Comparison of CCWG 2ⁿᵈ Draft Proposal (Community Mechanism as Sole Member) and ICANN Board Proposal

In the table below, "Generally Supported" indicates elements of the CCWG 2ⁿᵈ Draft Proposal that the ICANN Board appears to generally agree with and "Change Recommended" identifies elements of the CCWG Proposal that the ICANN Board has either suggested changes to or has indicated that it does not support, in both instances based on our review and understanding of the "Board Input to CCWG-Accountability 2ⁿᵈ Draft Proposal Comments Matrix and Notes on Proposed Elements," dated 11 September 2015 and other documents submitted by the ICANN Board as part of the ICANN Board Comments on CCWG-Accountability 2ⁿᵈ Draft Proposal. In most instances where a provision is "Generally Supported" we have not described the CCWG provision in any detail or provided comments.

	CCWG 2ⁿᵈ Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
1.	**Mission: ¶164, §1**	**CHANGE RECOMMENDED**	
	CCWG recommends certain changes to be made to ICANN's "Mission Statement" to clarify that: (1) ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS; (2) 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; (3) ICANN's powers are "enumerated" – meaning that anything not articulated in the Bylaws are outside the scope of ICANN's authority. CCWG has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission.	The Board generally supports amending the Mission Statement and Core Values. Specific changes to the text in the Bylaws will need to be thoroughly reviewed before being finalized -- needs to unambiguously maintain ICANN's ability to enforce its contracts with registries and registrars. The Board agrees that the Affirmation of Commitments (AoC) should be included in the revised Bylaws. The AoC requires ICANN to continue to work for the maintenance of a single, interoperable Internet. This may require actions that are not immediately recognized as fulfilling primary responsibilities, but need to be taken, to participate in different fora and spaces to build support for the single, interoperable Internet. While the Board is committed to upholding human rights as appropriate within the Mission, inclusion of human rights in the ICANN Bylaws is premature at this time. There continues to be debate both in the CCWG on the topic, as well as in the wider ICANN community.	Note with respect to the CCWG recommendation regarding clarification in the Mission Statement that ICANN's powers are enumerated, that the Board emphasizes that under broad AoC requirements regarding maintenance of a single, interoperable Internet, the Board may need to take actions that are not specifically enumerated.

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
2.	**Core Values: ¶164, §2**	**CHANGE RECOMMENDED**	
	CCWG recommends certain changes to ICANN's "Core Values" including: (a) Incorporate into the Bylaws ICANN's obligation to operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These obligations are now contained in ICANN's Articles of Incorporation. (b) Designate certain Core Values as "Commitments" (which are so fundamental to ICANN's operation that they are intended to apply consistently and comprehensively), including ICANN's obligations to: (i) Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet; (ii) Limit its activities to those within ICANN's Mission that require or significantly benefit from global coordination; (iii) Employ open, transparent, bottom-up, multistakeholder processes; and (iv) Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment. (c) Slightly modify the remaining Core Values to reflect the AoC, and to add an obligation to avoid capture.	The Board supports the CCWG recommendations, but cautions that specific proposed changes to Bylaw text will need to be thoroughly reviewed before being finalized. It should be recognized that the Board's mandate includes a responsibility to act in the global public interest with respect to our primary mission of ensuring the stability, security and resilience of the Internet's unique identifier systems.	All specific Bylaw changes will need to be thoroughly reviewed before being finalized, and this is a matter that the CCWG well understands. The Board emphasizes its mandate to act in the global public interest with respect to ICANN's primary mission of ensuring the stability, security and resilience of the Internet's unique identifier systems. Unclear whether the Board is taking issue with moving the provision referred to in (a) first column into Bylaws from Articles. Note that the provision already addresses the notion of the Board's responsibility to "act in the global public interest" (i.e., the obligation to "operate for the benefit of the Internet community as a whole").
3.	**Core Values – Balancing or Reconciliation Test: ¶164, §3**	**GENERALLY SUPPORTED**	

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
4.	**Mission and Core Values as Fundamental Bylaws: ¶164, §4**	**GENERALLY SUPPORTED**	
5.	**Fundamental Bylaws: §§4.1, 4.2**	**CHANGE RECOMMENDED**	
	The CCWG proposes to make some Bylaw provisions harder to change than others, in two ways: 1. by sharing the authority to authorize changes between the ICANN Board and the ICANN community (organized through its SOs and ACs in the Community Mechanism as Sole Member (CMSM), 2. and by requiring higher thresholds to authorize changes than is the case for Standard Bylaws (all the other ICANN Bylaws). Parts of ICANN's Bylaws will become Fundamental Bylaws by identifying them as such in the Bylaws, by setting out how new Fundamental Bylaws can be defined and by defining a different process to change them than the process used for changes to Standard Bylaws.	The Board agrees with the establishment of Fundamental Bylaws and that the authority to change them should be shared between the Board and community. The Board also agrees with the higher threshold proposed by the CCWG for Board approval of Fundamental Bylaws. The Board believes that the shared authority for changing these Fundamental Bylaws can be achieved through empowering the SOs and ACs in the Bylaws without having to move to a CMSM model. In the event the Board does not follow its Bylaws, then the community may use binding arbitration, and in the event the Board does not abide by this arbitration, it may enforce the arbitration through the courts.	While the Board generally supports the concept of Fundamental Bylaws and "shared authority" with the community for changes to Fundamental Bylaws, the Board does not support the Community Mechanism as Sole Member and the scope and enforcement of community powers that it provides. The Board proposes a different less-robust enforcement mechanism, the Multistakeholder Enforcement Mechanism (MEM), as discussed below under Item 35.
6.	**Establishing Fundamental Bylaws: §4.2, ¶¶233, 234)**	**GENERALLY SUPPORTED**	
7.	**Adding New or Changing Existing Fundamental Bylaws: §4.3, ¶236**	**CHANGE RECOMMENDED**	
	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	The Board supports the new community power to approve a change to a Fundamental Bylaw, but believes this can be achieved without having to move to a CMSM model. For	In relation to community decision-making, see Item 35, below. The Board has provided an example of a voting

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
proposing the addition or amendment: 1. The Board would propose a 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 approve the addition or amendment by a 75% vote of all Directors then in office (higher than the usual threshold of 66%). 3. Alongside the Board, the community through the CMSM would also need to approve the change. The threshold to approve any changes to Fundamental Bylaws would be set at the same high bar (75% of all votes in the CMSM cast in favor). 4. If the change were agreed, then the new/revised Fundamental Bylaw would appear in the Bylaws, and appropriate reference to the text as a Fundamental Bylaw would be added (if needed) to the part of the Bylaws that lists them. In the case of a revision to existing Bylaws text, 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.	example, a resolution supporting the change from each of the SOs, and no advice against the changes received from the ACs. With regards to Board decisions, the Board agrees with 3/4 of all Directors as the required threshold. Additionally, the Bylaws should be amended to include a requirement for public comment on all proposed changes to Bylaws.	mechanism but agrees that discussion of the threshold should proceed in the community. The voting threshold does not appear to be a significant change from community practices with respect to decisions that they currently make. With respect to the Board observation regarding need for public comment for Bylaw amendments, CCWG may wish to clarify that the "usual process" for new/changes to Fundamental Bylaws would include a public comment period, as is contemplated for changes to Standard Bylaws (discussed in ¶397). The CCWG 2nd Draft Proposal expressly provides that "[a]longside the powers granted to the community through the Sole Member Model … there needs to be a forum where the use of any of the powers is discussed across the whole ICANN community – before the power under consideration is used". This is intended among other things to provide opportunity for ACs/SOs that may have decided not to formally participate in CMSM decisions to offer their views on the proposed exercise of a community power.(§6.3)

