CCWG DRAFT PROPOSAL V. 9
29 April 2015

Table of Contents

Executive Summary

01 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.

02 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 attain 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.

03 This report for public comment represents the current work product of the CCWG. It is focused on draft work stream 1 recommendations, which were the focus of the first five months of work (from December 2014 until May 2015). These recommendations do not reflect CCWG consensus at this point. The CCWG is seeking confirmation of its approach, and guidance upon several options, from the community.

04 The CCWG accountability Charter has been endorsed by the GNSO, ALAC, ccNSO, GAC and ASO. The CCWG is composed of 25 members, appointed by each endorsing organization, and 254 participants. Participation in the group is open to any party. The CCWG work was conducted through weekly conference calls, attended on average by 44 participants and members, and it held face-to-face meetings in Frankfurt (19-20 January 2015), Singapore (9-12 February 2015) and Istanbul (23-24 March 2015) as well as two intense work days with each 6 hours of telephone conferences on April 23th and 24th.

05 The CCWG has designed its work so that it may be coordinated with the timeline of the IANA Stewardship Transition. The work stream 1 proposals, when finalized, will be presented to the ICANN Board of Directors for transmission to NTIA along with the ICG assembled transition proposal.

06 The CCWG has established a set of requirements that need to be fulfilled in order to enhance ICANN's accountability. In order to do so, the CCWG has established

- An inventory of existing accountability mechanisms;
- An inventory of contingencies that ICANN must be safeguarded against; and
- A set of 26 stress tests to establish whether the newly designed accountability architecture efficiently protects ICANN from the contingencies identified.

07 The CCWG has based its deliberations on requests and suggestions that have been provided by the community during a public comment period conducted last year following the NTIA announcement and added its own findings as well as input from independent advisors to establish a list of requirements that need to be met by an improved accountability system in ICANN. With this report, the CCWG is seeking additional input and guidance from the community.

08 To date, the CCWG has defined the following requirements:

09 The CCWG identified four building blocks that need to be in place and that would form the accountability mechanisms required to improve accountability. These building blocks are :

- Principles that form the Mission and core values of ICANN
- The Board of Directors
- An empowered community
- Independent appeal mechanisms

10 The recommendations include revising ICANN's Bylaws to clarify the scope of ICANN's policy authority, reflect key elements of the Affirmation of Commitments, and establish a set of "Fundamental Bylaws", which enjoy special protection and can only be changed based on prior approval by the Community. The following items shall have the status of Fundamental Bylaws:

- The mission;
- The independent review process;
- The power to veto non-fundamental Bylaw changes and to approve changes to Fundamental Bylaws;
- New community powers such as recall of the Board.

11 The group also recommends bringing the regular reviews, which are required by the Affirmation of Commitments (such as the accountability and transparency reviews) into ICANN's Bylaws. In response to the CWG proposals, the IANA Performance Review would be added to these regular reviews.

12 A key recommendation of the CCWG is to empower the community to have more influence on certain Board decisions. The group identified powers and associated mechanisms including the ability to:

- Recall the ICANN Board of Directors;
- Remove individual Board Directors;
- Veto or approve changes to the ICANN Bylaws, Mission and Core Values;
- Reject Board decisions on Strategic Plan and budget, where the Board has failed to appropriately reflect community input in these documents.

In addition to the aforementioned powers, the CCWG recommends significantly enhancing ICANN's Independent Review Panel. The Panel should become a standing panel of 7 independent panelists, proposed by the ICANN Board with a confirmation procedure involving the community. Materially affected parties, including in some cases the community itself, would have standing to initiate a procedure in front of the panel. The decisions of the panel would not only assess compliance with process, but also the merits of the case against the standard of ICANN's Mission, Commitments and Core values. Additionally, the decisions of the Panel would be binding for the ICANN Board. The CCWG also recommends improvements in the Panel's accessibility, especially the cost of access.

13 Finally, the CCWG proposes a number of key reforms to ICANN's Request for Reconsideration process. The key reforms proposed include the expansion of the scope of permissible requests to include Board/staff actions or inactions that contradict ICANN's mission or core values, and the extension of the time for filing a Request for Reconsideration from 15 to 30 days.

14 **IMPLEMENTATION:**

15 In its deliberations and in discussion with its independent legal counsel, it has become clear that all requirements established by the CCWG can be implemented within ICANN’s current setup as a non-profit corporation based in California. Specifically, ICANN’s Articles of Incorporation and Bylaws may be amended to reserve to the multistakeholder community the powers the CCWG is proposing.

16 The CCWG proposes to the community in this Public Comment report a Reference Mechanism based on creation of a formal membership body 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 Organizations and Advisory Committees would each become a “Member” of ICANN. To provide Sos and Acs the legal status required to be Members, they would be established as unincorporated associations. As unincorporated associations, the SOs and ACs would exercise the community powers set out in this part of this Report. The Sos and Acs would be Members; whether ICANN’s Nominating Committee would be a statutory designator or would select Board directors through other means, it is contemplated that it would continue to function in its current influential manner. (Legal counsel is reviewing alternatives). No third party and no individuals would become Members of ICANN.
2. There would be no need for individuals or organizations to change the ways in which they participate in ICANN or the SOs or ACs to create the new "Members" or "unincorporated associations."
3. Our legal counsel have advised that through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today.

4. In the group's reference option, a community group exercising the community powers would have 29 votes in total; 5 for the gNSO, the ccNSO, the ASO, the GAC and ALAC; 2 each for SSAC and RSSAC. The Nominating Committee would not have any voting rights; however, it would have the power to designate directors (the reason why it is established as an unincorporated association is merely to give it the right to appoint and recall ICANN Board members).

17 The group discussed variations of these mechanisms and seeks guidance from the community regarding the proposed options.

18 An essential part of the CCWG Charter calls for stress testing of accountability enhancements. '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. The 26 stress tests were grouped into 5 categories: financial crisis or insolvency, failure to meet operational obligations, legal / legislative actions, failure of accountability and failure of accountability to external stakeholders.

19 Applied to the recommendations, the stress tests demonstrate that these WS1 recommendations increase ICANN's accountability significantly, providing adequate mitigation measures in situations where that was not the case without these recommendations. The requirement that ICANN remains compliant with applicable legislations, in jurisdictions where it operates, is also fulfilled.

20 The stress test exercise demonstrates that WS1 recommendations do enhance the community's ability to hold ICANN Board and management accountable, relative to present accountability measures. It is also clear that the CWG proposals are complementary to CCWG measures. One stress test regarding appeals of ccTLD revocations and assignments (ST 21) has not been adequately addressed in either the CWG or CCWG proposals, awaiting policy development from the ccNSO.

21 The CCWG Accountability's assessment is that its recommendations published for public comment are consistent with the CWG expectations regarding budget, community empowerment, review and redress mechanisms, as well as appeals mechanisms with regards to ccTLD related issues. The group is grateful to the CWG for the constructive collaboration that was set up across the groups.

22 During the public comment period, the CCWG Accountability will pursue its efforts in order to finalize its proposals and facilitate implementation. An indicative, best case implementation plan is provided in this report.

1) Introduction & Background

Note: This section is a summary. For more information on background, methodology, definitions and scoping, we invite you to refer to Appendix A of this report. An inventory of existing ICANN Accountability Mechanisms may also be found in Appendix A.

Introduction

23 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.

24 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 attain 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.

25 Informed by community discussions and public comment periods, 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.

26 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. The CCWG Charter was circulated for adoption on 3 November – see appendix B.

27 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.

28 The CCWG also includes:

- 1 ICANN Board liaison who brings the voice of the Board and Board experience to activities and deliberations[1];
- 1 ICANN staff representative who provides input into the deliberations[2];
- 1 former ATRT member who serves as a liaison and brings perspective and ensures that there is no duplication of work[3];
- 4 ICG members who participate in the CCWG-Accountability, including two who serve as liaisons between the two groups.

29 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.

30 More information on the background, please refer to appendix A

1.2 Definitions & Legal Scoping

31 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.

32 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.

33 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

01 ---

02

03

04

[1] Should there be an issue of a consensus call, the Board Liaison would not participate in such a consensus call.
[2] Should there be an issue of a consensus call, the staff representative would not participate in such a consensus call.
[3] Should there be an issue of a consensus call, the ATRT Expert would not participate in such a consensus call.

and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.

34 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.

35 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.

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

1.3 Legal Advice

37 The CCWG-Accountability engaged two law firms to provide advice on feasibility of its proposed frameworks and mechanisms, Adler & Colvin and Sidley Austin LLP. The firms’ work was coordinated through 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.

38 The CCWG Legal Sub-Team's rules of engagement and working methodologies are described in Appendix D.

1.4 Input Gathered from the Community: Required Community Powers

39 As indicated in the methodology section of Appendix A, the group reviewed the collection of public comments received during the development of the Enhancing ICANN Accountability and categorized these as work stream 1 (WS1) and work stream 2 (WS2). 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.

40 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, 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 may veto certain Board decisions reserved for Members 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 veto certain Board decisions if reserved for Members if Members are empowered in WS1 (above). For example, a bottom-up consensus process to change ICANN Bylaws might be rejected by the ICANN Board, but the Members could then veto that decision.

