

## ICANN Board Comments on Third CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations

14 December 2015

### Commitment to Enhancing ICANN Accountability

The Board appreciates the opportunity to provide comments on the Third CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations as part of the CCWG's process. The Board is pleased with the extent of agreement within the CCWG-Accountability reflected in the Third Draft Proposal, and expects that the input by the SOs and ACs, and the broader community, during this final public comment phase is important to finalize a consensus document. In line with the CCWG Chairs' 9 December 2015 communication to the SO and AC leadership, the Board is sharing its comments with the respective SOs and ACs, in addition to filing them with the CCWG.

As part of the ICANN community, we share the same goals – improving the organization, confirming that ICANN adheres to its Mission, and building on existing mechanisms to ensure ICANN and its stakeholders continue to remain accountable to the broader Internet community, independent of a contract with the U.S. Government. ICANN is an ever-improving and evolving organization, and will continue to improve in the future through the organizational and AoC reviews.

The Board's comments identify many areas where the Board is in complete agreement with the proposals, as well as areas of continued concern. The Board previously identified a few areas of concern in response to the Summary document posted on 15 November. In an effort to engage as quickly as possible, the Board flagged these areas for the CCWG-Accountability through two messages to the group ([19 November 2015](#) and [24 November 2015](#)). The Board now provides specific proposals to address the Board's concerns in those areas, along with rationale. Upon review of the CCWG-Accountability's Final Report that includes the decisions of the Chartering Organizations, the Board will have to consider whether its concerns were addressed and whether the final recommendations (including the specifics within those recommendations) are in the global public interest. The Board looks forward to receiving the Final Report and considering it using the process set out in the [16 October 2014 Resolution](#). The Board is open to discussing its inputs further with the CCWG-Accountability.

Much of the CCWG-Accountability Proposal will require Bylaws changes, and the language throughout the Proposal represents drafting guidance to counsel for those Bylaws. The Board expects to participate in the Bylaws development process.

## The CCWG-Accountability Recommendations

### I. Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers - Pages 12-15; Annex 1

#### A. The Board Supports the Establishment of the Empowered Community including the Sole Designator Model with Powers of Board Appointment, Removal, and Enforcement. The Board also agrees to Inspection Rights for the Community that are Well-Defined

The Board supports the CCWG-Accountability recommendations of an Empowered Community, with the Sole Designator holding the limited powers of appointment, removal, and enforcement.

As the Board understands the Sole Designator, it is a companion to how the community will come together to exercise new powers. The Sole Designator does not have any independent ability to make decisions for the community; it acts only on the direction of the community. For example, in appointing Board Directors, the Sole Designator will only be empowered to appoint Directors selected by the various organizations that currently appoint to the ICANN Board (i.e., At-Large Community, ASO, ccNSO, GNSO and NomCom). The Sole Designator can only remove Directors that the community has determined to remove. For escalation and enforcement of community powers, the Sole Designator is only empowered to, for example, initiate an IRP after the Empowered Community collectively determines that enforcement is appropriate. The Board is supportive of this clear, limited role.

With regard to Paragraph 55, bullet 4, on the community involvement in defining the public interest, the Board supports that the development of a definition of the “global public interest” should involve the full community, including the Board. That is aligned with the work that is already underway and consistent with the strategic plan. The language suggested by the CCWG for the Articles of Incorporation should be modified, however, to reflect that once developed, the organization will be guided by a clear definition of global public interest. The suggestion that “global public interest” should be left to “interpretation” could lead to unpredictable and conflicting results, and the Board sees an important role in helping to define the global public interest as it relates to ICANN’s Mission.

#### B. Board Comments and Supporting Rationale on Well-Defined Inspection Rights

With regard to inspection rights, the Board agrees that there are ways to enhance ICANN’s transparency, including access to information. Inspection rights would include access to accounting records, and minutes of meetings. However, the Board has concerns about the inspection rights concept that need to be addressed. The right to inspect ICANN documents that is referenced in Paragraphs 56, 57, 63 and elsewhere is not yet appropriately scoped. The Board is concerned with a few issues:

- Giving the Sole Designator an inspection right represents a fundamental expansion of the Designator structure. As discussed above, the Designator structure is a legal entity that will enforce the community powers. The Sole Designator is not the source of those powers. One of the major concerns that led to the rejection of the membership model was the member becoming a power structure within ICANN. If the Designator is given rights outside of the Board appointment/removal and enforcement powers, these rights

must be tempered by companion work on accountability of the Designator. That work has not been done. Instead, the Board recommends that the inspection right be provided to the community, with enforcement power to the Designator.

- The Proposal cites California Corporations Code Section 6333 as the definition of the inspection right. While the general concept can be imported into the Bylaws, the code section itself should not be cited in the Bylaws, as it references inspection of documents related to “interests as a member,” and membership rights and interests do not exist in ICANN. If the reference to membership rights remains, this would leave Independent Review Panels or courts to interpret questions of how California Non-Profit Membership interests might translate into the ICANN Designator model.
- There is no information in the Proposal of how the Sole Designator or the Community would reach a decision of what documents it needs, when or for what purpose, or what the Sole Designator would do with the documents once received. There is no information on whether the Sole Designator should have any particular competence to review these documents for any particular purpose.<sup>1</sup>

To reinforce the importance of the concerns raised above, should the Board’s comments not be directly addressed, the Board would have to consider, as specified in the [16 October 2014 resolution](#), whether it believes the specifics of the recommendation meet the global public interest and whether there would be a need to initiate a formal dialogue with the CCWG over the inspection rights issue. Set forth here is a proposal that would address the Board’s concerns. The Board’s concerns could be addressed in other ways.