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
8.	**Which Current Bylaws Become Fundamental Bylaws: §4.4, ¶1031**	**CHANGE RECOMMENDED**	
	The following would be made Fundamental Bylaws in the first instance: 1. The Mission / Commitments / Core Values; 2. The framework for the Independent Review Process; 3. The manner in which Fundamental Bylaws can be amended; 4. The powers set out in Section 7 of this report; 5. The CMSM Model; 6. The IANA Function Review and the Separation Process required by the CWG-Stewardship's proposal; 7. The Post-Transition IANA governance and Customer Standing Committee structures, also required by the CWG-Stewardship's proposal. The CCWG recommends that the Board adopt a transitional provision in its Bylaws which would commit ICANN to implement the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability.	The Board agrees with most of the proposed Fundamental Bylaws identified, but for #5, the CMSM Model. The Board recommends that the MEM Bylaws be made Fundamental. Additionally, for areas where the CCWG has identified that additional work remains, such as on the IRP, the Board suggests further community consideration as to whether those items should be included in the Fundamental Bylaws immediately or once there are additional process improvements developed.	In relation to the CMSM/MEM, see below under Item 35. With respect to the Bylaws relating to "areas where the CCWG has identified that additional work remains," the CCWG Proposal states that the CCWG recommends that the Board adopt a transitional provision "which would commit ICANN to implement the CCWG-Accountability recommendations . . ." It appears that the Board does not support inclusion of this provision in the Bylaws. Jones Day has confirmed that the Board is supportive of #7 (which was omitted from the list of assessed items).

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
9.	**Power to Approve Changes to the Fundamental Bylaws: §4.5**	**CHANGE RECOMMENDED**	
	Critical aspects of the powers and processes required to maintain ICANN's accountability to the community, and the organization's purpose and Core Values, should be changed only as a result of a broad consensus. The power to approve changes to the Fundamental Bylaws would form part of the process set out for agreeing to any changes of the Fundamental Bylaws. Through the CMSM, the SOs and ACs 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. By creating this special co-decision process, authority to change fundamental aspects of ICANN's governing framework is shared more broadly than it otherwise would be.	The Board supports the new community power to approve a change to a Fundamental Bylaw, but believes this can be achieved without having to move to a CMSM model. For example, instead of a vote within the CMSM, the threshold could be a resolution from each of the SOs approving the Fundamental Bylaws change, and no advice against the changes received from any of the ACs.

The escalation mechanism in the event the Board failed to follow the Fundamental Bylaws change process would include reconsideration as appropriate and binding MEM arbitration, with recourse to court for enforcement. | In relation to the CMSM/MEM, see below under Items 10 and 35.

The Board has provided an example of a voting mechanism but agrees that discussion of the threshold should proceed in the community. The voting threshold does not appear to be a significant change from community practices with respect to decisions that they currently make. |
| 10. | **Purpose of the IRP: §5.1, ¶268** | **CHANGE RECOMMENDED** | |
| | The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

1. Empower the community and affected individuals/entities to prevent "mission creep" and enforce compliance with the Articles and Bylaws through meaningful, affordable, accessible expert review of ICANN actions.

2. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its Mission or that violate its | The Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

The Board recommends creating a separate Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to seek independent review of actions that are alleged to be inconsistent with or violation with the new community powers. This is separate from and in addition to refining the existing IRP process for individuals/entities to allow for | The IRP proposed by the CCWG is based upon the existing IRP with enhancements to make its decisions binding and enforceable in civil court. It would be an arbitral body custom-designed to adjudicate disputes that may be complex due to ICANN's unique purpose and function. The IRP would be accessible both to persons/groups/entities outside of ICANN as well as those within ICANN, including SOs and ACs.

The Board proposes **two** arbitral bodies: (1) The IRP, open to claims, filed by parties inside or outside of ICANN, involving violation of ICANN Articles or Bylaws. (We understand that the Board has not decided whether the IRP |

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
Articles or Bylaws. 3. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs and ACs, and the community in connection with policy development and implementation. To ensure that the IRP functions as intended, CCWG proposes to subject the IRP to periodic community review.	meaningful recourse on individual decisions of the Board. The Board also supports carrying out a periodic review of the IRP.	should be binding or non-binding.) (2) The MEM, open to internal claims filed by a requisite combination of SOs and ACs, limited to Board violations of Fundamental Bylaws. We agree that the Board cannot surrender responsibility to perform its core fiduciary duties to a binding arbitration process (although allegations that it breached such duties may be tested in arbitration). Nevertheless, while precedent does not precisely define what actions might be considered a core fiduciary duty, California law clearly permits the member in a CMSM model to have reserved powers that the Community would not have under the Board Proposal, and that would be enforceable regardless of Board fiduciary duties. (In other words, under California law, when a sole member is provided with reserved powers, the board is relieved of its fiduciary duties with respect to the member's exercise of those powers.) In particular, matters of budgetary allocations, strategic and operational plans and implementation of IANA functions review recommendations would not be subject to challenge under a MEM process. A Sole Member with reserved powers would have clear rights to intervene in issues relating to budgets, strategic/ operating plans and implementation of IANA functions review recommendations. Further clarification is needed to verify the scope of actions that the Board proposes to subject to MEM Arbitration, as the Board Proposal relates to community powers and Jones Day documentation focuses on challenges to Board actions that are alleged to

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
		violate Fundamental Bylaws. Absent a membership structure, the Board Proposal cannot provide the Community with corporate powers over issues including budget rejection, strategic plan rejection, and implementation of IANA functions review recommendations to the same extent as the CMSM model. The MEM is an enforcement mechanism that is less robust than the enforcement provided by the CMSM. The Board Proposal would position the multi-stakeholder community to act as a collective complainant, reacting to Board violations only of Fundamental Bylaws.
11. **Role of the IRP: §5.1, ¶268**	**CHANGE RECOMMENDED**	
The role of the Independent Review Process (IRP) will be to: 1. Hear and resolve claims that ICANN through its Board of Directors or staff has acted or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization); 2. Reconcile conflicting decisions of process-specific "expert panels"; and 3. Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds).	The Board supports Role (**1**). With respect to Role (**2**), the Board believes that appeals on the merits of decisions by expert panels should be heard within appeal processes developed as part of the expert panel process. For example, for new gTLDs, the Board supports developing appeal mechanisms within the new gTLD process, as defined with the community. There need to be clear lines to keep the IRP separate from operational matters. For Role (**3**) the Board recommends creating a separate binding arbitration process called the MEM to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers.	The Board Proposal with respect to the MEM provides the community with less ability to challenge Board actions as described in the comments to Item 10 above.

