 2015).</p>
<p>124 This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.</p>	<p>125 The Affirmation of Commitments required this review every three years.</p>

- Bylaws to add an IANA Function Review and Special IANA Function Review:

<p>IANA FUNCTION REVIEW AND SPECIAL IANA FUNCTION REVIEW</p>	
<p>126 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</p>	

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.

- 127 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.
- 128 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.
- 129 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).
- 130 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.

131 .

Source of participantsComposition of Review Teams for various reviews to date:

132 ATRT1 (14 people; 12 from AC & SOs):	140 ATRT2 (15 people; 11 from AC & SOs)
133 1 ALAC	141 2 ALAC
134 2 GAC	142 3 GAC
135 1 ASO	143 1 SSAC

136 3 ccNSO	144 1 ASO
137 5 GNSO	145 2 ccNSO
138 ICANN Board Chair or designee	146 2 GNSO
139 Assistant Secretary for NTIA	147 2 Experts
	148 ICANN Board Chairman or designee
	149 Assistant Secretary for NTIA
150 SSR (15 people; 12 from AC & SOs):	160 WHOIS (13 people; 9 from AC & SOs):
151 1 ALAC	161 2 ALAC
152 1 GAC	162 1 GAC
153 2 SSAC	163 1 SSAC
154 1 RSSAC	164 1 ASO
155 2 ASO	165 1 ccNSO
156 3 ccNSO	166 3 GNSO
157 2 GNSO	167 3 Experts/Law Enforcement
158 2 Experts	168 ICANN CEO or designated nominee
159 ICANN CEO or designee	

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

- 169 Following community feedback received during the Second Public Comment Period, the CCWG-Accountability is recommending that the location of ICANN’s principal office under Section 8b of the Affirmation of Commitments, which is reflected in the existing content of ~~The~~ ICANN Bylaws Article XVIII, not be made a Fundamental Bylaw, but be classified as a Standard Bylaw. See Annex 03 – Recommendation #3: Redefining ICANN’s Bylaws as “Standard Bylaws” and “Fundamental Bylaws.”
- 170 Section 7 of the Affirmation of Commitments has been added to the list of Affirmation of Commitments paragraphs that the CCWG-Accountability is recommending be included in the ~~the~~ ICANN Bylaws. This recommendation was included in the First Draft Proposal, but was omitted from the Second Draft Proposal. Following a comment received during the Second Public Comment Period, this text has been included again.
- 171 Following a query during the Second Public Comment Period, the recommendations section now clarifies that new review rules apply as soon as the ICANN Bylaws have been adopted, and that the new rules will also apply, to the extent practicable, to any reviews already underway.
- 172 In the second row of proposed Bylaw text in the table, with the lead-in “The Bylaws will to provide a framework for All periodic reviews.” the text has been updated to take into account comments during the Second Public Comment Period that the proposed composition of Affirmation of Commitments Review Teams in the Second Draft Proposal (three members per SO and AC) could reduce the number of Affirmation of Commitments Review Team members,

and that it did not take into account the possible need to increase the representation of affected Constituencies.

- 173 Commenters expressed a wish to have each individual Review Team determine whether to recommend amending or sunset of its own review. This has been reflected in the clarifying notes accompanying the third-to-last row of the table of proposed Bylaws for the section, Accountability & Transparency Review.
- 174 In the “Reviewing effectiveness of WHOIS/Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust” table of proposed Bylaw changes, the first paragraph has been replaced with proposed text from the ICANN Board during the Second Public Comment Period. No change was made to the review cycle timing in the last row of that table; however, to ensure that reviews would occur every five years at a minimum; in contrast, the Board’s proposed text for that section could have resulted in six or seven years between reviews.
- 175 In the “Promoting Competition, Consumer Trust, and Consumer Choice” table, in the second-to-last row of the table, the proposed Bylaw text has been amended to respond to comments by the ICANN Board that, in making a decision about the next round of gTLDs, it would make its decision based on input from the Review Team as well as input from the community and [ICANN](#) staff.

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?

- 176 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?

177 **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 a 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 criteria.
-

477178 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.
-

478179 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.
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479180 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.
-

~~180~~181 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.
-