CCWG-ACCT ~~Working~~Work Party 1: Community Empowerment

Input for First Public Comment Report

~~Fourth Draft - as at~~ 17 April 2015 at ~~0300~~2355 UTC

This ~~paper~~ is ~~the **fourth and final draft** content for~~ Work Party 1's contribution to the CCWG's First Public Comment Report ~~that is generated from the work done to date by WP1~~. The section numbers are from the content map the co-chairs circulated earlier this month; the paragraph numbers are simply for ease of reference within each sub-section.

Where text is in bold, italicised and underlined like this, it is not consensus material based on discussion so far. In the final First Public Comment Report, the only remaining text marked like this would be to indicate lack of consensus in the CCWG for the community to consider (subject to CCWG decisions about how to mark up the work).

Content in boxes like this is to help the CCWG understand the material – things like: drafting notes, matters to consider, alternative options, questions to think about and so on. Such content is added on the Rapporteur's sole responsibility – there has not been time to test it with the full ~~Working~~Work Party except for a few hours on Friday. I hope that it assists our work next week.

Thank you to all the participants in WP1 and beyond who have contributed to the quality of this work.

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17 April 2015

6. Accountability Mechanisms

6.5 Community Empowerment

a) This section deals with ways to give the ICANN community certain powers to hold ICANN's board accountable to the broader community, whereas the Board's primary duty is to protect the interests of ICANN *the corporation*.

b) The following subsections set out our proposal for **how** the community will be empowered (through a **mechanism** called >>>xxx<<<), and our proposals for **what** the community should be able to do - the new **powers** it will gain in relation to the Board.

6.5.1   Mechanism to empower the community: >>>Name of Mechanism<<<

a) Initial legal advice has indicated that the set of powers in this report can be made available to the ICANN community. More specifically: there are approaches we can take within ICANN to make these powers legally available and durable. The CCWG continues to take legal advice and to debate the pros and cons of the specific options for this, which will feature in our Second Public Comment Report.

b) In the meantime, the CCWG is largely agreed on the following:
   * To be as restrained as possible in the degree of structural or organising changes required in ICANN to create the mechanism for these powers
   * The mechanism should be organised along the same lines as the community – that is, in line and compatible with existing SO / AC / SG structures
   * ***To ensure there is (as far as possible) an equality of voting power / representation between the three Supporting Organisations, the GAC and At Large, with lesser but present power/representation for SSAC and RSSAC***

> An alternative to the above representation was suggested: that the voting power / representation should be the same as that in the Board[1].
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> The CCWG should **discuss** this matter.

c) In our Second Public Comment report, *we will set out the proposed mechanism or two alternatives, and if alternatives are proposed will explain the decision factors the community could consider before deciding which it prefers.*

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[1] The Board has sixteen voting members. Eight are appointed by the NomCom. Two each for the ccNSO, GNSO, ASO, one for the At Large Community and the President / CEO. Ref: ICANN Bylaws Article VI Section 2(1).

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

a) The right to set budgets and strategic direction is a critical governance power for an organisation. By allocating resources and defining the goals to which they are directed, strategic/operating plans and budgets have a material impact on what ICANN does and how effectively it fulfils its role.

b) Today, ICANN's Board makes final decisions on strategy, operations plans and budgets. While ICANN consults the community in developing strategic/business plans, there is no mechanism defined in the bylaws which requires ICANN to develop such plans in a way that includes a community feedback process. Even if feedback was unanimous, the Board could still opt to ignore it today.

c) This new power would give the community the ability to consider strategic & operating plans and budgets after they are approved by the Board (but before they come into effect) and reject them - generally, based on perceived inconsistency with the purpose, mission and role set out in ICANN's articles/bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community.

> This is an open set of grounds. A suggestion is that the grounds should be specified in advance. The CCWG should **discuss** this matter.

