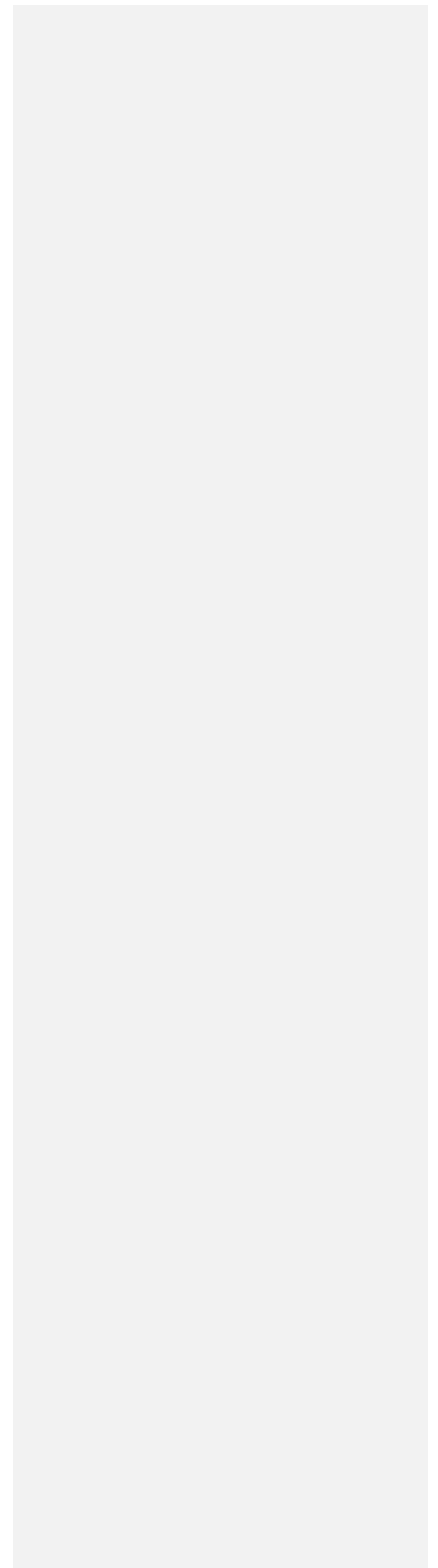


CCWG DRAFT PROPOSAL V. 4  
28 APRIL 2015



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## Table of Contents

<b>Executive Summary</b> .....	<b>4</b>
<b>1. Introduction and Background</b> .....	<b>5</b>
Introduction to the Enhancing ICANN Accountability & Governance Process .....	6
Formation of the CCWG-Accountability.....	7
Composition of the CCWG-Accountability.....	7
Work Streams.....	8
<b>2. Methodology</b> .....	<b>9</b>
Defining Requirements for Work Stream 1 .....	9
Defining WS1 high level requirements.....	12
Building Blocks .....	13
Legal Advice .....	14
<b>3. Definitions &amp; Scoping</b> .....	<b>15</b>
<b>4. Inventory of existing ICANN Accountability Mechanisms</b> .....	<b>16</b>
ICANN Bylaws and Bylaws-Mandated Redress Mechanisms.....	16
<b>5. Input Gathered from the Community: Required Community Powers</b> .....	<b>20</b>
<b>6. Accountability Mechanisms</b> .....	<b>22</b>
6.1 Description of Overall Accountability Architecture .....	22
6.2 Revised Mission, Guarantees & Core Values.....	24
6.3 Fundamental Bylaws.....	36
6.3.1 What is a “Fundamental Bylaw” .....	36
6.3.2 Establishing Fundamental Bylaws .....	36
6.3.3 Adding new or changing existing Fundamental Bylaws .....	37
6.3.4 Which of the current Bylaws would become Fundamental Bylaws? .....	37
6.4 Independent Review Panel Enhancements.....	38
6.5 Reconsideration Process Enhancements .....	46
6.6 Community Empowerment.....	50
6.6.1 Mechanism to empower the community:.....	50
6.6.1.1 The Community Mechanism: Reference Mechanism.....	50
6.6.2 Power: reconsider/reject budget or strategy / operating plans.....	54
6.6.3 Power: reconsider/reject changes to ICANN “standard” bylaws.....	56
6.6.4 Power: approve changes to “Fundamental” Bylaws.....	56
6.6.5 Power: Recalling individual ICANN directors.....	57
6.6.6 Power: Recalling the entire ICANN Board .....	59
6.7 Incorporating AoC into the ICANN Bylaws.....	60
6.7.1 Preserving ICANN Commitments from the AoC.....	61
6.7.2 AoC Reviews .....	64
6.8 Bylaws changes suggested by Stress Tests .....	71
6.8.1 Forcing the board to respond to Advisory Committee formal advice .....	71



6.8.2 Require consultation and mutually acceptable solution for GAC  
advice that is backed by consensus..... 72

**7. Stress Tests ..... 74**

Stress test category I: Financial Crisis or Insolvency ..... 77

Stress test category II: Failure to Meet Operational Expectations ..... 78

Stress test category III: Legal/Legislative Action ..... 82

Stress test category IV: Failure of Accountability ..... 85

Stress test category V: Failure of Accountability to External Stakeholders ..... 92

**8. Items for Consideration in Work Stream 2 ..... 94**

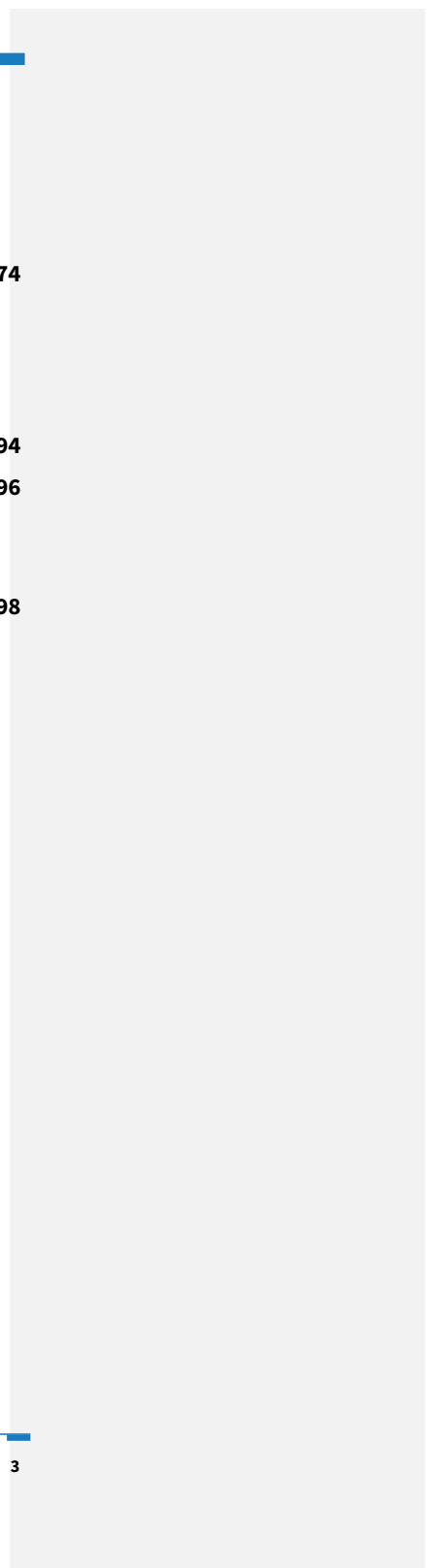
**9. Implementation Plan Including Timing ..... 96**

9.1 Timeline..... 96

9.2 Next Steps ..... 96

9.3 Implementation..... 97

**10. Public comment input ..... 98**



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# Executive Summary

## PLACEHOLDER

This proposal presents the outcome of Work Stream 1 and was the focus of the CCWG-Accountability the first five months of work (from December 2014 until June 2015). The CCWG has designed its work so that it may be coordinated with the timeline of the IANA Stewardship Transition. This proposal will be presented to the ICANN Board of Directors for transmission to NTIA along with the ICG assembled transition proposal.

## KEY ITEMS SUGGESTED:

- 4 building blocks, one accountability framework
- A renewed IRP: - Independence, - Standing - Accessiblity - Binding nature of decisions (briefly touching on how this would work legally) - decisions not only on process but the merits of the case
- Bringing in the AoC : reviews become part of ICANN, including IANA Perf review
- Community mechanism : how it is formed, how the powers get triggered, the # of voters, the consequence of votes, etc.
- Board recall is ultimate power but there are steps in between

## GENERIC TAKEAWAYS:

- These recommendations do not reflect CCWG consensus at this point.
- The CCWG process can be trusted: large, open, etc.
- Proposals are feasible, & can be implemented in time
- It is, in fact, simple!
- It addresses the needs of CWG

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# 1. Introduction and Background

*This section includes an overview of the Enhancing ICANN Accountability & Governance process, and its foundation in the NTIA IANA Functions' Stewardship Transition.*

## Background on the NTIA IANA Functions' Stewardship Transition

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. 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.

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

In September 2014, the ICG published a [Request for Proposals \(RFP\)](#) 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.

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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 (RIRs) IANA Stewardship Proposal Team ([CRISP Team](#)); and
- Protocol Parameters: IANAPLAN Working Group ([IANAPLAN WG](#))

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 – CWG- Stewardship continues to work on its proposal.

Following submissions from the three communities, the ICG will assess the respective outputs, assemble a complete proposal for the transition and provide numerous opportunities for additional input and comment.

## Introduction to the Enhancing ICANN Accountability & Governance Process

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.

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.

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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

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 (DT) 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 A), is available on the CCWG-Accountability [Wiki site](#).

The CCWG [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 ([see Motion here](#))
- At-Large Advisory Committee (ALAC) on 18 November ([see poll results here](#))
- Country Code Names Supporting Organization (ccNSO) on 20 November ([see meeting minutes here](#))
- Governmental Advisory Committee (GAC) on 8 December ([see email here](#))
- Address Supporting Organization (ASO) on 9 December ([see email here](#))

## Composition of the CCWG-Accountability

The CCWG-Accountability consists of 222 [people](#), organized as 26 [members](#), appointed by and accountable to the CCWG chartering organizations, 254 [participants](#), who participate as individuals, and 48 [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.

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## THE CCWG 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;
- 4 ICG members who participate in the CCWG-Accountability, including two who serve as liaisons between the two groups.

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.

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 conversations, there is the possibility to sign up as a mailing list "observer" which offers read-only access to the mailing list.

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](#).

## Work Streams

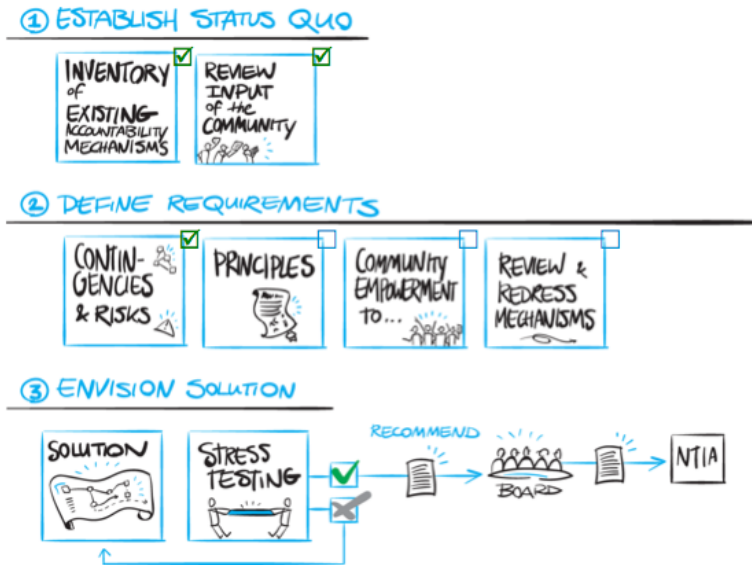
Per the CCWG-Accountability [Charter](#), the work of the CCWG-Accountability would proceed in two Work Streams defined as follows:

- **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



## 2. Methodology

This section describes the methodology through which the CCWG-Accountability developed and completed the Work Stream 1 proposal.



### Defining Requirements for Work Stream 1

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 \(including the AOC reviews on accountability\)](#)
- [Work Area 2: Review Input from Public Comment and Categorize Items into Work Streams 1 & 2 \(WS1 & WS2\)](#)
- [Work Area 3: Review Issues Identified by CWG-Stewardship](#)

- 
- [Work Area 4: Identify Contingencies \(especially in relation to Work Stream 1\)](#)

The four areas were populated with volunteer CCWG members and participants who had dedicated mailing lists and wiki spaces to advance their work.

#### **WORK AREA 1: INVENTORY OF EXISTING ACCOUNTABILITY MECHANISMS**

One of the first deliverables within the CCWG 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'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. This inventory is further described in section 4 of this document.

#### **WORK AREA 2: ASSESSMENT OF COMMENTS TO DATE**

Another area of initial CCWG 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 (WS1) or Work Stream 2 (WS2). 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 WS1 are adequate to force implementation of WS2 items despite resistance from ICANN management and board.

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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.

*See Appendix E. Input from Public Comment and Categorization into Work Streams 1 & 2 (15 January 2015)*

### **WORK AREA 3: INTERRELATION WITH THE CWG-STEWARDSHIP WORK**

The CCWG 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.

In January 2015, the CCWG 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 attention.

While the work was completed in March 2015, the collaboration was maintained throughout the end of their respective mandates.

### **WORK AREA 4: STRESS TEST AND CONTINGENCIES WORK PARTY**

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.

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.

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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 [WA4 webpage](#).

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](#)".

This work continues through the [Stress Tests Work Party \(ST-WP\)](#), so as to continue its identification of stress tests and their application. Section 7 of this proposal describes the work of the Stress Test Work Party.