41 Work Stream 1 accountability mechanisms are presented in detail in Section 2.

42 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, including on IANA functions' costs. This expectation is dealt with in section 2.6.2.
- **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 veto ICANN Board decisions relating to periodic or special reviews of the IANA function undertake through the IANA review function (exercise IRF); as well as the related creation of a stakeholder community / member group in order ensure the ability to exercise these kinds of rights. This expectation is dealt with in section 2.6.

- **Review and redress mechanisms:** The CWG would like to have the assurance that an IANA Periodic Review (or related special review) could be incorporated as part of the AoC mandated reviews integration into ICANN's Bylaws. This expectation is dealt with in section 2.7.2.
- **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, 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 3.

---

43 *[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.*

2) Accountability Mechanisms

2.1 Description of Overall Accountability Architecture

44 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:
    - Remove individual directors or recall the ICANN Board of Directors;
    - Approve or veto changes to the ICANN Bylaws, Mission, Commitments 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, Commitments and Core Values of the organization (i.e., the Constitution).
  - The group proposes changes that should be made to the Mission, Commitments 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, Commitments and Core Values.

46 *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.*

2.2 Revised Mission, **Commitments** & Core Values

47 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.

48 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 is 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.

49 **SUMMARY OF RECOMMENDED CHANGES**

50 [***Note***: Legal counsel Sidley Austin LLP and Adler & Colvin have not reviewed the underlying proposed Bylaw revisions at this stage. The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through

this comment process, the legal team will need time to draft appropriate language for revisions to the Articles of Incorporation and Bylaws.]

51 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 regulation of 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 Commitments 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 Commitments are now contained in ICANN's Articles of Incorporation.
        ii. Designate certain Core Values as Commitments. These values are so fundamental to ICANN's operation that they should rarely need to be balanced against each other. Those Commitments 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 Commitments, 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 Commitments 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 (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, Commitments 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

52 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 Commitments and Core Values. Taken together, the proposed Mission, Commitments, 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 approval of the community subject to procedural and substantive safeguards.

QUESTIONS AND OPEN ISSUES:

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

53 The proposed language is intended to convey the substance of the proposed Bylaws changes related to ICANN's Mission, Commitments and Core Values; Legal counsel Sidley Austin LLP and Adler & Colvin have not reviewed the underlying proposed Bylaws revisions. The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through this comment process, the legal team will need time to draft appropriate language for revisions to the Articles of Incorporation and Bylaws. Once further developed, the proposed amendments to the Articles of Incorporation and Bylaws will be subject to public consultation.

54 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	Notes, Comments, Questions

	in red or strike-out text	
55 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: 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. 2. Coordinates the operation and evolution of the DNS root name server system 3. Coordinates policy development reasonably and appropriately related to these technical functions.	56 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: 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. 2. Coordinates the operation and evolution of the DNS root name server system 3. Coordinates policy development reasonably and appropriately related to these technical functions. 57 *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	62 *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 Affirmation of Commitments (AoC).*

		*Consensus Policies (as defined in Specification 1) 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. [**Sidley**: clause (b) does not appear grammatically correct when attached to the full sentence.]*	
	58	*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 *[**Sidley**: Grammar]*	
	59	*In this role, with respect to protocol port and parameter numbers, ICANN's mission is to [INSERT][**Adler note**: Will language be inserted here before the report goes public?]*	
	60	*In this role, with respect to the DNS root server system, ICANN's mission is to [INSERT] [**Adler note**: Will language be inserted here before the report goes public?]*	
	61	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.	

COMMITMENTS AND CORE VALUES

63 The CCWG proposes to ensure that all elements of the Affirmation of Commitments [***Sidley note***: AoC and Affirmation of Commitments are used inconsistently throughout. Consider conforming to use only one term] 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.

64 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 2.6.3 of the CCWG Draft Report.

Current Bylaws Language	Working Draft New/changed text appears in red or strike-out text	Notes, Comments, Questions
65 Bylaws re reconciling competing Core Values 66 In performing its mission, the following core values should guide the decisions and actions of ICANN: [Core Values Listed] 67 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	68 Fundamental Commitments and Core Values 69 In ~~performing~~ carrying out its mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below. 70 These Commitments and Core Values are ~~deliberately expressed in very general terms, so that they may~~ intended to apply ~~provide useful and relevant guidance~~ in the broadest possible range of circumstances. ~~Because they are not narrowly prescriptive, the~~ The specific way in which they apply, individually and collectively, to each new situation ~~will necessarily~~ may depend on many factors that cannot be fully anticipated or enumerated. ~~; and because they are statements of principle rather than practice,~~ Situations may ~~will inevitably~~ arise in which perfect fidelity to all ~~eleven~~ Fundamental Commitments and Core Values simultaneously is not possible. 71 To the extent a Commitment	76 *ICANN's Mission Statement articulates WHAT is in scope and includes examples of what is out of scope for 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."* 77 *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*

appropriate and defensible balance among competing values.	must be reconciled with other Commitments and/or one or more Core Values in any particular situation, such reconciliation must be: 72 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 Commitments and Core Values (a "Substantial and Compelling Reason in the Public Interest"); 73 Likely to promote that interest, taking into account competing public and private interests that are likely to be affected by the balancing; 74 Narrowly tailored using the least restrictive means reasonably available; and No broader than reasonably necessary to address the specified Substantial and Compelling Reason in the Public Interest. 75 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.	*"Commitments" and "Core Values."* 78 *To the extent that this kind of reconciliation would impinge on one or more of the fundamental Commitments, 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.*
Section 2. CORE VALUES. 79 In performing its mission,	80 Commitments. In performing its mission, ~~the following~~	82 This additional language is derived from ICANN's

the following core values should guide the decisions and actions of ICANN: 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 requiring or significantly benefiting from global coordination. 3. 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. 4. 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	~~core values should guide the decisions and actions of ICANN:~~ 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 Commitments and Core Values ~~the Fundamental Rights~~ set forth below. Specifically, ICANN's action must: 81 Preserve~~ing~~ and enhance~~ing~~ the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet; 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; Respect~~ing~~ the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's mission and require~~ing~~ or significantly benefit from global coordination;	current Articles of Incorporation. This language also supports Affirmation of Commitments 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." 83 In *AoC Section 9.2 and AoC Section 3(b)* ICANN commits to preserve the security, stability and resiliency of the DNS. 84 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. 85 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.

particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. 5. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.	Employ~~ing~~ 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; Make~~ing~~ 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~~; Remain~~ing~~ accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.	86 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 experts. 87 In *AoC Section 9.1*, ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency."
88 **Core Values:** In performing its mission, the following core values should guide the decisions and actions of ICANN: 89 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and	95 Core Values: In performing its mission, the following core values should also guide the decisions and actions of ICANN: 96 Seeking and supporting broad, informed participation reflecting the functional, geographic, and	103 In *AoC Section 7*, 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

	cultural diversity of the Internet at all levels of policy development and decision-making.		cultural diversity of the Internet at all levels of policy development and decision-making to 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* [← should this word be italicized?]		development of policy consideration."
90	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.	97	To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies;	104	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.
91	5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.	98	Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market that enhances consumer trust and choice.	105	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?
92	6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.	99	Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy	106	In *AoC Section 9.3*, ICANN commits to promote "competition, consumer trust, and consumer choice."
93	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.			107	AoC 3(c) provides that ICANN will "promote competition, consumer trust, and consumer choice in the DNS marketplace."
94	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.			108	In *AoC Section 9.3*, ICANN commits to promote "competition, consumer trust, and consumer choice." See discussion above re "public interest."

	development process. 100 Operate with efficiency and excellence, ~~acting in~~ a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the Internet. 101 While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values. 102 [Not advance] [Refrain from advancing] the interests of one or more interest groups at the expense of others [***Adler note***: Will both alternatives be left in the report?]	109 In *AoC Section* 7, ICANN "commits to adhere to transparent and accountable budgeting processes." 110 In *AoC Section 8*, ICANN commits to "operate as a multi-stakeholder, private sector led organization." *AoC Section 8* further provides that ICANN is a private organization and not controlled by any one entity. 111 In AoC Section 4, ICANN commits to perform analyses to ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders.

2.3 Fundamental Bylaws

2.3.1 What is a "Fundamental Bylaw"

112 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.

2.3.2 Establishing Fundamental Bylaws

113 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.

114 **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). ← *These cross-references need to be updated. (a) and (b) are no longer used, and this is confusing as written]*]

115 Legal advice has confirmed this proposition is feasible.

2.3.3 Adding new or changing existing Fundamental Bylaws

116 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 favor 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.

117 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.

[***Sidley***: Should this paragraph be listed under the header "Questions and Open Issues" to make it clear to the community that feedback is being sought here? Consider a uniform demarcation in each instance throughout the proposal.]

2.3.4 Which of the current Bylaws would become Fundamental Bylaws?

118 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 / Commitments / Core Values;
2. The Independent Review process;
3. The manner in which Fundamental Bylaws can be amended;
4. The powers set out in section 2.6 of this report;
5. Reviews that are part of the CWG's work – the IANA Functions Review and the Separation Review;
6. 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. [← Does this belong below, under Questions and Open Issues?]

119 **QUESTIONS AND OPEN ISSUES: [← Per prior comment, consider a uniform demarcation throughout the document, with an explanation to the public]**

120 3) 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.