### **C. Board Proposal on Well-Defined Inspection Rights**

#### *Additional Transparency Requirements*

The Board supports a well-defined right of inspection of accounting records and minutes of meetings in support of the community powers. The Board proposes that the inspection right be framed in the Bylaws as follows: *The community will have a right to seek accounting records and minutes of meetings that are related to the exercise of the Community Powers. To obtain records, the community should have a minimum of two SOs/ACs seeking a Community Forum on the topic, and no fewer than three SOs/ACs supporting a request for the records. The Sole Designator should have the power to enforce ICANN’s failure to abide by the records request, following an escalation path (as appropriate) of reconsideration, Ombudsman and ultimately IRP. The right to the records rests in the Empowered Community.*

This formation achieves a few objectives. First, similar to the use of inspection rights in the membership structure, this gives the community special access to records that are tethered to the powers that the community holds. Second, it reinforces the Empowered Community as having interests in the records, as opposed to making the Sole Designator as a separate power structure within ICANN. Third, because the inspection rights are tethered to the community powers, the Sole Designator is not being asked to take on inspection or investigatory powers that are beyond its enforcement role. With these limitations, the Board would support the

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<sup>1</sup> Within the CCWG-Accountability, there were discussions regarding the use of non-disclosure agreements to require confidentiality of the Sole Designator (i.e., the collection of representatives from

inclusion of inspection rights in the Fundamental Bylaws.

#### *New Commitment to Investigations*

Separately, the Board understands that there could be areas where the community might wish to have additional power in requiring – and having transparency into – investigations of potential fraud or financial mismanagement in ICANN. To address these concerns, the Board supports the development of the following inspection or audit process: *Upon three SOs/ACs coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specified audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.* The investigatory process should first be developed outside of the ICANN Bylaws, and can be incorporated into the Bylaws when appropriate.

Allowing for the right to access specific documents related to the community powers, as well as a new ability to trigger third-party investigations, addresses the community concerns of greater access to documents and additional accountability in operations. These two companion processes provide a clear line between information that is appropriate for general public release (transparency), and information that may be confidential or proprietary but necessary to review if there are concerns raised about management practices.

As stated in its [24 November comment to the CCWG](#), the Board agrees with the CCWG-Accountability that ICANN can and should review and improve transparency practices on documentation. ICANN's Documentary Information Disclosure Policy (DIDP) and its Defined Conditions for Non-Disclosure need to be reviewed to increase transparency practices, and the Board supports this Work Stream 2 action.

## II. Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce – Pages 16-23; Annex 2

### A. The Board Supports This Recommendation, and Suggests Further Defining the Thresholds

The Board supports the engagement, escalation, and enforcement process laid out in the Proposal. The process appears to be designed to facilitate discussion among the ICANN community, while balancing issues of resourcing and costs. The expectation that much of the community discussion, if it is ever needed, will occur using remote participation is a welcome addition and eases the ability for all to participate and engage.

### B. Board Comments and Supporting Rationale on Further Defining Thresholds

The thresholds as set out in the Proposal (Pages 22-23) seem well defined for the design of ICANN today. The Board would not support lowering of any of these thresholds<sup>2</sup> because these community powers represent the voice of the ICANN community. A reduction of the threshold could risk that a decision does not reflect the community's will.

While the thresholds seem well defined for the design of ICANN today, the Board recommends further defining the thresholds for exercising community powers in the event that the number of SOs or ACs change. Leaving this issue for future consideration raises the potential for renegotiation of the community thresholds. This potential for renegotiation adds a level of instability and a lack of predictability. As a result, the Board recommends (1) clarifying that the thresholds identified in the Proposal are based on the current structure; and (2) identifying the percentages that will be applied in the event that there is a change in the number of SOs or ACs in the future.

### C. Board Proposal on Further Defining Thresholds

The Board provides the following table, including percentages, to be used in implementation of the thresholds that any community decision – today or in the future – would have to meet. The inclusion of percentages will address the renegotiation concerns raised above.

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<sup>2</sup> Upon implementation, care should be taken to assure that the defined thresholds are consistent across all of the areas where they appear in documentation, as well as clearly documented to relieve any question of which threshold applies to which power.

Required Community Powers?	Should a conference call be held?	Should a Community Forum be convened?	Is there consensus support to exercise a Community Power?	
			Current	Future, If Change
1. Reject a proposed Operating Plan/Strategic Plan/Budget	2 AC/SOs support blocking	3 AC/SOs support blocking	Minimum 4 support rejection, and no more than 1 objection	80% support rejection, and no more than 1 SO/AC objection
2. Approve changes to Fundamental Bylaws and Articles of Incorporation	2 AC/SOs support approval	3 AC/SOs support approval	Minimum 4 support approval, and no more than 1 objection	80% support rejection, and no more than 1 SO/AC objection
3. Reject changes to regular bylaws	2 AC/SOs support blocking	2 AC/SOs support blocking	Minimum 3 support rejection, and no more than 1 objection	60% support rejection, and no more than 1 SO/AC objection
4a. Remove an individual Board Director appointed by a Supporting Organization or Advisory Committee	Majority within the appointing AC/SO	Majority within appointing AC/SO	Invite and consider comments from all SO/ACs. 75% majority within the appointing AC/SO to remove their director	Invite and consider comments from all SO/ACs. 75% majority within the appointing AC/SO to remove their director
4b. Remove an individual Board Director appointed by the Nominating Committee	2 AC/SOs support	2 AC/SOs support	Minimum 3 support, and no more than 1 objection.	60% support rejection, no more than 1 SO/AC objection

Required Community Powers?	Should a conference call be held?	Should a Community Forum be convened?	Is there consensus support to exercise a Community Power?	
			Current	Future, If Change
5. Recall the entire board of directors	2 AC/SOs support	3 AC/SOs support	Minimum 4 support, and no more than 1 objection <sup>3</sup>	Minimum of 4 support and minimum of 80% support, with no more than 1 SO/AC objection
6. Initiate a binding Independent Review Process	2 AC/SOs support	2 AC/SOs support	Minimum 3 support, and no more than 1 objection. Require mediation before IRP begins	60% support rejection, and no more than 1 SO/AC objection Require mediation before IRP begins
7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation	2 AC/SOs support	3 AC/SOs support	Minimum 4 support, and no more than 1 objection	80% support rejection, and no more than 1 SO/AC objection

<sup>3</sup> A minority of CCWG-Accountability participants prefer to require 5 Supporting Organizations and Advisory Committees, or allow 1 objection to block consensus

### III. Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws' – Pages 23-26; Annex 3

#### **The Board Supports This Recommendation**

It is important that the community supports changes to ICANN's governing documents. While the Board has always required Bylaws changes to be submitted for public comment and has considered those comments when taking decisions, the formalization of this process is welcome.