## Defining WS1 high level requirements

The [Frankfurt face-to-face meeting](#) on 19-20 January 2014 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 two Work Parties:

- [Work Party 1: Community Empowerment](#) (WP1) 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.
- [Work Party 2: Review and Redress](#) (WP2) is considering enhancements to existing accountability and new mechanisms and the creation of a standard for review and redress, the goal is to develop a clearly articulated **standard against which ICANN's actions are evaluated**.

Work Party 1 (WP1) and Work Party 2 (WP2) were formed following the Frankfurt meeting in January 2015.

### WORK PARTY 1 (WP1): COMMUNITY EMPOWERMENT

A new working group was formed to consider proposed powers for the community to hold ICANN to account, and to develop a consensus on the most appropriate mechanisms (or structures) that would allow the community to exercise these powers.

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**Powers and mechanisms were defined as follows:**

- Powers 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 (WP2): REVIEW & REDRESS**

A second new working group 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.

## **Building Blocks**

In February 2015, the CCWG-Accountability identified four building blocks that would form the accountability mechanisms required to improve accountability.



#### 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, guarantees 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.

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. A [template](#) was designed to structure and help identify ingredients. A set of [criteria](#) was also suggested to frame discussions.

## Legal Advice

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 firms, through the coordination of the Legal Sub-Team of the CCWG. See Appendix B for more information on the legal sub-team

methodology. The legal advice was key to the CCWG-Accountability in formulating its recommendations. The CCWG legal sub-team's rules of engagement and working methodologies are described in Appendix B.

### 3. Definitions & Scoping

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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.

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, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programs.

The group proposed that accountability is comprised four dimensions: One, transparency, means that an actor (ICANN) is answerable to its stakeholders by being open and visible to them. A second, consultation, means that the actor (ICANN) continually takes input from and explains its positions to the stakeholders. Third, review means that the actor's actions, policies and programs are subject to outside monitoring and evaluation. The fourth dimension, 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.

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

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 CCWG-Accountability's activities:

- 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.

See Appendix C “CCWG Accountability – Problem definition” (current version, 13 March 2015) for more information.

## 4. Inventory of existing ICANN Accountability Mechanisms

*This section presents an inventory of existing ICANN accountability mechanism and expands on the work developed by Work Area 1 mentioned on Section 2. The inventory of existing accountability mechanisms produced by the group on 15 December 2014 is available as Appendix D of this report.*

### 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

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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 (AOC)**

Signed with the United States Department of Commerce (DoC) on 30 September 2009, the [Affirmation of Commitments](#) (AoC) 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. See appendix F.

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## 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 AoC timeframe. Pursuant to the AoC, 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 (C.2.9.2.d).
- Registry Agreements and Registrar Accreditation Agreements (see <https://www.icann.org/resources/pages/agreements-policies-2012-02-25-en> and

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<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.

#### **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.

## 5. Input Gathered from the Community: Required Community Powers

As indicated in section 2, the group reviewed the collection of public comments received during the development of the Enhancing ICANN Accountability and categorized these as work stream 1 and work stream 2. WS1 mechanisms were defined as 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.

The mechanisms were divided in three sections:

1. Mechanisms giving the ICANN community ultimate authority over the ICANN corporation. Most of these were initially designated as WS1,

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since community Members need the leverage of IANA transition to obtain these Bylaws changes.

2. Mechanisms to restrict actions of the board and management of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (1, above).
3. Mechanisms to prescribe actions of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above). For example, a bottom-up consensus process to change ICANN bylaws might be rejected by ICANN board, but the Members could then reverse that decision and force the change.

Work Stream 1 accountability mechanisms are presented in detail in Section 6.

In addition, the CWG co-chairs detailed, in a [correspondence](#) dated 15 April 2015, the expectations from their group with regards to CCWG accountability WS1 recommendations. These expectations are:

- **ICANN budget:** The CWG supports the ability for the community to “veto” a budget. This expectation is dealt with in section 6.6.2.
- **Community empowerment mechanisms:** The CWG will be relying on the community empowerment and accountability mechanisms that the CCWG is currently considering and developing being in place at the time of the stewardship transition. In particular, mechanisms such as: the ability to review ICANN Board decisions relating to periodic or ad-hoc reviews of the IANA function 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. This expectation is dealt with in section 6.6.
- **Review and redress mechanisms:** The CWG would like to have the assurance that an IANA Periodic Review (or related ad-hoc review) could be incorporated as part of the AoC mandated reviews integration into ICANN’s Bylaws. This expectation is dealt with in section 6.7.2.
- **Appeal mechanisms (especially with regard to ccTLD related issues):** The CWG recommends that the CCWG should be mindful of the recommendations of the CWG in relation to an appeals mechanism for ccTLDs in delegation and re-delegation. The CWG has conducted a survey among the ccTLDs as part of the work of our Design Team B,

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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 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 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[1] in the draft transition proposal. This expectation is dealt with in section 7.

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[1] As a note of clarification, the CWG has been referring previously to this appeals mechanism as IAP (Independent Appeals Panel) but understands that the CCWG is referring to this mechanism as Independent Review Mechanism (IRP) which would also include the option for appeal. As such the CWG will be updating its references.

## 6. Accountability Mechanisms

### 6.1 Description of Overall Accountability Architecture

The CCWG-Accountability identifies four building blocks that would form the accountability mechanisms required to improve accountability.



#### 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.
  - The group identified powers and associated mechanisms including the ability to:
    - Recall the ICANN Board of Directors;
    - Approve or prevent changes to the ICANN Bylaws, Mission, Guarantees and Core Values
    - Reject Board decisions on Strategic Plan and budget, where the Board has failed to appropriately consider community input
- Principles form the Mission, Guarantees and Core Values of the organization i.e the Constitution
  - The group proposes changes that should be made to the Mission, Guarantees and Core Values in ICANN's Bylaws. For example, the group discussed how key provisions of the [Affirmation of Commitments](#) (AoC) could be reflected into the Bylaws
- 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
  - The group proposes to strengthen the existing independent review process suggesting improvements to its accessibility and affordability, and process design including establishment of a standing panel with binding outcomes. The IRP panel decisions would be guided by ICANN's Mission, Guarantees and Core Values.

**This section of the public comment report details the key recommendations upon which the CCWG would like to receive input from the community. These recommendations do not reflect CCWG consensus at this point.**

## 6.2 Revised Mission, Guarantees & Core Values

ICANN's current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN's accountability: 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.

The relevant language in the current Bylaws was adopted in 2003. Based on community input and our discussions since January, the Cross Community Working Group on Accountability (CCWG-ACCT) concluded that these provisions should be strengthened and enhanced to provide greater assurances that ICANN will remain accountable to its stakeholders and the global Internet community. In particular, the CCWG-ACCT found that:

- ICANN's Mission statement needs clarification with respect to the scope of ICANN's policy authority;
- The language in the Bylaws describing how ICANN should apply its Core Values is weak and permits ICANN decision makers to exercise excessive discretion;
- The current Bylaws do not reflect key elements of the Affirmation of Commitments; and



- The Board should have only a limited ability to change these key accountability provisions of ICANN's Bylaws.

## SUMMARY OF RECOMMENDED CHANGES

The Cross Community Working Group is seeking input on a number of recommended changes to the ICANN Bylaws to address the deficiencies described above. We have deliberately attempted to minimize language changes, and in the annotated language, we have (i) included the existing language; (ii) provided a redline showing proposed changes; and (iii) identified the source or justification for the proposed changes. Below we provide a summary of the proposed changes.

1. ICANN Mission Statement. CCWG-ACCT recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):
  - a. Clarify that ICANN's mission is limited to coordinating and implementing policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.
  - b. Clarify that ICANN's mission does not include the regulation of services that use the DNS or the content these services carry or provide. Regulation of content is the role of a sovereign, and is inconsistent with ICANN's limited technical mission.
  - c. Clarify that ICANN's powers are "enumerated" – meaning that anything not articulated in the Bylaws are outside the scope of ICANN's authority.
2. Core Values. CCWG-ACCT recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):
  - a. Divide the Core Values into "Guarantees" and "Core Values."
    - i. Incorporate into the Bylaws ICANN's obligation to operate for the benefit of the Internet community as a whole, carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These Guarantees are now contained in ICANN's Articles of Incorporation.

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- ii. Designate certain core values as “Guarantees.” These values are so fundamental to ICANN’s operation that they should rarely need to be balanced against each other. Those Guarantees include ICANN’s obligations to:
    - 1. Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
    - 2. Limit its activities to those within ICANN’s mission and require or significantly benefit from global coordination;
    - 3. Employ open, transparent, bottom-up, multistakeholder processes; and
    - 4. Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
  - iii. Slightly modify the remaining Core Values to:
    - 1. Reflect various provisions in the Affirmation of Guarantees, e.g., efficiency, operational excellence, and fiscal responsibility;
    - 2. Clarify that any decision to defer to input from public authorities must be consistent with ICANN’s Guarantees and Core Values. We believe that this is inherent in the current Bylaws, but felt that it was appropriate to call it out clearly for purposes of accountability. This does not interfere with the ability of the GAC to provide input or advice on any topic; rather, it clarifies that ICANN must always act in compliance with its Bylaws obligations.
    - 3. Add an obligation to avoid capture.
- 3. Balancing or Reconciliation Test**
- a. Modify the “balancing” language in the Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:
    - i. In any situation in which one Guarantee must be reconciled with another Guarantee or with a Core Value, the proposed language requires ICANN to ensure that its interpretation is

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- (i) justified by an important, specific, and articulated public interest goal within its Mission; (ii) likely to promote that public interest goal; (iii) narrowly tailored to achieve that goal; and (iv) no broader than necessary to do so; and
  - ii. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest in a way that is substantially related to that interest.
4. Fundamental (Durable or Enduring) Bylaws Provisions. The CCWG-ACCT recommends that the revised Mission Statement, Guarantees, and Core Values be adopted as “durable” or “enduring” elements of the ICANN Bylaws. Any modification to these Bylaws provisions would be subject to heightened standards including, for example, community ratification or subject to community veto.

## DISCUSSION

To whom is ICANN accountable? For what is it accountable? Those questions were a necessary starting point for the work of the CCWG, and the answers inform all of our recommendations. Our work on Independent Review attempts to answer the first question. The Bylaws changes recommended here are designed to answer the second. 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 an agreed-upon standard of behavior, articulated through its Guarantees and Core Values. Taken together, the proposed Mission, Guarantees, and Core Values statement 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 demonstrated support of the community subject to procedural and substantive safeguards.

## QUESTIONS AND OPEN ISSUES:

- Do you agree that these recommended changes to ICANN’s Mission, Guarantees and Core Values would enhance ICANN’s accountability?
- Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

The proposed language is intended to convey the substance of the proposed Bylaws changes related to ICANN’s Mission, Guarantees and Core Values; the specific language may need to be tweaked to address legal issues. Actual proposed Bylaws text changes will be subject to public consultation.

The table below compares the current draft proposals with the current language and explains the context in the “Notes” column. We are particularly interested in the community’s view as to the broad approach painted: of providing an almost “constitutional core” for ICANN against which the Board and staff can be held to account – by the community, and by the various review and redress procedures that feature elsewhere in this report.

**MISSION**

Current Bylaws Language	Working Draft New/changed text appears in red or strike-out text	Notes, Comments, Questions
<p>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:</p> <ol style="list-style-type: none"> <li>1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers.</li> <li>2. Coordinates the operation and evolution of the DNS root name server system</li> <li>3. Coordinates policy development reasonably and appropriately related to these</li> </ol>	<p>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:</p> <ol style="list-style-type: none"> <li>1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers.</li> <li>2. Coordinates the operation and evolution of the DNS root name server system</li> <li>3. Coordinates policy development reasonably and appropriately related to these</li> </ol>	<p><b><i>The additional language is intended clarify, but not to either diminish or expand ICANN’s current Mission. The proposed mission statement also reflects ICANN’s obligation under the <a href="#">Affirmation of Commitments (AoC)</a>.</i></b></p>

<p>technical functions.</p>	<p>technical functions.</p> <ul style="list-style-type: none"> <li>· <i>In this role, with respect to domain names, ICANN's mission is to coordinate the development and implementation of policy through a bottom-up, consensus-based multistakeholder process Consensus Policies (as defined in <u>Specification 1</u>) that (a) ensure the stable and secure operation of the Internet's unique names systems and (b) for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.</i></li> <li>· <i>In this role, with respect to IP addresses and AS numbers, ICANN's mission is to as described in the ASO MoU between ICANN and RIRs</i></li> <li>· <i>In this role, with respect to protocol port and parameter numbers, ICANN's mission is to [INSERT]</i></li> <li>· <i>In this role, with respect to the DNS root server system, ICANN's mission is to [INSERT]</i></li> </ul> <p>ICANN shall not undertake any other mission not specifically authorized in these Bylaws. Without in any way limiting the foregoing absolute prohibition it is expressly noted that ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.</p>	
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**GUARANTEES AND CORE VALUES**

The CCWG proposes to ensure that all elements of the [Affirmation of Commitments](#) are reflected in ICANN’s Bylaws and Articles of Incorporation. Some AoC provisions are incorporated as Commitments and Core Values, others are included in other sections of the governing documents. For example,

1. In **AoC Section 8(b)**, ICANN commits to 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.
  - a. Article XVIII, Section 1 of the Bylaws currently provide that *“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.”*
  - b. As set forth in the current Articles of Incorporation, ICANN’s is incorporated as a *“nonprofit public benefit corporation under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.”*
2. In **AoC Section 7**, ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross community deliberations and responsive consultation procedures, including detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, to publish an annual report of its progress, and to provide thorough and reasoned explanations for its decisions, etc. The CCWG proposes to incorporate this commitment into Bylaws Article III, which governs transparency.
3. In **AoC Section 4**, ICANN commits to perform and publish analysis of the positive and negative effects of its decisions on the public. The CCWG proposes to incorporate this commitment into Bylaws Article III, which governs transparency.