2.4 Independent Review Panel Enhancement

INTRODUCTION

121 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, transparent, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

122 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 Commitments to the community and its Core Values as required by the proposed Bylaws. (See, *Statement of Mission,* Commitments*, and Core Values*.)

123 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 a core skill of this IRP's panelists is the need to build a thorough and detailed understanding of how 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,* Commitments *& Core Values.* This reflects proposed changes and enhancements to ICANN's existing Independent Review Process. [***Sidley Note***: This standing panel could be supported by an independent secretariat function at a third party arbitration provider, such as that International Court of Arbitration at the International Chamber of Commerce, who could provide the functionality of transparent public dockets, court clerk services, and organization for the panelist].

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 Commitments to the community and/or

Core Values. [***Sidley Note***: Matters specifically reserved to any "Members" of ICANN in the Articles or Bylaws would be excluded from IRP review. Likewise, the IRP could also not address matters that are so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the board.]

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 Commitments 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 for review of very limited issues such whether the outcome exceeded the permissible scope of the arbitration or was procured by fraud or corruption. 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 third parties, and to avoid that the panel's outcome overcomes the Board in its fiduciary duties.

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 Commitments 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.

6. The CCWG recommends giving the community, as described in section 2.6.1, the right to have standing before the IRP. In such a case, the burden of the legal fees would be on ICANN. The precise process for such a case is still under development. [***Sidley Note***: Standing would also necessarily require an agreement to be bound by the outcome of the IRP process on behalf of the person invoking it]. [***Sidley Note***: Intervention by affected third parties may also be allowed under the IRP rules of procedure].

7. In their letter dated 15 April 2015, the CWG-Stewardship indicated "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". As requested by the CWG, decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other parties.

8. **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, Commitments, and Core Values.* [***Sidley Note***: may wish to add, (c) in violation of the California Corporations Code as interpreted by courts of competent jurisdiction].

9. **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.
    a. 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.

10. **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 completing the composition of the Panel. Reasonable efforts should be undertaken to achieve such diversity. [The location of the panel would need to be specified and could be limited to Los Angeles or other locations where ICANN has offices.]

11. **Size of Panel**
    a. Standing Panel – 7
    b. Decisional Panel – 1 or 3 Panelists

12. **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.

13. **Selection and Appointment**: The selection of panelists would follow a 3-step process:
    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 2.6) would be asked to confirm appointments.

14. **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.).

15. **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.

16. **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 made public?] and will reflect a well-reasoned application of the standard to be applied (i.e., the *Statement of Mission, Commitments, and Core Values*.

17. **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.
c. It is expected that judgments of the IRP would be enforceable in the court of the US and other countries that accept international arbitration results.

18. **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.

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

20. **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.

124 **QUESTIONS**

125 4) 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.

126 A detailed list of questions regarding principles and implementation for the IRP is provided in Appendix I. The CCWG Accountability would appreciate detailed community input to guide its work into providing more detailed requirements for the enhanced IRP. A specific community input form is provided.

2.5 Reconsideration Process Enhancement

127 **INTRODUCTION**

128 The CCWG proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action / inaction by ICANN's Board or staff, and which is provided for in Article IV, section 2 of ICANN's Bylaws. The key reforms proposed include: the scope of permissible requests has been expanded to include Board/staff actions or inactions that contradict ICANN's mission or core values, and the time for filing a Request for Reconsideration has been extended from 15 to 30 days. Additionally, the grounds for summary dismissal have been narrowed and the ICANN Board of directors must make determinations on all requests (rather than a committee handling staff issues). Another proposed change is that ICANN's ombudsman should make the initial substantive evaluation of the requests to aid the Board Governance Committee in its recommendation, and then requesters are provided an opportunity to rebut the BGC's recommendation before a final decision by the entire Board. More transparency requirements and firm deadlines in issuing of determinations are also proposed.

129 **STANDING**

130 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.

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

a. 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.
b. 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.

132 In their letter dated 15 April 2015, the CWG indicated "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." As requested by the CWG, decisions regarding ccTLD delegations or revocations would be excluded

from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

133 **STANDARD OF REVIEW**

134 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:

135 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.

136 **COMPOSITION**

137 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.

138 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.

139 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).

140 **Amend Paragraph 3:**

c. 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:

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

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

142 ~~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.~~

143 **DECISION-MAKING**

144 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.

145 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.

146 Adding hard deadlines to the process, including final determinations of the Board issued within 120 days from request, [although a request for reconsideration will not stay the effect of Board actions].

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

148 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.

149 The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rational 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.

150 **ACCESSIBILITY**

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

152 Amend paragraph 5 as follows:

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

    a) for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or
    b) for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
    c) for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

153 **DUE PROCESS**

154 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.

155 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).

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

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

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

159 **QUESTION**

160 5) 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.

161 Are the timeframes and deadlines proposed herein sufficient to meet the community's needs?

162 Is the scope of permissible requests broad / narrow enough to meet the community's needs?

2.6 Community Empowerment

2.6.1 Mechanism to empower the community:

163 Initial legal advice has indicated that the set of powers proposed in this report can be reserved to the ICANN multistakeholder community. More specifically there are approaches we can take within ICANN to make these powers legally available and enforceable.

164 As overall comments, the CCWG is largely agreed on the following:

1. To be as restrained as possible in the degree of structural or organising changes required in ICANN to create the mechanism for these powers
2. To organize the mechanism along the same lines as the community – that is, in line and compatible with existing SO / AC / SG structures

165 The subsections below explain the CCWG's reference proposal for the Community Mechanism and the major alternative considered to it (2.6.1.1), and the proposed participants in the mechanism and their levels of influence (2.6.1.2).

2.6.1.1 The Community Mechanism: Reference Mechanism

1. In its deliberations and in discussion with its independent legal counsel, it has become apparent that ICANN as a non-profit corporation organized under California law is able to reserve to the multistakeholder community the powers the CCWG is proposing. To reserve these powers, however, ICANN needs to make use of membership or designator roles.

2. While the status quo has elements of a designator model, efforts to simply expand the powers of the multistakeholder community through the Bylaws would be insufficient because such Bylaws 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.

3. California law, similar to the law of many other jurisdictions, allows for membership of non-profit corporations. Members have certain powers provided by law that may be expanded upon through Articles and Bylaws in a manner that is enforceable.

4. The CCWG proposes a **Reference Mechanism** based on based on creation of a formal membership body, as it is the approach that, based on analysis so far, fits requirements best. The Reference Mechanism would have the following key characteristics:
    a. The ICANN Supporting Organizations and Advisory Committees would each become a "Member" of ICANN, and through organization as unincorporated associations they would exercise the community powers proposed in this part of this Report.
    b. In their role as Members, they would exercise the new community powers set out in 2.6.2-2.6.7 below. Our legal counsel have advised that the powers we are proposing can be realized – and enforced – through this Membership model.
    c. There would be no need for individuals or organizations to change the ways in which they participate in ICANN or the SOs or ACs to create the new "Members" or "unincorporated associations." 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 is more accountable than it is today.
    d. Our legal advisors have advised 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.

e. A set of practical questions and answers regarding unincorporated associations is also available in Appendix H (Sidley and Adler & Colvin Memo (Unincorporated associations))

5. The powers proposed can be implemented under the Reference Mechanism, and it has advantages in terms of enforceability. Because, according to legal counsel, the Membership model provides the clearest path for the community to exercise the six community powers explicitly sought by the CCWG, it has been suggested as the Reference Mechanism by the group.

6. 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.

7. Designators are a construct in California law that can achieve reliable enforcement of 4 of the 6 community powers sought, specifically with respect to community approval or blocking of changes of Bylaws and the selection and removal of Board Members. There is concern however, regarding the ease and reliability with which the other two community powers sought (approval of budget and strategic plan) can be enforced once created under the designator model, according to legal counsel. Legal counsel further advises that the SOs and ACs should organize themselves into unincorporated associations in both corporate governance models, whether a designator or membership structure, to ensure their ability to enforce their rights.

8. Legal Counsel advise that the Membership model creates the most straightforward mechanism for the community to attain the proposed powers to hold the ICANN Board accountable. 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 and the community should select either a true membership model or an empowered designator model to achieve that accountability.

9. Variations of these mechanisms were also discussed:
   a. 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;
   b. 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".

c. 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.

10. 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.

11. 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.

12. How the Reference Mechanism operates (whether the votes are "cast" by the SOs and ACs as organized through a membership model, or there is some community group where there are representatives, and/or model rules for the unincorporated associations) is an important implementation detail that will be developed by the CCWG and open for thorough community consultation in our second Public Comment report.

13. Please see the additional detail that explains this model set out in Appendix [Legal Assessment - Executive Summary, Summary Chart and Revised Governance…]. Key pieces of legal advice that helped the CCWG arrive at this Reference Mechanism are also available [on the wiki at / attached as Appendices # &.]

166 **QUESTION**

167 6) Do you agree that the introduction of a community mechanism to empower the community over certain Board decisions would enhance ICANN's accountability?

168 7) 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.