#### IV. Recommendation #4: Ensuring Community Engagement in ICANN Decision Making: Seven New Community Powers – Pages 26-35; Annex 4

##### A. The Board Supports The Seven Areas of Community Powers

The Board supports that the community will be given seven new powers in the areas of:

- 1) The Power to Reject ICANN’s Budget or Strategic/Operating Plans
- 2) The Power to Reject Changes to ICANN Standard Bylaws
- 3) The Power to Remove Individual ICANN Board Directors
- 4) The Power to Recall the Entire ICANN Board
- 5) The Power to Approve Changes to Fundamental Bylaws and Articles of Incorporation
- 6) The Power to Initiate a Binding Community Independent Review
- 7) The Power to Reject ICANN Board Decisions Relating to Reviews of IANA Functions, Including Triggering of Post-Transition IANA Separation

The Board supports that the community engagement process, which focuses on discussion and building consensus prior to the community determining that it will exercise any of these powers, as noted in the discussion on Recommendation #2.

##### 1) The Power to Reject ICANN’s Budget or Strategy/Operating Plans (Pages 27-28)

###### **1)a. The Board Recommends a Clarification to Both the IANA Budget and ICANN Caretaker Budget**

Since the end of September, ICANN’s CFO and members of the Board (in their individual capacities) have been actively engaged in discussions with a sub-group of the CCWG-Accountability to define how the community power on the budget would be exercised, and specifically (1) how the IANA Budget fits into the community rejection process; and (2) defining the notional framework of a “caretaker” budget to be used during a rejection period. As further definition of the caretaker budget is required, this part of this community power was not fully incorporated into the Proposal. Further work is ongoing to finalize the definition of a caretaker budget, involving the CFO, some members of the Board (in their individual capacities), the CCWG-Accountability sub-group and CCWG-Accountability as a whole.

###### **1)b. Board Comments and Supporting Rationale on IANA Budget**

In implementation, the Board supports the inclusion of additional clarification of the role of the operating communities served by the IANA Functions in the acceptance or rejection of the IANA Functions Budget.

In this regard, the Board believes that the operating communities who are directly affected by the IANA Functions Budget are the ones who should have say over the IANA Functions Budget. These operational communities include the gTLD Registries, the Regional Internet Registries (RIRs), the ccTLD Registries and the IETF. The method by which these operational communities can accept or reject the IANA Functions Budget can be defined in implementation. The budget to operate the IANA Functions is currently less than 10% of the overall ICANN Budget. Stability in the IANA Functions operational funding is promoted while the power to reject ICANN’s budget by the Empowered Community remains full and meaningful.

To reinforce the importance of the concerns raised above, should the Board's comments not be directly addressed, the Board would have to consider, as specified in the [16 October 2014 resolution](#), whether it believes the specifics of the recommendation meet the global public interest and whether there would be a need to initiate a formal dialogue with the CCWG over the IANA Budget issue. Set forth here is a proposal that would address the Board's concerns. The Board's concerns could be addressed in other ways.

#### **1)c. Board Proposal on IANA Budget**

In implementation, the Board suggests that any process through which a portion or the whole of the IANA Budget is subject to rejection must include the voice of the operational communities served by the IANA Functions. These operational communities include the gTLD Registries, the RIRs, the ccTLD Registries and the IETF.

#### **1)d. Board Comments and Supporting Rationale on ICANN Caretaker Budget**

Though the Board would favor a "targeted veto" which would prevent a specific activity or object of disagreement from the community to be carried out, the alternative of a caretaker budget (as currently defined) is considered an acceptable alternative under the conditions that it would only be triggered following the adequate steps of escalation.

#### **1)e. Board Proposal on ICANN Caretaker Budget**

In the event that the process for community power to reject the Operating Plan and Budget is invoked, and after the preceding escalation mechanism (as described in Recommendation #2) has failed to resolve an issue, the rejection is triggered. While the rejection is in effect and being resolved, ICANN needs an operating plan and a budget so that it can continue to operate on a day-to-day basis. The notion of a caretaker Operating Plan and Budget has been defined to address this need. The caretaker budget is in substance a replacement Operating Plan and Budget designed to allow the organization to operate its basic and primary functions, while avoiding "non-indispensable" work during the period of the rejection is in effect. The conceptual definition of the caretaker budget has been formulated, but the more detailed definition of what is "indispensable" or not now must be further documented.

The Board accepts the above described approach to the veto process and corresponding caretaker Operating Plan and Budget. The Board also recommends that the caretaker budget approach be embedded in the Fundamental Bylaws, including the responsibility of the CFO to establish the caretaker budget in accordance with the defined approach. The Board's acceptance of this approach is also predicated on the consistency of the implemented solution with the conceptual definition described above.

## 2) The Power to Reject Changes to ICANN Standard Bylaws (Pages 28—29)

### **2)a. The Board recommends clarifying the Interrelation of Policy-Related Bylaws Changes**

The Board supports the community having an opportunity to weigh in on Bylaws changes. The Board agrees that Bylaws changes should not be put into place over significant community objection.

### **2)b. Board Comments and Supporting Rationale on Clarifying the Interrelation of Policy Recommendations and Bylaws Changes**

The Board has a specific concern in the description of the new issue raised in Paragraph 158, addressing the interrelation of policy recommendation and Bylaws changes. The Board understands that the Proposal addresses the following principles:

- The need to clearly identify Bylaws changes that are proposed as a result of implementation of policy recommendations adopted by the Board.
- Policy-related Bylaws changes should accurately reflect the approved policy.
- After a complete and inclusive Policy Development Process, the community powers should not be used to re-litigate the outcomes of that Process through attempts to block the policy-related Bylaws changes. The existence of the community powers is a complement to the multistakeholder process, and does not replace the need for early and open engagement.