In each case above, any changes to the relevant governing documents would be subject to rejection by the community or a direction that the Board reconsider the proposed change in accordance with the recommendations set out in Section 6.6.3 of the CCWG Draft Report.

Current Bylaws Language	Working Draft New/changed text appears in red or strike-out text	Notes, Comments, Questions
Bylaws re reconciling competing Core Values In performing its mission, the	<b>Fundamental Guarantees</b> and Core Values In <del>performing</del> <b>carrying out</b> its mission,	ICANN’s Mission Statement articulates <i>WHAT</i> is in scope and out of scope for

<p>following core values should guide the decisions and actions of ICANN: [Core Values Listed]</p> <p>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. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on 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. 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>ICANN <b>will act in a manner that complies with and reflects ICANN’s Guarantees and respects ICANN’s Core Values, both described below.</b></p> <p>These <b>Guarantees</b> and Core Values are <b>deliberately expressed in very general terms, so that they may intended to apply provide useful and relevant guidance</b> in the broadest possible range of circumstances. <b>Because they are not narrowly prescriptive, the</b> The specific way in which they apply, individually and collectively, to each new situation <b>will necessarily may</b> depend on many factors that cannot be fully anticipated or enumerated. <b>and because they are statements of principle rather than practice, Situations may will inevitably</b> arise in which perfect fidelity to all <b>eleven Fundamental Guarantees and Core Values</b> simultaneously is not possible.</p> <p><b>To the extent a Commitment must be reconciled with other Guarantees and/or one or more Core Values in any particular situation, such reconciliation must be:</b></p> <ol style="list-style-type: none"> <li><b>a. Justified by an important, specific, and articulated public interest goal that is within ICANN’s Mission and consistent with a balanced application of ICANN’s other Guarantees and Core Values (a “Substantial and Compelling Reason in the Public Interest”);</b></li> <li><b>b. Likely to promote that interest,</b></li> </ol>	<p>ICANN. ICANN’s “Core Values” articulate HOW ICANN is to carry out its Mission. The CCWG acknowledges that in some situations the Core Values may be in tension with one another, requiring a decision maker to reconcile the competing values to achieve ICANN’s Mission. ICANN’s current Bylaws describe this process and permit the decision maker to exercise its judgment in order to achieve “an appropriate and defensible balance among competing values.”</p> <p>While some degree of flexibility is needed, the language in the current Bylaws provides no principled basis for reconciling the principles in any particular situation. The proposed language articulates the standard to be applied when an ICANN decision maker is required to reconcile competing values. To facilitate this process and to limit opportunities for abuse, the CCWG proposes to create a two-tiered values statement consisting of ICANN “Guarantees” and “Core Values.”</p> <p>To the extent that this kind of reconciliation would impinge on one or more of the</p>
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	<p>taking into account competing public and private interests that are likely to be affected by the balancing;</p> <p>c. Narrowly tailored using the least restrictive means reasonably available; and</p> <p>d. No broader than reasonably necessary to address the specified Substantial and Compelling Reason in the Public Interest.</p> <p>In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest in a way that is substantially related to that interest.</p>	<p><i>fundamental Guarantees, the proposed language would require the decision maker to meet a high bar, demonstrating that any balancing is necessary and likely to achieve an important public interest goal, and narrowly tailored to achieve that goal. The bar is set to be somewhat more flexible with respect to reconciliation of Core Values.</i></p>
<p><b>Section 2. CORE VALUES.</b> In performing its mission, the following core values should guide the decisions and actions of ICANN:</p> <p>1. Preserving and enhancing the operational stability, reliability, security, and global Interoperability of the Internet. 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</p>	<p><b>Guarantees.</b> In performing its mission, <del>the following core values should guide the decisions and actions of ICANN:</del> ICANN must operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable law and international conventions and through open and transparent processes that enable competition and open entry in Internet-related markets, and that reflect the Guarantees and Core Values the Fundamental Rights set forth below. Specifically, ICANN's action must:</p> <p>1. Preserving and enhancing the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;</p>	<p>This additional language is derived from ICANN's current <a href="#">Articles of Incorporation</a>. This language also supports <a href="#">Affirmation of Commitments</a> language, including Section 3, in which ICANN "commits 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."</p>



<p>requiring or significantly benefiting from global coordination.</p> <p>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.</p> <p>8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. ALSO: Bylaws Section 3: 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>10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.</p>	<ol style="list-style-type: none"> <li>2. <b>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></li> <li>3. Respecting 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 requiring or significantly benefit from global coordination;</li> <li>4. Employing open, transparent and bottom-up, private sector led multistakeholder policy development mechanisms processes that (i) seeks 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;</li> <li>5. Making decisions by applying documented policies consistently, neutrally, objectively, and fairly, with integrity and fairness without singling out any particular party for disparate discriminatory treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition;</li> <li>6. Remaining accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.</li> </ol>	<p>In AoC Section 9.2 and AoC Section 3(b) ICANN commits to preserve the security, stability and resiliency of the DNS.</p> <p>In AoC Section 8(a), ICANN affirms its commitments to 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.</p> <p>In AoC Section 8(c), ICANN commits to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.</p> <p>The changes in the current Bylaws for Core Value #8 reflect and incorporate current Bylaws Section 3. On NON-DISCRIMINATORY TREATMENT. The OED defines "disparate" as "Essentially different in kind; not able to be compared." "Discriminatory" is defined as "making or showing an unfair or prejudicial distinction between different categories of people or things." This change was suggested by one of the CCWG's independent</p>
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		<p>experts.</p> <p>In <i>AoC Section 9.1</i>, ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency.”</p>
<p><b>Core Values:</b> In performing its mission, the following core values should guide the decisions and actions of ICANN:</p> <p>4. 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.</p> <p>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>Core Values: In performing its mission, the following core values should <b>also</b> guide the decisions and actions of ICANN:</p> <ol style="list-style-type: none"> <li>1. 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 <b>ensure that decisions are made in the global public interest identified through the bottom-up, multistakeholder policy development process and are accountable, transparent, and respect the bottom-up multistakeholder nature of ICANN process;</b></li> <li>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 and <b>the roles of both ICANN’s internal bodies and external expert bodies;</b></li> </ol>	<p>In <i>AoC Section 7</i>, ICANN commits to “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.”</p> <p>AoC 3(a) provides that ICANN will 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>Text has been added in an attempt to address the difficulty in defining “public interest” without reference to the substantive issue in question, the context in which the issue arises, and the process through which it is identified. Does this solve the problem? Is the language redundant and unnecessary in light of the Commitment to operate for the benefit of the public?</p>

<p>5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.</p> <p>6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.</p> <p>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.</p> <p>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>3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a <b>healthy competitive environment in the DNS market that enhances consumer trust and choice.</b></p> <p>4. 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></p> <p>5. <b>Operate with efficiency and excellence, acting in a fiscally responsible and accountable manner</b> and at a speed that is responsive to the needs of the Internet.</p> <p>6. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account <b>the public policy advice of governments and public authorities in accordance with the Bylaws and to the extent consistent with these Fundamental Guarantees and Core Values.</b></p>	<p>In <i>AoC Section 9.3</i>, ICANN commits to promote “competition, consumer trust, and consumer choice.”</p> <p>AoC 3(c) provides that ICANN will “promote competition, consumer trust, and consumer choice in the DNS marketplace.”</p> <p>In <i>AoC Section 9.3</i>, ICANN commits to promote “competition, consumer trust, and consumer choice.” See discussion above re “public interest.”</p> <p>In <i>AoC Section 7</i>, ICANN “commits to adhere to transparent and accountable budgeting processes.”</p> <p>In <i>AoC Section 8</i>, ICANN commits to “operate as a multi-stakeholder, private sector led organization.” <i>AoC Section 8</i> further provides that ICANN is a private organization and not controlled by any one entity.</p> <p>In <i>AoC Section 4</i>, ICANN commits to perform analyses to ensure that its decisions are in the public interest, and not just the interests of a particular set</p>
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	7. [Not advance] [Refrain from advancing] the interests of one or more interest groups at the expense of others	of stakeholders.
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## 6.3 Fundamental Bylaws

### 6.3.1 What is a “Fundamental Bylaw”

ICANN’s Bylaws can generally be changed by resolution of the Board. With a 2/3 majority, the Board can change the rules of the game within ICANN. The CCWG believes that some aspects of ICANN’s Bylaws should be **harder to change** than others. These would be deemed Fundamental Bylaws. The core mission, commitments, and values of ICANN, or core features of the accountability tools set out in this Report, would be examples of things that the Board on its own should not be able to change.

### 6.3.2 Establishing Fundamental Bylaws

The CCWG therefore proposes the creation of Fundamental Bylaws. They become fundamental by identifying them as such, and by defining a different (and more difficult) process to change them than the process used for general Bylaws changes.

**To implement this, a new provision would be added to the Bylaws that sets out:**

1. Which sections of the bylaws are Fundamental Bylaws (i.e. a list of the articles / sections / subsections that are Fundamental)
2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed
3. That this defining and establishing clause of the Fundamental Bylaws can only be changed by the process mentioned in b) above (that it, it is listed in the provision in a) above).

Legal advice has confirmed this proposition is feasible.

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### 6.3.3 Adding new or changing existing Fundamental Bylaws

It is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones, as the purpose of these accountability reforms would not be served if ICANN could not change in response to the changing Internet environment. On the other hand, there appears to be consensus that ICANN should be able to expand its Mission only under very limited circumstances. To establish a new Fundamental Bylaw or to change or remove an existing one, the following steps would be followed where the Board (or the staff through the Board) is proposing the addition:

1. The Board would propose the new Fundamental Bylaw or a change to / removal of an existing one through the usual process, but would need to identify it as a Fundamental Bylaw Proposal throughout the process.
2. The Board would need to cast 3/4 of votes in favour of the change (higher than the usual threshold of 2/3).
3. The new community power set out in 6.6.4 to approve changes to Fundamental Bylaws would apply. The threshold to approve the change would be set at a high bar, similar to the level of support needed to recall the entire Board.
4. If the change were agreed, then the new Fundamental Bylaw would appear in the Bylaws wherever it had to, and reference to the text as a Fundamental Bylaw would be added to the part of the Bylaws that lists them. In the case of an amendment, the text would be amended. In the case of a removal, the text would be removed and the reference to that part would be removed.

The CCWG welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG welcomes feedback on whether the Mission Statement should be subject to even higher bars.

### 6.3.4 Which of the current Bylaws would become Fundamental Bylaws?

The general approach should be to have only critical matters defined in the Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN's structures. It would harm, not help, accountability to make changes to bylaws in general face the same thresholds as are proposed for Fundamental Bylaws. In the CCWG's view, "critical matters" are those that define the corporation's scope and mission, and the core accountability tools the community requires. Accordingly, the following would be Fundamental Bylaws in the first instance:

1. The Mission / Guarantees / Core Values
2. The Independent Review process
3. The manner in which Fundamental Bylaws can be amended
4. The powers set out in section 6.6 of this report
5. The CCWG is interested in views from the community about whether there are other parts of the Bylaws that should be protected by making them Fundamental Bylaws.

**QUESTION:** Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

## 6.4 Independent Review Panel Enhancements

### INTRODUCTION

The consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing Independent Review Process (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 a process that was *binding* rather than merely advisory. Commenters also strongly urged that the IRP be *accessible*, both financially and from a standing perspective, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

The process described below calls for a standing, independent panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and across issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission, whether it is abiding by policies adopted by the multistakeholder community, and whether in carrying out its mission and applying consensus policies it is acting in accordance with the Guarantees to the community and its Core Values, in all cases as required by the proposed Bylaws. (See, *Statement of Mission, Guarantees, and Core Values.*)

The proposal calls for a fully *independent* judicial/arbitral function. The purpose of a standing panel is to ensure that panelists are not beholden to ICANN or any of its constituent bodies – but they are. But a core skill of this IRP's panelists is the need to build a thorough and detailed understanding of how

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ICANN's Mission is implemented, and its commitments and values applied – over time and across a variety of situations.

1. **Purpose of the IRP:** The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical mission and, in carrying out that mission, acts in a manner that respects community-agreed fundamental rights, freedoms, and values.
  - a. Empower the community and affected individuals/entities to prevent “mission creep,” enforce compliance with established multistakeholder policies, provide redress for due process violations, and protect the multistakeholder process through meaningful, affordable, access to expert review of ICANN actions.
  - b. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its mission or that violate community-approved standards of behavior, including violations of established ICANN policies.
  - c. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs/ACs, and the community in connection with policy development and implementation.
  
2. **A Standing Panel:** The IRP should be a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN's action or inaction in violation of commitments made in ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Guarantees & Core Values*. This reflects proposed changes and enhancements to ICANN's existing Independent Review Process.

#### QUESTIONS AND OPEN ISSUES:

- To what extent is ICANN permitted to “outsource” operation of the standing panel and its operations? Is outsourcing desirable to enhance independence? If so, what safeguards need to be in place to ensure that the outsourced service provider (as opposed to the individual panelists) is itself independent of ICANN?
  
3. **Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint alleging that a specified action or inaction is not within ICANN's Mission or that is undertaken in manner that violates ICANN's Guarantees to the community and/or Core Values.

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- 4. Possible Outcomes of the IRP:** Decision that an action/failure to act (a) is or is not within ICANN's Mission and/or (b) was undertaken in a manner that violates ICANN's Guarantees or Core Values. The intent is that IRP decisions should be binding on ICANN.
- a. Decisions of the IRP are not subject to appeal (except, on a basis limited to procedural issues, in front of California courts). However, the panel may not direct the Board or ICANN on how to amend specific decisions, it shall only be able to make decisions that confirm a decision by ICANN, or cancel a decision, totally or in parts.
  - b. This balance between the absence 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 3<sup>rd</sup> parties, and to avoid that the panel's outcome overcomes the Board in its fiduciary duties.