2.6.1.2 Influence in the Community Mechanism

169 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

170 The CCWG also discussed two alternative approaches, neither of which received 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”

a. The rationale for the Reference Option 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.
b. 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.
c. 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).
d. 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.
e. The rationale for Alternative B is to give equal influence to each of the seven SOs and ACs.
f. 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. It is therefore more closely aligned with the existing structure of ICANN **and in keeping ICANN rooted in the private sector**.
g. 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 of the whole CCWG.
h. 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.

171 **QUESTION:**

172 8) 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.

2.6.2 Power: reconsider/reject budget or strategy/operating plans

173 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.

174 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.

175 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 based on perceived inconsistency with the purpose, mission and role set out in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community.

176 Time would be included in planning and budgeting processes for the community to consider adopted plans and decide whether to reject such plans (timeframe to be determined). These processes would also need to set out the required level of detail for such documents.

177 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.

178 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 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.

179 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 [***Sidley Note***: "Tabled" is unclear. Does tabled mean "explicitly raised" or "presented formally for reconsideration"] 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.

180 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.

181 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.

182 **QUESTION:**

183 9) 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.

2.6.3 Power: reconsider/reject changes to ICANN "standard" Bylaws

184 This section applies to "standard" Bylaws.

185 ICANN's Bylaws set out many of the details for how power is exercised in ICANN, including by setting out the company's Mission, Commitments 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.

186 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, Commitments 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.

187 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.

188 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 favor.

189 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 2.6.1 above, to limit any potential for abuse of this power.

190 **QUESTION**:

191 10) 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.

2.6.4 Power: approve changes to “Fundamental” Bylaws

192 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.

193 This power would form part of the process set out for agreeing to any changes of the “fundamental” Bylaws. Through the community mechanism, the community would have to give positive *assent* to any change *before* it was finalized, as part of a co-decision process between the Board and the community.

194 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

195 The threshold of support in the community mechanism to approve changes to “fundamental” Bylaws is set out in section 2.3.3 of this First Public Comment Report, where we set out what the “fundamental” Bylaws are alongside the process for their creation and amendment.

196 **QUESTION**:

197 11) 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.

2.6.5 Power: Removing individual ICANN Directors

198 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.

199 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 available only to the Board itself, and can be exercised through a 75% vote of the Board. There is no limitation[4] on the types of situation for which the Board can remove a director.

200 This power would clarify that the community organizations that appointed a given director may end their service in office, and trigger a reappointment process. The general approach, consistent with the law, is that the appointing body is the removing body.

201 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.

202 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.

203 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.

204 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

01
02
03
04

[4] 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.

previous NomCom Chair and would otherwise be formulated on the same basis as the regular NomCom. Either option is legally viable. This is likely to only rarely be used.

205 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.

- ☐ 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.
- ☐ 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.

206 **QUESTION**:

207 12) 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.

2.6.6 Power: Recalling the entire ICANN Board

208 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.

209 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.

210 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.

211 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%]** 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.

212 This threshold was chosen to stop any particular SO or AC being able to prevent the recall 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.

213 An alternative option of 80% for the threshold in such a case is also being considered, but would require a unanimous vote by the community, save for one SO or AC. [***Adler Note***: Is the only difference in this alternative the different threshold? This needs to be clarified.]

214 Ongoing work in the CCWG will flesh out how to deal with transitional matters raised, including at least the following:

1. The need to ensure ICANN does have a Board in place after the removal (whether there is:
2. A phase of "caretaker" behavior by the outgoing Board while new members are elected, or
3. A need to elect alternate Board members in each Board selection process, or
4. A pre-defined subset of the community that could function as an interim Board;
5. Continuity in the role of Chief Executive were the Board to be removed;
6. "Caretaker" conventions for the CEO to follow in a situation where the Board had been removed.

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

216 **QUESTION:**

217 13) 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.

2.7 Incorporating AoC into the ICANN Bylaws

218 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.

219 Elimination of the AoC as a separate agreement 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:

220 Preserving ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews.

221 Bringing the four AoC review processes into ICANN's Bylaws.

222 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.

223 Each of the above measures is addressed below.

224 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.

225 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.

2.7.1 Preserving ICANN Commitments from the AoC

[***Note***: All bylaw text will need significant attention from the Legal Team once the mechanism and power have been decided upon. We will not take on review of such text at this time.]

ICANN COMMITMENTS IN THE AOC	**AS EXPRESSED IN ICANN BYLAWS**
226 3. This document affirms key commitments by DOC and ICANN, including commitments to: 227 (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; 228 (b) preserve the security, stability and resiliency of the DNS;	231 In revised Core Values: 232 *Proposed core value 6* (with **additional text**) 233 Ensure that decisions made related to the global technical coordination of the DNS are made in the **global** public interest and are accountable, transparent **and should respect the bottom-up multistakeholder**

229 (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and 230 (d) facilitate international participation in DNS technical coordination.	**nature of ICANN.** 234 *Proposed core value 5* (with **additional text**): 235 Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment **that enhances consumer trust and choice.**
236 4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.	237 In revised Core Values: 238 *Proposed new Section 9 in Bylaws Article III Transparency* (with **additional text**) 239 ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial **or non-financial** impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.
240 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	241 in revised Core Values: 242 *Proposed insertion of new section 8 in Article III Transparency* (this is AoC para 7 in its entirety including **additional text**): 243 ICANN **shall** adhere to transparent and accountable budgeting processes, **providing [reasonable] [adequate] advance notice to facilitate stakeholder engagement in policy decision-making**, fact-based policy development, cross-community deliberations, and responsive

thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.	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. 244 In addition, ICANN **shall** provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

ICANN COMMITMENTS IN THE AOC	AS EXPRESSED IN ICANN BYLAWS
245 8. ICANN affirms its commitments to: 246 (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet;	247 In revised Core Values: 248 *Propose inserting 8(a) in full as a new core value in the Bylaws* 249 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.
250 (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	251 The nonprofit commitment in 8b is reflected in ICANN's ARTICLES OF INCORPORATION: a. "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. " 252 A change to the Articles would require 2/3

	vote of the Board and 2/3 vote of the Members/Designators. 253 The ‘headquartered” commitment in 8b is already in current ICANN Bylaws, at Article XVIII Section 1: a. “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.” 254 While the Board could propose a change to this Bylaws provision, Members/Designators could block the proposed change (75% vote). [***Note***: Have thresholds been determined?] 255 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). [***Note***: why is 80% used?]
256 (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.	257 Propose inserting 8(c) in full as a new core value in the Bylaws (including **additional text**): 258 Operating as a multi-stakeholder, **bottom-up** private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

ICANN COMMITMENTS IN THE AOC	**AS EXPRESSED IN ICANN BYLAWS**
259 9. Recognizing that ICANN will evolve and	260 See Section 2.6.2 of this document for

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:	Bylaws text to preserve commitments to perform these ongoing reviews.

261 **QUESTION:**

262 14) 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.

2.7.2 AoC Reviews

263 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.

264 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.

265 These proposals are presented beginning on the next page.

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

267 All of the reviews listed in this section 2.6.2 would be governed by the following:

	PROPOSED BYLAW TEXT		**COMMENT**
268	ICANN will produce an annual report on the state of improvements to Accountability and Transparency.	270	This is new. It is a recommendation based on

269	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.		one in ATRT2 and becomes more important as reviews are spread further apart.
271	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.		
272	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.		
273	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.		
274	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.	275	AoC requires Board to 'take action' within 6 months

	PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW		NOTES
276	1. **Accountability & Transparency Review**. 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.	279	This commitment is reflected in Bylaws Core Values
277	In this review, particular attention should be paid to:		
278	(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;		
280	(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;	285	Rephrased to avoid implying a review of GAC's effectiveness
281	(c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);		
282	(d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and		
283	(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.		
284	The review team shall assess the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section		
286	The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews. [***Note***: should not include ability to terminate IFR.]	287	New
288	This periodic review shall be conducted no less frequently than every	289	AoC required every

five years, measured from the date the Board received the final report of the prior review team.	3 years.

	PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW		NOTES
290	2. **Preserving security, stability, and resiliency.**		
291	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.	297	This commitment is reflected in Bylaws Core Values
292	In this review, particular attention will be paid to:		
293	(a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;		
294	(b) ensuring appropriate contingency planning; and		
295	(c) maintaining clear processes.		
296	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.		
298	The review team shall assess the extent to which prior review recommendations have been implemented.	299	Make this explicit
300	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.	301	AoC required every 3 years.

	PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW		NOTES
302	3. **Promoting competition, consumer trust, and consumer choice.** 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.	303	This commitment will be added to Bylaws Core Values
304	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.	308	Re-phrased to cover future new gTLD rounds.
305	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:		
306	(a) the gTLD application and evaluation process; and		
307	(b) safeguards put in place to mitigate issues involved in the expansion		
309	The review team shall assess the extent to which prior review recommendations have been implemented.	310	Make this explicit
311	Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.	312	New
313	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. [***Note***: CWG contemplates first IRF at 2 years and then periodic reviews every 5 years thereafter.]	314	AoC also required a review 2 years after the 1 year review.

	PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW		NOTES
315	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.**		
316	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.		
317	Such existing policy also includes the requirements that legal constraints regarding privacy, as defined by OECD in 1980 as amended in 2013. " http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm http://www.oecd.org/internet/ieconomy/privacy-guidelines.htm	319	New
318	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.		
320	The review team shall assess the extent to which prior review recommendations have been implemented.	321	Make this explicit
322	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.	323	AoC required every 3 years.

