

# CCWG-ACCT Working Party 1: Community Empowerment

## Input to Public Comment Report #1:

### Working Party Comments Draft at 8 April 2015

The text which follows is the **first draft** content for the CCWG's first Public Comment Report that is generated from the work done to date by WP1.

**This document is open for comments and suggestions from the members of WP1 and other interested parties - please add comments of any sort for us to consider, ideally on or before 10 April at 0300 UTC.**

Note: **where text is in bold and underlined like this**, it is not yet consensus material based on discussion so far.

## 6. Accountability Mechanisms

### 6.5 Community Empowerment

This section deals with ways to give the ICANN community certain powers to hold ICANN's board accountable to the broader community. These powers are designed to balance the board's existing duty to protect the interests of ICANN the corporation.

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

#### 6.5.1 *Mechanism to empower the community*

*[due with WP1 on 8 April for 10 April discussion.]*

*2-3§ introduction of purpose of mechanism, 2-3§ summary of recommendation + description of key design features for the mechanism based on template (but not relying on template format). Rationale for each feature would be useful (including whether they stem for the need to protect against capture for instance). + proposed implementation method.*

#### 6.5.2 **Power: reject budget / strategy**

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

Today, ICANN's Board makes final decisions on strategy proposals and annual budgets. While ICANN consults the community in developing strategic/business plans, there is no formal mechanism defined which requires ICANN to develop such plans in a way that includes a community feedback process.

This power would give the community the right to consider strategic, business plans and budgets after they are adopted by the Board (but before they come into effect) and to "send them back" for reconsideration for any reason deemed appropriate - generally, based on perceived inconsistency with the purpose and role set out in ICANN's articles/bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community.

**Time would be included in the strategic planning, business planning and budgeting processes for the community to consider adopted plans and decide whether to send them back for reconsideration (timeframe to be determined).** If the community exercise this power, the Board would have the chance to absorb the feedback, make adjustments and pass amended plans before there was any day-to-day impact on ICANN's business arising from the act of sending the matter back.

In a situation of significant and sustained disagreement between the community and the Board regarding a proposed annual budget, ICANN would continue to operate according the previous year's approved budget.

This power does not allow the community to re-write a business plan or a budget: it is a review and reconsideration process that gives a different set of eyes the right to demand reconsideration of such documents by the Board if the community feels they are not acceptable. **A plan or budget could only be sent back for reconsideration once on a particular issue: if the Board reconsidered a matter and decided not to change it, then other mechanisms are available if the community wanted to take the matter further.**

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

### 6.5.3 Power: reject changes to ICANN bylaws

ICANN's bylaws set out many of the details for how power is exercised in ICANN, including by setting out the company's mission and core values. Changes to those bylaws are generally the right of the Board. It is possible for the Board to make bylaws changes that the community does not support. If it did so, the Board could unilaterally change ICANN's mission and core values in a way that is not consistent with its intended role.

This power would give the community the right to examine bylaws changes **after they are adopted by the Board (but before they come into effect)** and to "send them back" for reconsideration for any reason deemed appropriate if the community does not support them.

This would most likely be where a proposed change altered the mission and core values, or had a negative impact on ICANN's ability to do fulfil its purpose in the community's opinion.

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

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

#### 6.5.4 Power: approve changes to “fundamental” bylaws

As outlined elsewhere in this document, a number of “fundamental” bylaws are proposed. These will cover key elements of the bylaws which will be more protected from changes than the rest - to ensure critical aspects of the powers and processes required to maintain ICANN's accountability to the community cannot easily be changed.

This power would be part of the process set out for the change of such “fundamental” bylaws. It would require the community to give positive assent to any bylaw change before it was finalised, essentially making such changes a co-decision process between the Board and the community organised through the mechanism described above. Such changes would require a very high degree of community assent, as the purpose of this power is to make changing items in these bylaws possible only with very wide support from the community.

The threshold to approve changes to “fundamental” bylaws is set out in section >>>x.x<<< of this comment paper, where we set out what the “fundamental” bylaws are alongside the process for their creation and amendment.

#### 6.5.5 Power: Recalling individual ICANN directors

The ICANN Board is the governing body for ICANN, employing the CEO, developing organisation policies, making decisions on key issues and defining and holding to account the staff for implementing the organisation's strategy and business plans.

Directors are currently appointed for a fixed term and generally are in office for the whole term they are appointed - by their SO, by the Nominating Committee or by the Board (in the case of the Chief Executive). The power to remove individual directors of the ICANN Board

is at present only available to the Board itself, and can be exercised where directors breach the “codes of conduct” applicable to them in their role.