#### QUESTIONS AND OPEN ISSUES:

- Some members of the working group feel that the Board or the community should be permitted under certain circumstances to reject an IRP decision, for example, with the unanimous support of the Board and a designated community body? Others note that this is inconsistent with our intent to ensure that the IRP, and not the Board, is the final arbiter of whether or not the Board has acted properly.
- 5. Standing:** Any person/group/entity "materially affected" by an ICANN decision maker that (a) exceeds the scope of ICANN's limited Mission; (b) has been undertaken in a manner that violates ICANN's Guarantees and/or Core Values; or (c) violates an established ICANN policy.
- a. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
  - b. 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;
  - c. Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
  - d. A balance of hardships tipping decidedly toward the party seeking the relief.



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## QUESTIONS AND OPEN ISSUES:

- How would “material affect” be measured in the event that the “community” generally, or specific community groups sought independent review?
  - Who should have the right to intervene in an IRP in order to support or oppose the merits of a complaint?
  - Should ICANN have the right or obligation to “join” necessary parties to an independent review?
  - What constitutes a “necessary party”?
  - How do we prevent abuse of intervention rights?
  - Application of standard to existing IRPs?
6. **Standard of Review:** A party challenging an action or inaction has the burden to demonstrate that the complained-of action violates either (a) substantive limitations on the permissible scope of ICANN’s actions, or (b) decision-making procedures, in each case as set forth in ICANN’s By-laws, Articles of Incorporation, or *Statement of Mission, Guarantees, and Core Values*.
7. **Composition of Panel; Expertise:** Significant legal expertise, particularly international arbitration expertise and expertise, developed over time, about the DNS and ICANN’s policies, practices, and procedures. At a minimum, Panelists should receive training on the workings and management of the domain name system. 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 individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.
- While most of the working group was comfortable with this formulation, some participants prefer to require that the panelists themselves possess the requisite skill sets – of course, individual panelists need not possess every kind of expertise, rather, they suggest that taken together the panel should possess the requisite skills.
8. **Diversity: Geographic diversity.** English as primary working language with provision of translation services for claimants as needed. The Standing Panel members should have diversity in geographic and cultural representation. Diversity of experience will be considered in

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completing the composition of the Panel. Reasonable efforts should be undertaken to achieve such diversity.

**QUESTIONS AND OPEN ISSUES:**

- How will geographic diversity be defined? For example, no more than X members from any one Region? Alternatively, no less than 1 member from each region?
- Other diversity, e.g., gender?

**9. Size of Panel**

- a. Standing Panel – 7
- b. Decisional Panel – 1 or 3 Panelists

**QUESTIONS AND OPEN ISSUES:**

- How large should the panel be? A minimum of 5 panelists is required, to achieve geographic diversity, but recognizes the need to ensure that a sufficient number of panelists are available to hear a case at any time, to ensure that replacement panelists are readily available in the event that a panelist becomes available in the course of a case. We would value community input on this issue.

- 10. Independence:** 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; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply, and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited.

**QUESTIONS AND OPEN ISSUES:**

- What is the term of the appointment? 3 or 4 years?
- Limit to a single term?
- How long prior to appointment should previous ICANN engagement be prohibited? 2 years? Longer or shorter?
- How long should the post term engagement prohibition apply? 2 years? Longer?

- 11. Selection and Appointment:** The selection of panelists would follow a 3-step process:

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- a. Third party international arbitral bodies would nominate candidates
  - b. The ICANN Board would select panelists and propose appointees.
  - c. The community mechanism (see section 6.6) would be asked to confirm appointments.

**12. Recall or other Accountability:** Appointments made for a fixed term with no removal except for specified cause (corruption, misuse of position for personal use, etc.).

**QUESTIONS AND OPEN ISSUES:**

- The process for removal of panelists for cause must be defined. Board or community initiated process? Ultimate decision maker – Board, community, other members of the IRP standing panel, or some combination?

**13. Settlement Efforts:**

- a. Reasonable efforts, as specified in a public policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
- b. Parties to cooperatively engage informally, but either party may inject independent dispute resolution facilitator (mediator) after initial CEP meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after specified period, that party's concludes in good faith that further efforts are unlikely to produce agreement.
- c. The process must be governed by clearly understood and **pre-published rules applicable to both parties** and be subject to strict time limits.

**QUESTIONS AND OPEN ISSUES:**

- The CCWG-ACCT is recommending changes to the Reconsideration process. Under what circumstances, if any, should the Reconsideration process be a necessary first step to filing an IRP request?
- What timeline is appropriate for CEP? Fourteen (14) days?
- What is the source for independent dispute resolution facilitators? Professional mediation services? A member of the standing IRP panel (who could not then serve as a IRP panelist in that case)? Community members acceptable to ICANN and the complainant?

- What non-disclosure obligations are appropriate? Can complainant waive confidentiality with respect to some or all issues.
- For transparency purposes, should a complainant have the right to post its written submissions, if any, publicly? To have any meetings recorded and transcribed?

**14. Decision Making:**

- a. In each case, a single or 3 member panel will be drawn from standing panels. In single member panel, ICANN and complaining party agree on panelist. In 3-member panel cases, each party selects one panelist, and those panelists select a third. We anticipate that the Standing Panel would draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.
- b. 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 will reflect a well-reasoned application of the standard to be applied (i.e., the *Statement of Mission, Guarantees, and Core Values*).

**QUESTIONS AND OPEN ISSUES:**

- When is a single member panel appropriate, when is a 3-member panel appropriate?
- Can a complainant elect a 3-member panel in any case? If so, is cost shifting appropriate?

**15. Decision:**

- a. Panel decisions (where there is more than one panelist) would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP itself should be empowered to set.
- b. The CCWG recommends that IRP decisions be “precedential” – meaning, that deference should a panel give to prior decisions? By conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers, which is valuable. It also reduces the chances of inconsistent treatment of one claimant or another, based on the specific individuals making up the decisional panel in particular cases. But this makes it more likely that a “bad” decision in one case affects other cases going forward.

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## QUESTIONS AND OPEN ISSUES:

- On balance, the CCWG believes that IRP decisions should create precedent for future decisions. Do you agree? What degree of deference should prior decisions have?

### 16. **Accessibility and Cost:**

- a. The CCWG recommends that ICANN would bear the administrative the costs of maintaining the system (including Panelist salaries). 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 to pro bono representation for community, non-profit complainants.
- b. Panel should complete work expeditiously; issuing a scheduling order early in the process, and in the ordinary course should issue decisions within a standard time frame.

## QUESTIONS AND OPEN ISSUES:

- 3-month/6 month decision requirement?
- Provision for complex cases, such as monthly reports?

### 17. **Implementation:** The CCWG proposes that the revised IRP provisions be adopted as Fundamental Bylaws.

### 18. **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 independent review process. We recommend reviewing and enhancing the DIDP as part of the accountability enhancements in Work Stream 2.

## QUESTIONS

Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

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## 6.5 Reconsideration Process Enhancements

### INTRODUCTION

### STANDING

Amend "who" has proper standing to file a Reconsideration Request to widen its scope by including board/staff actions/inactions that contradict ICANN's *mission or core values* (was only *policies* before). It is noted that under the existing bylaws paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Reconsideration Request process.

#### ICANN's Bylaws could be revised (added text in red below):

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. One or more **ICANN Board or** staff actions or inactions that contradict established ICANN policy(ies), **its mission, core values**; or
  - b. One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of ~~material~~ **relevant** 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 that are taken as a result of the Board's reliance on false or inaccurate ~~material~~ **relevant** information.

### STANDARD OF REVIEW

The CCWG proposals in terms of standard of review are as follows:

- Broaden the types of decisions, which can be re-examined to include board- staff action/inaction against ICANN's mission or core values (as stated in bylaws / Articles).
- Provide more transparency in dismissal process
- Provide board with reasonable right to dismiss frivolous requests, but not on the grounds that one didn't participate in ICANN's public comment or on the claim one is vexatious or querulous, which is too subjective.
- Propose to amend Paragraph 9 on BGC summary dismissal as follows:

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The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous ~~querulous or vexatious~~; or (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 Reconsideration Request shall be **documented and promptly** posted on the Website.

## COMPOSITION

The group considers there is need to rely less on the legal department (who holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More board member engagement is needed in the overall decision-making process.

Requests should no longer go to ICANN's lawyers (in-house or out-house) for the first substantive evaluation. Instead, the Requests could go to ICANN's Ombudsman for a first look, who could make the initial recommendation to the BGC. The Ombudsman may have more of an eye for fairness to the community in looking at these requests. Note the bylaws charge the BGC with these duties, so BGC would utilize the Ombudsman instead of its current practice of ICANN's lawyers to aid the BGC's in its initial evaluation.

All final determinations of reconsideration requests are to be made by the entire board (not only requests about board actions as is the current practice).

### Amend Paragraph 3:

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
  - a. evaluate requests for review or reconsideration;
  - b. summarily dismiss insufficient requests;
  - c. evaluate requests for urgent consideration;
  - d. conduct whatever factual investigation is deemed appropriate;
  - e. request additional written submissions from the affected party, or from other parties;
  - f. ~~make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors;~~ and
  - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

And delete Paragraph 15 since the board will make all final decisions regarding requests related to staff action/inaction:

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15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

## DECISION-MAKING

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

Provide a rebuttal opportunity to the BGC's final recommendation (although requesters can't raise new issues in a rebuttal) before the full Board finally decides.

Adding hard deadlines to the process, including final determinations of the Board issued within 120 days from request.

Propose to amend reconsideration rules as follows (in red):

16. The Board Governance Committee shall make a final ~~determination or a~~ recommendation to the Board with respect to a Reconsideration Request within thirty 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 ~~determination or~~ 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 entire Board for its evaluation.**



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17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. 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 Board Governance Committee within 60 days of receipt of the Reconsideration Request 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 120 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 Board's decision on the recommendation is final.

## ACCESSIBILITY

Extend the time deadline for filing a Reconsideration Request from 15 to 30 days from when Requester learns of the decision/inaction.

Amend paragraph 5 as follows:

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within ~~fifteen~~ **30** days after:
- 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
  - 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
  - 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.

## DUE PROCESS

ICANN's Document and Information Disclosure Policy (DIDP) should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

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Provide all briefing materials supplied to the board to the Requester should be provided so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality requirements).

Final decisions should be issued sooner – hard deadline of 120 days.

Requesters should be provided more time to learn of action/inaction and to file the request.

Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

**QUESTION:** Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 6.6 Community Empowerment

### 6.6.1 Mechanism to empower the community:

- a) Initial legal advice has indicated that the set of powers in this report can be made available to the ICANN community. More specifically: there are approaches we can take within ICANN to make these powers legally available and durable.
- b) As overall comments, the CCWG is largely agreed on the following:
  - To be as restrained as possible in the degree of structural or organising changes required in ICANN to create the mechanism for these powers
  - The mechanism should be organised along the same lines as the community – that is, in line and compatible with existing SO / AC / SG structures
- c) The subsections below explain the CCWG's reference proposal for the Community Mechanism and the major alternative considered to it (6.6.1.1), and the proposed participants in the mechanism and their levels of influence (6.6.1.2).

#### 6.6.1.1 The Community Mechanism: Reference Mechanism

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- a) In its deliberations and in discussion with its independent legal counsel, it has become clear that ICANN as a non-profit corporation based in California can deliver the powers the CCWG is proposing for the community. To secure the delivery of these powers, however, ICANN needs to make use of membership or designator roles.
  - b) With the status quo, the best we could do is to incorporate weaker variations of the proposed powers in the ICANN bylaws, but they would be unlikely to be enforceable to the degree the global multistakeholder community - or this CCWG - would expect. In preparing for the environment that emerges following the end of the post-NTIA contract, our task as a CCWG is to strengthen ICANN's accountability, not to allow it to be weakened. So the status quo is not an option.
  - c) California law, similar to the law of many other jurisdictions, allows for membership of non profit corporations. Members have range of powers guaranteed in law, and the tools to enforce their rights against the corporation as well.
  - d) The CCWG has therefore decided to propose a **Reference Mechanism** based on membership to the community in this Public Comment report, as it is the approach that - based on analysis so far - fits requirements best. The Reference Mechanism would have the following key characteristics:
    - 1) The ICANN Supporting Organisations and Advisory Committees would each become a “member” of ICANN, and through unincorporated associations would exercise the community powers set out in this part of this Report.
    - 2) In their role as members, they would exercise the new community powers set out in 6.6.2-6.6.7 below. The lawyers are clear that the powers we are proposing can be realised - and enforced - with this membership model.
    - 3) There would be no need for individuals or organisations to “join” ICANN or to “join” the SOs or ACs they participate in to do anything that they currently do within ICANN. Community participants would have the choice of opting in and participating in this new accountability system, or to simply keep on doing what they do today in an ICANN that was more accountable than it is today.
    - 4) Our legal advisors are clear that through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today. In fact, in some respects individual participants would be safer from hostile legal action than they are today.
    - 5) A set of practical questions and answers regarding unincorporated associations is also available in Appendix X (Sidley Memo (Unincorporated associations))

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- e) In arriving at this Reference Mechanism, the primary alternative the CCWG has investigated is a model based on “designators”. In this part of the report, we refer to this as the Alternative Mechanism.
  - f) Designators are a construct in California law that can achieve some of the powers proposed below - mainly those regarding the selection and removal of Board members and the approval or blocking of changes to bylaws. But they cannot reliably deliver other aspects of the set of powers the CCWG believes the community needs, if it is to fully hold ICANN to account. Crucially, in the view of our counsel, this would also oblige the SOs and ACs to organise themselves into unincorporated associations - and so some perceived simplicity compared with the membership model isn't actually possible.
  - g) Variations of these mechanisms were also discussed:
    - 1) The notion of creating a permanent CCWG or a Community Council that was the sole “member” or “designator” was considered but rejected mainly because it created additional accountability problems and offered no accountability advantages compared with the Reference Mechanism;
    - 2) The notion of all SOs and ACs collectively creating an unincorporated association that would be the single member of ICANN. However this model “would add only complexity without contributing real advantages”.
    - 3) The notion of a first step of change (in a timeframe consistent with WS1) focusing on changes in the bylaws and current mechanisms only, while assessing the opportunity to go one step further as part of WS2.
  - h) None of the mechanism possibilities should be considered “off the table”. The work of the CCWG has proceeded quickly, and our counsel are rapidly becoming familiar with the complexities of ICANN's history and current approach to dealing with many of these matters.
  - i) That said, the CCWG is clearly of the view that the Reference Mechanism is the currently preferred approach, and relies on this in much of what follows.
  - j) Please see the additional detail that explains this model set out in Appendix ? [Legal Assessment - Executive Summary, Summary Chart and Revised Governan...]. Key pieces of legal advice that helped the CCWG arrive at this Reference Mechanism are also available [on the wiki at / attached as Appendices ? # &.]