324 The CWG-Stewardship has also proposed a periodic review that should be added to the Bylaws.

	PERIODIC REVIEW OF THE IANA FUNCTIONS
325	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 the Post-Transition IANA entity (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.

326 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.

327 The IFR should be outlined in the ICANN Bylaws and included as a Fundamental Bylaw as part of the work of the CCWG-Accountability and would operate in a manner analogous to an Affirmation of Commitments (AOC) review. 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.

328 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.

329 **QUESTION:**

330 17) 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.

2.8 Bylaws changes suggested by Stress Tests

331 [***Note***: Sidley Austin LLP and Adler & Colvin are not reviewing bylaw text at this stage of review.]

332 The CCWG Charter calls for stress testing of accountability enhancements in both work stream 1 and 2. Among deliverables listed in the charter are:

333 **Identification of contingencies to be considered in the stress tests.**

334 Review of possible solutions for each Work Stream including stress tests against identified contingencies.

335 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.

336 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.

337 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.

2.8.1 Forcing the Board to respond to Advisory Committee formal advice

338 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).

339 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.

340 Recommendation 9 from ATRT2[5] 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.

01
02
03
04

[5] See page 11 of this PDF: https://www.icann.org/en/system/files/files/draft-recommendations-15oct13-en.pdf

341 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.

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

342 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
343 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. 344 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	345 Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try to find "a mutually acceptable solution." 346 This is required for any GAC advice, not just for GAC consensus advice. 347 Today, GAC adopts formal advice according to its Operating Principle 47: "*consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection*[6]." But the GAC may at any time change its	348 One proposed measure is to amend ICANN Bylaws (Article XI Section 2, item 1j) to give due deference only to GAC consensus advice. 349 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. 350 GAC can still give ICANN advice at any time, with or without consensus.

01 ———————————————

02

03

04

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

thereby approve GAC advice that restricted free expression, for example.	procedures to use majority voting instead of its present consensus.	

351 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. Clause j: *The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANNhe advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. sons 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 ICANNhe Governmental Advisory Committee and the ICANNdvice that is supported by consensus taken into account, both in.*
2. Clause k: *If no such solution can be found, the ICANNf no such solution can be found, the ICANN ICANNdvice that is supported by consensus taken into account, both in.pported by consensus taken into account, both in.to the rights or obligations of Governmental Advisory Committee Members with regard to public policy issues falling within their responsibilities.*
3. 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 other that 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."
    a. 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"
    b. 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.
    c. 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.

352 **QUESTION**:

353 18) 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.

3) Stress Tests

Introduction

354 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

355 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.

AMONG DELIVERABLES LISTED IN THE CCWG-ACCOUNTABILITY CHARTER ARE:

356 Identification of contingencies to be considered in the stress tests

357 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

1. Analysis of potential weaknesses and risks
2. Analysis of existing remedies and their robustness
3. Definition of additional remedies or modification of existing remedies
4. Description of how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies

358 CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) analyzed timely before the transition.

359 **IN ADDITION, THE CCWG CHAIRS HAS ASKED OUR WORK PARTY TO CONSIDER THIS YES/NO QUESTION:**

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

361 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.

362 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

363 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)

364 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.

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

365 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)

366 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)

367 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 either is able to drive its agenda on all other stakeholders, or abuse accountability mechanisms to prevent all other stakeholders from advancing their interests (veto).

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

368 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.

369 Public comment participants may conceive of other contingencies and scenario risks beyond the 26 stress tests identified in this section. In that case, we encourage commenters to apply their own stress test analysis. To do so, a commenter can examine ICANN's present accountability mechanisms to determine whether they adequately address the contingency. Then, the commenter can examine the proposed accountability enhancements in this document, and assess whether they give the community adequate means to challenge Board decisions and to hold the Board accountable for its actions.

370 For example, the stress test team evaluated contingencies that could generally be described as external events (cyber attack, financial crisis, etc.). We discovered that while some risk mitigation was possible, it became clear that no accountability framework could entirely eliminate the risk of such events nor thoroughly alleviate their impact. Instead, it was critical to explore the ability of the community to hold ICANN Board and management accountable for their preparation and reaction to the external events. The proposed accountability measures do provide adequate means to do so.

371 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.

372 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)

373 The stress test exercise demonstrates that WS1 recommendations do enhance the community's ability to hold ICANN Board and management accountable, relative to present accountability measures. It is also clear that the CWG proposals are complementary to CCWG measures. One stress test regarding appeals of ccTLD revocations and assignments (ST 21) has not been adequately addressed in either the CWG or CCWG proposals, awaiting policy development from the ccNSO.

374 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
375 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. 376 6. General financial crisis. 377 7. Litigation arising from private contract, e.g., Breach of Contract.	380 ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community. 381 The Community has input in ICANN budgeting and Strat Plan. 382 Registrars must approve ICANN's variable registrar fees. If not, registry	384 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. 385 Another proposed mechanism is community challenge to a Board

378 8. Technology competing with DNS. 379 Consequence: loss affecting reserves sufficient to threaten business continuity.	operators pay the fees. 383 ICANN's reserve fund could support operations in a period of reduced revenue. Reserve fund is independently reviewed periodically.	decision using a reconsideration request and/or referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a revenue or expenditure decision outside the annual budget process, the Reconsideration or IRP mechanisms may be able to reverse that decision unless it was deemed vital to ICANN.
386 **Conclusions:** 387 a) This threat is not directly related to the transition of IANA stewardship.	388 b) Existing measures would be adequate, unless the revenue loss was extreme and sustained.	389 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
390 9. Major corruption or fraud. 391 Consequence: major impact on corporate reputation, significant litigation and loss of reserves.	392 ICANN has annual independent audit that includes testing of internal controls designed to prevent fraud and corruption. 393 ICANN maintains an anonymous hotline for employees to report suspected fraud. 394 ICANN Board can dismiss CEO and/or executives responsible. 395 The community has no ability to force the Board to report or take action against suspected corruption or fraud.	396 One proposed measure is to empower the community to force ICANN's Board to consider a recommendation arising 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. 397 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. 398 If ICANN's Board were involved, or if

				the Board did not act decisively in preventing corruption or fraud (for instance by enforcing internal controls or policies), a proposed measure empowers the community to remove individual Directors or recall the entire Board.
399	**Conclusions:**	401		402
400	a) This threat is not directly related to the transition of IANA stewardship		b) Existing measures would not be adequate if litigation costs or losses were extreme and sustained.	c) Proposed measures are helpful, but might not be adequate if litigation costs and losses were extreme and sustained.

403

Stress test category II: Failure to Meet Operational Expectations

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
404	1. Change authority for the Root Zone ceases to function, in part or in whole.	407	Under the present IANA functions contract, NTIA can revoke ICANN's authority to perform IANA functions and re-assign to different entity/entities.	409	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.
405	2. Delegation authority for the Root Zone ceases to function, in part or in whole.	408	After NTIA relinquishes the IANA functions contract, this measure will no longer be available.	410	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.
406	Consequence: interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.			411	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 the IANA

		Functions Contract with PTI. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP. 412 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. □ 413 Suggestions for Work Stream 2: 414 Require annual external security audits and publication of results. 415 Require certification per international standards (ISO 27001) and publication of results.
416 **Conclusions:** 417 a) This threat is directly related to the transition of IANA stewardship	418 b) Existing measures would be inadequate after NTIA terminates the IANA contract.	419 c) Proposed measures are, in combination, adequate to mitigate this contingency 420

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
421	11. Compromise of credentials. 422 Consequence: major impact on corporate reputation, significant loss of authentication and/or	423	Regarding compromise of internal systems: 424 Based upon experience of the recent security breach, it is not apparent how the community holds ICANN	431	Regarding compromise of internal systems: 432 No measures yet suggested would force ICANN management to conduct an after-action report and

authorization capacities.	management accountable for implementation of adopted security procedures. 425 It also appears that the community cannot force ICANN to conduct an after-action report on a security incident and reveal that report. 426 Regarding DNS security: 427 Beyond operating procedures, there are credentials employed in DNSSEC. 428 ICANN annually seeks SysTrust Certification for its role as the Root Zone KSK manager. 429 The IANA Department has achieved EFQM Committed to Excellence certification for its Business Excellence activities. 430 Under C.5.3 of the IANA Functions Contract, ICANN has undergone annual independent audits of its security provisions for the IANA functions.	disclose it to the community. 433 Nor can the community force ICANN management to execute its stated security procedures for employees and contractors. 434 Regarding DNS security: 435 One proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an AoC Review – namely, *Security Stability and Resiliency*. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP. 436 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. 437 Suggestions for Work Stream 2: 438 - Require annual external security audits and publication of results. 439 - Require certification per international standards (ISO 27001) and publication of

		results.
Conclusions: a) This threat is directly related to the transition of IANA stewardship	b) Existing measures would not be adequate.	c) Proposed WS1 measures, in combination, would be helpful to mitigate the scenario, but not to prevent it. W2 suggestions might provide risk mitigation measures.

STRESS TEST	**EXISTING ACCOUNTABILITY MEASURES**	**PROPOSED ACCOUNTABILITY MEASURES**
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. Consequence: DNS security and stability could be undermined, and ICANN actions could impose costs and risks upon external parties.	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) NTIA presently gives clerical approval for each delegation to indicate that 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.	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. 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 through an IRP.
Conclusions: 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.

