Joint Comments from SO-AC-SG-C Leaders: Changes to the Enhancing ICANN Accountability Process

We, the undersigned, thank ICANN for its September 18 response to the questions posed by the leaders of ICANN's Supporting Organizations (SOs), Advisory Committees (ACs), Stakeholder Groups (SGs) and Constituencies ("SO-AC-SG-C Leadership"), as well the decision to open up the process on Enhancing ICANN Accountability ("Accountability Process") for a 21-day public comment period at the community's request. We are fully supportive of and committed to the goal of enhanced accountability, as well as of improving trust across the ICANN Community.

Upon careful review of ICANN's response, we strongly recommend a number of changes to the ICANN's staff proposed Accountability Process. We believe that if it is to produce meaningful outcomes and invoke the trust of the community, the Accountability Process must:

- Rely upon the preexisting Cross-Community Working Group (CCWG) model;
- Provide a clear standard for and process around Board referral or rejection of community recommendations;
- Not limit the scope of Accountability Processes and mechanisms that may be considered;
- Limit the role of Expert Advisors, the ICANN Board Liaison, and the ICANN Staff Member with respect to consensus calls;
- Allow the Cross Community Group to participate in the development of recommendations; and
- Allow the SOs, ACs, and SGs to each appoint an alternate representative to the CG.

The Accountability Process should use the existing CCWG model.

As noted in the September 18 correspondence, mutual trust across ICANN and the community is fundamental to the Accountability Process. To enhance community trust, we believe that the Accountability Process should rely upon a model that is understood, tested, and trusted by the multi-stakeholder community: the CCWG.

The success of the multi-stakeholder model relies not only upon its ability to bring a broad range of voices and interests to the table, but also upon the ability to balance such interests. As raised in the September 3 correspondence of the SO-AC-SG-C Leadership to ICANN, "CCWGs almost always permit anyone to participate in all activities except consensus calls and associated polling." We believe that CCWGs' reliance upon designated representation from ICANN's SOs and ACs for consensus calls should not hinder active participation, whether from additional members of the SOs and ACs or from individuals that do not currently identify with one of these groups. While it would be up to the CCWG participants to identify working procedures in developing the group's charter, we would hope that such methods would encourage both depth and breadth of participation. However, we believe that having designated representatives from ICANN's SOs and ACs can serve a balancing function to ensure that divergent interests that may exist across such groups are balanced in the ultimate recommendations. We believe that this helps avoid the potential for capture by particular stakeholders that may be better resourced to participate within the process.

To the extent that there are other stakeholders that are not yet affiliated with an ICANN SO AC SG or C, we encourage ICANN to work to educate such participants about the existing participation structures within the multi-stakeholder model. If, following these efforts, certain stakeholders could still not appropriately be integrated into one of the existing SOs, ACs, SGs or Cs then the creation of an "other" category could be considered by the CCWG in developing its Charter and working methods. Notwithstanding, we believe that active participation in the CCWG should be open to all interested parties.

The undersigned have previously advocated that a traditional CCWG should be the primary vehicle for the Accountability Process and continues to support this position. While the Coordination Group may prove useful given the time constraints at stake in the process, we believe that it should truly serve a narrow coordinating function, as is seen in the IANA Stewardship Transition Process. However, if ICANN elects to pursue the CCG/CG model in spite of community opposition, we insist on the procedural changes described in the following sections. Most recommendations made herein regarding the CCG and CG should apply equally if the preferred CCWG model is ultimately adopted

The ICANN Board must accept the outcome of the Accountability Process unless a legal conflict is identified by experts who are independent of ICANN and an agreed process for handling Board rejections or referrals of community recommendations must be in place.

We appreciate ICANN's assurance that the Board's interests are aligned with those of the community. However, as stated in the ICANN Bylaws: *"Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies."* This fiduciary responsibility requires that Directors represent the interests of ICANN as an organization even over those of the ICANN multi-stakeholder community. We believe that in the context of the Accountability Process this fiduciary duty creates the possibility of tension between the interests of the ICANN Board and those of the ICANN community. New or strengthened accountability mechanisms may impose new requirements upon ICANN as an organization. These requirements may be deemed cumbersome, restrictive, or otherwise undesirable by representatives of the organization. In these circumstances, the ICANN Board could find the organization's interests at odds with those of the community and be led to reject such recommendations. This tension is further evidenced in efforts by senior ICANN staff to narrow the scope of the Accountability Process, further described in the following section.

While we are appreciative of ICANN's commitment to continued open and transparent dialogue between the ICANN Board, staff, the Coordination Group (CG) and the Cross Community Group (CCG), dialogue in itself does not sufficiently address the foregoing concern. In light of this tension and potential for conflict of interest, we believe that further procedural assurances are required with regard to the Board's acceptance, referral, or rejection of a community recommendation. First, the process must assume that the ICANN Board will accept all community recommendations put forward by the CG unless a legal conflict is identified and confirmed by independent experts selected by the community. Second, if a legal conflict meeting this criterion is identified, the recommendation(s) must go back to the CG and the CCG for further consideration and refinement, rather than being rejected outright.