**QUESTION :** Do you agree that the introduction of a community mechanism to empower the community over certain Board decisions would enhance Ican's accountability ?

What guidance, if any, would you provide to the CCWG regarding the proposed options? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

### 6.6.1.2 Influence in the Community Mechanism

- a) The CCWG considered the decision weights of the various parts of the community within the mechanism. The following table sets out the Reference Option, which was the most supported approach among CCWG participants:

Community segment	Reference Option “votes”
ASO	5
ccNSO	5
gNSO	5
At Large	5
GAC	5
SSAC	2
RSSAC	2

- b) The CCWG also discussed two alternative approaches, neither of which significant support:
- 1) Alternative A - Each SOs receives 4 “votes”; each AC receives 2 “votes”
  - 2) Alternative B - Each SO and AC receives 5 “votes”
- c) The rationale for the Reference Option 1 is that it gives the bulk of influence on an equal basis between the three SOs for which ICANN deals with policy development and the two ACs that are structurally designed to represent stakeholders (Governments and Internet users, respectively) within ICANN, while still guaranteeing a say for the other ACs.
- d) The reasons to allocate a lower number of “votes” to SSAC in the Reference Option is that it is a specific construct within ICANN designed to provide expertise on security and stability, rather than a group representing a community of stakeholders
- e) For RSSAC, the reason is slightly different but relies on the limited size of the community of root server operators as well as the strong focus of their mission on operations (compared with ICANN’s mission being focused mainly on policy).

- f) The rationale for Alternative A is that it gives the bulk of influence to the SOs, while guaranteeing a say for the ACs on an equal basis between them. It is therefore more closely aligned with the existing structure of ICANN.
- g) The rationale for Alternative B is to give equal influence to each of the seven SOs and ACs.
- h) The logic for 5 “votes” in the Reference Option for the higher number is to allow for greater diversity of views, including the ability to represent all the ICANN regions in each SO. The logic for 4 “votes” in Alternative A is to allow for appropriate coverage across SGs in the GNSO.
- i) The Reference Option emerged as part of Work Party 1’s deliberations following up on the CCWG’s discussions in Singapore. Alternatives A and B emerged recently in deliberations and of the whole CCWG.
- j) The subsidiary option discussed in Istanbul of 2 votes for the first five SOs and ACs, and one vote for the remaining two, has not been pursued.
- k) The CCWG is interested in community views on the relative influence particular SOs and ACs, or classes of these, should have.

**QUESTION:** What guidance, if any, would you provide to the CCWG regarding the proposed options related to the relative influence of the various groups in the community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

## 6.6.2 Power: reconsider/reject budget or strategy / operating plans

- a) The right to set budgets and strategic direction is a critical governance power for an organisation. By allocating resources and defining the goals to which they are directed, strategic/operating plans and budgets have a material impact on what ICANN does and how effectively it fulfills its role.
- b) Today, ICANN’s Board makes final decisions on strategy, operations plans and budgets. While ICANN consults the community in developing strategic/business plans, there is no mechanism defined in the bylaws which requires ICANN to develop such plans in a way that includes a community feedback process. Even if feedback was unanimous, the Board could still opt to ignore it today.

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- c) This new power would give the community the ability to consider strategic & operating plans and budgets after they are approved by the Board (but before they come into effect) and reject them - generally, based on perceived inconsistency with the purpose, mission and role set out in ICANN's articles/bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community.
  - d) Time would be included in planning and budgeting processes for the community to consider adopted plans and decide whether to reject (timeframe to be determined). These processes would also need to set out the required level of detail for such documents.
  - e) If the community exercised this power, the Board would have to absorb the feedback that came with the decision, make adjustments and pass amended plans. The planning process should be structured so this can be done before there was any day-to-day impact on ICANN's business arising from the power being exercised.
  - f) In a situation of significant and sustained disagreement between the community and the Board regarding a proposed annual budget, ICANN would temporarily continue to operate according to the previous year's approved budget. The Board must however resolve the situation of not operating with an approved budget - eventually it will have to reconcile itself to the community's view. If the Board is unable or unwilling to do so, other mechanisms (as set out in this part of the First Public Comment Report) are available if the community wanted to take the matter further.
  - g) This power does not allow the community to re-write a plan or a budget: it is a process that requires reconsideration of such documents by the Board if the community feels they are not acceptable. **Where a plan or budget has been sent back, all the issues must be tabled on that first return. That plan or budget cannot be sent back again with new issues raised, but the community can reject a subsequent version where it does not accept the Board's response to the previous rejection.**
  - h) As this power would become part of existing planning processes (incorporated into the bylaws as required), it does not raise questions of standing in respect of someone raising a complaint.
  - i) **At the appropriate point in the planning cycle the challenge period would be open, and any participant in the community powers mechanism would be able to raise the question. A 2/3 level of support in the mechanism would be required in the mechanism to reject a first time: a 3/4 level of support for subsequent rejection/s.**

**QUESTION:** Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

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### 6.6.3 Power: reconsider/reject changes to ICANN “standard” bylaws

This section applies to “standard” Bylaws.

- a) ICANN’s bylaws set out many of the details for how power is exercised in ICANN, including by setting out the company’s Mission, Guarantees and Core Values. Changes to those bylaws are generally the right of the Board. It is possible for the Board to make bylaws changes that the community does not support. For example, the Board could unilaterally change the ccNSO’s Policy Development Policy, or the SG structure of the GNSO, or the composition of the Nominating Committee.
- b) This power would give the community the right to reject proposed bylaws changes ***after they are approved by the Board (but before they come into effect)***. This would most likely be where a proposed change altered the Mission, Guarantees and Core Values, or had a negative impact on ICANN’s ability to fulfill its purpose in the community’s opinion, but would be available in response to any proposed bylaws change.
- c) The time required for this power to be exercised would be included in the bylaws adoption process (***probably a two-week window following Board approval!***). If the community exercises this power, the Board would have to absorb the feedback, make adjustments, and propose a new set of amendments to the bylaws.
- d) ***It would require a 3/4 level of support in the community mechanism to reject a proposed bylaw change.*** Note that for the Board to propose a bylaws change requires a 2/3 vote in favour.
- e) This power does not allow the community to re-write a proposed bylaws change: it is a rejection process where the Board gets a clear signal the community is not happy. ***There is no limit to the number of times a proposed change can be rejected, but the threshold for sending one back is a supermajority in the community mechanism set out in 6.6.1 above, to limit any potential for abuse of this power.***

**QUESTION** : Do you agree that the power for the community to reject a proposed bylaw change would enhance ICANN's accountability ? Do you agree with the list of requirements for this recommendation ? If not, please detail how you would recommend to amend these requirements.

### 6.6.4 Power: approve changes to “Fundamental” Bylaws



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- a) As outlined elsewhere in this First Public Comment Report, the CCWG is proposing that some core elements of the bylaws be defined as “fundamental”. Bylaws that are created as “fundamental” will be harder to amend or replace, and through a different process, than the rest of the bylaws. The intention is to make sure that matters like critical aspects of the powers and processes required to maintain ICANN’s accountability to the community, and the organization’s purpose and core values, are highly unlikely to change.
  - b) This power would form part of the process set out for agreeing any changes of the “fundamental” bylaws. Through the community mechanism, the community would have to give positive *assent* to any change *before* it was finalised, as part of a co-decision process between the Board and the community.
  - c) Such changes would require a very high degree of community assent, as the purpose of this power is to make changing items in such bylaws possible only with very wide support from the community.
  - d) The threshold of support in the community mechanism to approve changes to “fundamental” bylaws is set out in section 6.3.3 of this First Public Comment Report, where we set out what the “fundamental” bylaws are alongside the process for their creation and amendment.

**QUESTION :** Do you agree that the power for the community to approve any fundamental bylaw change would enhance ICANN’s accountability ? Do you agree with the list of requirements for this recommendation ? If not, please detail how you would recommend to amend these requirements.

## 6.6.5 Power: Recalling individual ICANN directors

- a) The Board is the governing body of ICANN, employing the CEO, overseeing organizational policies, making decisions on key issues, defining the organization’s strategic and operating plans and holding the staff to account for implementing them.
- b) Directors are currently appointed for a fixed term and generally are in office for the whole term they are appointed - by their SO/AC, by the Nominating Committee or by the Board (in the case of the Chief Executive and relating to their status as an employee). The power to remove individual directors of the ICANN Board is at present only available to the Board itself, and can be exercised through a 75% vote of the Board. There is no limitation<sup>1</sup> on the types of situation for which the Board can remove a director.

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<sup>1</sup> There are escalation paths, up to and including removal from the Board, for Board member violations of the Code of Conduct and Conflict of Interest Policies, but the Bylaws do not currently require such a violation occur prior to Board removal.

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- c) This power would allow the community to end the term of a director, and trigger a reappointment process. The general approach is that the appointing body is the removing body.
  - d) For the seven directors appointed by the three Supporting Organizations or by the At-Large community (or by subdivisions within them e.g. within the GNSO), a process led by that organization or subdivision would lead to the director's removal.
  - e) For the directors appointed by the Nominating Committee, the CCWG seeks the community's views about how to allow for removal. Following the principle of "the appointing body is the removing body", it does need to be the NomCom which takes the decision to remove one of these directors. Consistent with the Reference Mechanism outlined above, the NomCom will need to obtain legal structure to be able to remove directors - but it will also need this to appoint directors.
  - f) Our initial view is that such a removal process should only be triggered on the petition of at least two of the SOs or ACs (or an SG from the GNSO). Such a petition would set out the reason/s removal was sought, and then the NomCom would consider the matter.
  - g) The CCWG sees two options for the composition of the NomCom when considering removal of a director.
    - 1) It could simply be that the NomCom members at the time of a petition being lodged would decide.
    - 2) Alternatively, a special committee of the NomCom could be established to deal with removal petitions when they arise. Such a "Recall Committee" would have as chair a previous NomCom Chair and would otherwise be formulated on the same basis as the regular NomCom. Either option is legally viable.
  - h) The advantage of such a separate committee is that it avoids burdening the ordinary NomCom with such matters. The disadvantage is that it would require a new set of volunteers to populate it, as it would be preferable for the personnel of the two groups to be separate.
    - 1) Whether the decision-making body is the SO/AC or the NomCom, removal would require a **[75%]** level of support (or equivalent) to decide in favor of removal.
    - 2) ***The petitioning threshold to start the NomCom consideration of removing a director should be set at least at a majority of the SO/AC's governing body/council***

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**QUESTION:** Do you agree that the power for the community to remove individual Board members would enhance ICANN's accountability ? Do you agree with the list of requirements for this recommendation ? If not, please detail how you would recommend to amend these requirements.

### 6.6.6 Power: Recalling the entire ICANN Board

- a) There may be situations where removing individual ICANN directors is not seen as a sufficient remedy for the community: where a set of problems have become so entrenched that the community wishes to remove the entire ICANN Board in one decision.
- b) Beyond the power set out above to remove individual directors, this power would allow the community to cause the removal of the entire ICANN Board. The community would initiate use of this power on the petition of ***two thirds of the SOs or ACs in ICANN, with at least one SO and one AC petitioning.***
- c) After a petition is raised, there would be a set period of time for SOs / ACs to individually and collectively deliberate and discuss whether the removal of the Board is warranted under the circumstances. Each SO and AC, following its internal processes, would decide how to vote on the matter.
- d) It would be preferable for a decision of this sort to be the result of cross-community consensus. Where this consensus is not apparent, a suitably high threshold for the exercise of this power, ***[75%] [85%] of all the support available within the community mechanism would have to be cast in favor to implement it.*** This ensures that non-participation does not lower the threshold required to remove the Board.

This was chosen to prevent any particular SO or AC being able to prevent the removal of the Board, but to be as high as possible without allowing that to occur. The requirement on all recordable support/opposition to be counted was to avoid non-participation reducing the effective threshold for decision.

- f) Ongoing work in the CCWG will flesh out how to deal with transitional matters raised, including at least the following:
  - the need to ensure ICANN does have a board in place after the removal (whether there is:
  - a phase of “caretaker” behaviour by the outgoing Board while new members are elected, or
  - a need to elect alternate Board members in each board selection process, or
  - a pre-defined subset of the community that could function as an interim Board;

- continuity in the role of Chief Executive were the Board to be removed;
- “caretaker” conventions for the CEO to follow in a situation where the Board had been removed.

It should be noted that legal advice has confirmed that a caretaker Board mechanism was achievable.

**QUESTION :** Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability ? Do you agree with the list of requirements for this recommendation ? If not, please detail how you would recommend to amend these requirements.