	STRESS TEST		EXISTING ACCOUNTABILITY MEASURES		PROPOSED ACCOUNTABILITY MEASURES
454	21. A government official demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD Manager.	459	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.	463	From the CWG draft proposal: "CWG-Stewardship recommends not including any appeal mechanism that would apply to ccTLD delegations and redelegations in the IANA Stewardship Transition proposal."
455	However, the IANA Function Manager is unable to document voluntary and specific consent for the revocation from the incumbent ccTLD Manager.	460	There is presently no mechanism for the incumbent ccTLD Manager or the community to challenge ICANN's certification that process was followed properly.	464	From CWG co-chair correspondence on 15-Apr-2015: "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."
456	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 Parties and/or Significantly Interested Parties.	461	See GAC Principles for delegation and administration of ccTLDs. GAC Advice published in 2000 and updated in 2005 specifically referenced to Sections 1.2 & 7.1	465	Regarding CCWG proposed measures:
457	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.	462	See Framework of Interpretation, 20-Oct-2014	466	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, Commitments and Core Values.
458	Consequence: Faced with			467	Another proposed CCWG mechanism is community challenge to a Board decision, referring it to an

	this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.				Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to revoke or assign management responsibility for a ccTLD, the IRP mechanism might be enabled to review that decision. Would require a standard of review.
468	**Conclusions:**				
469	a) This threat is directly related to the transition of IANA stewardship	470	b) Existing measures would not be adequate.	471	c) Proposed measures do not adequately empower the community to address this scenario until the appropriate processes develop appropriate mechanisms.

Stress test category III: Legal/Legislative Action

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
472	3. Litigation arising from existing public policy, e.g., Antitrust suit	475	The community could develop new policies that respond to litigation challenges.	479	After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:
473	In response, ICANN Board would decide whether to litigate, concede, settle, etc.	476	An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.	480	The community could develop new policies that respond to litigation challenges.
474	Consequence: significant interference with existing policies and/or policy development relating to relevant activities	477	Reconsideration looks at process but not substance of a decision.	481	Another measure would give the community standing to file for Reconsideration or IRP,
		478	ICANN must follow orders from courts of competent		

	jurisdiction.	based on amended Mission, Commitments and Core Values. 482 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.
483 **Conclusions:** 484 a) This threat is not directly related to the transition of IANA stewardship	485 b) Existing measures are inadequate.	486 c) Proposed measures would help the community hold ICANN accountable, but might not be adequate to stop interference with ICANN policies.

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
487	4. New regulations or legislation. 488 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. 489 In response, ICANN Board would decide whether to litigate, concede, settle, etc.	491	The community could develop new policies that respond to new regulations. 492 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. 493 Reconsideration looks at process but not substance of a decision.	495	After ICANN Board responded to the regulation (litigate or change policy/implementation), the community would have several response options: 496 The community could develop new policies that respond to regulation. 497 Another measure would give the community standing to file for Reconsideration or IRP, based on amended Mission, Commitments and Core Values.

490 Consequence: significant interference with existing policies and/or policy development relating to relevant activities	494 ICANN must follow orders from courts of competent jurisdiction.	498 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.
499 **Conclusions:** 500 a) This threat is not directly related to the transition of IANA stewardship	501 b) Existing measures are inadequate.	502 c) Proposed measures would be an improvement but might still be inadequate.

STRESS TEST	**EXISTING ACCOUNTABILITY MEASURES**	**PROPOSED ACCOUNTABILITY MEASURES**
503 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. 504 In response, ICANN Board would decide whether to litigate, concede, settle, etc. 505 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.	506 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] 507 However, the IANA stewardship transition might result in root zone maintainer not operating under USG contract, so would not be protected from lawsuits. 508 A separate consideration: 509 An ICANN Board decision (litigate or settle) could not be challenged by the	512 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. 513 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, Commitments and Core Values.

	community at-large, which lacks standing to use IRP. 510 Reconsideration looks at process but not substance of a decision. 511 ICANN must follow orders from courts of competent jurisdiction.	
514 **Conclusions:** 515 a) This threat is directly related to the transition of IANA stewardship	516 b) Existing measures might not be adequate.	517 c) At this point, CWG's recommendations are still in development.

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
518	20. A court order is issued to block ICANN's delegation of a new TLD, because of complaint by existing TLD operators or other aggrieved parties.	522	Before delegation, the community lacked standing to object to string similarity decisions. Reconsideration requests looks at process but not at *substance* of the decision.	526	Preventive: During policy development, the community would have standing to challenge ICANN Board decisions about policy and implementation.
519	For example, an existing gTLD operator might sue to block delegation of a plural version of the existing string.	523	An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.	527	A future new gTLD Guidebook could give the community standing to file objections.
520	In response, ICANN Board would decide whether to litigate, concede, settle, etc.	524	Reconsideration looks at process but not substance of a decision.	528	Remedial: After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:
521	Consequence: ICANN's decision about how to respond to court order could bring liability to ICANN and its contract parties.	525	ICANN must follow orders from courts of competent jurisdiction, and may consider factors such as cost of litigation and insurance.	529	One measure would give the community standing to file for Reconsideration or IRP, according to standard of review in amended

		Mission, Commitments and Core Values. 530 One proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an AoC Review – namely, *Consumer Trust, Choice, and Competition*. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.
531 **Conclusions:** 532 a) This threat is not directly related to the transition of IANA stewardship	533 b) Existing measures would be inadequate.	534 c) Proposed measures would be an improvement but might still be inadequate.

Stress test category IV: Failure of Accountability

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
535 10. Chairman, CEO or officer acting in a manner inconsistent with the organization's mission. 536 24. An incoming Chief Executive institutes a "strategic review" that arrives at a new, extended mission for ICANN. Having just hired the new CEO, the Board approves the new mission / strategy without community consensus. 537 Consequence: Community ceases to see ICANN as	538 As long as NTIA controls the IANA functions contract, ICANN risks losing IANA functions if it were to expand scope too broadly. 539 The Community has some input in ICANN budgeting and Strat Plan, and could register objections to plans and spending on extending ICANN's mission. 540 California's Attorney General has jurisdiction over non-profit entities	541 One proposed measure empowers the community to veto ICANN's proposed strategic plan or annual budget. This measure could block a proposal by ICANN to increase its expenditure or extending its mission beyond what the community supported. 542 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. The IRP decision would be based on a standard of

	the community's mechanism for limited technical functions, and views ICANN as an independent, *sui generis* entity with its own agenda, not necessarily supported by the community. Ultimately, community questions why ICANN's original functions should remain controlled by a body that has acquired a much broader and less widely supported mission.		acting outside Bylaws or Articles of Incorporation.		review in the amended Mission Statement, including "ICANN shall not undertake any other mission not specifically authorized in these Bylaws".
543	**Conclusions:**				
544	a) This threat is directly related to the transition of IANA stewardship	545	b) Existing measures are inadequate after NTIA terminates the IANA contract.	546	c) Proposed measures in combination are adequate.

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
547	12. Capture by one or several groups of stakeholders. 548 Consequence: major impact on trust in multistakeholder model, prejudice to other stakeholders.	549	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.	550	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. 551 Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community. 552 To prevent capture by

		governments, 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.
553 **Conclusions:** 554 a) This threat is not directly related to the transition of IANA stewardship	555 b) Existing measures would be inadequate	556 c) Proposed measures would be adequate.

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
557	13. One or several stakeholders excessively rely on accountability mechanism to "paralyze" ICANN. 558 Consequence: major impact on corporate reputation, inability to take decisions, instability of governance bodies, loss of key staff	559	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. 560 There are no present mechanisms for a ccTLD operator to challenge a revocation decision.	561	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. 562 Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community. 563 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.

		564 It should be noted that proposed measures for Reconsideration and IRP include the ability to dismiss frivolous or abusive claims and to limit the duration of proceedings.
565 **Conclusions:** 566 a) This threat is not directly related to the transition of IANA stewardship	567 b) Existing measures seem to be adequate.	568 c) Improved access to Reconsideration and IRP could allow individuals to impede ICANN processes, although this risk is mitigated by dismissal of frivolous or abusive claims.

STRESS TEST	**EXISTING ACCOUNTABILITY MEASURES**	**PROPOSED ACCOUNTABILITY MEASURES**
569 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. 570 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.	571 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. 572 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. 573 The Community has input in ICANN budgeting and Strat Plan.	576 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. 577 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

	574 Registrars must approve ICANN's variable registrar fees, though Registrars do not view this as an accountability measure. 575 California's Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.	commitment or expenditure outside the annual budget process, the IRP mechanism enables reversal of that decision. 578 Another proposed measure is to amend ICANN Bylaws to prevent the organization from expanding scope beyond ICANN's amended Mission, Commitments and Core Values. 579 If ICANN's Board proposed to amend/remove these Bylaws provisions, another proposed measure would empower the community to veto that proposed Bylaws change.
580 **Conclusions:** 581 a) Threat is directly related to the transition of IANA stewardship	582 b) Existing measures are inadequate.	583 c) Proposed measures in combination may be adequate.

