MEMORANDUM

TO: CCWG-ACCT Working Party 1

FROM: Sidley Austin LLP and Adler & Colvin

RE: Legal Assessment: Community Empowerment Proposed Powers

DATE: April 11, 2015

You have asked that we review the document attached in Annex A and provide comments regarding the powers that are described. We refer you to our memo of April 10, 2015, which provides an overview of key considerations relevant to the described powers and the related comments to certain of the templates attached to that memo—most notably templates WP1-C, WP1-D, WP1-F, WP-1A, WP1-5B-2, WP1-7A, WP1-2A, WP1-2A,B,C,D,E and WP1-4A (in the sections entitled "Legal Analysis and Viability"). We have noted our comments in that document in **Bold Blue.**

We incorporate by reference into this memo the Qualifications section of our April 10th memo.

Analysis

The legal viability of the powers sought to be granted to the community— and the ease or difficulty of implementation from a legal perspective—will depend upon how the community is organized and the degree to which legal personhood attaches, as explained in our April 10th memo in greater detail. We also refer you to that memo for discussion of the concepts of members versus designators.

As a general conclusion, the powers that you describe can be granted to the members of a nonprofit public benefit corporation organized under California law. Many of the powers may also be exercised by designators, but designator authority is inherently more limited under California law. Member, designator, and third-party approval structures may also be combined, if necessary, to reach a desired result. Note also that corporate law and contract law tools will likely be needed to implement some of the powers discussed below.

ANNEX A

CCWG-ACCT Working Party 1: Community Empowerment

Input for First Public Comment Report:

Second Draft Version - as at 10 April 2015 0755 UTC

This is the **second draft** content for the CCWG's first Public Comment Report that is generated from the work done to date by WP1.

This document includes all comments received by 0700 UTC on 10 April, to the best of the Rapporteur's ability. Sincere apologies for any missed comments.

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, whereas the board's primary duty is 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: >>>Name of Mechanism<<<

[due to draft for the 13 April meeting if legal advice on 10 April is clear; otherwise, after 13 April meeting.]

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.

Please see discussion of various mechanisms in the Sidley Austin and Adler & Colvin April 10th memo.

Please see discussion of the need to balance accountability mechanisms and powers with considerations of efficiency in decision-making in the Sidley Austin and Adler & Colvin April 10th memo.

On 8-Apr call, our legal experts focused on Members or Designators as most likely mechanisms.

Please see discussion of members and designators from the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" section in template WP1-D. Please also see the discussion of designators the "Legal Analysis and Viability" section in template WP1-C (not to be confused with the discussion of statutory delegates also contained in that template).

6.5.2 Power: reject budget or strategy/operating plans

Please see discussion of community approval/veto of board decisions with respect to budget and strategy in the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" sections of templates WP1-C and WP-1F.

Please see discussion of the need to balance accountability mechanisms and powers with considerations of efficiency in decision-making in the Sidley Austin and Adler & Colvin April 10th memo.

Note that this is the one power proposed in this document with which we have concerns. While this power may be granted to the community through a member mechanism, consideration should be given to the impact of this community power on the ability of the board to serve as an effective steward of ICANN and an efficient decision-making body positioned to balance competing interests and consider the long-term consequences, cognizant of the variety of concerns of community groups. We have concerns about implementation in terms of defining the level of detail that must be included in budgets, strategic plans and operating plans for community approval. Given these concerns, we question the necessity of this power in light of the more powerful accountability mechanisms available: powers over board composition, including the power to remove individual directors (by those designating) and to recall the entire board, as well as the power to amend and/or approve and reject amendments proposed by the board.

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/operating 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 mechanism defined in the bylaws which requires ICANN to develop such plans in a way that includes a community feedback process. Even if feedback was unanimous, the Board could still opt to ignore it today.

This new power would give the community the ability to consider strategic & operating plans and budgets after they are adopted by the Board (but before they come into effect) and reject them - generally, based on perceived inconsistency with the purpose, mission 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 planning and budgeting processes for the community to consider adopted plans and decide whether to reject (timeframe to be determined). If the community exercise this power, the Board would have to absorb the feedback, make adjustments and pass amended plans. The planning process should be structured so this can be done before there was any day-to-day impact on ICANN's business arising from the act of rejection.

Author 4/11/2015 10:58 AM

Comment [1]: Mathieu comments: This is where we'll get pushback. Because the timelines are already very tight.
Maybe we could prevent that by stating that the objection to budget / strategy would be an ex-post process, which would "suspend" its execution ?