Recommendations that are rejected or referred must come back to the community with significant time for deliberation and refinement before the September 2015 deadline. Third, rejection or referral of a Board recommendation back to the CG and CCG shall require full consensus of the ICANN Board. Fourth, all Board meetings, discussions and email on the Accountability issue must be open, including exchanges with the CG, the Board and Staff liaisons and other ICANN staff including the ICANN General Counsel's office.

Like ICANN, we hope that an open, transparent, and collaborative process will ensure that the community's recommendations are accepted in full and this rejection process will not have to be called upon. Still, we believe it is prudent to account for this possibility at the outset.

ICANN must not limit the scope of the Accountability Process at its outset.

We believe that the scope of the Accountability Process must allow for the strengthening of existing accountability mechanisms, as well as the identification of new mechanisms that the community regards as necessary for ensuring an accountable ICANN. The Accountability Process has seen repeated attempts by senior members of ICANN staff to scale back the scope of the process to mechanisms narrowly tied to the transition of the IANA Stewardship Transition, as well as repeatedly framing the issue in terms of "ICANN *remaining* accountable" (emphasis added). This presupposition and narrowing of scope has been pushed forward by ICANN in spite of widespread community opposition to both.[1]

We believe that the CG and CCG should have the ability to consider any mechanisms for improving ICANN accountability. In addition to identifying stress tests, we believe that the Accountability Process should include consideration of new or improved checks and balances and mechanisms to ensure that meaningful and independent redress is available to stakeholders that have been adversely affected by ICANN's actions or inactions. In recognition of the September 2015 deadline for the IANA Stewardship Transition we believe that one of the tasks of the CCWG and CG should be to consider which accountability mechanisms and improvements must be implemented in advance of the transition and which may be implemented thereafter. We believe that the community and ICANN should work closely in developing the full implementation timeline.

Limit the role of Expert Advisors, liaisons, and the ICANN Staff Member with respect to consensus calls.

We welcome the use of expert Advisors to inform the work on Enhancing ICANN Accountability. If community recommendations and expressions in response to the *Call for Candidates: Seeking Advisors to the ICANN Accountability & Governance CG* are given weight we believe that the expert Advisors to the CG may contribute positively to the process. We believe that the process could be further improved by encouraging members of the Public Experts Group to consult with the community in its selection of experts. We believe that the SO-AC-SG-C Leadership structure could be leveraged to these ends.

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[1] An assessment by members of the Registry Stakeholder Group found that in the previous Public Comment Period on Enhancing ICANN Accountability, eight comments specifically opposed the efforts by ICANN staff to limit the scope of the process.

Notwithstanding the valuable contributions we believe expert Advisors may bring to the Accountability Process, we believe that the process of taking consensus calls should be limited to the community-appointed members of the CG and should not include such Advisors.

Likewise, we believe that the ICANN Board Liaison and the appointed member from ICANN Staff should not participate in consensus calls. We believe that these participants may bring valuable knowledge to the accountability process and improve coordination and communication in the work of the CG. However, as previously discussed, within the Accountability Process, the interests ICANN Staff and the ICANN Board may not align with those of the community. We would be concerned if this tension resulted in an inability to reach consensus on accountability recommendations that had the full support of the CG members that were organically chosen by the multi-stakeholder community.

If the roles of the seven Advisors, the ICANN Board Liaison, and the ICANN staff appointee are truly advisory we believe that the role of the SOs, ACs, and SGs may retain an appropriate degree of influence in developing the ultimate accountability enhancements; otherwise, we fear that the influence of Advisors and the ICANN Board Liaison may be used to dilute the community's role within the CG.

Allow the Cross Community Group to participate in the development of recommendations.

The CCG's involvement in the Accountability Process should go beyond the identification of issues. Though we believe that the CG structure including community-appointed members and advisors may prove valuable from a coordination standpoint, the CCG is where the widest community involvement will take place and it should remain involved throughout the Accountability Process, including in the development of recommendations. We believe that the CCG should be empowered to recommend solutions for consideration by the CG and, likewise, that the CG should be required to use the CCG as a tool for soliciting wider community feedback on discussion topics and recommendations.

Allow the community to appoint an alternate representative to the Coordination Group.

Given the time constraints at play in the Accountability Process we recognize the utility of creating a small group to perform a coordinating function. However, the narrow community representation on the CG also creates limitations.

We recommend that ICANN allow the SOs, ACs, and SGs to appoint an alternate representative to the CG, to participate in meetings, calls, or other work of the CG in the event that the designated member could not participate. Given the importance of the Accountability Process to the entire ICANN community, we believe it is fundamental that a voice representing each ICANN constituency group be present in *all* accountability conversations. Further, the appointment of an alternate member would improve continuity in the work of the CG in the case that one of its community-appointed members was no longer able to continue his or her duties.

We appreciate the opportunity to submit these comments and strongly recommended changes to the ICANN staff's proposed Enhancing ICANN Accountability process. Other SO-AC-SG-C leaders may still choose to sign on to this joint comment, following the completion of their bottom-up, consensus

consultation processes, and some have submitted separate comments, either independently or in addition to this joint statement.

Signed,

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Olivier Crépin-LeBlond, At-Large Advisory Committee
Keith Drazek, Registries Stakeholder Group
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