	STRESS TEST	**EXISTING ACCOUNTABILITY MEASURES**	**PROPOSED ACCOUNTABILITY MEASURES**
584	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. 585 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	586 Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try and find "a mutually acceptable solution." 587 This is required for any GAC advice, not just for GAC consensus advice. 588 Today, GAC adopts formal advice according to its Operating Principle 47: "*consensus is understood to mean the practice of*	589 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. 590 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

	approve GAC advice that restricted free online expression, for example.		*adopting decisions by general agreement in the absence of any formal objection*."[7] But the GAC may at any time change its procedures to use majority voting instead of consensus.		consensus. GAC can still give ICANN advice at any time, with or without consensus.
	Conclusions:				
	a) This threat is not directly related to the transition of IANA stewardship		b) Existing measures are inadequate.		c) Proposed measures are adequate.

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
	22. ICANN Board fails to comply with Bylaws and/or refuses to accept the decision of a redress mechanism constituted under the Bylaws. Consequence: Community loses confidence in multistakeholder structures to govern ICANN.		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. Aggrieved parties can ask for Reconsideration of Board decisions, but this is currently limited to questions of whether process was followed. Aggrieved parties can file for IRP, but decisions of the panel are not binding on ICANN.		One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged. [***Sidley***: is something missing here?] Another proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an AoC Review – namely, the *Accountability and Transparency Review Team*. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP. One proposed measure is empowering the community

[7] ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles

	601 California's Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.	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. 605 If the ICANN Board were to ignore binding IRP decisions, another proposed measure would empower the community to force resignation ICANN Board member(s).
606 **Conclusions:** 607 a) This threat is directly related to the transition of IANA stewardship	608 b) Existing measures are inadequate.	609 c) Proposed measures in combination are adequate because the community has power to spill the Board.

STRESS TEST	**EXISTING ACCOUNTABILITY MEASURES**	**PROPOSED ACCOUNTABILITY MEASURES**
610 23. ICANN uses RAA or other agreements to impose requirements on third parties, outside scope of ICANN mission. (e.g. registrant obligations) 611 Affected third parties, not being contracted to ICANN, have no effective recourse. 612 Contracted parties, not affected by the requirements, may choose not to use their ability to challenge ICANN's decision. 613 This issue occurs in policy	615 During policy development, affected third parties may participate and file comments. 616 Affected third parties may file comments on proposed changes to registry and registrar contracts. 617 Affected third parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies. 618 Affected third parties (e.g. registrants and users) have no standing to challenge	620 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, Commitments and Core Values. 621 Another proposed measure is empowering the community to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power

	development, implementation, and compliance enforcement. 614 Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.		ICANN management and Board on how it has *implemented* approved policies. 619 If ICANN changes its legal jurisdiction, that might reduce the ability of third parties to sue ICANN.		to issue a binding decision. That IRP decision would be based on a standard of review in the amended Mission statement, including "ICANN shall not undertake any other mission not specifically authorized in these Bylaws."
622 623	**Conclusions:** a) This threat is not directly related to IANA transition	624	b) Existing measures are inadequate.	625	Proposed measures would be adequate.

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

	STRESS TEST		**EXISTING ACCOUNTABILITY MEASURES**		**PROPOSED ACCOUNTABILITY MEASURES**
627	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. 628 Consequence: Staff capture of policy implementation undermines the legitimacy conferred upon ICANN by established community based policy development processes.	629	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. 630 An ICANN Board decision could not be challenged by the community at-large, which lacks standing to use IRP.	631	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.
632 633	**Conclusions:** a) This threat is not directly related to IANA transition	634	b) Existing measures are inadequate.	635	c) Proposed measures would, in combination, be adequate.

Stress test category V: Failure of Accountability to External Stakeholders

	STRESS TEST		EXISTING ACCOUNTABILITY MEASURES		PROPOSED ACCOUNTABILITY MEASURES
636	14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC)	638	The AoC can be terminated by either ICANN or NTIA with 120 days notice.	641	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.
637	Consequence: ICANN would no longer be held to its Affirmation commitments, including the conduct of community reviews and required implementation of review team recommendations.	639	As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.	642	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.
		640	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 .	643	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.
				644	Note: none of the proposed measures could prevent NTIA from canceling the AoC.
645	**Conclusions:**				
646	a) This threat is directly	647	b) Existing measures are	648	c) Proposed measures in

	related to IANA transition		inadequate after NTIA terminates the IANA contract.		combination are adequate.

	STRESS TEST		EXISTING ACCOUNTABILITY MEASURES		PROPOSED ACCOUNTABILITY MEASURES
649	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. 650 Consequence: affected parties might be prevented from seeking legal redress for commissions or omissions by ICANN.	651	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. 652 Paragraph 8 of the AoC requires ICANN to remain headquartered in the US, but the AoC can be terminated by ICANN at any time 653 As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.	654	ICANN's present Bylaws include a commitment to maintain headquarters in California with offices around the world. 655 If ICANN's Board proposed to amend this Bylaws provision, one proposed measure would empower the community to veto that proposed Bylaws change.
656	**Conclusions:** 657 a) This threat is directly related to the transition of IANA stewardship	658	b) Existing measures are inadequate once NTIA terminates IANA contract.	659	c) Proposed measures improve upon existing measures, and may be adequate.

	STRESS TEST		EXISTING ACCOUNTABILITY MEASURES		PROPOSED ACCOUNTABILITY MEASURES
660	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. 661 Consequence: Responsibilit	662	The present IANA contract (link) at C.2.1 does not allow ICANN to sub-contract or outsource its responsibilities to a 3rd party without NTIA's consent. 663 NTIA could exert its control over ICANN's decision as	665	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. 666 The CCWG is proposing to

y 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.	long as it held the IANA contract. But not after NTIA relinquishes the IANA contract. 664 Nor would NTIA's required principles for transition be relevant after transition occurred.	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. 667 Note: This would not cover re-assignment of the Root Zone Maintainer role, which NTIA is addressing in a parallel process.
668 **Conclusions:** 669 a) This threat is directly related to the transition of IANA stewardship	670 b) Existing measures would not be adequate after NTIA relinquishes the IANA contract.	671 c) Proposed measure are adequate to allow community to challenge ICANN decisions in this scenario.

4) Items for Consideration in Work Stream 2

672 The CCWG Charter states that:

673 In the discussions around the accountability process, the CCWG 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.

674 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

675 However, concerns were raised within the CCWG about the incentives for ICANN to implement Work Stream 2 proposals when they are finalized after the transition has taken place. The CCWG'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.

676 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 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.

677 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.

678 To ensure the Board's due consideration and implementation of the outcomes of Work Stream 2 accountability mechanisms, the proposal would not require the level of the complexity of the 2002 reform effort.

679 The CCWG recommends that the Board adopts a transitional article in its Bylaws which would commit ICANN to implement the CCWG recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to the following list of issues (see below).

Items for consideration within Work Stream 2

680 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:

1. Enhancements to ICANN's accountability based on the law(s) applicable to its actions;
2. Alternative options for ICANN's jurisdiction (understood as 'place of legal establishment') based on possible accountability limitations related to the current jurisdiction of ICANN;
3. Enhancements to the Ombudsman's role and function;
4. Limiting ICANN's ability to deny transparency / disclosure requests;
5. 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;

6. Define security audits and certification requirements for ICANN's IT systems;
7. 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;
8. Improve diversity in all its aspects at all levels of the organization; and
9. Enhancements to ICANN's whistle blower policy.

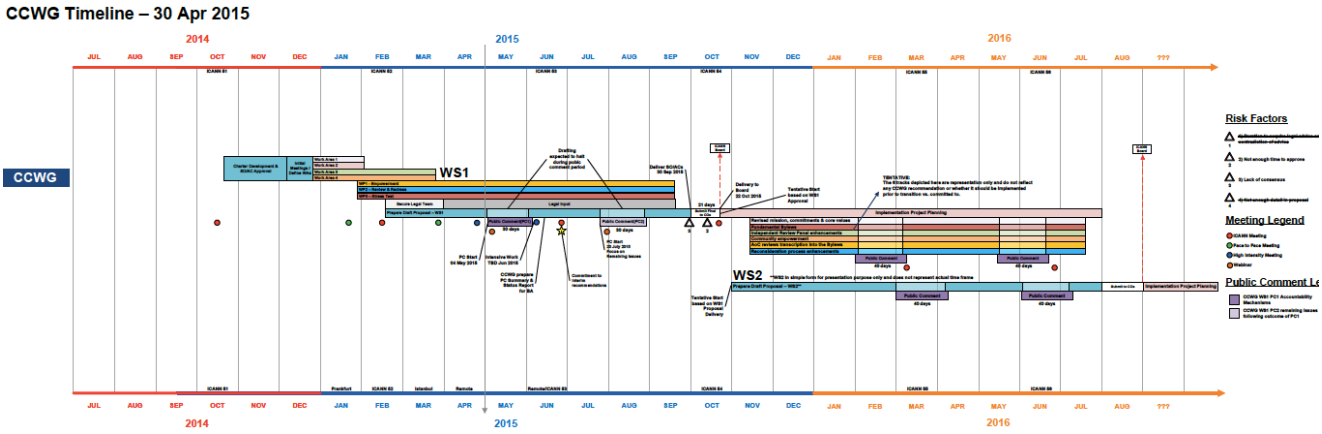
681 **QUESTION:**

682 19) 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.