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	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
12.	**A Standing Panel: §5.1, ¶268**	**GENERALLY SUPPORTED**	
	The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.	Agreed.	Note that with the MEM, the Board Proposal appears to create a second, separate Standing Panel. It is unclear whether some panelists may serve on both, what the extra cost of training and maintaining two panels would be, and how reliable precedents would develop with two arbitral bodies having overlapping jurisdiction and the potential for inconsistent outcomes.
13.	**Initiation of an IRP: §5.1, ¶268**	**CHANGE RECOMMENDED**	
	An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified Board or staff action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws. Matters specifically reserved to the Sole Member of ICANN in the Articles or Bylaws would also be subject to IRP review.	The ICANN Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws. The Board supports the need for refining the existing IRP process for individuals/entities. The Board recommends creating a separate MEM process to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers.	As noted in the comments to Item 10 above, further clarification regarding the scope of the MEM Arbitration process is required. The Board is aligned with the CCWG that more work is needed on the IRP. The CCWG may need to consider in more depth how to assure that the IRP is in practice limited as intended to address violations of Articles or Bylaws; we understand from Jones Day and ICANN Legal that the existing IRP process has at times in practice been used to address a broader range of issues. (Perhaps it would be helpful to review the operational detail included in the Bylaws, which is leading to problems with the scope of the IRP.) It is expected that the enhanced IRP would be used on a limited basis, and only available when it is alleged that the Board/staff has violated the articles/bylaws (i.e., limited in scope, similar to a constitutional court). Outstanding questions regarding initiation

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
		include the "measure of consensus" the Board would view as required for SOs or ACs (i.e., the requisite number) to initiate a petition for MEM Arbitration. An SO or AC harmed by the Board's action would need to go through the collective process to invoke an MEM, but would not be materially limited by a consensus requirement before invoking the IRP as envisioned by both CCWG and the Board. The mechanics of invoking the IRP process also need to be clarified with respect to the question of to whom the filing would be made. The issue is whether ICANN intends to run the secretariat or clerk's office functions for the MEM or to have an independent third-party arbitration organization provide such support. See discussion under Item 22 below relating to settlement efforts that must be undertaken prior to/in connection with initiating an IRP.
14. **Possible Outcomes of the IRP: §5.1, ¶268**	**CHANGE RECOMMENDED**	
An IRP will result in a declaration that an action/failure to act complied or did not comply with ICANN's Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions should be binding on ICANN. 1. Decisions of a three-member decisional panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented via the IRP	Agreed. The Board notes that several areas may need refinement based on CCWG's discussions on IRP developments. The Board is supportive of interim relief limited to status quo preservation. Separately, the Board notes that the proposed MEM arbitration process will be binding.	The outcomes set forth in the Board's MEM Arbitration proposal are distinct from those set forth by CCWG. It is not clear which features proposed by CCWG are acceptable to the Board for the IRP and for the MEM. Further clarification is required to fully comment on these distinctions. Questions about the MEM include: 1. Will SOs and ACs wishing to pursue MEM arbitration—referred to as a MEM Issue Group—constitute a separate

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments

Sub Group process.
 	
2. This balance between the limited right of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.
 	
3. The limited right to appeal is further balanced by the community powers, relevant policy development process, and advice from ACs, each as set forth in the Bylaws.
 	
4. IRP panelists will consider and may rely on prior decisions of other IRPs addressing similar issues.
 	
5. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
 	
  a) 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;
 	
  b) Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
 	
  c) A balance of hardships tipping decidedly toward the party seeking the
		unincorporated association or other legal entity?
		
		2. Could the Board agree to submit an issue to the determination by the MEM even if the underlying topics are within its fiduciary discretion under the business judgment rule?
		
		3. Would MEM Issue Groups be limited to enforce the results of arbitration through the California courts, courts in places where ICANN has an office and/or courts in a broader range of jurisdictions?
		
		4. Will the MEM process proposed meet international standards for arbitration?
		
		5. Would the results of MEM arbitrations be enforceable in non-U.S. courts?
		
		6. If "any single SO or AC, by some measure of consensus, may indicate its intent to initiate MEM Arbitration," would the Board be able to claim that the SO or AC's challenge was not appropriately brought pursuant to such a measure of consensus?
		
		7. Will MEM Arbitration decisions be made public?
		
		8. Will panels of the MEM be obliged to follow the holdings of other panels unless the holding is overturned by an en banc review?
		
		9. What are the procedures for en banc

CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
relief.		appeal to the MEM Standing Panel?
		10. Are both parties entitled to appeal by right?
		11. Is there a process by which the MEM Standing Panel, in some level of consultation with the challenging party, can ensure that the Board's remedial action is sufficient to remedy the violation of a Fundamental Bylaw?
		12. Can Board actions taken between issuance of a MEM arbitration award and review of an en banc appeal be considered to moot the challenge brought by the challenging party?
		13. Who will administer the MEM process in the sense of serving as the clerk's office for the arbitration panels?
		14. How can the community have assurance of impartial administration of the process by the clerk's office for the MEM?
		15. If the MEM process is itself adopted as a Fundamental Bylaw, how can periodic community review affect changes that may be necessary?
		16. By what mechanism, if any, could the full community enforce a decision of the MEM?
		Relevant distinctions include:
		1. A distinct appeals process which provides for en banc review to the full MEM Standing Panel. The proposed standard for review

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
			for an en banc appeal has not been clarified.
			2. The proposal does not clarify the standard for the right to appeal to the full MEM Standing Panel.
			3. The Board Proposal, which does not include a membership model, limits desired community powers. (See comments to Item 10 above.)
			4. The MEM Arbitration proposal sets forth that prior decisions will have precedential value; however, further clarification is required.
			5. The Board Proposal does not clarify the scope of interim relief that may be provided under the MEM Arbitration process (i.e., whether the MEM process could provide prospective, interlocutory or injunctive, relief).
15.	**Standing: §5.1, ¶268**	**CHANGE RECOMMENDED**	
	Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims	The ICANN Board agrees that any person/group/entity materially affected by an alleged violation of ICANN's Bylaws or Articles of Incorporation should have the right to file a complaint under the IRP. Until agreement is reached across the community on different time periods the Board recommends that the current time period of 30 days remains. Separately, the Board recommends creating a separate binding MEM arbitration process to meet the needs for the community to review	The Board appears to agree with maintaining the current "materially affected" threshold for filing a complaint with the IRP or, presumably, the MEM. A person/group/entity that is "materially affected" by the ICANN action or inaction will have standing to enforce the arbitration award in a California court because the person/group/entity has a personal stake in the outcome. (Note, however, that standing may not be waivable by the parties; it is a jurisdictional requirement that the court must

	CCWG 2nd Draft Proposal	ICANN Board Proposal	Sidley/Adler Comments
	involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.	and enforce claims that the Board is not abiding by the community powers.	conclude exists.) The MEM model complicates the standing analysis because community members seeking to arbitrate must join together as a MEM Issue Group. It will be important for the Board to clarify whether they intend the MEM Issue Group to be considered an unincorporated association, which would be required to establish associational standing. If the MEM Issues Group does not come into existence until it is formed to file a complaint with the MEM, a question arises regarding how it can claim that it existed at the time of (and was materially affected by) the Board's alleged violation. To file a MEM complaint, must all members of the Issues Group be materially affected or can the Group file a MEM complaint in collective support of a single SO or AC that is materially affected? The CMSM avoids the difficulty of a temporary "coalition of the willing" by existing as an unincorporated Sole Member entity prior to the filing of any claim with the IRP (or MEM).
16.	**Community IRP: §5.1**	**CHANGE RECOMMENDED**	
	CCWG recommends giving the community the right to have standing with the IRP. In such cases, ICANN will bear the costs associated with the Standing Panel, although the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.	The Board recommends creating a separate MEM process to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers. ICANN will fund MEM arbitrations.	The Board has not indicated a clear commitment on funding IRPs as they currently exist; that is a matter for further discussion.

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17.	**Exclusions; ccTLD Delegation/Redelegation and Numbering Resources: §5.1, ¶268, clauses 8,9**	**GENERALLY SUPPORTED**	
	As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.

The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing. | Agreed.

