

This document summarizes discussion of stress test 14 and proposed bylaws changes to bring Affirmation of Commitments (AoC) commitments and periodic reviews into the ICANN bylaws.

The AoC is a 2009 bilateral agreement between the US government and ICANN.¹ After the IANA agreement is gone, the AoC will likely become the next target for elimination since it will be the last remaining aspect of a unique US oversight role for ICANN.

Elimination of the AoC would be simple matter for a post-transition ICANN, since the AoC can be terminated by either party with just 120 days notice. The CCWG Stress Test Work Party addressed this contingency since it was cited in prior public comments². The CCWG evaluated the contingency of ICANN unilaterally withdrawing from the AoC against existing and proposed accountability measures, as seen below:³

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC)</p> <p>Consequence: ICANN would no longer be held to its AoC commitments, including the conduct of community reviews and required implementation of review team recommendations.</p>	<p>The AoC can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p> <p>But as a result of IANA stewardship transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain the AoC .</p>	<p>One proposed mechanism is community standing to challenge a board decision by referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN canceled the AoC, the IRP mechanism could enable reversal of that decision.</p> <p>Another proposed measure is to import AoC provisions into the ICANN bylaws, and dispense with the bilateral AoC with NTIA. Bylaws would be amended to include AoC commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9, or other provisions that are deemed essential by the community.</p> <p>If ICANN’s board proposed amending the AoC provisions brought into the bylaws, another proposed measure would empower the community to veto that proposed bylaws change.</p> <p>Note: none of the proposed measures could prevent NTIA from canceling the AoC.</p>
<p>Conclusions: This threat is directly related to IANA transition</p>	<p>Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>Proposed measures in combination are adequate.</p>

The CCWG proposed two responses to stress test 14:

1. CCWG is considering how to preserve ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews. [cite or include documents]

¹ Affirmation of Commitments, Sep-2009, at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

² See <https://community.icann.org/display/acctcrosscomm/ST-WP+++Stress+Tests+Work+Party>

³ Applying Stress Tests, 20-Mar-2015, at <https://community.icann.org/download/attachments/52232556/Applying%20Stress%20Tests%20%5BDraft%20v8%5D.pdf?version=1&modificationDate=1426877855000&api=v2>

2. CCWG has proposed bringing the four AoC review processes into ICANN's bylaws.

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

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

Notably, the Government Advisory Committee (GAC) wrote in its 23-Mar-2015 letter to the CCWG, "ICANN should be based on principles of continuous improvement, with regular community-led and independent reviews of its key governance structures and processes."⁴

To bring the AoC reviews into the bylaws, CCWG began with present AoC requirements in section 9:

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below.

AoC section 10 further requires each review team to consider public comment before issuing its final report:

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

In the pages that follow, each of the AoC reviews is shown in the original, with CCWG's proposed bylaws implementation.

⁴ Letter from GAC Chair Thomas Schneider to CCWG, 23-Mar-2015, at <https://community.icann.org/pages/viewpage.action?pageId=52893935>

1. Accountability & Transparency Review

Below is the original text from the Affirmation of Commitments:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by:

- (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;
- (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;
- (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);
- (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and
- (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.

ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010.

The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment.

The Board will take action within six months of receipt of the recommendations.

Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

Note that the first paragraph of this AoC review states an ICANN commitment that is not explicitly stated in ICANN's present bylaws:

“ to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.”

In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments**, to include one subsection for each of the 4 Affirmation Reviews. The first subsection is for the review proposed below.

Proposed bylaws text for this Affirmation of Commitments review	Notes
<p>1. Accountability & Transparency Review. The Board shall cause a periodic review of ICANN’s execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.</p> <p>In this review, particular attention will be paid to:</p> <ul style="list-style-type: none"> (a) assessing and improving ICANN Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of GAC interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.; and (f) assessing the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section. <p>The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.</p> <p>The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board.</p> <p>The review team may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.</p> <p>To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to ICANN internal documents, and the output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.</p> <p>This periodic review shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the prior review team.</p>	<p>This commitment should be added to Core Values</p> <p>Rephrased to avoid implying a review of GAC's effectiveness</p> <p>Moved from AoC text into this list</p> <p>New</p> <p>New: Community chooses its own representatives</p> <p>New: experts</p> <p>New: access to documents</p> <p>More explicit about action required by board</p> <p>AoC required every 3 years.</p>

2. Preserving security, stability, and resiliency.

Below is the original text from the Affirmation of Commitments:

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to:

- (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;
- (b) ensuring appropriate contingency planning; and
- (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission.