5) Implementation Plan Including Timing

5.1 Timeline

683 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.



684 A full view version of this timeline exists on the CCWG wiki.

5.2 Next Steps

685 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 Steam 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 Work Stream 1 and on or around this time begins its work with Work Stream 2

5.3 Implementation

686 The CCWG views the oversight of Work Stream 1 implementation crucial to its mandate. Work Stream 1 accountability changes 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 Work Stream 1 implementation, and it is not possible to provide an exact timeline or duration beyond the information below and in the timeline in section 5.1 of this report. 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 Work Stream 1:

- Revised Mission, Commitments and Core Values
- Fundamental Bylaws changes
- Independent Review Panel enhancements
- Community empowerment
- AoC reviews transcription into the Bylaws
- Reconsideration process enhancements

As the CCWG progresses closer to its final Work Stream 1 Proposal, implementation planning will become clearer. Once approval has been obtained, implementation can begin.

A significant number of CCWG Accountability WS1 recommendations involve updating the ICANN Bylaws. A best case timeline for implementation can be found below. About 105 days appear necessary until approval of the Bylaw changes, which appear as a key milestone.

STEP 1 – ESTABLISHMENT OF BYLAW PROPOSALS – AROUND 45 DAYS

Assuming that lawyers have very clear direction and guidance, the legal work of preparing proposed amendments to ICANN's Articles and Bylaws could be accomplished in as little as two weeks. However, in the drafting process issues may become apparent that have not been anticipated and need additional guidance which would slow the drafting process down.

Similarly, assuming clear direction and guidance on the ACs/SOs and assuming that these entities do not have assets or revenues, the documents for the unincorporated associations (assuming 6) could be drafted in another two weeks.

Thus, the drafting of amendments to the core ICANN governance documents and creation of basic streamlined unincorporated association documents should take about four to six weeks total, to have solid first drafts for review.

STEP 2 – POSTING AND APPROVAL OF BYLAWS – AROUND 60 DAYS INCLUDING 40 DAYS PUBLIC COMMENT

The general process for the posting and approval of Bylaws amendments is as follows:

- The Board considers the proposed revisions for posting for public comment. The Board typically receives items for consideration approximately 7 calendar days before action. Given the import of the CCWG work, a special Board meeting could be called (upon proper notice - 48 hour minimum) in order to address the implementation work.
- So long as the Board approves the posting, staff can prepare the posting as soon as possible. We could aim at making sure that any public comment [opening text][it is unclear what "opening text" means] would be completed no later than the day the Board is scheduled to consider the posting, so that there is no undue delay.
- Public comment is typically for 40 days. There is the opportunity for a shorter period of time, though practice has been to never go below 30 days for Bylaws changes. ICANN would only shorten that period if there was community consensus that a less than 30-day window was more appropriate.
- The public comment would have to be considered and provided to the Board for consideration and approval. We could work to identify what types of timeframes would

be appropriate for this, though typically there is a need for at least 2 weeks to prepare the matter for the Board's further consideration/approval, depending on the complexity of the comments.

- Assuming there is nothing within the public comment that requires substantial modification (which could require further public comment), once the Board considers and approves the revisions, they are made effective immediately.
- What this means is that from the time the Bylaws are provided to the Board for consideration for posting for public comment, we're looking at approximately 60 days (assuming a 40 day public comment and that Board meetings are convened as needed for this purpose) to implementation.

695 **STEP 3 – SETTING UP THE MECHANISMS - DURATION DEPENDS ON SO/AC PROCESSES**

696 In terms of regulatory filings, with both the designator and Membership models all that is required is that the new Articles of incorporation be filed with the State of California. There is no approval process to factor in at the state or federal level.

697 In terms of community powers, each SO/AC would additionally need to, according to their processes, select their representatives into the community mechanism described in 2.6.1.

698 Each SO/AC would need to make appropriate arrangements to fully participate within the community mechanism.

699 In terms of setting up the IRP, a process to nominate, select and confirm the initial panelists would have to be convened. The engagement of International Arbitration Bodies and the nomination phase of this process could actually start before approval of the relevant Bylaws. However, the launch of an IRP is likely to take 3 to 6 months.

700 **The following tables suggests implementation milestones and dates for Work Stream 1 recommendations**		**Complete** √ or xx **Progress** ○ or xx In **Planning** ◊ or xx In	
CCWG-ACCT Rec #	**Description/Implementation Summary**	**Milestones, Completion Dates (See Executive**	**Expected Implementation Date after**

		Summaries for additional details)	Approval
701 **Community Empowerment**		702	
703	704	705	706
707 **Review & Redress**		708	
709	710	711	712

6) Public Comment Input

713 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.

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

715 Insert deadline + practical suggestions here.

716 **Revised Mission, Commitments & Core Values**

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

717 **Fundamental Bylaws**

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

718 **Independent Review Panel Enhancement**

5. 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.

719 Please refer to Appendix I – Independent Review Panel Enhancement – Questions & Open Issues

720 **Reconsideration Process Enhancement**

6. 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. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

721 **Mechanism to empower the Community**

7. 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.

722 **Power: reconsider/reject budget or strategy/operating plans**

8. 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.

723 **Power: reconsider/reject changes to ICANN "standard" Bylaws**

9. 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.

724 **Power: approve changes to "Fundamental" Bylaws**

10. 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.

725 **Power: Recalling individual ICANN Directors**

11. 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.

726 **Power: Recalling the entire ICANN Board**

12. 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.

727 **Incorporating AoC into the ICANN Bylaws**

13. 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.
14. 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.

728 **Bylaws changes suggested by Stress Tests**

15. 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.

729 **Items for Consideration in Work Stream 2**

16. 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.

Glossary

See also https://www.icann.org/resources/pages/glossary-2014-02-03-en

CCWG-Accountability

The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) that was convened to design a proposal that ensures that ICANN's accountability and transparency commitments to the global Internet community are maintained and enhanced in the absence of the historical relationship with the U.S. Government.

Consolidated RIR IANA Stewardship Proposal Team

The Consolidated RIR IANA Stewardship Proposal Team (CRISP Team) was established by the Internet Number Community through the Regional Internet Registries to produce a proposal for IANA activities related to the allocation of blocks of Internet Number Resources, the IANA Number Registries, administration of the special-purpose "IN-ADDR.ARPA" and "IP6.ARPA" DNS zones, and other related registry management tasks.

CWG-Stewardship

The Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship), whose main goal is to produce a consolidated transition proposal for the elements of the IANA Functions related to the Domain Name System.

Designator

(suggest asking lawyers for accuracy)

Fundamental Bylaw

The concept of fundamental bylaw is used to represent a bylaw provision which the community wishes to protect from change by requiring a higher standard of community approval and ICANN Board voting threshold before it can be changed or removed.

IANA Stewardship Transition Coordination Group (ICG)

The IANA Stewardship Transition Coordination Group (ICG) was formed to coordinate the development of a proposal among the communities affected by the IANA functions. The creation of the ICG was initiated and facilitated by ICANN, and the Membership of the ICG has been defined by the Internet communities participating in it. The groups' sole deliverable is a proposal to the NTIA recommending a transition plan of NTIA's stewardship of IANA functions to the Internet community, consistent with the key principles outlined in the NTIA March 14 announcement.

ICG’s proposal will combine recommendations developed by the three operational communities affected by the IANA functions: the IANAPLAN WG representing the protocol parameters community, the Consolidated RIR IANA Stewardship Proposal Team (CRISP Team) representing the IP address communities, and CWG-Stewardship for the Naming community.

The ICG is focused on delivering a proposal to transition the stewardship of the IANA functions to the multistakeholder community.

IANAPLAN Working Group

The IETF established the IANAPLAN Working Group (IANAPLAN WG) to produce a proposal for the transition of IANA functions related to the maintaining of the codes and numbers contained in a variety of Internet protocols developed by the IETF.

Independent Review Process Panel

Independent Review Process Panel (IRP Panel), is an independent arbitral panel of neutrals which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of the Bylaws, Articles of Incorporation, or *Statement of Mission, Commitments, and Core Values*, substantive limitations on the permissible scope of ICANN's actions or [may wish to add, the California Corporations Code as interpreted by courts of competent jurisdiction].

Member

(suggest asking lawyers for accuracy)

Nominating Committee

The Nominating Committee (NomCom) is an independent committee tasked with selecting eight Members of the Board of Directors, five Members of the At-Large Advisory Committee, three Members of the Generic Names Supporting Organization (GNSO), and three Members of Country-Code Names Supporting Organization (ccNSO). (See Bylaws Article VII, Section 1.)

Ombudsman

The ICANN Ombudsman investigates and addresses complaints brought by the ICANN community. The Ombudsman is independent, impartial, and neutral, a reviewer of facts and an investigator of complaints about unfairness.

Reconsideration Process

Reconsideration Process is a 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.

Root Server System Advisory Committee

The role of the Root Server System Advisory Committee ("RSSAC") is to advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Stress Test

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. The CCWG is using stress tests to analyze certain ICANN and DNS

ecosystem risks or contingencies can be mitigated by applying the accountability mechanisms available to the CCWG.

761 **Work Streams**

762 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.

763 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.