The IAB, which has oversight of the protocol parameters IANA function for the IETF, has requested a similar exclusion for disputes related to protocol parameters in its public comment on the CCWG Proposal, in accordance with the March 2000 MoU between the IAB, IETF, and ICANN. The Board agrees with that limitation as well. | We note that while ccTLD delegation/ redelegation is excluded from IRP review at this point, the ICANN governance documents post-transition should contemplate a process that will be agreed upon by the ccTLD community. |
| 18. | **Standard of Review: §5.1, ¶268, clause 10** | **CHANGE RECOMMENDED** | |
| | The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on their own independent interpretation of the ICANN Articles and Bylaws in the context of applicable governing law. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles and Bylaws. 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. | Agreed that the standard of review requires modification. As an initial step, the Board recommends rolling back the standard of review to the standard that was in place pre-April 2013, stating: "Requests for such independent review shall be referred to an Independent Review Panel (IRP) 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 those Articles of Incorporation and Bylaws." Additionally, the Board proposes continuing consideration of the standard of review in the IRP enhancement work that will be ongoing. | Unclear whether the Board's proposed standard of review including rolling back the standard of review to the standard that was in place pre-April 2013 is consistent with the CCWG 2nd Draft Proposal. |

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19.	**Composition of IRP Panel and Expertise, Diversity and Size: §5.1, ¶268, clauses 11, 12, 13**	**CHANGE RECOMMENDED**	
	Composition of Panel: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration. Panelists should also possess 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.

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

Size of Panel:

1. Standing Panel - a minimum of 7 panelists | Agreed. The Board recommends that no Standing Panel be empanelled until the scope of the IRP is clarified. The Board agrees with the CCWG's recommendation to require 3-member decisional panels. | Further clarification will be required prior to the implementation of a final, agreed-upon arbitration process.

The IRP process that is currently in place should continue to operate under the status quo until such time as the final, agreed-upon arbitration process is implemented. |

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	2. Decisional Panel - 3 panelists		
20.	**Independence: §5.1, ¶268, clause 14**	**GENERALLY SUPPORTED**	
	IRP Panel members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP. 1. Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for IRP, beginning by consulting the community on a draft tender document. 2. ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; conduct an initial review and vetting of applications; and work with ICANN and the community to develop operational rules for IRP. 3. The community would nominate a slate of	Agreed.	

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	proposed panel members. 4. Final selection is subject to ICANN Board confirmation.		
21.	**Recall or Other Accountability: §5.1, ¶268, clause 15**	**GENERALLY SUPPORTED**	
	Appointments made for a fixed term of five (5) years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the IRP Sub Group.	The ICANN Board supports 5-year terms and agrees that a recall process should be developed to ensure accountability.	
22.	**Settlement Efforts: §5.1, ¶268, clause 16**	**GENERALLY SUPPORTED**	
	1. Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case. 2. 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 (Cooperative Engagement Process or mediation) if, after specified period, that party concludes in good faith that further efforts are unlikely to produce agreement. 3. The process must be governed by clearly understood and pre-published rules applicable to both parties and be subject to strict time limits. In particular, the CCWG will review the Cooperative Engagement	Agreed. The Board notes that the CCWG Proposal does not contain a lot of detail on how the mediation piece would fit into the timelines, and other process points, but agrees with the CCWG Proposal that these details can be worked through.	Upon agreement on the scope and form of the arbitration process to be implemented, CCWG will work with the ICANN Board to develop further details regarding mediation. CCWG should clarify whether the Reconsideration Request process must be pursued prior to initiating an IRP (i.e., whether the Reconsideration Request process is a mandatory escalation path to an IRP).

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	Process as part of Work Stream 2.		
23.	**Decision Making: §5.1, ¶268, clause 17**	**GENERALLY SUPPORTED**	
	1. In each case, a 3-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the 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. 2. 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.	Agreed.	
24.	**Decisions: §5.1, ¶268, clause 18**	**GENERALLY SUPPORTED**	
	1. Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set. 2. The CCWG recommends that IRP decisions be "precedential" - meaning, that panelists should consider and may rely on prior decisions. By conferring precedential weight on panel decisions, the IRP can	Agreed. Decisions should be binding unless there is a conflict with the Board's fiduciary responsibilities.	See comments to Item 10 above. It is unclear here whether the Board is referring to decisions made by the IRP or MEM, or both. We understand that the Board proposes both a binding MEM and an IRP, the binding nature of which the Board has not decided upon. In either case, the stakeholder community's ability to subject actions to review under binding arbitration is more limited under the MEM proposal than it would be in a CMSM model, where the Sole Member would have access to

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	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. 3. The CCWG intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment. 4. It is intended that judgments of a decisional panel or the Standing Panel would be enforceable in a court of the U.S. and other countries that accept international arbitration results.		the IRP for binding arbitration on any claim regarding the Sole Member's rights or powers. Unclear how the Board intends to reconcile decisions of the MEM that are in conflict with its fiduciary duties.
25.	**Accessibility and Cost: §5.1, ¶268, clause 19**	**CHANGE RECOMMENDED**	
	The CCWG recommends that ICANN would bear all the administrative costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process. However,	ICANN will fund the costs of MEM binding arbitration, including legal fees. Because of the availability of a funded MEM through which community empowerment tools can be enforced, the Board recommends that the more individualized IRP proceedings should be subject to the current cost-shifting process.	

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	the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent community abuse of the process.		
26.	**Time for Resolving IRPs: §5.1, ¶268, clause 19**	**GENERALLY SUPPORTED**	
	The 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 (six months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.	Agreed.	
27.	**Implementation: §5.1, ¶268, clause 20**	**GENERALLY SUPPORTED**	
	The CCWG proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional, detailed work.

Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.

They may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review. | The Board agrees that IRP provisions should be adopted as Fundamental Bylaws, and also agrees that detailed rules will need to be developed. As an initial step, the Board recommends rolling back the modification of standard of review to the standard that was in place before 2013.

The Board also recommends that as the IRP was identified as an area of additional work, the community considers whether it should be included in the Fundamental Bylaws immediately or once there are additional process improvements developed. | |

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28.	**Transparency: §5.1, ¶268, clause 21**	**GENERALLY SUPPORTED**	
	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 Documentary Information Disclosure Policy (DIDP) as part of the accountability enhancements in Work Stream 2.	Agreed. The Board is aware of concerns raised by some members of the community, and believes that the DIDP process should be reviewed and enhanced, including additional process in how the community can challenge a denial of public release of a document/part of a document. The Board agrees that this is appropriate for continuing improvements work within ICANN. Note: the DIDP process is not intended as a process for community members to obtain information for their personal use on a confidential basis.	
29.	**Reconsideration Request Standing: §5.2, ¶271**	**GENERALLY SUPPORTED**	
	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). The CCWG-Accountability Proposal states that under the existing Bylaws paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Reconsideration Request process. 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.	Agreed with suggested expansion of scope. The Board notes that the expansion of the scope of the Reconsideration could help embed the Reconsideration Process within a clear escalation path for individual claimants raising concerns with the organization's actions or decisions. The Board suggests that the Reconsideration Process could be improved if the Reconsideration Process could be further expanded to allow for standing when actions of the Board/staff are alleged to be unfair or illogical to permit an opportunity for review of matters beyond the basic process level.	CCWG should clarify whether the Reconsideration Request process must be pursued prior to initiating an IRP (i.e., whether the Reconsideration Request process is a mandatory escalation path to an IRP). We note that while ccTLD delegation/redelegation is excluded at this point, the ICANN governance documents post-transition should contemplate a process that will be agreed upon by the ccTLD community.

