

1 ALAC Comment on CCWG-Accountability Initial Draft Proposal

2 DRAFT – 02 June 2015

3 Introduction

4 The ALAC appreciates the amount of work that has gone into producing this Draft Proposal.

5 Although the ALAC is primarily represented by its five Members on the CCWG, extensive consultation
6 with and discussion among a much wider At-Large community has taken place in parallel with the CCWG
7 deliberations.

8 Although At-Large, like other parts of the community, is not unified in how accountability should be
9 addressed, this statement reflects a carefully thought out consensus of the larger group. Within the
10 comment, references will be made to the At-Large Advisory Committee (ALAC) as the body that formally
11 issues statements, but that notwithstanding, the positions presented do represent the position of the
12 wider group.

13 For clarity, the comments will be in reference either to Draft Proposal (4 May 2015 version) Section
14 numbers, and/or individual Paragraph numbers, whichever is most applicable.

15 In reply to specific questions, omission of such questions from the statement implies that the ALAC
16 concurs with the proposal and has nothing to add at this stage, or our comments in the sections
17 preceding the comments are sufficient.

18 Overview

19 In general the ALAC is supportive of the direction being taken by the CCWG and will provide guidance on
20 a number of issues, some of which the CCWG is explicitly seeking, and others where the ALAC believes
21 that reconsideration may be required.

22 Section 3: Principles

23 **Paragraph 50, Section 3.1.1.a:** The ALAC believes that in accordance with the Affirmation of
24 Commitments, ICANN has a responsibility to develop policies that fill foster user trust in the DNS. The
25 ALAC understands that ccTLDs are outside of ICANN scope in regard to this.

26 The ALAC believes that fostering trust in the DNS must be incorporated into the ICANN Bylaws. This can
27 be accomplished by adding the phrase “and to foster user trust in the DNS” to Paragraph 56 as well as
28 including it in Commitments. The reference in paragraph 107 is not sufficient since that is in relation
29 solely to competition.

30 **Paragraph 65:** The ALAC believes that it is appropriate to define the reference to Private Sector
31 leadership as explicitly meaning NOT led by the governments. And furthermore that although it is may
32 be led by the private sector (as defined here, governments do have a role to play in the ICANN
33 Multistakeholder model.

34 The ALAC recommends caution on classing any Bylaws related to reviews as fundamental without a
35 provision for altering the timing, with widespread community agreement, but without requiring a formal
36 Bylaw change.

37 **Section 4: Appeals Mechanisms**

38 **Paragraph 133, Section 13:** The ALAC notes that although independence from ICANN is required, there
39 is no such requirement with respect to independence to other parties related to the dispute. Such
40 parties could be contracted parties, or local, national or international entities related to the dispute.

41 **Section 4.2:** Regarding the enhancements to the Reconsideration Process, many recent reconsideration
42 requests involved decisions of external panels. The ALAC suggests that the proposal be explicit as to
43 whether such decisions are eligible for reconsideration and if so, how they are to be carried out (purely
44 Board reconsideration or re-chartering a new and/or expanded panel). Also to be considered should be
45 whether discrepancies between multiple panel results could be the subject of reconsideration.

46 Paragraph 156: The ALAC supports adding specific target deadlines for resolution of reconsideration
47 requests, but suggests that they be worded as to allow for extraordinary situations which might require
48 elongation of period allowed. Paragraph 159 makes such an allowance for the 60 day period but not for
49 the 120 day period.

50 **Section 5: Community Empowerment**

51 **Section 5.1:** The ALAC has significant concerns with the concept of enforceability. With the exception of
52 removal of one or more Board members, most ALAC members do not believe that legal enforceability is
53 either required or desirable.

54 We have specific concerns on the possibility of personal liability on volunteers who are not backed by
55 any corporate employers who might have interests similar to theirs.

56 Moreover, if one looks at past cases where parts of the community were displeased with Board actions,
57 it is difficult to find instances were:

- 58 • Sufficient parts of the community were displeased so as to trigger the kinds of powers we are
59 now envisioning; and
- 60 • The situation was sufficiently severe as to warrant community action.

61 The ALAC understands that the prime intent of “enforceability” is not to take legal action, but to ensure
62 that the community has the power to convince the ICANN Board that community wishes should take
63 precedence. Nevertheless, the existence of such ultimate power is troublesome to many within the
64 ALAC and At-Large.