In a situation of significant and sustained disagreement between the community and the Board regarding a proposed annual budget, ICANN would temporarily continue to operate according the previous year's approved budget. The board must however resolve the situation of not operating with an approved budget. **If the Board is unable or unwilling to do so, other mechanisms (as set out in this part of the Comment Report) are available if the community wanted to take the matter further.**

This power does not allow the community to re-write a plan or a budget: it is a review and redress process that requires reconsideration of such documents by the Board if the community feels they are not acceptable. **Where a plan or budget has been sent back, all the issues must be tabled on that first return. That plan or budget cannot be sent back again with new issues raised, but the community can reject a subsequent version where it does not accept the Board's response to the previous rejection.**

As this power would become part of existing planning processes (incorporated into the bylaws as required), it does not raise questions of standing in respect of someone raising a complaint. **At the appropriate point in the planning cycle the challenge period would be open, any participant in the mechanism would be able to raise the question. A simple majority in the mechanism would be required in the mechanism to reject a first time: a 60% for subsequent rejection/s.**

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Comment [2]: Mathieu commented to ask whether more threshold info required, so I have drafted this. Not clear whether it hits the mark.

6.5.3 Power: reject changes to ICANN bylaws

Please see discussion of community power to approve/veto and otherwise amend the ICANN bylaws in the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" section of templates WP-1A and WP1-5B-2.

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. For example, 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 eventually reject those changes. 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 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 to absorb the feedback, make adjustments, and propose a new set of amendments to the bylaws.

It would require a vote of 60% to reject a proposed bylaw change.

This power does not allow the community to re-write a proposed bylaws change: it is a review and redress 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 rejected, but the threshold for sending one back is a supermajority in the community mechanism set out in 6.5.1 above, to limit any potential for abuse of this power.**

6.5.4 Power: approve changes to "fundamental" bylaws

Please see discussion of community power to approve/veto and otherwise amend the ICANN bylaws in the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" section of templates WP-1A and WP1-5B-2.

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, as well as the organisation's purpose and core values, 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

Please see discussion of community power to remove individual ICANN directors and recall of the full board in the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" section at the end of template WP1-7A. Please also see discussion of statutory members in template WP1-D and discussion of designators the "Legal Analysis and Viability" section in template WP1-C (not to be confused with the discussion of statutory delegates also contained in that template).

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

Directors are currently appointed for a fixed term and generally are in office for the whole term they are appointed - by their SO/AC, by the Nominating Committee or by the Board (in the case of the Chief Executive and relating to their status as an employee). The power to remove individual directors of the ICANN Board is at present only available to the Board itself, and can be exercised through a 75% vote of the Board. There is no limitation[1] on the types of situation for which the Board can remove a director.

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

[1] There are escalation paths, up to and including removal from the Board, for Board member violations of the Code of Conduct and Conflict of Interest Policies, but the Bylaws do not currently require such a violation occur prior to Board removal.

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 escalate issues with the director to the point where there was consideration of the director's removal 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 is to be agreed once we have greater clarity on what the mechanism is to do so, but should be set at around 20% of those who would have a vote.

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Comment [3]: Logic: it should not be too hard to start this process, and a director who faces this challenge of a petition to remove but where this is strongly rejected has their mandate re-confirmed. Preferable to have this than an overly high threshold to start considering the matter.

6.5.6 Power: Recalling the Entire ICANN Board

Please see discussion of community power to remove individual ICANN directors and recall of the full board in the Sidley Austin and Adler & Colvin April 10th memo and the "Legal Analysis and Viability" section at the end of template WP1-7A. Please also see discussion of statutory members in template WP1-D and discussion of designators the "Legal Analysis and Viability" section in template WP1-C (not to be confused with the discussion of statutory delegates also contained in that template).

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 initiate use of this power on the petition of **two of any of the SOs or ACs in ICANN**. After a petition is raised, **there will be a set period of time for SOs and ACs to individually and collectively deliberate and discuss whether the spilling of the Board is warranted under the circumstances. Each SO and AC, following its internal processes, would direct its representative(s) within the community mechanism on how to vote on the matter.**

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Comment [4]: Roelof Meijer: I do not agree. This makes non-voters and abstainers into voters against and thus gives those voting against a involuntary supporting base. Although depending on the community mechanism we ultimately choose, this approach potentially turns this power into a virtual (powerless) one, eventually giving a largely dysfunctional board a comfortable position. The threshold of for the execution of this power should be quite high, but is should be doable. A solution might be two voting rounds: 1st round quorum equals 75% of votes available. If quorum not met, but 75% or more of votes cast is in favor, then second round with quorum equalling 75% of votes cast

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.

Author 4/11/2015 10:58 AM

Comment [5]: This was what I thought the consensus was in Istanbul. Point for discussion on 10 April.

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?

- Requiring the Board to act (ATRT recommendation refers – see below)

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 AOC or elements of it may be incorporated into the ICANN Bylaws. Please see discussion of incorporation of the AOC into the ICANN Bylaws in the “Legal Analysis and Viability” section of template WP1-2A.

The Affirmation of Commitments (AoC) is a 2009 bilateral agreement between the US government and ICANN[2]. After the IANA agreement is terminated, the AoC will become the next target for elimination since it would be the last remaining aspect of a unique United States 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[3]. 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.
2. Bringing the four AoC review processes into ICANN’s bylaws.