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30.	**Goals – Summary Dismissal: §5.2, ¶277**	**GENERALLY SUPPORTED**	
31.	**Preparation of Information to Reach Recommendations: §5.2, ¶¶278-283**	**GENERALLY SUPPORTED**	
32.	**Decision Making: §5.2, ¶¶284-290**	**CHANGE RECOMMENDED**	
	The Board Governance Committee (BGC) shall make a final 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.

The Board shall not be bound to follow the recommendations of the BGC. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the BGC within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting | Agreed in principle.

Note: there are some practical details that need to be considered before a rebuttal should be included as part of the process. Those include questions such as: what are the limitations of the scope of a rebuttal? How would it be limited so as not to be an opportunity to introduce new arguments? How does it impact the timeframe? How can it have safeguards so as to not delay? What are the Board's obligations in considering a rebuttal?

The Board notes that the inclusion of the rebuttal process, and clarity around it, may impact the timelines presented. | Further clarification will be needed around the rebuttal process. |

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	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. In any event, the Board's final decision shall be made within 120 days of decision on the recommendation is final.		
33.	**Accessibility: §5.2, ¶¶291-293**	**GENERALLY SUPPORTED**	
34.	**Due Process: §5.2, ¶¶294-299**	**GENERALLY SUPPORTED**	
35.	**Community Mechanism as Sole Member Model: §6**	**CHANGE RECOMMENDED**	
	Establish a Community Mechanism as Sole Member Model (CMSM).

ICANN's internal governance structure would be transformed from a structure having no members, to a structure having a single member. The CMSM model would rely on direct participation by SOs and ACs in this sole member for exercise of community powers but would not require any of them to have legal personhood. The directions for voting would come from the SOs and ACs. No SO or AC, or any individual, has to "join" ICANN or the Sole Member in order to exercise their rights, and no new legal obligations arise for any stakeholder.

The SOs and ACs that wish to participate by voting in the Sole Member would simply indicate they wish to do so at the time of its creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to | The ICANN Board does not support this proposal. While the Board is supportive of a change in the balance of power among the community and the Board on operational matters, and agrees with the CCWG Proposal elements that enhance those community powers, the Board believes that a Sole Member Model may introduce too much change and may lead to a delay in the IANA Stewardship Transition until that model has been working in practice.

The Board agrees in principle with the process of petitioning, discussion and decision among the multistakeholder community to achieve the community powers.

To support and enforce the new community powers that are proposed within the CCWG Proposal, the ICANN Board proposes for consideration an alternative MEM process that leverages ICANN's existing governance | The Board does not raise any issue as to whether the CMSM is workable as a matter of law. Its lack of support for the Sole Member model appears to be based on an observation that the CMSM introduces too much change which may lead to delays in the IANA Stewardship transition. It is not clear, and we should confirm with the Board, as to which change or changes are of particular concern. While the specifics of CMSM are unique, membership is common in nonprofit governance systems and a sole member structure is relatively simple. ICANN's ACs and SOs already have significant relevant knowledge and experience in matters of ICANN operations and governance. The CCWG Proposal contemplates that ICANN and its ACs and SOs will continue to operate as they do now, but with a backstop of community powers available to hold the Board accountable in extraordinary circumstances, in the legally well- |

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participate through voting initially could opt in later. New SOs or ACs that are created at a later date could choose to participate in the Sole Member at any time, but this would require the current participants to approve this and the ICANN Bylaws to be amended to reflect their participation.

The SOs and ACs could only instruct the Sole Member to exercise the powers as a group and would do so by using a voting mechanism as defined in the Bylaws (except with respect to appointing/removing individual directors). | structure as well as the existing structure of SOs and ACs within ICANN. The MEM ensures that that the community has access to binding arbitration to enforce the new community powers, without requiring the formation of a member or a community voting mechanism. The binding arbitration will be enforceable under the laws of the State of California, and other courts as appropriate.

The Board's MEM is less subject to capture than the CMSM because the CMSM requires a change to ICANN's governance structure, without a set composition of participants within the CMSM and no requirement that the participation be reflective of the multistakeholder model. The CMSM would bring with it statutory rights that could impact ICANN and its operations, without any fiduciary duty to ICANN. The MEM is a mechanism that would work within ICANN's governance structure, and would be initiated through multistakeholder input and not on a more limited voting design. The use of the MEM does not introduce any significant additions to the potential for capture within the ICANN governance structure.

The Board's approach relies on the broader SO and AC multistakeholder model to reach ultimate decisions to influence operational matters, as opposed to the collection of whatever grouping of SOs or ACs that happen to be part of (or are eligible to be part of) the Sole Member at a particular time. This provides simplicity as well as predictability on the scope of the community that is able to take these | understood structure of a sole membership.

The MEM proposed by the Board as the alternative raises the following issues.

1. The MEM provides a mechanism for the SOs and ACs to challenge a decision or action of the Board that they believe violates the Fundamental Bylaws. However, it does not allow SOs and ACs to challenge decisions or actions of the Board that they believe violate Articles or a Standard Bylaw.

   The CCWG views all Bylaws as important -- the distinction between Standard Bylaws and Fundamental Bylaws was simply to indicate those that had to have a higher threshold of support for a change to occur, and that there was a strong community desire to have an approval right on changes to such Fundamental Bylaws.

   We note that Individuals who meet the standing requirements have the ability to challenge decisions or actions of the Board with respect to a Standard Bylaw pursuant to the IRP processes. We presume an SO/AC could use that process to address Article and Standard Bylaw concerns, in the IRP process proposed by the Board. As discussed above under Item 24, we understand that the Board has not decided whether the IRP should be binding or non-binding.

2. The Board proposes that if the Board is found by the MEM arbitration to have |

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	decisions at any time. (See also the MEM summary and FAQs.)	violated a Fundamental Bylaw, the Board is required to remedy that violation, within the Board's discretion. However, the MEM does not deal with the situation where compliance with the arbitral award conflicts with the Board's fiduciary duty. This may be problematic with respect to matters relating to the budget, strategic/operating plans and/or implementation of recommendations from an IANA function review. Under the CMSM model, the Sole Member does not have similar conflicts with respect to fiduciary duties. 3. The MEM does not appear to address the CWG-Stewardship's requirement that the community have the right to approve a recommendation by a Special IANA Function review team to form an SCWG and to approve any recommendation by an SCWG to initiate a separation and select a new IANA Functions Operator. 4. The MEM discussion to date leaves open the important question of what level of consensus will be required to initiate a MEM. 5. The MEM discussion anticipates the use of a MEM Issue Group to pursue a MEM process, but does not yet provide a lot of detail on how the MEM Issue Group would be formed and would function to play this key role in the MEM. The Board expressed that the MEM uses the broader SO and AC multistakeholder model to reach ultimate decisions to influence

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		operational matters, as opposed to the collection of whatever grouping of SOs or ACs happen to be part of (or are eligible to be part of) the Sole Member. The Board Proposal makes it clear that the Board would like to have all SOs and ACs involved in the decision to exercise community powers, whether by voicing support or refraining from abstaining. The focus in the CCWG Proposal on SOs and ACs opting in or out of being VOTING participants in the CMSM may be viewed to imply an anticipated lack of participation by the full SO and AC community. However, the CMSM model anticipates that all SOs and ACs (and other stakeholders) participate in some manner in the Community Mechanism. The CCWG developed trigger procedures, quorum requirements and supermajority provisions to help assure that the Community Mechanism cannot take action unless a significant number of participants are involved. The discussion phase is intended to include all stakeholders, not just the voting participants. These requirements will be further developed in implementation.
		With respect to the Board's concerns about the statutory rights of the Sole Member, this was an area of considerable discussion in the CCWG that will be addressed through Bylaw provisions. Since the Sole Member only takes action as directed by the SOs and ACs with voting rights, the Sole Member's exercise of statutory rights can be limited by requiring a high supermajority of votes in the community mechanism to authorize action.
		The CCWG proposed the CMSM model based