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

e) If the community exercised this power, the Board would have to absorb the feedback that came with the decision, make adjustments and pass amended plans. The planning process should be structured so this can be done before there was any day-to-day impact on ICANN's business arising from the power being exercised.

f) In a situation of significant and sustained disagreement between the community and the Board regarding a proposed annual budget, ICANN would temporarily continue to operate according the previous year's approved budget. The Board must however resolve the situation of not operating with an approved budget – eventually it will have to reconcile itself to the community's view. If the Board is unable or unwilling to do so, other mechanisms (as set out in this part of the First Public Comment Report) are available if the community wanted to take the matter further.

g) This power does not allow the community to re-write a plan or a budget: it is a process that requires reconsideration of such documents by the Board if the community feels they are not acceptable. ***Where a plan or budget has been sent back, all the issues must be tabled on that first return. That plan or budget***

cannot be sent back again with new issues raised, but the community can reject a subsequent version where it does not accept the Board's response to the previous rejection.

h) As this power would become part of existing planning processes (incorporated into the bylaws as required), it does not raise questions of standing in respect of someone raising a complaint.

i) *At the appropriate point in the planning cycle the challenge period would be open, and any participant in the community powers mechanism would be able to raise the question. A 2/3 level of support in the mechanism would be required in the mechanism to reject a first time: a 3/4 level of support for subsequent rejection/s.*

6.5.3   Power: reconsider/reject changes to ICANN bylaws

a) ICANN's bylaws set out many of the details for how power is exercised in ICANN, including by setting out the company's mission 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 ICANN's mission and core values in a way that is not consistent with its intended role.

b) This power would give the community the right to reject proposed bylaws changes *after they are approved by the Board (but before they come into effect)*. This would most likely be where a proposed change altered the mission and core values, or had a negative impact on ICANN's ability to fulfil its purpose in the community's opinion, but would be available in response to any proposed bylaws change.

c) The time required for this power to be exercised would be included in the bylaws adoption process (*probably a two-week window following Board approval*). If the community exercise this power, the Board would have to absorb the feedback, make adjustments, and propose a new set of amendments to the bylaws.

d) *It would require a 3/4 level of support in the community mechanism to reject a proposed bylaw change*. Note that for the Board to propose a bylaws change requires a 2/3 vote in favour.

e) This power does not allow the community to re-write a proposed bylaws change: it is a rejection process where the Board gets a clear signal the community is not happy. *There is no limit to the number of times a proposed change can be rejected, but the threshold for sending one back is a supermajority in the community mechanism set out in 6.5.1 above, to limit any potential for abuse of this power*.

6.5.4   Power: approve changes to "fundamental" bylaws

a) As outlined elsewhere in this First Public Comment Report, the CCWG is proposing that some core elements of the bylaws be defined as "fundamental". Bylaws that are created as "fundamental" will be harder to amend or replace, and through a different process, than the rest of the bylaws. The intention is to make sure that matters like critical aspects of the powers and processes required to maintain ICANN's accountability to the community, and the organisation's purpose and core values, are highly unlikely to change.

> We need to ensure that the First Public Comment Report includes details of who can propose new "fundamental" bylaws, who can propose changes to "fundamental" bylaws, what is the process for such changes and so on. We presume ~~Working~~Work Party 2 is defining this.

b) This power would form part of the process set out for agreeing any changes of the "fundamental" bylaws. Through the community mechanism, the community would have to give positive *assent* to any change *before* it was finalised, as part of a co-decision process between the Board and the community.

c) Such changes would require a very high degree of community assent, as the purpose of this power is to make changing items in such bylaws possible only with very wide support from the community.

d) The threshold of support in the community mechanism to approve changes to "fundamental" bylaws is set out in section >>>x.x<<< of this First Public Comment Report, where we set out what the "fundamental" bylaws are alongside the process for their creation and amendment.

6.5.5   Power: Recalling individual ICANN directors

a) The Board is the governing body of ICANN, employing the CEO, overseeing organisational policies, making decisions on key issues, defining the organisation's strategic and operating plans and holding the staff to account for implementing them.

b) Directors are currently appointed for a fixed term and generally are in office for the whole term they are appointed - by their SO/AC, by the Nominating Committee or by the Board (in the case of the Chief Executive and relating to their status as an employee). The power to remove individual directors of the ICANN Board is at present only available to the Board itself, and can be exercised through a 75% vote

of the Board. There is no limitation[2] on the types of situation for which the Board can remove a director.

c) This power would allow the community to end the term of a director, and trigger a reappointment process. For directors appointed by supporting organisations or advisory committees, or subdivisions within them (e.g. within the GNSO), a process led by that organisation or subdivision could lead to the director's removal. The principle is that the appointer is also the remover, and that is where the decision is made.

d) ***For the removal of non-SO/AC directors appointed by the Nominating Committee,*** an SO, AC or SG could escalate issues with the director to the point where there was consideration of the director's removal by the community mechanism noted in 6.5.1 above.

