

**CCWG-Accountability:
Using Stress Tests to evaluate existing and proposed accountability measures [Draft v4]**

An essential part of our CCWG Charter calls for stress testing of accountability enhancements in both work stream 1 and 2. Among deliverables listed in the Charter are:

Identification of contingencies to be considered in the stress tests

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.

In addition, the CCWG chairs has asked our work party to consider this yes/no question:

While this is not a gating factor, is the threat directly related to the transition of the IANA stewardship?

CCWG Work Team 4 gathered an inventory of contingencies identified in prior public comments. That document was posted to the wiki at <https://community.icann.org/display/acctcrosscomm/ST-WP+---+Stress+Test+Work+Party>

In Singapore, the work party drafted several examples of using these stress tests evaluate existing and proposed accountability measures:

Stress test category V. Failure of Accountability to External Stakeholders.

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC) Consequence: ICANN would no longer be held to its Affirmation commitments, including the conduct of community reviews and required implementation of review team recommendations.</p>	<p>The AoC can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p> <p>But as a result of IANA stewardship transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain the AoC .</p>	<p>One proposed mechanism is community challenge to a board decision, such as referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN canceled the AoC, the IRP mechanism could enable reversal of that decision.</p> <p>Another proposed measure is to import AoC provisions into the ICANN bylaws, and dispense with the bilateral AoC with NTIA. Bylaws would be amended to include AoC commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9.</p> <p>If ICANN’s board proposed to amend the AoC provisions added to the bylaws, another proposed measure would empower the community to veto that proposed bylaws change.</p> <p>Note: none of the proposed measures could prevent NTIA from canceling the AoC.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures are adequate.</p>

Stress test category IV. Failure of Accountability

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>16. ICANN engages in programs not necessary to achieve its limited technical mission. For example, uses fee revenue or reserve funds to expand its scope beyond its technical mission, giving grants for external causes.</p> <p>Consequence: 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>	<p>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 IANA stewardship transition, ICANN would no longer need to limit its scope order to retain IANA contract with NTIA.</p> <p>Community was not aware of 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>The Community has input in ICANN budgeting and Strat Plan.</p> <p>Registrars must approve ICANN’s variable registrar fees, though Registrars do not view this as an accountability measure.</p> <p>California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>One proposed measure is empowering the community to veto ICANN’s proposed annual 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, this would be an extreme measure since the entire budget would have to be vetoed.</p> <p>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 Independent Review Panel (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>Another proposed measure is to amend ICANN bylaws to prevent the organization from expanding scope beyond what is needed for SSR in DNS operations and to meet mission and core values of ICANN.</p> <p>If ICANN’s board proposed to amend/remove these bylaws provisions, another proposed measure would empower the community to veto that proposed bylaws change.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures in combination may be adequate.</p>

Stress test category IV. Failure of Accountability

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>18. 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.</p> <p>Consequence: 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 GAC advice that restricted free online expression, for example.</p>	<p>Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try and find "a mutually acceptable solution."</p> <p>This is required for any GAC advice, not just for GAC consensus advice.</p> <p>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>"¹ But the GAC may at any time change its procedures to use majority voting instead of consensus.</p>	<p>One proposed measure is to give the community standing to veto a board decision. If ICANN board acquiesced to GAC advice that was not supported by GAC consensus, the community veto could enable reversal of that decision.</p> <p>Another proposed measure is to amend ICANN bylaws (Section XI 1j) to give due deference only to GAC consensus advice, and add a definition of "consensus".</p> <p>The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require due deference only to advice that had GAC consensus.</p>
<p>This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures are adequate.</p>

¹ ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

Stress test category IV. Failure of Accountability

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>22. ICANN Board fails to comply with bylaws and/or refuses to accept the decision of a redress mechanism constituted under the bylaws.</p> <p>Consequence: Community loses confidence in multistakeholder structures to govern ICANN.</p>	<p>As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to ignore bylaws. But as a result of IANA stewardship transition, ICANN would no longer need to follow bylaws in to retain IANA contract with NTIA.</p> <p>Aggrieved parties can ask for Reconsideration of board decisions, but this is currently limited to questions of whether process was followed.</p> <p>Aggrieved parties can file for IRP, but decisions of the panel are not binding on ICANN.</p> <p>California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged.</p> <p>One proposed measure is to empower the community to force ICANN’s board to implement a recommendation arising from ATRT. There may be other forms of board inaction which may require additional accountability mechanisms.</p> <p>One proposed measure is empowering the community to challenge a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN failed to comply with its bylaws, the IRP mechanism enables a reversal of that decision.</p> <p>If the ICANN board were to ignore binding IRP decisions, another proposed measure would empower the community to force resignation ICANN board member(s).</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures are inadequate.</p>	<p>Proposed measures in combination are adequate, to the extent the ICANN board takes seriously the threat of being recalled. Or Proposed measures in combination are adequate because the community has power to spill the board.</p>

Stress test category I. Financial Crisis or Insolvency

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>5. Domain industry financial crisis. Consequence: significant reduction in domain sales generated revenues and significant increase in registrar and registry continuity costs, threatening ICANN's ability to operate.</p>	<p>ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community.</p> <p>The Community has input in ICANN budgeting and Strat Plan.</p> <p>Registrars must approve ICANN's variable registrar fees.</p> <p>ICANN's reserve fund could support continued operations in a period of reduced revenue.</p>	<p>One proposed measure would empower the community to veto ICANN's proposed annual budget. This measure enables blocking a proposal by ICANN to increase its revenues by adding fees on registrars, registries, and/or registrants.</p> <p>Another proposed mechanism is community challenge to a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a revenue or expenditure decision outside the annual budget process, the IRP mechanism could reverse that decision.</p>
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>	<p>Existing measures would be adequate, unless the revenue loss was extreme and sustained.</p>	<p>Proposed measures are helpful, but might not be adequate if revenue loss was extreme and sustained.</p>

Stress test category III. Legal/Legislative Action

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>19. 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. Consequence: The entity charged with root zone maintenance could face the question of whether to follow ICANN re-delegation request or to follow the court order. (also see Stress Test #21)</p>	<p>Under the present agreement with NTIA, the entity performing root zone maintenance is protected from lawsuits since it is publishing the root per contract with the USG.</p> <p>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>ICANN is bound to follow appropriate court orders from courts of competent jurisdiction.</p>	<p>While it would not protect the root zone maintainer from lawsuits, one proposed mechanism is community challenge to a management decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to re-delegate a gTLD, the IRP mechanism could reverse that decision.</p> <p>Questions about a counterparty to replace NTIA are being considered by the CWG for IANA stewardship transition. We will evaluate CWG proposed mechanisms in this area when they are published.</p>
<p>Conclusions: This threat is directly related to the transition of IANA stewardship</p>	<p>Existing measures might not be adequate.</p>	<p>At this point, CWG's recommendations are still in development.</p>

Stress test category III. Legal/Legislative Action

Stress Test	Existing Accountability Measures	CCWG Proposed Accountability Measures
<p>3. Litigation arising from existing public policy, e.g., Anti-Trust</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>		
<p>Conclusions: This threat is not directly related to the transition of IANA stewardship</p>		