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			on its assessment of the model's ability to deliver on the CCWG's goals relative to its risks. The CCWG considered and rejected an enhanced board-centric model after extensive analysis and deliberation indicated that it could not adequately support the enforceability of all the powers deemed essential, not only by the CCWG but by the CWG as well.
36.	**Petition: §7, ¶¶365-368**	**CHANGE RECOMMENDED**	
	To trigger community consideration for the use of a community power, an SO or AC has to agree by a resolution of its governing body that the power should be used within a window of time (generally a maximum period of 15 days from the announcement of the decision that might trigger the power's use). The threshold to agree by a resolution is a simple majority (enough votes to exceed 50%).	Agreed, subject to further discussions on the threshold.	Unclear what threshold the Board would support.
37.	**Discussion: §7, ¶¶370-372**	**GENERALLY SUPPORTED**	
38.	**Decision: §7, ¶¶373-376**	**CHANGE RECOMMENDED**	
	After the discussion window has closed, a specified time period for SOs and ACs that have voting rights in the Community Mechanism begins. This Decision Period lasts for 15 days, starting the day after the conclusion of the discussion window period. The process by which SOs and ACs vote, quorum requirements, and other associated matters are described in Section 6.2 of this	With respect to a decision on exercising a community power, Board agrees with the process proposed, including the time periods set out. The Board does not support the need for the CMSM as a centralized place where the multistakeholder participants are to vote on a decision, nor the need for a Sole Member to act upon the decision. Instead, the Board recommends that the threshold to exercise a community power be set based upon the existing SO and AC structures (i.e., a decision	On the overall concepts of the CMSM and MEM models, see comments above, under Item 35. The CMSM's exercise of community powers is, fundamentally, based on the existing SOs and ACs making decisions to do so. The Board's objections appear to be more directed toward the centralized community voting procedure for SOs and ACs that is one part of the CMSM process. The Board would prefer to rely on having

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	report. The threshold of votes required to exercise a power is described alongside each power in the following sub-sections.	to exercise the community power could require at least two SOs to support exercising the community power, and no more than one AC providing advice against exercising the community power.)	existing SOs and ACs pass resolutions to register their consent or objection to Board actions or to exercise community powers. If the Board's concerns about voting are shared by the CCWG, the Sole Member's internal voting process could be replaced with the same approach to community decisions currently in use, while maintaining the CMSM model.
39.	**Power to Reconsider or Reject Budget or Strategic Plan/Operating Plan: §7.1**	**CHANGE RECOMMENDED**	
	Community power to reject strategic and operating plans and budgets (both ICANN general and, separately, with respect to the budget for the IANA Functions) through a petition after they are approved by the Board but prior to effectiveness. A separate petition is required for each Budget or plan being challenged. If the exercise of this power leads to no budget for either or both of ICANN and the IANA Functions being in place at the start of a new financial year, a caretaker budget struck at the same level as the previous year's budget will apply. A community decision to reject a Budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community. The rationale for any community veto should be Consensus based. The veto could only concern issues that had been raised in the consultations conducted	The Board rejects the CCWG proposed process. The Board proposes that after a robust community input process on the annual budget and on the Annual Operating Plan, the community should have a maximum of two opportunities to raise a collective concern and tell the Board that a Budget should not go through, initiating a consultation requirement to see if the community concern can be addressed. The process would be similar to situations where the Board has determined that it needs to act inconsistently with GAC advice: • If Board elects to pass Budget notwithstanding community concern, the budget accepted may not include new, substantial items not accepted by the community, and may not represent an increase of more than 10% over the previous year's Budget (plus inflation). • The Board may also approve long-term Operating Plans and Strategic Plans through this consultation method, however the Board agrees with the CCWG Proposal	The Board's consultation requirement needs to be discussed in further detail. The consultation process proposed by the Board provides for significantly less community empowerment than the veto right for the community, which is a CWG-Stewardship dependency with respect to the budget. While the effect of this significant step-down in community empowerment from the CCWG Proposal may be mitigated somewhat, if the Board gives the community the same deference it currently gives to GAC advice, there is no assurance that the current GAC level of deference would, in fact, be applied under the Board Proposal. In any event, if a veto right is to be replaced with consultation, the CWG-Stewardship will need to advise on whether this will be sufficient. The CCWG's decision not to limit the number of vetoes of strategic/operating plans under its Proposal reflects substantial community discussion of the issue and was made so the Board could not simply wait out the community

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before the Board approved the budget or plan. New issues could not be raised for a second veto - all issues must be raised for consideration in a first veto process. If the community exercised its veto power with respect to any budget, operating or strategic plan, the Board would have to absorb the feedback that came with the decision, make adjustments and propose an amended budget or plan. If the community does not accept the revised proposal as suitable, it can exercise a second veto. No limit is proposed to the number of times the community can veto a strategic plan, but the Board and the community should enter into dialogue after the first veto. Where a budget or operating plan has been rejected for a second time, ICANN will operate on the previous year's budget for the new fiscal year. The Board will propose a new budget for the subsequent financial year in the usual way. If the community regards the Board's response to a second veto as unacceptable, the other community powers are available for use. To succeed, a veto would require a 66% level of support in the Community Mechanism. A 75% level of support is required for a second veto on the same budget or plan.	that those long-term planning documents should be developed jointly and with more time built into the process to provide for plans that are supported by the community. • The Board must provide reasons in the global public interest for not accepting the community's view. In the event the Board fails to abide by these processes, or the community believes that the Board has taken a decision in these areas that is inconsistent with the Mission and Core Values, the MEM will provide binding arbitration over that issue. In addition, the community will have the ability to remove individual Board Directors or recall the Board.	without addressing its concerns. The CCWG could address a concern over potentially unlimited vetoes under its Proposal by capping the number of vetoes at a certain number (but more than two), or raising the voting requirement for subsequent vetoes. Moreover, the CCWG considered at length how the community power to veto a budget (up to two times) or strategic/operating plan (an unlimited number of times), along with the other community powers, would fit with the Board's appropriate exercise of its fiduciary duties. In this consideration, a key benefit of the CMSM model chosen by the CCWG is that California law clearly permits all of the desired community powers, including the proposed veto rights over the budget and strategic/operating plan here, to be reserved to the Sole Member, thus avoiding a potential conflict with the Board's exercise of its fiduciary duties. The Board Proposal does not address how outside of a Sole Member or other member-based model this conflict will be resolved. Thus, if, for example, the Board adopted a budget over community objection with an increase of more than 10%, in violation of the Bylaws, in order to fulfill its fiduciary duties, it is unclear what, if any, legal recourse the community would have, since a bylaw that would have the effect of requiring the directors to act without regard for their fiduciary duties could be invalidated in court.