The Board supports each of these principles. The language provided at Paragraph 158 is not clear, therefore the Board proposes some specific changes below in an attempt to reflect these principles.

### **2)c. Board Proposal on Clarifying the Interrelation of Policy Recommendations and Bylaws Changes**

The Board proposes that Paragraph 158 could be clarified as follows:

*The escalation and enforcement processes for this power are as presented in ‘Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce.’ with the following exception:*

- *The CCWG-Accountability proposes that there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception, which would be embedded into the Fundamental Bylaws, would be as follows:*
  - *The ICANN Board must separate the approval of Bylaw changes that are the result of a Policy Development Process from any other proposed Bylaw changes*
  - *When the Board is considering a Bylaws change that is the result of a Policy Development Process, the Board must so indicate. The community may only exercise its power to reject a Standard Bylaws change that is the result of a Policy Development Process when the Supporting Organization that made the Policy recommendation (1) is among the SOs and ACs formally supporting the holding of a Community Forum; and (2) is among the SOs and ACs that support the rejection of the Bylaw. If both of these conditions are not met, then the*

*community power cannot be used to reject the Standard Bylaws change that is the result of a Policy Development Process.*

### 3) The Power to Remove Individual ICANN Board Directors (Pages 31-32)

#### **3)a. The Board Supports this Recommendation, with the Development of Clear Process and Rationale**

The Board supports the recommendation that the community should be empowered to remove Board members. The process that the CCWG-Accountability has developed for the removal addresses many of the Board's earlier concerns in how this power would be exercised, and the Board suggests specific further development of clear process and use of rationale for removal.

#### **3)b. Board Recommends the Development of Clear Process and Rationale**

The Board suggests that the process for engagement and escalation for both the SO/AC-appointed Directors and the NomCom-appointed Directors should be the same. Both should involve a dialogue and engagement with the affected Director, the appropriate SO/AC Chair or Chair of the NomCom, and, as an addition to the CCWG-proposed process, the Chair of the Board (or Vice-Chair if the matter concerns the Chair of the Board). The involvement of these relevant parties allows for a clear understanding of the issues relating to the community's dissatisfaction and concerns.

The Board specifically notes the importance of transparency around the initiation of a community discussion on Board removal (individual or entire), and that such removal discussions be supported by clear rationale for why removal is sought. The Board is focusing on the importance of clear, fulsome rationale to support such an extraordinary action.

Finally, the Board again notes the importance of independent judgment of Directors and the diversity in cultural background and in experiences of the individual Board members that make up the Board. Appointing Directors that have different experiences, cultures and expertise makes for a stronger Board. The independence of individual board members helps protect ICANN's governance model from capture or control by special interests and assures stronger independent governance of the organization.

Rationales for removal, and transparency around the removal processes allows the community assurance that the reasons relating to any proposed removal are not in conflict with good governance of ICANN. This will enable ICANN to assure that it is maintaining good governance practices and adhering to the principles, laws and regulations that ICANN operates under as a not-for-profit organization. Any Board, be it interim or regularly seated, should have accepted standards for independence and diversity.

#### **3)c. Board Proposal on the Development of Clear Process and Rationale**

The Board suggests a process for escalation prior to the removal for all Directors, whether SO/AC-appointed Directors or NomCom-appointed Directors. Concerns must be raised directly with the affected Director, as well as the Chair of the Board (or Vice-Chair if there are concerns with the Chair). *This could be achieved through including in the petition phase (as described, for*

*example in Annex 4 Paragraph 40 (NomCom-appointed) or Paragraph 47 (SO/AC-appointed)) a requirement that prior to completion of the petition phase, that the affected Director and the Chair of the Board (or Vice-Chair, if appropriate) be invited to a dialogue. The dialogue would also include the individual(s) bringing the petition and the chair of the SO/AC where the petition is under consideration. The purpose of the dialogue is to gain a full understanding of the issues leading to the petition, and consider if there are other ways to address the community concerns and the purpose of and rationale for any proposed removals.*

The Board reinforces the importance that any initiation of a community discussion on Board removal (individual or entire) be supported by clear rationale for why removal is sought. This could be achieved through adding to the petition phase (as described, for example in Annex 4 Paragraph 40 (NomCom-appointed) or Paragraph 47 (SO/AC-appointed)) *“Any initiation of a petition must be supported by a fulsome and written rationale stating the reasons why removal is sought.”*

Finally, to address the Board’s comments on independence, an additional bullet point could be added to Paragraph 175 stating, *“The Respective Supporting Organization, Advisory Committee and NomCom shall consider independence as part of its identification of replacement Board members.”* In addition, a line could be inserted at the end of Paragraph 183 (and assuring corresponding text is included in the Bylaws) stating, *“In line with best practices, at least half of the Interim Board members should meet the regulatory requirements of independence.”*

#### 4) The Power to Recall the Entire ICANN Board (Pages 32-33)

##### **4)a. The Board Supports this Recommendation, and Supports Maintaining High Thresholds**

The Board has supported the recommendation that the community should be empowered to remove the entire Board. The process that the CCWG-Accountability has developed for the removal addresses many of the Board’s earlier concerns in how this power would be exercised. It is important to continue to ensure clear thresholds for the removal of the entire ICANN Board.

##### **4)b. Board Comments and Supporting Rationale on Maintaining High Thresholds**

As noted in response to Recommendation #2, the Board would object to any attempt to lower the threshold for the removal of the entire Board below a minimum of four SOs/ACs (see threshold table reference in comments on Recommendation #2). The current threshold is important to safeguard that the special action of entire Board recall is supported across the ICANN community.

The Board comments above on the rationale for the removal of Board members, and the need for independence apply here as well.

##### **4)c. Board Proposal on Maintaining High Thresholds**

With regards to implementation, the Board suggests that measures be implemented in the Bylaws to prevent any attempt to lower the threshold for the removal of the entire Board below four SOs/ACs. The current threshold is important to safeguard that the special action of entire Board recall is supported across the ICANN community.

Additionally, the Board Proposals above under Removal of Individual ICANN Board Directors apply here as well.