An alternative proposal for dealing with NomCom appointed board members has been presented by Avri Doria for consideration. ~~The CCWG should~~ **discuss** ~~this.~~

In order to remove an individual director(s) appointed by the Nominating Committee, a Nomcom recall process will be added to the Bylaws section on Nomcom. The recall process would be initiated by a petition by 3 AC/SO, including at least 1 SO and 1 AC. The petition must include a description of the case for removal. The Recall process would be chaired by an emeritus chair of a previous Nominating Committee selected by the ICANN Board. The Recall Committee will be made up of appointees from the various AC/SO according to the same formula used to populate the Nominating Committee and will use the same processes and procedures. The members of the current nominating committee will not be qualified for participation. The single focus of the Recall Committee will be to review the case for removal presented by the petitioners and decision on removal of Board Member(s) referred to in the AC/SO petition. The Board Members(s) under consideration for removal will be given an opportunity to respond to any issues in the petition. Decision will be by 3/4 vote of the Recall Committee. The Recall Committee will be disbanded after completing its task.

Other WP1 members have different variations on this proposal, including that the power should simply sit with the Nominating Committee itself.

The CCWG should **discuss** this.

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e) Whether the decision-making body is the SO/AC or the community mechanism, removal would require a **[66%] [75%]** level of support (or equivalent) to decide in favour of removal.

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[2] 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.

f) ***The petitioning threshold to start the consideration of removing a director is to be agreed once we have greater clarity on what the mechanism is to do so, but should be set at least at a majority of those who would make the decision.***

> WP1 has had considerable debate on the above, with the question of whether common requirements should be imposed on SOs/ACs for the thresholds of their processes – and if so whether ranges should be specified.
>
> For example: "Each SO/AC will define its own process for removal but the threshold to call for such must be at least A% or equivalent, and the majority to enact a removal must be at least B% or equivalent."
>
> The CCWG should **discuss** this matter.

6.5.6   Power: Recalling the entire ICANN Board

a) There may be situations where removing individual ICANN directors is not seen as a sufficient remedy for the community: where a set of problems have become so entrenched that the community wishes to remove the entire ICANN Board in one decision.

b) Beyond the power set out above to remove individual directors, this power would allow the community to cause the removal of the entire ICANN Board. The community would initiate use of this power on the petition of ***two thirds of the SOs or ACs in ICANN, with at least one SO and one AC petitioning***.

c) After a petition is raised, there would be a set period of time for SOs / ACs to individually and collectively deliberate and discuss whether the removal of the Board is warranted under the circumstances. Each SO and AC, following its internal processes, would decide how to vote on the matter.

d) It would be preferable for a decision of this sort to be the result of cross-community consensus. Where this consensus is not apparent, a suitably high threshold for the exercise of this power, **[75%] [85%]** ***of all the support available within the community mechanism would have to be cast in favour to implement it.*** This ensures that non-participation does not lower the threshold required to remove the Board.

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

e) Ongoing work in the CCWG will flesh out how to deal with transitional matters raised, including at least the following:
  • the need to ensure ICANN does have a board in place after the removal (whether there is:
    o a phase of "caretaker" behaviour by the outgoing Board while new members are elected, or
    o a need to elect alternate Board members in each board selection process, or
    o a pre-defined subset of the community that could function as an interim Board;
  • continuity in the role of Chief Executive were the Board to be removed;
  • "caretaker" conventions for the CEO to follow in a situation where the Board had been removed.

6.6   Incorporating AoC into the ICANN Bylaws

a) The Affirmation of Commitments (AoC) is a 2009 bilateral agreement between the US government and ICANN[3].   After the IANA agreement is terminated, the AoC will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.

b) Elimination of the AoC would be simple matter for a post-transition ICANN, since the AoC can be terminated by either party with just 120 days' notice. The CCWG Stress Test Work Party addressed this contingency since it was cited in prior public comments[4]. The CCWG evaluated the contingency of ICANN unilaterally withdrawing from the AoC against existing and proposed accountability measures, including:

  1. Preserving ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews.
  2. Bringing the four AoC review processes into ICANN's bylaws.