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40. **Power – Reconsider/Reject Changes to ICANN Standard Bylaws: §7.2**	**GENERALLY SUPPORTED**	
SOs and ACs who participate in the CMSM (with input from the larger community) have the collective right to reject proposed changes to Standard Bylaws after they are approved by the Board during a petition window of 15 days (but prior to effectiveness). A veto by the CMSM Sole Member would require a 66% level of support in the Community Mechanism. Where a veto was successful, the Board must propose a new set of amendments to the Bylaws as per its usual processes. The community does not have power to re-write a Board-proposed Bylaw change There is no limit to the number of times a proposed change can be rejected.	Agreed, however the community threshold to demonstrate an objection to a Bylaws change needs to be agreed upon, using the current SO/AC structure as opposed to the voting mechanism proposed in the CCWG Proposal.	We need to understand what threshold the Board is proposing. It is unclear whether the Board Proposal intends to give the community a direct veto right over Standard Bylaws amendments. California law permits specifically named persons to be given the right to veto a Bylaws amendment. If the Board's intent is to give that explicit veto right to the community, it is unclear who would be named in the Bylaws as holding the third party veto right so as to have standing to enforce the right. Without such a clearly stated veto right, it appears that the community would rely on Bylaws provisions requiring the Board to give the community the opportunity to voice objections before adopting Standard Bylaws changes. If the Board took action to amend the Bylaws, even in violation of a Bylaw provision requiring deference to community objections, in order to fulfill what the Board perceived to be its fiduciary duties, it is unclear what, if any, legal recourse the community would have, since a bylaw that would have the effect of requiring the directors to act without regard for their fiduciary duties could be invalidated in court.

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41.	**Power: Removing Individual Board Directors: §7.3**	**CHANGE RECOMMENDED**	
	Power to remove individual director before end of term without rules/ limitations for cause.

For the seven Directors appointed by one of the three SOs or by the At-Large Community, only a process led by that organization or subdivision would decide on the Director's removal.

For Directors appointed by the Nominating Committee, the SOs and ACs participating in the CMSM would make a decision on the director's removal through CMSM process. Any participating SO or AC would be able to petition for the removal of a Director appointed by the Nominating Committee.

No new call to consider the removal of that same Director can be made during the term they are serving on the Board following a vote to remove them failing or no decision being made.

Replacements: Where a Director who had been appointed by an SO or AC is removed, that SO or AC is responsible for filling the vacancy through the usual process. Where a Director who has been appointed by the Nominating Committee is removed, the Nominating Committee may appoint a new Director. In all cases, Directors appointed to replace Directors removed by this power fill the same "seat" and their term will come to an end when the term of the Director they are replacing would have | The Board supports a Community Mechanism to remove directors but suggests signed pre-service letters should be a pre-condition to Board membership and would indicate cause for immediate removal upon the occurrence of specific events, including (i) serious violations of governance standards (including statutory causes for removal such as fraud), (ii) refusal to abide by the processes set forth to enable new community empowerment areas or (iii) failure to abide by a MEM outcome.

This would be a singular process regardless of appointing body. Thresholds for petitioning for individual Director removal pursuant to pre-service letter could be 2 SO or ACs to petition and 75% of all SO/ACs to remove.

With pre-service letters, the Board would not have the ability to remove individual Directors without cause and would be limited by the pre-service letters in initiating Board member removal.

The Board supports 'due process' for Directors, including a right of reply and the ability to confront those seeking removal. The CCWG Proposal is a good starting point, but the Board supports developing interim measures prior to removal, including tiered sanctions for continuous violations.

The Board agrees that there should not be a call for removal of any individual Director more than once in the same term. If there is a path to | Although ultimately the practical effect may be similar, the Board's proposed mechanism for director "removal" is legally distinct from that proposed by the CCWG: in a Sole Member model, the Sole Member alone has the legal right, under California corporate law, to remove directors, whereas in the Board's model, the community's actions would trigger automatic resignations in director pre-service letters.

Also, under the Board Proposal removal would be available only for defined causes and only by the community as represented by the SOs and ACs.

The CCWG has discussed at length whether the whole community or only the responsible SO/AC should be allowed to trigger the removal of a given director. Reserving this power to the responsible SO/AC reinforces the accountability of the elected directors to the constituency selecting the director. Both approaches can be implemented legally, and each has arguments pro and con; the CCWG has determined that removal by the selecting group is the better choice, and, moreover, our experience with nonprofit corporate governance supports this approach.

Under the CMSM model, the Sole Member's power to remove a director without cause and without the consent of the applicable SO or AC can and would be sufficiently constrained by internal voting procedures to be developed in the implementation phase. It is true that the |

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done.	tiered sanctions, the limitation may need to be reconstructed to allow sanctions to be imposed.	introduction of the member model eliminates the Board's right to remove a director without cause.
		Under the Board Proposal, the Board would not have the ability to remove individual directors without cause, but rather the only way to remove directors would be through the pre-service letter process. However, under California law, in a non-member non-designator nonprofit corporation, the board always retains the right to remove directors without cause (Corp Code Section 5222). (Or, if some of the ICANN stakeholders were deemed to be designators because of their right to appoint directors, then those stakeholders could also remove the appointed directors without cause.)
		It is not clear to us what constitutes a "refusal to abide by the processes set forth to enable new community empowerment areas." Further guidance from the Board is needed here.
		What other "specific events" would be grounds for removal?
		The Board needs to provide more detail on their proposed petition process, including how it relates to petition/ discussion/ decision process discussed above and whether/ how the process is binding on the Board. The resignation of a director appointed by a SO/AC could be triggered by petition by the community, even if the appointing body does not want the director removed.
		The Board's suggestion regarding "interim measures prior to removal" needs to be

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			clarified and developed. What would be the process and sanctions?
42.	**Power – Recalling the Entire Board: §7.4**	**CHANGE RECOMMENDED**	
	Removal: Power of the community to remove the entire Board by petition of SOs or ACs. A Valid Petition is signed by at least two of the SOs or ACs, at least one of which must be an SO, (indicated by signature following the decision of a simple majority of that SO or AC's governing body). After a Valid Petition is raised, there is a 15-day Discussion Period for SOs and ACs to discuss whether the recall of the entire ICANN Board is warranted under the circumstances - including through a meeting of the proposed ICANN Community Forum, followed by a 15-day Decision Period during which each SO and AC would follow its own internal processes to decide how to vote on the matter. For the recall to be effective, a suitably high threshold for the exercise of this power, [75%] of all the votes available within the Community Mechanism as Sole Member Model is required. The collective results of the vote of the SOs and ACs becomes the action of the Community Mechanism as Sole Member Model without any further Board action. Interim Board: in the event that the threshold is met for a recall of the entire Board, simultaneous with that vote, Directors to serve on the Interim Board will be selected automatically. The Interim Board will consist of the group of candidates that each SO and AC with the right to appoint directors was required to provide by the end of the Discussion Period, as well as two candidates supplied by the	Removal: Removal of Board through removal of individual directors through pre-service letters discussed above. There is nothing to stop those 15 individual votes from happening concurrently. The removal of 8 or more Directors should be subject to the more rigorous thresholds proposed by the CCWG for the removal of the entire Board. Interim Board: The Board recognizes the need for a swift mechanism for seating of the Interim Board, and believes framework of the proposed approach is workable. However, the crisis situation that would be reached if the entire Board were unseated at the same time should be met with an insistence upon some key criteria, such as, a high level of independence and professionalism among the Interim Board, and the insistence on operational core competencies such as in finance, risk, audit and governance. At no time should the Board not meet the regulatory aspirations of a predominance of independent Directors. The development of a unified, objective removal process across all Directors helps reduce the potential for the Board to become more of a representational entity serving individualized interests.	Please refer to our comments under Item 41 above. The proposed alternative is unlikely as effective as the prospect of full Board recall in persuading the Board and staff to be pro-actively accountable to the community in order to avoid reaching the sort of situation where full Board recall would be considered under the CCWG 2nd Draft Proposal. What is the "unified, objective removal process," and how is the Board bound by it? With respect to the Board's concern regarding the potential that the Board become "a representational entity serving individualized interests", a determination in the Community Mechanism to recall the Board would be a collective decision, subject to extremely high thresholds that would ensure the decision reflected the general consensus of the broader community. The Board's concern about "becoming a representational entity" is less of a corporate legal issue than a cultural one: California law, by providing that separate member classes and designators can select and remove specific directors, implicitly validates the idea that nonprofit directors can represent and be responsive to the constituencies who place