5) The Power to Approve Changes to ICANN Fundamental Bylaws and Articles of Incorporation (Pages 29—30)

**The Board Supports This Recommendation**

The Board supports that the community should have a role in the determination of whether changes to Fundamental Bylaws and the Articles of Incorporation are appropriate.

6) The Power to Initiate a Binding Community Independent Review (Pages 33-34)

**6)a. The Board Supports this Recommendation with Clear Demonstration of Community Support**

The development of process through which the community can direct the Sole Designator to enforce the other community powers is supported. This is an important part of accountability and the enhancements that are being developed.

**6)b. Board Comments and Supporting Rationale on Clear Demonstration of Community Support**

The Proposal includes the CCWG-Accountability's first effort to define the Community IRP, and provides for a Community IRP (which would be ICANN-funded) on all areas that are suggested for the IRP. A Community IRP will be fully funded by ICANN, and represents a use of ICANN's resources – resources that would otherwise fund initiatives within ICANN – and thus should be exercised minimally. While the Board initially recommended that the Community IRP should only be used for enforcement of Fundamental Bylaws and upholding the Empowered Community, the Board supports that the Community IRP should also be available for more general claims of violations of ICANN's Bylaws or Articles of Incorporation, as recommended at Paragraph 187. The Board is concerned that there should be protections built in on the potential community bringing challenges against other parts of the community, for example to challenge Board action on policy recommendations arising out of appropriately run policy development processes. The Board recommends that in those situations, a higher threshold might be appropriate.

For other recommendations for implementation on the IRP, please see below the discussion of Recommendation #7 (e.g. the Board does not support the use of the IRP (community or individual) to challenge process-specific expert panel determinations).

**6)c. Board Proposal on Scope of Community IRP**

Where the Empowered Community is considering the initiation of a Community IRP that could put parts of the community in conflict with each other (such as challenging Board action on policy recommendations arising out of appropriately run policy development processes) the Board suggests that such a decision should have a higher threshold (4 SOs/ACs, with no more

than 1 objecting). Alternatively, during implementation, an exception process could be developed that would allow for the impacted part of the community to have a required voice in the decision to initiate the Community IRP. This could, for example, be similar to the PDP carve-out developed for the Standard Bylaws rejection process.

With regards to the expert panel grounds set out in Paragraph 187, please see the Board Comments and Proposal set out in discussion of Recommendation #7 below.

7) The Power to Reject ICANN Board Decisions Relating to Reviews of IANA Functions, Including Triggering of Post-Transition IANA Separation (Pages 34-35)

#### **The Board Supports this Recommendation, with Clarification of Footnote 5**

The Board supports this recommendation and understands that this is a dependency between the CWG-Stewardship recommendations and the CCWG-Accountability Proposal.

The Board notes in Footnote 5, Page 27, that the creation of a Separation Cross Community Working Group requires a supermajority of each of the GNSO and the CCNSO Councils and needs to be approved by the ICANN Board following public comment as well as a community mechanism delivered by the CCWG-Accountability Process. The Board proposes that this footnote is clarified to be applicable only to the separation of the names community services of the IANA Functions. For example, inserting “for the naming community” in the first sentence so it reads: *“If the CWG-Stewardship’s IANA Functions Review determines that a separation process for the naming community is necessary, it will recommend the creation of a Separation Cross Community Working Group.”* If the scope is intended to be broader, any review process would have to include the other operational communities.

## V. Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values – Pages 36-39; Annex 5

### A. The Board Supports the Recommendations On Core Values and Commitments. The Board Supports Modifying the Mission Statement with an Emphasis on Clear, Concise Language

On 19 November, the Board provided the CCWG-Accountability with a [statement](#) on the proposed revisions to the Mission Statement. It is important that ICANN's Mission Statement be simple and clear. The CCWG-Accountability drafting effort on the Mission Statement has been intertwined with efforts on defining the scope of how ICANN serves its Mission, and the resulting language – which is still under discussion – continues to raise concern. The Board reiterates its comments here, with suggested changes.

### B. Board Comments and Supporting Rationale on Clear and Concise Language In the Mission Statement

The Board's concerns with the Mission Statement are twofold: ICANN's operational and policy role, and contractual enforcement.

In the proposed removal of the "chapeau" text, the remaining language specifying ICANN's role leaves out key components of ICANN's work. For example, in describing ICANN's role in regards to the coordination and allocation of names in the DNS, there was no mention of ICANN's key operational role; the text only focused on ICANN's role in policy development. To make sure that the Mission is an accurate reflection of ICANN's work, the Board provided language (below) that identifies both the operational and policy role that ICANN has in each of the areas described.

With regards to contractual enforcement, the ongoing dialogue within the CCWG-Accountability on issues of "grandfathering" contracts and trying to define ICANN's enforcement abilities as part of the Mission drafting efforts has not addressed the Board's concerns. Additionally, from the community discussions and lack of consensus on language, clarity is needed on the underlying purpose or goal for the proposed limitation. The Board cannot support including language in the Mission Statement that does not meet the community support levels that will be in place in the future for Fundamental Bylaws changes. Further, the Board cannot support the inclusion of language that is vague and an attempt to serve multiple goals. The Mission Statement is the test for ICANN's conduct, and the inclusion of complex text poses risks for the entire ICANN community that a future Independent Review Process panel will interpret the provisions in ways that the community never wished to be bound. If there were ever a test of the Mission statement before the IRP or the Court, general principles of law would require that any vagueness in the Bylaws be considered against ICANN. For predictability, it is in the interest of the entire community to have the Bylaws language as clear, precise and comprehensible as possible.

The Board agrees with the following two principles that serve as the basis for the contract enforcement discussions within the CCWG-Accountability: (1) ICANN's entering into and enforcement of Registry and Registrar contracts is an important component of ICANN's work in coordination and allocation of names in the Root Zone of the DNS; and (2) ICANN is not a regulator, and does not regulate content through these contracts.