c) All of the other sections in the AoC are either preamble text or commitments of the US Government. As such they don't contain commitments by ICANN, and so they cannot usefully be incorporated in the bylaws.

d) Each of the above measures is addressed below.

e) The AoC-based reviews and the commitments ICANN has made are being added to the ICANN bylaws as part of the IANA Stewardship transition process with the hope. It is possible that once adopted as fundamental bylaws, ICANN and the NTIA would

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[3] Affirmation of Commitments, Sep-2009, at https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en

[4] See https://community.icann.org/display/acctcrosscomm/ST-WP+--+Stress+Tests+Work+Party

be able to could consider mutually agree thatagreed changes to or ending of some or all of the AoC had been superseded and was, since in some respects it will no longer be necessary.

f) In reviewing this suggested approach to incorporating the AoC commitments in the bylaws, the community should consider the degree to which it finds the suggestions implementable and reasonable. The concepts outlined through these changes, rather than the specific drafting quality or precision, are the points to consider at this stage in the CCWG's work.

6.6.1 Preserving ICANN Commitments from the AoC

Note: The interaction between this drafting and the work done by Work Party 2 on the "Fundamental Commitments and Core Values" has not yet seen reconciliation done. This is something the CCWG will need to **discuss**.

ICANN Commitments in the AoC	As expressed in ICANN bylaws
3. This document affirms key commitments by DOC and ICANN, including commitments 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.	in revised Core Values: *Proposed core value 6* (with **additional text**) 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 nature of ICANN.** *Proposed core value 5* (with **additional text**): Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment **that enhances consumer trust and choice.**
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.	in revised Core Values: *Proposed new Section 9 in bylaws Article III Transparency* (with **additional text**) ICANN will perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial **or non-commercial** impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

ICANN Commitments in the AoC	As expressed in ICANN bylaws
7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.	in revised Core Values: *Proposed insertion of new section 8 in Article III Transparency* (this is AoC para 7 in its entirety including **additional text**): ICANN commits to 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 consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.
8. ICANN affirms its commitments to: (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; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.	in revised Core Values: *Proposed inserting (a) in full as a new core value in the bylaws* (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. Question the need for either A or B In Feb-2015, the ICANN CEO told a US Senate Committee, "the jurisdiction of ICANN shall remain in the United States of America, and we stand by this". This established an expectation, so the absence of ~~8b~~8(b) would be noted when Congress reviews the transition proposal. *Proposed inserting (c) in full as a new core value in the bylaws* (including **additional text**): 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
9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below :	See Section 6.6.2 of this document for bylaws text to preserve commitments to perform these ongoing reviews.

In paragraph 8 above, there is the need to carefully consider whether a) or b) need to be included.

The CCWG should **discuss** this.

6.6.2   AoC Reviews

a) Suggestions gathered during 2014 comment periods on ICANN accountability and the IANA stewardship transition suggested several ways the AoC Reviews should be adjusted as part of incorporating them into ICANN's bylaws:

- Ability to sunset reviews and create new reviews
- Community stakeholder groups should appoint their own members to the review teams
- Give review teams access to all ICANN internal documents
- Require the ICANN board to approve and implement review team recommendations, including recommendations from previous reviews.

b) In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments,** with an overarching chapeau for the way these reviews are conducted and then one subsection for each of the four current Affirmation Reviews.

c) These proposals are presented beginning on the next page.

Possible Bylaw that provides a chapeau for all periodic reviews

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

Proposed Bylaw Text	Comment
ICANN will produce an annual report on the state of improvements to Accountability and Transparency. ICANN will be responsible for creating an annual report that details the status of implementation on all reviews defined in this section. This annual review implementation report will be opened for a public review and comment period that will be considered by the ICANN Board and serve as input to the continuing process of implementing the recommendations from the review teams defined in this section.	This is new. It is a recommendation based on one in ATRT2 and becomes more important as reviews are spread further apart.
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.	
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.	
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.	
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.	

Proposed bylaws text for this Affirmation of Commitments review	Notes
# 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. In this review, particular attention will be paid to: (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; (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; (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.; and (f) assessing the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section. The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews. 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.	This commitment is reflected in Bylaws Core Values Rephrased to avoid implying a review of GAC's effectiveness Moved from AoC text into this list AoC required every 3 years.