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	NomCom if required, and it would replace the ICANN Board upon the threshold being met. The Interim Board will be in place only so long as required for the selection/election process for the Replacement Board and in no event longer than [120 days]. The Interim Board will not be not subject to the diversity requirements that apply to the ICANN Board generally. Replacement Board: In selecting a Replacement Board, SOs and ACs and the NomCom may, if they so choose, select Directors who were recalled and/or Directors serving on the Interim Board. In other words, service on the recalled Board or the Interim Board does not disqualify service on the Replacement Board.		them on a board. The Replacement Board was not addressed in the Board Proposal.
43.	**Accountability Requirements – Diversity: §8.1, ¶466**	**GENERALLY SUPPORTED**	
	CCWG recommends a number of specific actions to promote diversity, including specific processes within Work Stream 2.	The Board agrees that ICANN will need a path for continual evolution and improvement, but supports the utilization of "existing mechanisms" for such improvements.	We need more explanation from the Board about these "existing mechanisms" and whether the Board rejects the concept of Work Stream 2 processes altogether.
44.	**Accountability Requirements – Staff Accountability: §8.2, ¶484**	**CHANGE RECOMMENDED**	
	Work Stream 2. Develop a document through WS2 that clearly describes the role of ICANN staff vis-a-vis the ICANN Board and the ICANN community. Consider the creation of a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by Staff, establishment of regular independent (internal + community) surveys/audits to track progress and identify improvement areas,	Any improvements that relate to internal practices/policies governing an employment relationship, or that impact the management or evaluation of staff need to be coordinated to respect the proper reporting lines through "existing mechanisms".	We need more explanation from the Board about these "existing mechanisms" and whether the Board rejects the concept of Work Stream 2 processes altogether.

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	establish appropriate processes to escalate issues that enable both community and staff members to raise issues.		
45.	**Accountability Requirements – SO and AC Accountability: §8.3, ¶500**	**CHANGE RECOMMENDED**	
	As part of Work Stream 1 proposals: Include the review of SO and AC accountability mechanisms into the independent periodic structural reviews performed on a regular basis. These reviews should include consideration on the mechanisms that each SO/AC, as the case may be, has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc. through an amendment of Section 4 of Article IV of the ICANN Bylaws.

Various enhancements as part of the Work Stream 2 proposals. | Agreed. The Board encourages the CCWG to continue to identify paths for continuous improvements, particularly in the issues set out in this section. One of the areas where more work still needs to be done is in addressing the issues of community accountability, both within the community and in exercising the community powers. The conversation is not complete without an evaluation of how community leaders will remain more accountable to the members within their structures, and that the structures continue to remain open to new members.

The discussion of community accountability must be had in conjunction with the design of a new model - the conversations cannot be separated. The Board is committed to working with the community to continue the advancement of this issue, as well as to define the continuous improvement efforts that will flow from this report. | The Board says it supports identification of "paths for continuous improvement," but not whether it supports the specific processes outlined in the CCWG 2nd Draft Proposal.

Further explanation from the Board is needed on how it views the "issues of community accountability" being developed. |
| 46. | **Incorporation of the Affirmation of Commitments: §9** | **CHANGE RECOMMENDED** | |
| | AoC Reviews should be adjusted as part of incorporating them into ICANN Bylaws, including:

• Ability to sunset reviews, amend reviews, | In general, the Board is supportive of the incorporation of the reviews into the Bylaws. A few implementation paths diverge, including recognizing that there should be coordination among the community and the staff that are | How does the Board propose to effectuate coordination among the community and staff on the "review standardization effort" and who is involved in such efforts? |

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and create new reviews. • Community stakeholder groups should appoint their own representatives to review teams. • Give review teams access to ICANN internal documents. • Require the ICANN Board to consider approval and begin implementation of review team recommendations, including from previous reviews. Some review team recommendations could be rejected or modified by ICANN for reasons such as feasibility, time or cost. If the community disagreed with the Board's decision on implementation, it could invoke a Reconsideration or IRP to challenge that decision, with a binding result in the case of an IRP. • In Bylaws Article IV, add a new section for Periodic Review of ICANN Execution of Key Commitments, with an overarching framework for the way these reviews are conducted and then one subsection for each of the four current AoC Reviews. CCWG proposes, among other things, that subsequent rounds of new gTLDs should not be opened until the recommendations of the previous Competition, Consumer Choice & Consumer Trust review have been implemented.	currently working on a review standardization effort to develop documentation to address administrative review considerations, including: • Review team size and composition • Budget • Access to experts • Access to ICANN documentation • Expectations on process for adoption and implementation of reviews • Optimization and standardization of review team processes The outcomes of this standardization work would also include agreement upon how it could be changed, so that there is always assurance of community input. While the idea of being able to sunset and introduce new reviews is necessary, part of any of the AoC reviews should include consideration of their future use. The community should consider how to identify future reviews and agree upon scope. On the Competition, Consumer Choice & Consumer Trust review, the bar of future rounds of introduction of new gTLDs until prior recommendations are implemented poses a risk of a barrier to entry, and the Board is not supportive of that change. There is agreement upon changing the review	Further discussion around the cycle initiation is needed.

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		cycle to every 5 years, though the cycle initiation should be discussed with as part of the community/staff conversation. The Board reserves the right to consult with the community on specific issues that may arise in the Bylaws drafting process on the AoC importation into the Bylaws. The Board also agrees with proposing new text to capture current status of directory services work in ongoing review. The Board also supports the new IANA functions review, to be incorporated as part of the AoC related reviews into the Bylaws.	
	Stress Tests: §10	**GENERALLY SUPPORTED**	
47.	**Items for Consideration in Work Stream 2: §11**	**CHANGE RECOMMENDED**	
	Propose the Board adopt a transitional provision in its Bylaws as part of WS1 committing ICANN to implement CCWG (WS2) recommendations when supported by consensus, as well as task the WS1 with creating further enhancements to ICANN's accountability.	The Board supports the principle of continuous improvements, and recognize that ICANN will always be under a path of continuous improvement, even after the transition occurs, and set out a process (including the community and Board) of defining what improvements should be considered and standards against which continuous improvements would be measured. The Board supports the utilization of existing mechanisms, such as future ATRT reviews, as the "home" for topics where appropriate, or identify other mechanisms for continuous improvement. For example, the IRP enhancements should likely have their own	As indicated above, further explanation of "existing mechanisms" is necessary. What does the Board consider to be a "high threshold" with respect to continuous improvement? Further explanation of why continuous improvements would serve as a "bar" to the success of transition is necessary.

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	work group kicked off; the AoC review standardization should be its own community staff effort; Enhancements to the DIDP could fall neatly under the next ATRT work, etc.

Institute a Bylaws requirement that continuous improvement ideas must be supported by a high threshold of the community and to uphold the following criteria consistent with the lines of the NTIA criteria: (a) Support and enhance the multistakeholder model; (b) Maintain the security, stability, and resiliency of the Internet DNS; (c) Meet the needs and expectation of the global customers and partners of the IANA services; (d) Maintain the openness of the Internet; and (e) Not result in ICANN becoming a government-led or an inter-governmental organization.

The Board is concerned that treating areas that are naturally part of continuous improvements work as a part of the conditions for the IANA Stewardship Transition may serve as a bar to a successful conclusion of transition. | |