Particularly as it relates to the contractual enforcement issues, to reinforce the importance of the concerns raised above, should the Board's comments not be directly addressed, the Board would have to consider, as specified in the [16 October 2014 resolution](#), whether it believes this recommendation meets the public interest and whether there would be a need to initiate a formal dialogue with the CCWG over the proposed edits to the Mission Statement. The Board's concerns could be addressed in other ways.

### **C. Board Proposal on Clear and Concise Language In the Mission Statement**

The Board restates its proposal to separate the Mission Statement from the Scope of Responsibilities, and proposes a new additional paragraph for incorporation into the Bylaws that states that ICANN should not be in content regulation and ICANN should have the power and flexibility to enforce its contractual agreements with Registries and Registrars. The Board proposes that the directions provided to counsel for drafting the Mission Statement rely on the following language, which was provided in the Board's [19 November statement](#):

*The Mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the global, interoperable Internet's unique identifier systems.*

*In serving this mission, ICANN has the following scope of responsibilities:*

- 1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope includes both the allocation and assignment of names in the root zone as well as the coordination of the development and implementation of domain name policies.*
- 2. Coordinates the operation and evolution of the DNS root name server system. In this role, ICANN retains an operational role as well as considers inputs from the communities dependent on the root server system.*
- 3. Coordinates the allocation and assignment at the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers and ratifies, at the global level, policies developed that are reasonably and appropriately related to these IP and AS numbers.*
- 4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.*

*ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.*

The Board supports embodying the principles laid out above ("ICANN's entering into and enforcement of Registry and Registrar contracts is an important component of ICANN's work in coordination and allocation of names in the root zone of the DNS. ICANN is not a regulator, and does not regulate content through these contracts") in the Bylaws, however this type of language is not appropriate for inclusion in a Mission Statement. The Board suggests charging the Bylaws drafting team with a recommendation of where in the Bylaws to reflect this

description of the reach of Registry and Registrar contracts.

Based on the evolution of the text to date, and the suggestion that principles are laid out elsewhere in the Bylaws, the Board does not support the inclusion of any further text within the final paragraph of the Mission Statement.

The Board's [19 November statement](#) still reflects the Board's concerns in full.

## VI. Recommendation #6: Reaffirming ICANN’s commitment to respect internationally recognized Human Rights as it carries out its mission – Pages 40-42; Annex 6

### A. The Board Supports Integrating Human Rights Considerations in ICANN, with Clear Timetable to Define Human Rights Framework

As reiterated in its [24 November statement](#), the Board remains committed to upholding human rights as appropriate within its limited Mission and scope of responsibilities. However, the Board has concerns over the staged approach to addressing human rights that is reflected in the Proposal. At the CCWG-Accountability’s meeting in Los Angeles, the Board [noted](#) that if appropriate, it would support the inclusion of Bylaws text on human rights. However the work has not progressed enough, and more needs to be done before considering Bylaws placement.

### B. Board Comments and Supporting Rationale on Integrating Human Rights Considerations and Setting Clear Timetable to Define Human Rights Framework

The current Proposal includes “placeholder” text for the ICANN Bylaws (Page 41, Paragraph 255), awaiting a framework of interpretation to guide how a commitment to human rights within ICANN would be implemented. The development of a framework, which the Board supports, should be completed before a commitment to follow that framework is inserted into the Bylaws.

The inclusion of interim text into the Bylaws risks unintended consequences, including potential uses of IRPs to test human rights issues that are not anticipated or are not within ICANN’s scope. ICANN’s ability to conduct day-to-day operations or facilitate community policy development could be impacted, and the binding rulings of the IRP could result in an expansion of ICANN’s Mission in ways that the community does not support. While the language itself does not – in itself – create any additional obligation for ICANN, others could rely on the language to attempt to define new obligations that the community does not support.

While the Board appreciates that the proposed interim Bylaw text is intended to not place any additional obligations on ICANN, the language could actually be used to greatly expand ICANN’s human rights obligations. Some specific examples of concern include:

- Inclusion of a human rights commitment in the Bylaws would immediately allow for IRPs to be brought on human rights grounds. Similarly, there could be lawsuits relying on the Bylaws language filed against ICANN. When the Bylaws commitment is vaguely stated, any interpretation of the Bylaws language will be against ICANN, and have binding impact on the community’s ability to define a framework. Neither the IRP or the Courts will have any legal reason to wait for the community to complete the next step, and could make their own interpretations of the language.
- The proposed Bylaws text, with reference to “applicable law” to judge the acts of ICANN and those with relationships with ICANN, leaves open the question of which law should be applicable. This language expands, as opposed to limits, the potential scope of human rights challenges.
- The language about “*any entity having a relationship with ICANN*” raises the suggestion that the ICANN Bylaws have the power to bind those with relationships with ICANN in

how those entities respect, consider or enforce human rights. ICANN does not have this power. For example, registries and registrars contracted with ICANN do not take on any human rights obligations because they contract with ICANN. This language suggests that because they have a relationship with ICANN, there are human rights concerns that they could be obligated to address.

- The language suggests that there is already a framework within which ICANN processes complaints, requests or demands for ICANN to enforce human rights issues, which there is not. Indeed, there still appears to be divergence within the community about what should be considered as human rights considerations within ICANN's Mission. Without a framework, challenges could be raised around issues that are not agreed to be within ICANN's Mission, such as access, content or education.

Leaving these types of issues open puts the community, ICANN stakeholders such as contracted parties, and ICANN itself at risk. Courts or binding IRP panels could be used to create precedent defining what human rights are within ICANN's Mission. These determinations are better left for the ICANN community to sort out, instead of being imposed. Leaving these questions open for others outside of the ICANN community to define is not consistent with enhancing ICANN's accountability. The Board urges that the full scope of defined work on human rights should include consideration of impacts across all of ICANN's activities.

To reinforce the importance of the concerns raised above, should the Board's comments not be directly addressed, the Board would have to consider, as specified in the [16 October 2014 resolution](#), whether it believes the specifics of this recommendation meet the global public interest and whether there would be a need to initiate a formal dialogue with the CCWG over the timing of addressing the human rights issue. Set forth here is a proposal that would address the Board's concerns. The Board's concerns could be addressed in other ways.