## 6.7 Incorporating AoC into the ICANN Bylaws

- a) The Affirmation of Commitments (AoC) is a 2009 bilateral agreement between the US government and ICANN. After the IANA agreement is terminated, the AoC will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.
- b) Elimination of the AoC would be simple matter for a post-transition ICANN, since the AoC can be terminated by either party with just 120 days' notice. The CCWG Stress Test Work Party addressed this contingency since it was cited in prior public comments. The CCWG evaluated the contingency of ICANN unilaterally withdrawing from the AoC against existing and proposed accountability measures, including:
  1. Preserving ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews.
  2. Bringing the four AoC review processes into ICANN's bylaws.
- c) All of the other sections in the AoC are either preamble text or commitments of the US Government. As such they don't contain commitments by ICANN, and so they cannot usefully be incorporated in the bylaws.
- d) Each of the above measures is addressed below.
- e) The AoC-based reviews and the commitments ICANN has made are being added to the ICANN bylaws as part of the IANA Stewardship transition process. It is possible that once adopted as fundamental bylaws, ICANN and the NTIA could consider mutually agreed changes to or ending of some or all of the AoC, since in some respects it will no longer be necessary.
- f) In reviewing this suggested approach to incorporating the AoC commitments in the bylaws, the community should consider the degree to which it finds the suggestions implementable and

reasonable. The concepts outlined through these changes, rather than the specific drafting quality or precision, are the points to consider at this stage in the CCWG’s work.

## 6.7.1 Preserving ICANN Commitments from the AoC

ICANN COMMITMENTS IN THE AOC	AS EXPRESSED IN ICANN BYLAWS
<p>3. This document affirms key commitments by DOC and ICANN, including commitments to:</p> <p>(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>(b) preserve the security, stability and resiliency of the DNS;</p> <p>(c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and</p> <p>(d) facilitate international participation in DNS technical coordination.</p>	<p>In revised Core Values:</p> <p><i>Proposed core value 6 (with <b>additional text</b>)</i></p> <p>Ensure that decisions made related to the global technical coordination of the DNS are made in the <b>global</b> public interest and are accountable, transparent <b>and should respect the bottom-up multistakeholder nature of ICANN.</b></p> <p><i>Proposed core value 5 (with <b>additional text</b>):</i></p> <p>Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment <b>that enhances consumer trust and choice.</b></p>
<p>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</p>	<p>In revised Core Values:</p> <p><i>Proposed new Section 9 in bylaws Article III Transparency (with <b>additional text</b>)</i></p> <p>ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial <b>or non-financial</b> impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.</p>

<p>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>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>in revised Core Values:</p> <p><i>Proposed insertion of new section 8 in Article III Transparency (this is AoC para 7 in its entirety including <b>additional text</b>):</i></p> <p>ICANN <b>shall</b> adhere to transparent and accountable budgeting processes, <b>providing [reasonable] [adequate] advance notice to facilitate stakeholder engagement in policy decision-making</b>, 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> <p>In addition, ICANN <b>shall</b> 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>8. ICANN affirms its commitments to:</p> <p>(a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for</p>	<p>In revised Core Values:</p> <p><i>Propose inserting 8(a) in full as a new core value in the bylaws</i></p>

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.

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.

The “not-for-profit” commitment in 8b is reflected in ICANN’s ARTICLES OF INCORPORATION:

“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. ”

A change to the Articles would require 2/3 vote of the board and 2/3 vote of the Members.

The “headquartered” commitment in 8b is already in current ICANN bylaws, at Article XVIII Section 1:

“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.”

While the Board could propose a change to this bylaws provision, Members/Designators could block the proposed change (75% vote).

The CCWG is considering whether bylaws Article 18 Section 1 should be keep its current status or be listed as “Fundamental Bylaws”. In the latter case, any bylaws change would require approval by Members/Designators (75% or 80% vote).

	<p>Propose inserting 8(c) in full as a new core value in the bylaws (including <b>additional text</b>):</p> <p>Operating as a multi-stakeholder, <b>bottom-up</b> private sector led organization with input from the public, for whose benefit ICANN shall in all events act.</p>
<p>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 :</p>	<p>See Section 6.6.2 of this document for bylaws text to preserve commitments to perform these ongoing reviews.</p>

**QUESTION:** Do you agree that the incorporation into ICANN’s Bylaws of the AoC principles would enhance ICANN’s accountability ? Do you agree with the list of requirements for this recommendation ? If not, please detail how you would recommend to amend these requirements.

## 6.7.2 AoC Reviews

- a) Suggestions gathered during 2014 comment periods on ICANN accountability and the IANA stewardship transition suggested several ways the AoC Reviews should be adjusted as part of incorporating them into ICANN’s bylaws:
  - Ability to sunset reviews and create new reviews
  - Community stakeholder groups should appoint their own members to the review teams
  - Give review teams access to all ICANN internal documents
  - Require the ICANN Board to approve and implement review team recommendations, including from previous reviews.
- b) In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments**, with an overarching chapeau for the way these reviews are conducted and then one subsection for each of the four current Affirmation Reviews.
- c) These proposals are presented beginning on the next page.



**POSSIBLE BYLAW THAT PROVIDES A CHAPEAU FOR ALL PERIODIC REVIEWS**

All of the reviews listed in this section 6.6.2 would be governed by the following:

PROPOSED BYLAW TEXT	COMMENT
<p>ICANN will produce an annual report on the state of improvements to Accountability and Transparency.</p> <p>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>This is new. It is a recommendation based on one in ATRT2 and becomes more important as reviews are spread further apart.</p>
<p>All reviews will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board. The group must be as diverse as possible.</p>	
<p>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>To facilitate transparency and openness in ICANN's deliberations and operations, the review teams shall have access to ICANN internal documents, and the draft output 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>The final output of all reviews will be published for public comment. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.</p>	<p>AoC requires Board to 'take action' within 6 months</p>
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<p><b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b></p>	<p><b>NOTES</b></p>
<p><b>1. Accountability &amp; Transparency Review.</b> 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>In this review, particular attention should be paid to:</p> <p>(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>(b) assessing the role and effectiveness of GAC 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;</p> <p>(c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);</p> <p>(d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and</p> <p>(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.</p> <p>The review team shall assess the extent to which the Board and staff</p>	<p>This commitment is reflected in Bylaws Core Values</p> <p>Rephrased to avoid implying a review of GAC's effectiveness</p> <p>New</p> <p>AoC required every 3 years.</p>

<p>have implemented the recommendations arising from the reviews required by this section</p> <p>The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.</p> <p>This periodic review shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the prior review team.</p>	
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<b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b>	<b>NOTES</b>
<p><b>2. Preserving security, stability, and resiliency.</b></p> <p>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>In this review, particular attention will be paid to:</p> <ul style="list-style-type: none"> <li>(a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;</li> <li>(b) ensuring appropriate contingency planning; and</li> <li>(c) maintaining clear processes.</li> </ul> <p>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>The review team shall assess the extent to which prior review recommendations have been implemented.</p> <p>This periodic review shall be conducted no less frequently than every</p>	<p>This commitment is reflected in Bylaws Core Values</p> <p>Make this explicit</p>

five years, measured from the date the Board received the final report of the prior review team.	AoC required every 3 years.
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<b>PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW</b>	<b>NOTES</b>
<p><b>3. Promoting competition, consumer trust, and consumer choice.</b></p> <p>ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.</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 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> <ul style="list-style-type: none"> <li>(a) the gTLD application and evaluation process; and</li> <li>(b) safeguards put in place to mitigate issues involved in the expansion</li> </ul> <p>The review team shall assess the extent to which prior review recommendations have been implemented.</p> <p>Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.</p> <p>These periodic reviews shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the relevant review team.</p>	<p>This commitment will be added to Bylaws Core Values</p> <p>Re-phrased to cover future new gTLD rounds.</p> <p>Make this explicit</p> <p>New</p> <p>AoC also required a review 2 years after the 1 year review.</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p><b>4. 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.</b></p> <p>ICANN commits to enforcing its existing policy relating to WHOIS/Directory Services, 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.</p> <p>Such existing policy also includes the requirements that legal constraints regarding privacy, as defined by OECD in <a href="#">1980</a> as amended in <a href="#">2013</a><sup>2</sup>.</p> <p>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 and promotes consumer trust.</p> <p>The review team shall assess the extent to which prior review recommendations have been implemented.</p> <p>This periodic review shall be conducted no less frequently than every five years, measured from the</p>	<p>New</p> <p>Make this explicit</p> <p>AoC required every 3 years.</p>

<sup>2</sup> See

<http://www.oecd.org/sti/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm>  
<http://www.oecd.org/internet/ieconomy/privacy-guidelines.htm>

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date the Board received the final report of the prior review team.	
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The CWG-Stewardship has also proposed a periodic review that should be added to the Bylaws.

#### **PERIODIC REVIEW OF THE IANA FUNCTIONS**

The CWG-Stewardship recommends that the SOW review be done as part of the IANA Function Review (IFR). The IFR would not only take into account performance against the SOW, but would be obliged to take into account multiple input sources into account including community comments, CSC evaluations, reports submitted by 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 first IFR is recommended to take place no more than 2 years after the transition is completed. After the initial review, the IFR should occur every 5 years.

The IANA Function Review 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 (AOC) review. These “fundamental bylaws” would be ICANN bylaws that would require the approval of the multistakeholder community to amend. The approval of a fundamental bylaw could also require a higher threshold than typical bylaw amendments, for example, a supermajority. The members of the IANA Function Review Team (IFRT) would be selected by the Supporting Organizations and Advisory Committees 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.

While the IFR will normally be scheduled based on a regular 5 year cycle with other ICANN reviews, a Special Review may also be initiated following the CSC raising concerns with the GNSO and/or the ccNSO or by concerns raised by TLDs directly with the ccNSO or the GNSO. In the event of a Special Review being proposed, the ccNSO and GNSO should consult with both members and non-member TLDs, in the light of the consultations, the Councils can decide by a supermajority to call for a special review.

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**QUESTION:** Do you agree that the incorporation into ICANN's Bylaws of the AoC reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 6.8 Bylaws changes suggested by Stress Tests

- a) The 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.
- b) The CCWG Stress Test Work Party documented contingencies identified in prior public comments. The Stress Test Work Party then prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.
- c) The exercise of applying stress tests identified changes to ICANN bylaws that might be necessary to allow the CCWG to evaluate proposed accountability mechanisms as adequate to meet the challenges uncovered.

### 6.8.1 Forcing the board to respond to Advisory Committee formal advice

- a) Several stress tests indicate the need for a community power to force ICANN to take a decision on previously-approved Review Team Recommendations, consensus policy, or formal advice from an Advisory Committee (SSAC, ALAC, GAC, RSSAC).

- b) The CCWG is developing enhanced community powers to challenge a board decision, but this may not be effective in cases where the board has taken no decision on a pending matter. In those cases, the community might need to force the board to make a decision about pending AC advice in order to trigger the ability for community to challenge the decision via Reconsideration or IRP processes.
- c) Recommendation 9 from ATRT2<sup>3</sup> may answer this need:
  - 9.1. *ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:*
  - The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.*
- d) This ATRT2 recommendation, however has not yet been reflected in ICANN bylaws, so this change should be required before the IANA stewardship transition. In addition, there is a question as to whether a board "response" would be sufficient to trigger the RR and IRP review mechanisms in this proposal. The CCWG and CWG are waiting on legal advice as to that question.

## 6.8.2 Require consultation and mutually acceptable solution for GAC advice that is backed by consensus

- a) Stress Test 18 addresses ICANN’s response to GAC advice in the context of NTIA’s statement regarding the transition: “NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution”. This Stress Test was applied to existing and proposed accountability measures, as seen below:

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
18. Governments in ICANN’s Government Advisory	Current ICANN Bylaws (Section XI) give due deference to GAC advice,	One proposed measure is to amend ICANN bylaws (Article

<sup>3</sup> See page 11 of this PDF: <https://www.icann.org/en/system/files/files/draft-recommendations-15oct13-en.pdf>



<p>Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's board. 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 expression, for example.</p>	<p>including a requirement to try to find “a mutually acceptable solution.” This is required for any GAC advice, not just for GAC consensus advice. 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>4</sup>.” But the GAC may at any time change its procedures to use majority voting instead of its present consensus.</p>	<p>XI Section 2, item 1j) to give due deference only to GAC consensus advice. 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. GAC can still give ICANN advice at any time, with or without consensus.</p>
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- b) The CCWG proposes a response to Stress Test 18 to amend ICANN bylaws such that only consensus advice would trigger the obligation to try to find a mutually acceptable solution. The proposal is to amend ICANN Bylaws, Article XI Section 2 clause j as seen below. (addition here ***bold, italic and underlined***) Clause k is also shown for completeness but is not being amended.
1. *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. ***With respect to Governmental Advisory Committee advice that is supported by consensus***, 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. *If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.*
- c) Note that the proposed bylaws change for stress test 18 does not interfere with the GAC’s method of decision-making. If the GAC decided to adopt advice by majority voting or methods

<sup>4</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

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other than today's consensus, 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."

- d) Moreover, ICANN would still have to explain why GAC advice was not followed: "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"
- e) 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 – exactly the way GAC advice has been approved since ICANN began.
- f) NTIA gave specific requirements for this transition, and stress test 18 is the most direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. Unless and until there are other proposed measures that address this stress test, the proposed bylaws change should remain in consideration as an important part of the community's proposal.

**QUESTION:** Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 7. Stress Tests

*An essential part of our CCWG Charter calls for stress testing of accountability enhancements in both work stream 1 and 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.*

### Purpose & Methodology

The purpose of these stress tests is 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.

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**AMONG DELIVERABLES LISTED IN THE CCWG-ACCOUNTABILITY 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?*

Also, note that the CCWG charter does not ask that probability estimates be assigned for contingencies. The purpose of applying tests to proposed accountability measures is to determine if the community has adequate means to challenge ICANN's reactions to the stress test.