Proposed bylaws text for this Affirmation of Commitments review	Notes
## 2. **Preserving security, stability, and resiliency.** 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. In this review, particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. 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. 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.	This commitment is reflected in Bylaws Core Values Change: AoC required every 3 years.

Proposed bylaws text for this Affirmation of Commitments review	Notes
## 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. 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. 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: (a) the gTLD application and evaluation process; and (b) safeguards put in place to mitigate issues involved in the expansion. Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented. These periodic reviews shall be conducted no less frequently than every four years, measured from the date the Board received the final report of the relevant review team.	This commitment could be added to Bylaws Core Values Re-phrased to cover future new gTLD rounds. New AoC also required a review 2 years after the 1 year review.

Proposed bylaws text for this Affirmation of Commitments review	Notes
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. 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. 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
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. This periodic review shall be conducted no less frequently than every three years, measured from the date the Board received the final report of the prior review team.	AoC also required every 3 years.

Possible Place Holder for CWG – tbd Text to come from CWG (Design Team N).

Periodic review of the IANA Functions	new
tbd	

6.X   Bylaws changes suggested by Stress Tests

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

> *Identification of contingencies to be considered in the stress tests.*
> *Review of possible solutions for each Work Stream including stress tests against identified contingencies.*
> *The CCWG-Accountability should consider the following methodology for stress tests*
> - *analysis of potential weaknesses and risks*
> - *analysis existing remedies and their robustness*
> - *definition of additional remedies or modification of existing remedies*
> - *description how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies*
>
> *CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) its results being analyzed timely before the transition.*

b) The CCWG Stress Test Work Party documented contingencies identified in prior public comments. The Stress Test Work Party then prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.

c) The exercise of applying stress tests identified changes to ICANN bylaws that might be necessary to allow the CCWG to evaluate proposed accountability mechanisms as adequate to meet the challenges uncovered.

6.X.1 Forcing the board to respond to Advisory Committee formal advice

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

b) The CCWG is developing enhanced community powers to challenge a board decision, but this may not be effective in cases where the board has taken no decision on a pending matter. In those cases, the community might need to force the board to make a decision about pending AC advice in order to trigger the ability for community to challenge the decision via Reconsideration or IRP processes.

c) Recommendation 9 from ATRT2[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.*

d) This ATRT2 recommendation, however has not yet been reflected in ICANN bylaws, so this change should be required before the IANA stewardship transition. In addition, there is a question as to whether a board "response" would be sufficient to trigger the RR and IRP review mechanisms in this proposal. The CCWG and CWG are waiting on legal advice as to that question.

6.X.2 Require consultation and mutually acceptable solution for GAC advice that is backed by consensus

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

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
18. Governments in ICANN's Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's board.	Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try to find "a mutually acceptable solution."	One proposed measure is to amend ICANN bylaws (Article XI Section 2, item 1j) to give due deference only to GAC consensus advice, and indicate the definition of consensus that the GAC uses presently.
Consequence: Under current bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve GAC advice that restricted free expression, for example.	This is required for any GAC advice, not just for GAC consensus advice. 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 procedures to use majority voting instead of its present consensus.	The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require due deference only to advice that had GAC consensus. GAC can still give ICANN advice at any time, with or without consensus.

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

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

b) The CCWG proposes a response to Stress Test 18 to amend ICANN bylaws such that only consensus advice would trigger the obligation to try to find a mutually acceptable solution. The proposal is to amend ICANN Bylaws, Article XI Section 2 clause j as seen below. (addition here **_bold, italic and underlined_**)   Clause k is also shown for completeness but is not being amended.

> *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 ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.* **_With respect to Governmental Advisory Committee advice that is supported by consensus_**, *the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

> *k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.*

c) Note that the proposed bylaws change for stress test 18 does not interfere with the GAC's method of decision-making. If the GAC decided to adopt advice by majority voting or methods 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."

d) Moreover, ICANN would still have to explain why GAC advice was not followed: "In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice""

e) The only effect of this bylaws change is to limit the kind of advice where ICANN is obligated to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution". That delicate and sometimes difficult consultation requirement would only apply for GAC advice that was approved by consensus – exactly the way GAC advice has been approved since ICANN began.

f) NTIA gave specific requirements for this transition, and stress test 18 is the most direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. Unless and until there are other proposed measures that address this stress test, the proposed bylaws change should remain in consideration as an important part of the community's proposal.