### **C. Board Proposal on Human Rights on Integrating Human Rights Considerations and Clear Timetable to Define Human Rights Framework**

The Board proposes a clear path forward to allow a meaningful expression of human rights considerations in ICANN. The proposal takes into account all the ongoing work in ICANN on this topic, including the efforts of groups outside of the CCWG-Accountability. The Board proposes:

1. The Board will work with the community to develop a Human Rights Statement (a practice inspired by the Ruggie Principles), including by engaging an expert to assist in the development. ICANN will report to the community at the ICANN 55 Marrakesh meeting on the status of work and timelines for community input and review.
2. To address the Board's concerns noted above regarding broad Bylaw provisions, human rights considerations could be incorporated into the organizational, review process, such as requiring that reviews look at human rights as one of the elements, whether in an Affirmation of Commitments review or structural review.
3. The Work Stream 2 recommended work should be expanded to include considerations of whether human rights issues should be reflected within the Bylaws or elsewhere, and how human rights should be considered and reflected within the policy development work that is passed to the Board for approval. The framework must reflect responsibilities across the community, and not just at the Board or staff level.

## VII. Recommendation #7: Strengthening ICANN’s Independent Review Process – Pages 42-46; Annex 7

### **A. The Board Supports This Recommendation, but Requests Enhancements to Uphold the CCWG-Accountability’s Stated Purpose of the IRP**

The Board supports the recommendations on the IRP aligned with the CCWG-Accountability’s stated purpose (at Paragraph 228) for the IRP: “to ensure that any ICANN action or inaction does not exceed the scope of its limited technical mission and complies with both its Articles of Incorporation and Bylaws.”

The Board notes that there is ongoing work within the CCWG-Accountability regarding the development of the procedures that will be applied during the IRP. The Board agrees with many on the CCWG-Accountability that the sub-group that is being convened for this work will benefit from diverse participation, as well as from expertise from international arbitration and dispute resolution practitioners.

### **B. Board Comments and Supporting Rationale on the Independent Review Process and Enhancement to Uphold the CCWG-Accountability’s Stated Purpose of the IRP**

The Board still has concerns, as it stated in its comments on the Second Draft Report, that the IRP is not the venue to resolve disputes related to process-specific expert determinations. The availability of appeals mechanisms for expert determinations used in any process, such as the New gTLD Program, should be considered and addressed within the development of the process or program. For example, if the community wishes for the ability to more directly challenge substantive determinations of expert panels in the New gTLD Program application process, then the rules for such challenges should be developed as part of the review of the New gTLD Program, including considerations of how competing or inconsistent determinations should be treated. The IRP panels should not be used for specific, substantive operational decisions – the suggestion that a standing panel that exists for primarily judicial purposes should substitute its opinion over that of a range of specially-convened expert panels does not support accountability, predictability, security or stability. The use of the IRP for these operational decisions moves the IRP outside of the CCWG’s stated purpose.

The Board is supportive of allowing IRP challenges as they relate to process-specific expert panels in any situation where ICANN’s convening of an expert panel or acceptance of the expert panel’s opinion represents a violation of ICANN Bylaws. There does not need to be any specific reference to expert panels in the IRP section, as any violation of the ICANN Bylaws is already appropriately the basis of an IRP.

The Board also notes that the CCWG-Accountability now includes for the first time, at Paragraph 230, that the IRP should be used to “hear and resolve claims that ICANN has not met the requirements of the Documentary Information Disclosure Policy”. This is another example of encouraging the IRP to engage in operational review, as opposed to serving the CCWG-Accountability’s stated purpose for the IRP. Given the refinements to the Reconsideration Process, the Board suggests that preference should be given to the less resource-intensive

Reconsideration Process, which is already well-positioned for oversight over staff's operational actions.<sup>4</sup>

### **C. Board Proposal on the Independent Review Process and Enhancement to Uphold the CCWG-Accountability's Stated Purpose of the IRP**

The Board's comments could be addressed through the removal of the reference to the IRP having responsibility for reconciling conflicting expert panel decisions, as well as removal of the scope to resolve claims regarding the DIDP. To the extent that ICANN's action in either of these areas are alleged to be a violation of ICANN's Bylaws or Articles of Incorporation, the right to bring an IRP already exists. On the operational side, however, the use of the IRP as suggested would expand the scope of the IRP beyond the intended purpose. Further, escalation paths and appeals on these types of operational concerns should be process specific. For the DIDP, the Work Stream 2 effort on the DIDP can and should consider if there should be more robust escalation path, for example considering the refinements to the Ombudsman role. For conflicting decisions of expert panels in New gTLDs, an appeals process could be developed through the upcoming cycle of reviews.

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<sup>4</sup> The reference to the Sole Member at Page 43 should be updated to reflect the Empowered Community.

## VIII. Recommendation #8: Improving ICANN’s Request for Reconsideration Process – Pages 46-47; Annex 8

### **The Board Supports This Recommendation**

The Board supports the recommendations on the Reconsideration Process.

There are details that will need to be addressed in implementation, including considerations of potential issues that could arise when the ICANN Ombudsman has already reviewed an issue that later becomes the subject of a Request for Reconsideration (such as competing confidentiality concerns from the Ombudsman complaint process, or requester dissatisfaction with the Ombudsman outcome).

## IX. Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws – Pages 48-50; Annex 9

### The Board Supports This Recommendation

The Board supports the incorporation of the Affirmation of Commitments reviews into the Bylaws, and thanks the CCWG-Accountability for recognizing the importance of maintaining operational standards for the reviews outside of the Bylaws. These operational standards should include issues such as: composition of review teams, review team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to Counsel.

With regards to WHOIS, we note that the CCWG has adjusted the language regarding WHOIS, and note that while this has been captured in the recommendations the CCWG should also clarify this change in the main document. *We would also suggest changing “enforcing existing WHOIS policy” to “enforcing WHOIS/future Registration Directory Services policy” in Paragraph 250 (Page 48) and appropriate annexes.*

The Board supports the development of the IANA Functions Review as a Fundamental Bylaw, similar to the reviews currently described within the AoC.