65 The ALAC believes that even in the unknown future, if ICANN is to be even somewhat viable, there must
66 be sufficient goodwill to ensure community empowerment, and that the threat of removal will be
67 sufficient to cover any eventuality where this is not the case.

68 If, however, the CCWG ultimately recommends empowerment that is legally enforceable for any of the
69 envisioned community powers, the following must be mandatory:

- 70 • ACs, SOs, their Unincorporated Associates (UA) and the individuals empowered to act on behalf
71 of the UA, SO or AC must be fully indemnified by ICANN against any action that might be taken
72 against them in their capacity as ICANN participants.
- 73 • ICANN must fully fund any legal or other actions taken by the above entities in enforcing the
74 powers granted herein.
- 75 • Indemnification funds must be held in escrow to ensure that they will be available without
76 requiring ICANN action to release them.
- 77 • Legal enforcement of community powers could ONLY be exercised if a critical mass of SO/ACs
78 supported such action. Individuals and/or less than a critical mass of SO/ACs could not take such
79 action and certainly would not be indemnified if such action could not be effectively controlled.
- 80 • The availability of indemnification and holding the funds in escrow must be enshrined in a
81 Fundamental Bylaw.

82 In summary, enshrining the powers in the Bylaws is critical. Legal enforcement of them, with the
83 exception of Board member removal, is of far less importance.

84 Regarding Members vs Designators, the ALAC believes that Membership is the correct choice. It is a
85 simpler and well understood concept. Even if designators could achieve the same results, it is a
86 construct that is foreign to most of the community and will add another level of complexity to an ICANN
87 which is already nearly impossible to explain to newcomers or outsiders. Since both require legal status,
88 there does not seem to be anything in favor of the adoption of the Designator model.

89 That being said, if there is a mechanism to ensure that Board member removal can be enshrined in the
90 Bylaws without either a designator or membership model, the ALAC would far prefer that route. It has
91 been suggested that agreements pre-signed by Board members prior to taking their seats agreeing to
92 resign at the request of the community could accomplish that (similar to the mechanism described in
93 Paragraph 235).

94 **Section 5.1.2 Influence in the Community Mechanism:** The ALAC would accept the Reference
95 Mechanism of 5 votes per SO, the ALAC and the GAC, and 2 votes for the SSAC and RSSAC only if the
96 SSAC and RSSAC agree. In all other matters, these ACs are according similar rights and privileges in
97 ICANN and the ALAC sees no reason to alter that at this point. Although the size of the SSAC and RSSAC
98 are “small”, so is the ASO, and there seems to be no question about according it full weighting status.
99 We note that it might not be unrelated that the SSAC and RSSAC have been allotted lesser status and
100 neither are represented in the CCWG. The SSAC has explicitly stated that it is not a chartering
101 organization SOLELY due to lack of available resources and not due to lack of interest.

102 In the absence of support for the Reference Mechanism by the SSAC and RSSAC, the ALAC supports
103 Alternative B giving all ACs and SOs 5 votes.

104 Five is the correct number to allow regional diversity to be adequately covered by those ACs and SOs
105 that are organized base no ICANN's regions.

106 Under no circumstances would the ALAC agree to support Alternative A giving 4 votes to SOs and 2
107 votes to all ACs.

108 **Section 5.5 Power: Removing individual ICANN Directors:** Although some members of At-Large believe
109 that AC/SO-appointed Directors should either not be removable by either the community in general or
110 not solely by the AC/SO that appointed them, the majority believe that if a groups has the ability to
111 appoint a Director, they should similarly be able to withdraw that appointment. Specifically, a Director is
112 appointed not to "represent" the appointing group, but because the members of the group believe that
113 the person shares common values with the group. If that belief ceases to be correct, then it is
114 reasonable to no longer support that person as a Director.

115 The ability to remove individual Board members is viewed as crucial by most ALAC Members. Without it,
116 the only alternative is to remove the entire Board and this is a cataclysmic alternative as described
117 under the comment to section 5.6.

118 It has been argued that being able to withdraw such an appointment will "politicize" the appointment,
119 that the Director will alter their behaviour because of it, or that the group might withdraw the
120 appointment as punishment for not voting the way they would have wished on a specific issue. The
121 ALAC believes that all of these reasons have little merit.