This power would allow the community to end the term of a director, and trigger a reappointment process. For directors appointed by supporting organisations, a process led by that organisation could lead to the director’s removal. **For directors appointed by the Nominating Committee, a process led by the community mechanism could lead to the director’s removal.**

An internal SO process would allow the removal of a director appointed by that SO to be considered and then decided on. For the removal of non-SO directors appointed by the Nominating Committee, an SO, AC or SG could lead to the consideration of this by the community mechanism. In both cases, whatever the decision-making body, removal would require a **66% supermajority** of those voting to decide on their removal.

The petitioning threshold to start the consideration of removing a director, and the decision threshold to actually decide on removal, need to be reasonably high to show a strong degree of commitment to their removal by the selecting body before this occurs, and to not undermine directors in doing their job of being responsible for the whole of ICANN not just representing their appointing body. But this threshold in both cases will be lower than that for removing the whole ICANN Board, as set out below.

## 6.5.6 Power: Recalling the Entire ICANN Board

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

Beyond the power set out above to remove individual directors, this power would allow the community to cause the removal of the entire ICANN Board. The community mechanism would employ this power on the petition of **two of any of the SOs or ACs in ICANN**. After a period of deliberation and discussion within SOs and ACs, a decision would be made where **the votes to be cast by participants in the community mechanism have been directed by those SOs and ACs according to their internal processes and with a high threshold.**

To set a suitably high threshold for the exercise of this power, **75% of the votes available within the community mechanism would have to be cast in favour to implement it.** This ensures that non-participation does not lower the threshold required to remove the Board.

Ongoing work in the CCWG will flesh out how to deal with the need to ensure ICANN does have a board in place after the removal (whether there is a phase of “caretaker” behaviour by the outgoing Board while new members are elected; whether there is a need to elect alternate Board members in each board selection process; whether a subset of the community mechanism could function as an interim Board; continuity in the role of Chief

Executive were the Board to be removed; “caretaker” conventions for the CEO to follow in a situation where the Board had been removed; and others).

## 6.5.7 Power: Other Powers?

Are there any other powers we should flesh out content for at this time?

2-3§ about purpose and relevance of power, key design features with rationale, description of how the process would be exercised (may be based on template informations)

## 6.6 Incorporating AOC into the ICANN Bylaws

The Affirmation of Commitments (AoC) is a 2009 bilateral agreement between the US government and ICANN<sup>1</sup>. 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 comments<sup>2</sup>. The CCWG evaluated the contingency of ICANN unilaterally withdrawing from the AoC against existing and proposed accountability measures, including:

1. Preserving ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews. [cite or include documents prepared by Matthew Shears]
2. Bringing the four AoC review processes into ICANN’s bylaws.

### 6.6.1 AOC Reviews

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.

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

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

## Addendum 1: Affirmation of Commitments Reviews as part of ICANN Bylaws

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.

Proposed bylaws text for this Affirmation of Commitments review	Notes
<p><b>1. Accountability &amp; Transparency Review.</b> 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> <p>(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;</p> <p>(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;</p> <p>(c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);</p> <p>(d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and</p> <p>(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.; and</p> <p>(f) assessing the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section.</p> <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</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>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>New: access to documents</p> <p>More explicit about action required by board</p> <p>AoC required every 3 years.</p>
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Proposed bylaws text for this Affirmation of Commitments review	Notes
<p><b>2. Preserving security, stability, and resiliency.</b> The Board shall cause a periodic review of ICANN’s execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.</p> <p>In this review, particular attention will be paid to:</p> <ul style="list-style-type: none"> <li>(a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;</li> <li>(b) ensuring appropriate contingency planning; and</li> <li>(c) maintaining clear processes.</li> </ul> <p>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.</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 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</p>	<p>This commitment should be added to Core Values</p> <p>New: Community chooses its own representatives</p> <p>New: experts</p> <p>New: access to documents</p>

<p>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>More explicit about action required by board</p> <p>AoC required every 3 years.</p>
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Proposed bylaws text for this Affirmation of Commitments review	Notes
<p><b>3. Promoting competition, consumer trust, and consumer choice.</b> 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"> <li>(a) the gTLD application and evaluation process; and</li> <li>(b) safeguards put in place to mitigate issues involved in the expansion.</li> </ul> <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</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>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>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>
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Proposed bylaws text for this Affirmation of Commitments review	Notes
<p><b>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.</b> 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><b><u>[Robin Gross &amp; Bruce Tonkin suggested adding OECD privacy principles to the criterion of this review ]</u></b></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>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>

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.

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.

More explicit about action required by board

AoC also required every 3 years.