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+Tests+Work+Party>

We consolidated these into five 'stress test categories' listed below, and prepared draft documents showing how these stress tests are useful to evaluate ICANN's existing and CCWG's proposed accountability measures.

## **I. Financial Crisis or Insolvency (Scenarios #5, 6, 7, 8 and 9)**

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.

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## **II. Failure to Meet Operational Obligations (Scenarios #1,2,11, 17, and 21)**

ICANN fails to process change or delegation requests to the IANA Root Zone, or executes a change or delegation over the objections of stakeholders, such as those defined as 'Significantly Interested Parties' [<http://ccnso.icann.org/workinggroups/foi-final-07oct14-en.pdf>]

## **III. Legal/Legislative Action (Scenarios #3, 4, 19, and 20)**

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.

## **IV. Failure of Accountability (Scenarios #10, 12, 13, 16, 18, 22, 23, 24 and 26)**

Actions (or expenditure of resources) by one or more ICANN Board Members, 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 is either able to drive its agenda on all other stakeholders, or abuse accountability mechanisms to prevent all other stakeholders from advancing their interests (veto).

## **V. Failure of Accountability to External Stakeholders (Scenarios #14, 15, and 25)**

ICANN modifies its structure to avoid obligations to external stakeholders, such as terminating the Affirmation of Commitments, terminating presence in a jurisdiction where it faces legal action, 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

Note that we cannot apply stress tests definitively until CCWG and CWG have defined mechanisms/structures to test. This draft applies stress tests to a 'snapshot' of proposed mechanisms under consideration at this point in the process.

Also, note that several stress tests can specifically apply to work of the CWG regarding transition of the IANA naming functions contract (see Stress Tests #1 & 2, 10, 11, 14, 15, 16, 17, 19, 22, 24, 25)

The following table shows the stress test scenarios for each of our five categories of risk, alongside existing accountability mechanisms and measures and proposed accountability measures. Conclusions have been drawn after discussion and exploration of each hypothetical

situation, and the table also lists whether a) if the ‘threat’ is or is not directly related to the transition of IANA stewardship; b) if and to what extent existing measures and mechanisms are deemed adequate; and c) the adequacy and effectiveness of any proposed measures or mechanisms.

## Stress test category I: Financial Crisis or Insolvency

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
5. Domain industry financial crisis. Consequence: significant reduction in domain sales generated revenues and significant increase in registrar and registry costs, threatening ICANN’s ability to operate.	ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community.  The Community has input in ICANN budgeting and Strat Plan.	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.
6. General financial crisis.	Registrars must approve ICANN’s variable registrar fees. If not, registry operators pay the fees.	Another proposed mechanism 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.
7. Litigation arising from private contract, e.g., Breach of Contract.	ICANN’s reserve fund could support operations in a period of reduced revenue. Reserve fund is independently reviewed periodically.	If ICANN made a revenue or expenditure decision outside the annual budget process, the Reconsideration or IRP mechanisms could reverse that decision.
8. Technology competing with DNS.  Consequence: loss affecting reserves sufficient to threaten business continuity.		
<b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship.	b) Existing measures would be adequate, unless the revenue loss was extreme and sustained.	c) Proposed measures are helpful, but might not be adequate if revenue loss was extreme and sustained.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
9. Major corruption or fraud. Consequence: major	ICANN has annual independent audit that includes testing of internal controls designed to prevent fraud and	One proposed measure is to empower the community to force ICANN’s board to consider a recommendation arising

<p>impact on corporate reputation, significant litigation and loss of reserves.</p>	<p>corruption. ICANN maintains an anonymous hotline for employees to report suspected fraud. ICANN board can dismiss CEO and/or executives responsible. The community has no ability to force the board to report or take action against suspected corruption or fraud.</p>	<p>from an AoC Review. 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>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><b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship</p>	<p>b) Existing measures would not be adequate if litigation costs or losses were extreme and sustained.</p>	<p>c) Proposed measures are helpful, but might not be adequate if litigation costs and losses were extreme and sustained.</p>

## Stress test category II: Failure to Meet Operational Expectations

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>1. Change authority for the Root Zone ceases to function, in part or in whole. also 2. Delegation authority for the Root Zone ceases to function, in part or in whole. Consequence: interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.</p>	<p>Under the present IANA functions contract, NTIA can revoke ICANN's authority to perform IANA functions and re-assign to different entity/entities. After NTIA relinquishes the IANA functions contract, this measure will no longer be available.</p>	<p>The CWG proposal includes various escalation procedures to prevent degradation of service, as well as a plan (operational) for the transition of the IANA function.</p> <p>The CWG proposes that IANA naming functions be legally transferred to a new Post-Transition IANA entity (PTI) that would be a subsidiary of ICANN.</p> <p>The CWG 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 the ICANN Board to terminate or not renew</p>

		<p>the IANA Functions Contract with PTI. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>The CWG proposes the ability for the multistakeholder community to require, if necessary and after substantial opportunities for remediation, the selection of a new operator for the IANA Functions.</p> <p>Suggestions for Work Stream 2:</p> <p>Require annual external security audits and publication of results.</p> <p>Require certification per international standards (ISO 27001) and publication of results.</p>
<p><b>Conclusions:</b> a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures would be inadequate after NTIA terminates the IANA contract.</p>	<p>c) Proposed measures are, in combination, adequate to mitigate this contingency</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>11. Compromise of credentials. Consequence: major impact on corporate reputation, significant loss of authentication and/or authorization capacities.</p>	<p>Regarding compromise of internal systems:</p> <p>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>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>Regarding compromise of internal systems:</p> <p>No measures yet suggested would force ICANN management to conduct an after-action report and disclose it to the community.</p> <p>Nor can the community force ICANN management to execute its stated security procedures for employees and contractors.</p> <p>Regarding DNS security:</p>

	<p>Regarding DNS security: Beyond operating procedures, there are credentials employed in DNSSEC.</p> <p>ICANN annually seeks <a href="#">SysTrust</a> Certification for its role as the Root Zone KSK manager. The IANA Department has <a href="#">achieved</a> EFQM Committed to Excellence certification for its Business Excellence activities.</p> <p>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>One proposed measure empowers the community to force ICANN's board to consider a recommendation arising from an AoC Review – namely, <i>Security Stability and Resiliency</i>. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>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 be empowered to challenge that board decision to an IRP.</p> <p>Suggestions for Work Stream 2: - Require annual external security audits and publication of results. - Require certification per international standards (ISO 27001) and publication of results.</p>
<b>Conclusions:</b>		
a) This threat is directly related to the transition of IANA stewardship	b) Existing measures would not be adequate.	c) Proposed measures, in combination, would be helpful to mitigate the scenario, but not to prevent it.
<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>17. ICANN attempts to add a new top-level domain in spite of security and stability concerns expressed by technical community or other stakeholder groups.</p> <p>Consequence: DNS</p>	<p>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, .home (SAC 057)</p> <p>NTIA presently gives clerical approval for each delegation to indicate that</p>	<p>One proposed measure is to empower the community to force ICANN's board to respond to recommendations arising from an AoC Review – namely, 9.2 Review of Security, Stability, and Resiliency. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>



security and stability could be undermined, and ICANN actions could impose costs and risks upon external parties.	ICANN has followed its processes. NTIA could delay a delegation if its finds that ICANN has not followed its processes. Not clear if that would/could have been a finding if ICANN attempted to delegate a new TLD such as .mail or .home.	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 be empowered to challenge that board decision to an IRP.
<b>Conclusions:</b> a) This threat is partially related to the transition of IANA stewardship	b) Existing measures were adequate to mitigate the risks of this scenario.	c) Proposed measures enhance community's power to mitigate the risks of this scenario.

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>21. A government official demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD Manager.</p> <p>However, the IANA Function Manager is unable to document voluntary and specific consent for the revocation from the incumbent ccTLD Manager.</p> <p>Also, the government official demands that ICANN assign management responsibility for a ccTLD to a Designated Manager. But the IANA Function 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 Interested</p>	<p>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>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>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>"CWG-Stewardship recommends not including any appeal mechanism that would apply to ccTLD delegations and redelegations in the IANA Stewardship Transition proposal."</p> <p>Regarding CCWG proposed measures:</p> <p>One proposed CCWG 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, Guarantees and Core Values.</p> <p>Another proposed CCWG mechanism is community challenge to a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding</p>

<p>Parties and/or Significantly Interested Parties.</p> <p>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>Consequence: Faced with this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.</p>	<p>See <a href="#">Framework of Interpretation</a>, 20-Oct-2014</p>	<p>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> a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures would not be adequate.</p>	<p>c) At this point, proposed measures do not adequately empower the community to address this scenario.</p>

### Stress test category III: Legal/Legislative Action

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>3. Litigation arising from existing public policy, e.g., Antitrust suit</p> <p>In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>The community could develop new policies that respond to litigation challenges.</p> <p>An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent</p>	<p>After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>The community could develop new policies that respond to litigation challenges.</p> <p>Another measure would give the community standing to file for Reconsideration or IRP, based on amended Mission, Guarantees and Core Values.</p> <p>Another measure would allow each AoC</p>

	jurisdiction.	review team to assess implementation of prior recommendations, ad renew the recommendations. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.
<b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship	b) Existing measures are inadequate.	c) Proposed measures would help the community hold ICANN accountable, but might not be adequate to stop interference with ICANN policies.

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>4. New regulations or legislation. 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. In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>The community could develop new policies that respond to new regulations.</p> <p>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 IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction.</p>	<p>After ICANN board responded to the regulation (litigate or change policy/implementation), the community would have several response options:</p> <p>The community could develop new policies that respond to regulation.</p> <p>Another measure would give the community standing to file for Reconsideration or IRP, based on amended Mission, Guarantees and Core Values.</p> <p>Another measure would allow each AoC review team to assess implementation of prior recommendations, ad renew the recommendations. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
<b>Conclusions:</b> a) This threat is not directly related to the transition of	b) Existing measures are inadequate.	c) Proposed measures would be an improvement but might still be

IANA stewardship		inadequate.
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STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	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.</p> <p>In response, ICANN board would decide whether to litigate, concede, settle, etc.</p> <p>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.</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 US Government. [pending verification]</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>A separate consideration: An ICANN board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction.</p>	<p>While it would not protect the root zone maintainer from lawsuits, one CCWG proposed mechanism is community challenge of ICANN decision to re-delegate or its decision to acquiesce or litigate the court order. This challenge would take the form of a Reconsideration or IRP.</p> <p>After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the decision could be challenged via Reconsideration or IRP, based on standard of review in amended Mission, Guarantees and Core Values.</p>
<p><b>Conclusions:</b></p> <p>a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures might not be adequate.</p>	<p>c) At this point, CWG's recommendations are still in development.</p>
STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>20. A court order is issued to block ICANN's delegation of a new TLD, because of complaint by existing TLD</p>	<p>Before delegation, the community lacked standing to object to string similarity decisions. Reconsideration</p>	<p>Preventive: During policy development, the community would have standing to challenge ICANN board decisions about policy and implementation.</p>

<p>operators or other aggrieved parties. For example, an existing gTLD operator might sue to block delegation of a plural version of the existing string. In response, ICANN board would decide whether to litigate, concede, settle, etc. Consequence: ICANN's decision about how to respond to court order could bring liability to ICANN and its contract parties.</p>	<p>requests looks at process but not at <i>substance</i> of the decision.</p> <p>An ICANN board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>Reconsideration looks at process but not substance of a decision.</p> <p>ICANN must follow orders from courts of competent jurisdiction, and may consider factors such as cost of litigation and insurance.</p>	<p>A future new gTLD Guidebook could give the community standing to file objections.</p> <p>Remedial: After ICANN board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>One measure would give the community standing to file for Reconsideration or IRP, according to standard of review in amended Mission, Guarantees and Core Values.</p> <p>One proposed measure empowers the community to force ICANN's board to consider a recommendation arising from an AoC Review – namely, <i>Consumer Trust, Choice, and Competition</i>. An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
<p><b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship</p>	<p>b) Existing measures would be inadequate.</p>	<p>c) Proposed measures would be an improvement but might still be inadequate.</p>

## Stress test category IV: Failure of Accountability

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>10. Chairman, CEO or officer acting in a manner inconsistent with the organization's mission. 24. An incoming Chief Executive</p>	<p>As long as NTIA controls the IANA functions contract, ICANN risks losing IANA functions if it were to</p>	<p>One proposed measure empowers the community to veto ICANN's proposed strategic plan or annual budget. This measure could block a</p>

<p>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>Consequence: Community ceases to see ICANN as the community’s mechanism for limited technical functions, and views ICANN as an independent, <i>sui generis</i> entity with its own agenda, not necessarily supported by the community. Ultimately, community questions why ICANN’s original functions should remain controlled by a body that has acquired a much broader and less widely supported mission.</p>	<p>expand scope too broadly.</p> <p>The Community has some input in ICANN budgeting and Strat Plan, and could register objections to plans and spending on extending ICANN’s mission.</p> <p>California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>proposal by ICANN to increase its expenditure on extending its mission beyond what the community supported.</p> <p>Another 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, based on standard of review in amended Mission, Guarantees and Core Values.</p> <p>Another proposed measure is a proscriptive restriction on ICANN’s activities, as part of the Mission Statement in amended ICANN bylaws.</p>
<p><b>Conclusions:</b> a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>c) Proposed measures in combination are adequate.</p>