**X. Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees – Pages 50-51; Annex 10**

**The Board Supports This Recommendation**

The Board supports the focus that the CCWG-Accountability has placed on accountability Supporting Organizations and Advisory Committees, and the proposal to include this as part of the scope of organizational reviews in the ICANN Bylaws as reflected in Paragraph 266, Page 50. As the community obtains new powers to impact the operations of the organization, it is important that accountability is reviewed and strengthened among the community, and not just focused how the ICANN Board is accountable to the community.

**XI. Recommendation #11: Board Obligations with regards to Governmental Advisory Committee Advice (Stress Test 18) – Pages 51-52; Annex 11**

**The Board Supports This Recommendation**

The Board notes its appreciation for the work of the CCWG-Accountability to bring this issue to resolution prior to the publication of the Proposal. The recommendation addresses the Board's key issue that GAC advice for which special consideration is granted is supported by consensus. The recommendation also balances concerns that the GAC should maintain autonomy over its Operating Procedures, particularly in addressing issues of not allowing a single objection to repetitively block consensus within the GAC.

## **XII. Recommendation 12: Committing to further accountability work in Work Stream 2 – Pages 52-54; Annex 12**

### **A. The Board Supports Further Accountability Work And Confirms Commitment to How It Will Consider Further Recommendations**

As the Board confirmed for the CCWG-Accountability in a [13 November 2015 email](#):

*“The Board supports the context and elements around the list of WS2 items, and the work of the community to address these points.*

*The Board will use the same approach to accepting the WS2 recommendations as those of WS1, including meeting the criteria set out by NTIA.*

*We look forward to working with you and the community on the mechanisms, and will provide appropriate support for the work on the WS2 issues.”*

### **B. Board Comments and Supporting Rationale on Further Accountability Work And Confirms Commitment to How It Will Consider Further Recommendations**

The Board has concerns over the revised Recommendations and the open-ended scope reflected in the proposed interim Bylaw language, in two parts. First the CCWG-Accountability Proposal at Paragraph 281 seeks ICANN commitment to implement in full the CCWG-Accountability Work Stream 2 recommendations. This exceeds what the Board committed to even for Work Stream 1 recommendations, and the Board cannot agree to implement recommendations that it has not seen or evaluated. The Board remains ready to consider the Work Stream 2 recommendations under the same process it will evaluate the Work Stream 1 recommendations, as specified in the [October 2014 resolution](#). The Board understands that the CCWG-Accountability may have intended for this section to provide the same Board obligations that exist when considering recommendations arising out of the required reviews (including those currently in the AoC). Just as the Board is not required to accept all recommendations arising from those reviews, the suggestion of such a requirement here should be removed.

Second, the CCWG-Accountability proposal seeks to place unlimited topics into Work Stream 2, with the inclusion of the phrase “but not limited to” at Paragraph 283. The Board’s [13 November email](#) was sent in response to a finite list of Work Stream 2 recommendations. The Work Stream 2 effort should be defined and limited, to align with the staff and voluntary resources available. There is a real risk of volunteer burn out with the ongoing intensity of accountability work, and a corresponding opportunity cost of lack of progress on other important policy topics that are important to the ICANN community.

To reinforce the importance of the concerns raised above, should the Board’s comments not be directly addressed, the Board would have to consider, as specified in the [16 October 2014 resolution](#), whether it believes the specifics of this recommendation meet the global public interest and whether there would be a need to initiate a formal dialogue with the CCWG over the timing of addressing the WS2 issue. Set forth here is a proposal that would address the Board’s concerns. The Board’s concerns could be addressed in other ways.

### **C. Board Proposal on Further Accountability Work And Confirms Commitment to How It Will Consider Further Recommendations**

At the time that the Board approves of the CCWG-Accountability's Work Stream 1 recommendations, the Board will pass a resolution noting that it will follow the same process for considering Work Stream 2 recommendations. The Board will not support the inclusion of Bylaws language that does either of the following: (1) obligates the Board to implement all Work Stream 2 recommendations without specifying any process or test for the consideration of those recommendations; or (2) suggests that the scope of the Work Stream 2 effort can expand beyond the specifically identified topics. There are continuous avenues of review and improvement within ICANN, such as the ATRT reviews, that are defined and occur on regular cycles. It is important for the special CCWG-Accountability effort to come to a close and allow for future issues to be considered within the appropriate and regular review cycles.

If the CCWG-Accountability proceeds with a recommendation that the Board formalize its commitment to Work Stream 2 considerations in the Bylaws, the Board will support such an effort under the following conditions:

- *Delete, 'but not limited to', in proposed interim Bylaw text in Paragraph 282, Page 53.*
- *Include the principles that were included in the Board's October 2014 resolution on consideration of Work Stream 1 efforts, including: a requirement for consensus recommendations; dialogue if the Board believes that any of the recommendations are not in the global public interest; requirement that a 2/3 vote of the Board is required to reject any recommendation after consultation; and agreement that the Board will not change the consensus recommendations on its own.*
- *Include that the NTIA Criteria must be considered and upheld in any Work Stream 2 recommendation. This is a fundamental backstop to confirm that the goals of the transition remain part of how ICANN continues to evolve. Those fundamental criteria include that the recommendations:*
  - 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.*

Additionally, as the items identified for Work Stream 2 move forward, we appreciate the need to pace this work in relation to the other work ongoing across the organization, as we appreciate the IANA Stewardship Transition effort has taken a lot of volunteer time, sometimes requiring other work to be shifted to lower priority. With the Work Stream 1 recommendations in place, we look forward to working with the community to streamline and avoid duplication of work (such as the possibility of addressing transparency issues in Work Stream 2 as well as in ATRT3; or having Work Stream 2 efforts and a separate working party on human rights considerations). This is important for ICANN's volunteers as well as efficiency of work and resourcing across the organization. Finally, in implementation, the Board believes that it is important for all continuous improvement recommendations (Work Stream 2 or otherwise) to meet the criteria that the NTIA set out for the IANA Stewardship Transition as set out above.