122 Politicizing: This a curious comment given the the fact that the selection of Board Members by some
123 AC/SOs is already an extremely political event.

124 Altered behavior: Although the Director does not "represent" the group, surely the Director should
125 remain in regular contact with the group and understand where the group stands on specific issues.
126 When a vote is approaching that may go against the group, it is reasonable for the Director to approach
127 the group and explain why there are other considerations. That kind of dialog should allow the
128 occasional divergence of opinion. If this becomes a regular occurrence, perhaps the person DOES need
129 to be replaced. Moreover, it has been said that some Directors already vote differently near the end of
130 their term, hoping to encourage renewal – a characteristic which one would hopefully encourage non-
131 renewal.

132 Punishment: This rationale is interesting. We endow a group with the very onerous responsibility of
133 appointing Directors to ICANN's Board, and we trust them to do it with care and consideration of the
134 needs of the organization. But we then presume that they may act capriciously if they don't get their
135 way in a particular vote. If we really believe that an AC or SO would acting in that way, then ICANN
136 needs to rethink whether constituent bodies should be allowed to appoint Directors at all. Either we
137 have some level of trust that the groups will behave in a serious and thoughtful way on behalf of the
138 organization as a whole, or we don't. We cannot have it both ways.

139 On the issue of removing NomCom appointees to the Board, the ALAC believes that this should be a
140 community decision, just as it is to remove the entire Board. The ALAC does not support having the
141 regular NomCom remove Directors (and specifically those appointed by previous NomComs). The work
142 of the NomCom is sufficiently difficult that this additional task would either come at a time when they
143 are already overwhelmed with the task of identifying and narrowing down new potential appointees, or
144 could come at a time when the NomCom is not even fully organized. Moreover this responsibility would
145 taint what should be a group that is focussing purely on finding the best candidates for the Board as well
146 as other ICANN bodies. Lastly, since the NomCom must operate in complete secrecy (regarding
147 candidates), it would be a bad plan to alter that rule for this particular task allowing full consultation
148 with the community. It would be equally bad to shroud the removal process in secrecy and NOT allow
149 consultation.

150 There is a simple solution to this. There should be a sub-committee of the NomCom appointed to carry
151 out NomCom-appointed Director removals. This committee should be composed of the representatives
152 of the SO/AC (or their Unincorporated Associations) empowered to act on behalf of the SO/AC for all of
153 the other empowerment mechanisms. We therefore have the removal of NomCom appointees carried
154 out by the very community that desires these removals, without having to create an artificial and
155 perhaps distorting intermediary mechanism. The Bylaws restricting who can sit on a NomCom or what
156 NomCom members can do after their term may need to be reviewed for the members of this sub-
157 committee, particularly in the expected typical case where the sub-committee may technically exist in a
158 given year, but may never actually be convened to take any action.

159 **5.6 Power: Recalling the entire ICANN Board:** The ALAC has reservations about this mechanism.
160 Exercising it could potentially be catastrophic for ICANN, all the more so given that to date there has not
161 been a viable proposal for how to govern ICANN in the interim until a new Board is selected. The
162 potential for any interim Board being subject to capture or being unresponsive to community input is
163 high, as is the danger of not having an effective Board in place to address any unforeseen
164 circumstances that might arise. It is because of these difficulties that the ALAC would far prefer the
165 “surgical” approach of carefully removing the Directors that the community believes are the source of
166 ICANN’s problems while leaving a core Board in which it has confidence.

167 **Section 6: Incorporating the Affirmation of Commitments into the ICANN** 168 **Bylaws**

169 Accountability and Transparency (A&T) Review - Paragraphs 310-317: The wording of this section should
170 be altered to indicate that the a-e list is not prescriptive. Each review team should be given the authority
171 to decide exactly what A&T issues it will address. Based on the experiences of the ATRT1 and ATRT2, the
172 current formulation implies:

- 173 • A narrow focus of A&T as understood by particular individuals in 2009. The very existence of this
174 CCWG illustrates the “straitjacket” that the A&T review teams were controlled by forcing
175 concentration on issues that may have been of lesser importance and restricting what they
176 could look at in addition to or instead of the prescribed list.

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- The requirement to review in depth the previous work and to explore new areas creates an ever increasing workload that will make it very difficult for an ATRT to effectively tackle real issues that are relevant at the time of its formation.