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>12. Capture by one or several groups of stakeholders. Consequence: major impact on trust in multistakeholder model, prejudice to other stakeholders.</p>	<p>Regarding capture by governments, 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>CCWG proposals for community empowerment rely upon supermajority to veto ICANN budgets and strategic plans, to remove ICANN board director(s). A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough.</p> <p>Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.</p> <p>To prevent capture by governments,</p>

		another proposed measure would amend ICANN bylaws (Article XI, Section 2, item 1j) to obligate trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.
<b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship	b) Existing measures would be inadequate	c) Proposed measures would be adequate.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>13. One or several stakeholders excessively rely on accountability mechanism to “paralyze” ICANN.</p> <p>Consequence: major impact on corporate reputation, inability to take decisions, instability of governance bodies, loss of key staff</p>	<p>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>There are no present mechanisms for a ccTLD operator to challenge a revocation decision.</p>	<p>CCWG proposals for community empowerment rely upon supermajority to veto ICANN budgets and strategic plans, to remove ICANN board director(s). A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough.</p> <p>Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.</p> <p>However, some CCWG proposals may make redress mechanisms more accessible and affordable to individual stakeholders, increasing their ability to block implementation of policies and decisions. The standards of review may need to be adjusted based on whether the community or an individual sought the review /redress.</p>
<b>Conclusions:</b> a) This threat is not directly related to the transition of IANA stewardship	b) Existing measures seem to be adequate.	c) Proposed measures may need to distinguish community powers from those available to individuals.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	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 in 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 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 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, 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 ICANN’s amended Mission, Guarantees and Core Values.</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><b>Conclusions:</b> a) Threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures are inadequate.</p>	<p>c) Proposed measures in combination may be adequate.</p>



STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	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><sup>5</sup> But the GAC may at any time change its procedures to use majority voting instead of consensus.</p>	<p>One proposed measure would amend ICANN bylaws (Article XI, Section 2, item 1j) to obligate trying to find a mutually agreeable solution only where GAC advice was supported by GAC 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>GAC can still give ICANN advice at any time, with or without consensus.</p>
<p><b>Conclusions:</b></p> <p>a) This threat is not directly related to the transition of IANA stewardship</p>	<p>b) Existing measures are inadequate.</p>	<p>c) Proposed measures are adequate.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	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</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</p>	<p>One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged.</p> <p>Another proposed measure empowers the community to force ICANN’s board to consider a recommendation arising from an AoC Review – namely, the <i>Accountability and Transparency Review</i></p>

<sup>5</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

<p>structures to govern ICANN.</p>	<p>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><i>Team.</i> An ICANN board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</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><b>Conclusions:</b> a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures are inadequate.</p>	<p>c) Proposed measures in combination are adequate because the community has power to spill the board.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>23. ICANN uses RAA or other agreements to impose requirements on third parties, outside scope of ICANN mission. (e.g. registrant obligations)</p> <p>Affected third parties, not being contracted to ICANN, have no effective recourse.</p> <p>Contracted parties, not affected by the requirements, may choose not to use their ability to challenge ICANN’s decision.</p>	<p>During policy development, affected third parties may participate and file comments.</p> <p>Affected third parties may file comments on proposed changes to registry and registrar contracts.</p> <p>Affected third parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies.</p> <p>Affected third parties (e.g. registrants and users) have no standing to challenge ICANN</p>	<p>A proposed measure to empower an aggrieved party (e.g. registrants and users) to challenge a board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision, based on standard for review in the amended Mission, Guarantees and Core Values.</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, Guarantees and Core Values of ICANN.</p>

<p>This issue occurs in policy development, implementation, and compliance enforcement.</p> <p>Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.</p>	<p>management and board on how it has <i>implemented</i> approved policies.</p> <p>If ICANN changes its legal jurisdiction, that might reduce the ability of third parties to sue ICANN.</p>	
<p><b>Conclusions:</b> a) This threat is not directly related to IANA transition</p>	<p>b) Existing measures are inadequate.</p>	<p>Proposed measures would be adequate.</p>

**ON 12-MARCH, THIS ADDITIONAL STRESS TEST WAS ADDED TO CATEGORY IV: FAILURE OF ACCOUNTABILITY**

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>26. 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 do so intentionally or unintentionally, the result is the same.</p> <p>Consequence: Staff capture of policy implementation undermines the legitimacy conferred upon ICANN by established community based policy development processes.</p>	<p>The reconsideration review mechanism allows for appeal to the Board of staff actions that contradict established ICANN policies. However, reconsideration looks at process but not substance of a decision.</p> <p>An ICANN board decision could not be challenged by the community at-large, which lacks standing to use IRP.</p>	<p>If the staff action involved a board decision, there are proposed improvements to challenge a board decision by reconsideration or referral to an Independent Review Panel (IRP) with the power to issue a binding decision.</p>
<p><b>Conclusions:</b> a) This threat is not directly related to IANA transition</p>	<p>b) Existing measures are inadequate.</p>	<p>c) Proposed measures would, in combination, be adequate.</p>

## Stress test category V: Failure of Accountability to External Stakeholders

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC)</p> <p>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 standing to challenge a board decision by 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 commitments and reviews that were 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><b>Conclusions:</b></p> <p>a) This threat is directly related to IANA transition</p>	<p>b) Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>c) Proposed measures in combination are adequate.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>15. 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>Consequence: affected parties might be prevented from seeking legal redress for commissions or omissions by ICANN.</p>	<p>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>Paragraph 8 of the AoC requires ICANN to remain headquartered in the US, but the AoC can be terminated by ICANN at any time.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p>	<p>ICANN's present bylaws include a commitment to maintain headquarters in California with offices around the world.</p> <p>If ICANN's board proposed to amend this bylaws provision, one proposed measure would empower the community to veto that proposed bylaws change.</p>
<p><b>Conclusions:</b> a) This threat is directly related to the transition of IANA stewardship</p>	<p>b) Existing measures are inadequate once NTIA terminates IANA contract.</p>	<p>c) Proposed measures improve upon existing measures, and may be adequate.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>25. ICANN delegates or subcontracts its obligations under a future IANA agreement to a third party. Would also include ICANN merging with or allowing itself to be acquired by another organization.</p> <p>Consequence: 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.</p>	<p>The present IANA contract (<a href="#">link</a>) 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>NTIA could exert its control over ICANN's decision as long as it held the IANA contract. But not after NTIA relinquishes the IANA contract.</p> <p>Nor would NTIA's required principles for transition be relevant after transition</p>	<p>The CWG planning the IANA stewardship transition could require community consent before ICANN could sub-contract or outsource its IANA responsibilities to a 3rd party.</p> <p>The CCWG is proposing to empower 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>Note: This would not cover re-</p>

	occurred.	assignment of the Root Zone Maintainer role, which NTIA is addressing in a parallel process.
<b>Conclusions:</b> a) This threat is directly related to the transition of IANA stewardship	b) Existing measures would not be adequate after NTIA relinquishes the IANA contract.	c) Proposed measure are adequate to allow community to challenge ICANN decisions in this scenario.

## 8. Items for Consideration in Work Stream 2

The CCWG Charter states that:

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.

While work stream 2 is not necessary to be implemented or committed to before the transition takes place, the Charter insists that they should remain firmly within the scope of the CCWG. The items listed below should therefore be considered as no less important than the Work Stream 1 items.

### Commitment to Work Stream 2 proposal consideration

However, concerns were raised within the CCWG about the incentives for ICANN to implement WS2 proposals when they are finalized after the transition has taken place. The group's recommendation to achieve sufficient commitment from ICANN is to rely on an interim Bylaw provision, noting that such provisions have been successfully used in the past.

ICANN has, where appropriate, used transitional articles within its Bylaws to identify issues that are necessary to address on a transitional basis, but will expire upon the occurrence of another event. The

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broadest use of a transitional article was in 2002, after the large ICANN Evolution and Reform effort, which made commitments to future occurrences such as a new MoU between ICANN and a group of Regional Internet Registries at the time when new obligations would come into force for the ASO, or obligations that would be taken on by the ccNSO once formed. See <https://www.icann.org/resources/unthemed-pages/bylaws-2002-12-15-en#XX>.

There is also precedent for the use of transitional terms after the GNSO was restructured, and the Board seat selected by the At-Large Community was implemented.

To account for something such the Board's due consideration and implementation of the outcomes of Work Stream 2 accountability mechanisms, the proposal wouldn't require anything of the complexity after the 2002 reform effort.

**RECOMMENDATION : The CCWG recommends that the Board adopts a transitional article in its Bylaws which would commit ICANN to confirm the relevant CCWG recommendations, and task the group with investigating potential enhancements to ICANN's accountability in the following list of (see section below).**

## Items for consideration within Work Stream 2

During the course of its deliberations, the CCWG encountered several items which it considered as Work Stream 2. The list of items considered for Work Stream 2 is the following:

- Enhancements to ICANN's accountability based on the law(s) applicable to its actions;
- Alternative options for ICANN's jurisdiction (understood as 'place of legal establishment') based on possible accountability limitations related to the current jurisdiction of the Corporation;
- Enhancements to the Ombudsman's role and function;
- Limiting ICANN's ability to deny transparency / disclosure requests;
- Improvements to ICANN's budgeting and planning process that guarantee the ability for the community to have input, and for that input to be given due consideration;
- Define security audits and certification requirements for ICANN's IT systems;
- Institute a culture of default transparency at ICANN, including guidelines for when it is acceptable to classify information, requirements for logging decisions to classify information and procedure for de-classifying information;
- Improve diversity in all its aspects at all levels of the organization.

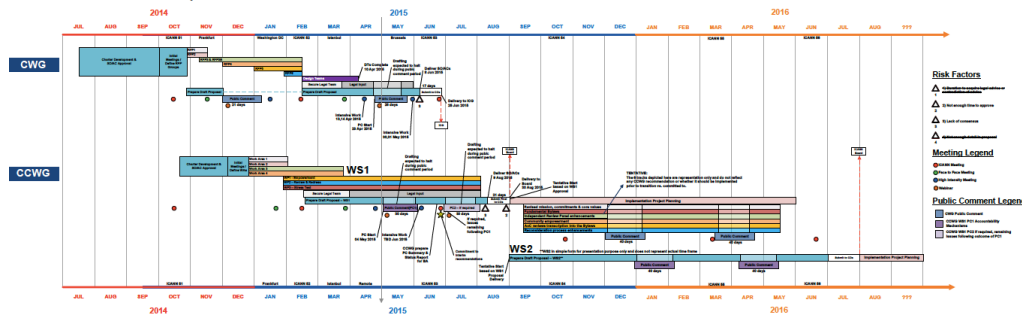
**QUESTION:** The CCWG seeks input from the community regarding its proposed work plan for the CCWG Accountability work stream 2? If need be, please clarify what amendments would be needed.

## 9. Implementation Plan Including Timing

### 9.1 Timeline

The timeline below is a combination of the CWG and CCWG. The reason for combining both is that the completion of the CCWG’s Work Stream 1 (WS1) effort is an essential component for the IANA Stewardship transition to occur. Note that this timeline only focuses on WS1 and its corresponding implementation. Work Stream 2 remains in basic form until its more clarity on what accountability mechanisms will make up its scope.

CCWG-CCWG Timeline – 30 Apr 2015



A full view version of this timeline exists on the [CCWG wiki](#).

### 9.2 Next Steps

After the public comment period the CCWG Accountability will analyze inputs ahead of ICANN53 in Buenos Aires and aims at being in a position to have an informed and thorough discussion with the community during ICANN53.



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Based on the inputs received and this extended discussion, a second public comment would be issued after ICANN53, focused on any outstanding issue and providing additional details on the proposed work stream 1 mechanisms.

At the time of this publication, this document will undergo its first public consultation. Upon completion, the CCWG will reconvene and continue its efforts to finalizing its Work Stream 1 proposal for submission to the ICANN Board. Key milestones include:




- CCWG reviews Public Comment #1 and adjusts proposal as agreed
- CCWG prepares materials in preparation for ICANN 53 and hosts several sessions to further inform the community of its progress
- CCWG prepares its second draft proposal and readies it for a second public consultation (note, only as required on those accountability mechanisms not committed to or agreed to from the first public consultation).
- CCWG reviews Public Comment #2 and modifies its proposal to prepare the final version
- CCWG delivers the final proposal to SOs/ACs for approval
- CCWG delivers the final proposal to the ICANN Board
- Upon proper notification, the CCWG begins Implementation Oversight of WS1 and on or around this time begins its work with WS2

## 9.3 Implementation

The CCWG views the oversight of Work Stream 1 implementation crucial to its mandate. WS1 accountability changes with either have to be implemented or committed to before any transition of the IANA Stewardship from NTIA can occur. At the time of this publication, it is difficult to provide details of the effort required for WS1 implementation, and it is not possible to provide an exact timeline or duration. However, the CCWG roughly estimates nine months for implementation understanding that several tracks of effort and change will be required, some of which will require multiple public comment periods. The CCWG has tentatively outlined the following six tracks for implementation of WS1:

1. Revised mission, commitments & core values
2. Fundamental Bylaws changes
3. Independent Review Panel enhancements
4. Community empowerment
5. AoC reviews transcription into the Bylaws
6. Reconsideration process enhancements

As the CCWG progress closer to its final WS1 Proposal, implementation planning will become clearer. Once approval has been obtained, implementation can begin.

<p><b>The following tables suggests implementation milestones and dates for Work Stream 1 recommendations</b></p>		<p><b>Complete</b>    ✓ or  <b>XX</b></p> <p><b>Progress</b>    ◦ or  <b>XX In</b></p> <p><b>Planning</b>    ◊ or  <b>XX In</b></p>	
CCWG-ACCT Rec #	Description/Implementation Summary	Milestones, Completion Dates (See Executive Summaries for additional details)	Expected Implementation Date after Approval
<b>Community Empowerment</b>			
<b>Review &amp; Redress</b>			

## 10. Public comment input

Do you believe the set of WS1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

Do you have any general feedback or suggestion on the interim work stream 1 proposals?

Insert deadline + practical suggestions here.