The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN.

Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

3. Promoting competition, consumer trust, and consumer choice

Below is the original text from the Affirmation of Commitments:

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of

(a) the application and evaluation process, and

(b) safeguards put in place to mitigate issues involved in the introduction or expansion.

ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.

The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments**, to include the review proposed below.

Proposed bylaws text for this Affirmation of Commitments review	Notes
<p>3. Promoting competition, consumer trust, and consumer choice. ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.</p> <p>The Board shall cause a review of ICANN’s execution of this commitment after any batched round of new gTLDs have been in operation for one year.</p> <p>This review will examine the extent to which the expansion of gTLDs has promoted competition, consumer trust, and consumer choice, as well as effectiveness of:</p> <ul style="list-style-type: none"> (a) the gTLD application and evaluation process; and (b) safeguards put in place to mitigate issues involved in the expansion. <p>The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.</p> <p>To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.</p> <p>The output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.</p> <p>Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.</p> <p>These periodic reviews shall be conducted no less frequently than every four years, measured from the date the Board received the final report of the relevant review team.</p>	<p>This commitment should be added to Core Values</p> <p>Re-phrased to cover future new gTLD rounds.</p> <p>New: Community chooses its own representatives</p> <p>New: experts</p> <p>New: access to documents</p> <p>More explicit about action required by board</p> <p>New</p> <p>AoC also required a review 2 years after the 1 year review</p>

4. Directory Services (WHOIS)

Below is the original text from the Affirmation of Commitments:

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.

One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.

The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN.

Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments**, to include the review proposed below.

Proposed bylaws text for this Affirmation of Commitments review	Notes
<p>4. Reviewing effectiveness of WHOIS/Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust. ICANN commits to enforcing its existing policy relating to WHOIS/Directory Services, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.</p> <p>The Board shall cause a periodic review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.</p> <p>[Robin Gross & Bruce Tonkin suggested adding OECD privacy principles to the criterion of this review]</p> <p>The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts, including representatives of law enforcement and experts on privacy, to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.</p> <p>To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.</p> <p>The output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.</p> <p>This periodic review shall be conducted no less frequently than every three years, measured from the date the Board received the final report of the prior review team.</p>	<p>This commitment should be added to Core Values</p> <p>New</p> <p>New: Community chooses its representatives</p> <p>New: experts</p> <p>New: access to documents</p> <p>More explicit about action required by board</p> <p>AoC also required every 3 years.</p>

Additional bylaws requirements related to the AoC Reviews

On 20-Mar-2015, Avri Doria wrote:

Also we might want to put something in the bylaw that have become process, such as yearly accountability and transparency report from ICANN as part of its annual reporting mix.

Also require yearly reports on the implementation status of all review-based recommendations. So a section on reporting requirements might be worth adding. For example:

5. ICANN will be responsible for creating an annual report that details the status of implementation on all reviews defined in this section. This annual review implementation report will be opened for a public review and comment period that will be considered by the ICANN Board and serve as input to the continuing process of implementing the recommendations from the review teams defined in this section.

On 23-Mar-2015:

Sebastien Bachollet recommended a diversity requirement for members of review teams appointed by stakeholder groups.

James Gannon suggested that SSR reviews should occur more frequently than every 5 years. The community has the option to do more frequent reviews; 5 years is the minimum frequency.

Alan Greenberg promised to send new text that ATRT recommended for WHOIS/Directory Services review.

Several CCWG participants noted that AoC sections 3,4,7, and 8 include commitments that need to be added to the Core Values section of ICANN bylaws.

Chris Disspain suggested adding explanations wherever proposed text differs from AoC text. (done)

On 4-Mar-2015, Robin Gross and Bruce Tonkin suggested adding OECD privacy principles to the criterion of the WHOIS/Directory Services review.