Each of these measures are addressed below.

[2] Affirmation of Commitments, Sep-2009, at https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en

[3] See https://community.icann.org/display/acctcrosscomm/ST-WP+--+Stress+Tests+Work+Party

6.6.1 Preserving ICANN Commitments from the AOC

[Matthew, Avri, Steve, and Fiona will complete this table by Sunday 12-Apr]

ICANN Commitments in the AoC	As expressed in ICANN bylaws
3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.	in revised Core Values:
4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.	in revised Core Values:
7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which	in revised Core Values:

ICANN relied.	
8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.	in revised Core Values:
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 :	See Section 6.6.2 and Addendum 1 of this document for bylaws text to preserve commitments to perform these ongoing reviews.

6.6.2 AOC Reviews

To bring the AoC reviews into the bylaws, CCWG began with present AoC requirements in section 9. Each of the 4 AoC reviews are proposed as ICANN bylaws additions, as described in Addendum 1. The proposed text preserves the essential elements of AoC reviews, with changes suggested during 2014 comment periods on ICANN accountability and the IANA transition:

- Ability to sunset reviews and create new reviews
- Community stakeholder groups should appoint their own members to 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.

6.X Bylaws changes suggested by Stress Tests

The CCWG charter calls for stress testing of accountability enhancements in both work stream 1 and 2. Among deliverables listed in the charter are:

> *Identification of contingencies to be considered in the stress tests.*

Review of possible solutions for each Work Stream including stress tests against identified contingencies.
The CCWG-Accountability should consider the following methodology for stress tests

- *analysis of potential weaknesses and risks*
- *analysis existing remedies and their robustness*
- *definition of additional remedies or modification of existing remedies*
- *description how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies*

CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) its results being analyzed timely before the transition.

The CCWG Stress Test Work Party documented contingencies identified in prior public comments . The Stress Test Work Party then prepared a draft document showing how these stress tests are useful to evaluate existing and proposed accountability measures.

The exercise of applying stress tests identified changes to ICANN bylaws that might be necessary to evaluate proposed accountability mechanisms as adequate to the challenges.

[inserting here a suggestion from Jonathan Zuck to ensure that ICANN board respond to formal advice from Advisory Committees. This is in response to several Stress Tests]

6.X.1 Forcing the board to respond to Advisory Committee formal advice

Please see discussion of the ability to reverse an ICANN Board decision to reject a recommendation of a review panel, or to compel the ICANN Board to follow a recommendation in the face of board inaction, in the "Legal Analysis and Viability" section of template WP1-2A,B,C,D,E.

Several stress tests indicate the need for a community power to force ICANN to take a decision on previously-approved Review Team Recommendations, consensus policy, or formal advice from an Advisory Committee (SSAC, ALAC, GAC, RSSAC).

The CCWG is developing enhanced community powers to challenge a board decision, but this may not be effective in cases where the board has taken no decision on a pending matter. In those cases, the community might need to force the board to make a decision about pending AC advice in order to trigger the ability for community to challenge the decision via Reconsideration or IRP processes.

Recommendation 9 from ATRT2 may answer this need [footnote needed]:

> 9.1. ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:

The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.

This ATRT2 recommendation, however has not yet been reflected in ICANN bylaws, so this change should be required before the IANA transition. In addition, there is a question as to whether a board "response" would be sufficient to trigger the RR and IRP review mechanisms in this proposal. The CCWG and CWG are waiting on legal advice as to that question.

6.X.2 Require consultation and mutually acceptable solution for GAC advice that is backed by consensus

Please see discussion of implementation of consensus requirement for GAC advice in the "Legal Analysis and Viability" section of template WP1-4A.

Stress Test 18 addresses ICANN's response to GAC advice in the context of NTIA's statement regarding the transition: "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution". This Stress Test was applied to existing and proposed accountability measures, as seen below:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
18. Governments in ICANN's Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's board. Consequence: Under current bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve GAC advice that restricted free expression, for example.	Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try to find "a mutually acceptable solution." This is required for any GAC advice, not just for GAC consensus advice. Today, GAC adopts formal advice according to its Operating Principle 47: "*consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection*."[1] But the GAC may at any time change its procedures to use majority voting instead of its present consensus.	One proposed measure is to amend ICANN bylaws (Article XI Section 2, item 1j) to give due deference only to GAC consensus advice, and indicate the definition of consensus that the GAC uses presently. The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require due deference only to advice that had GAC consensus. GAC can still give ICANN advice at any time, with or without consensus.

[1] ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles

The CCWG proposes a response to Stress Test 18 to amend ICANN bylaws such that only consensus advice would trigger the obligation to try to find a mutually acceptable solution. The proposal is to amend ICANN Bylaws, Article XI Section 2 clause j as seen below. (additions bold) Clause k is also shown for completeness but is not being amended.

> j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **With respect to Governmental Advisory Committee advice that is supported by consensus**, the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
>
> k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

Note that the proposed bylaws change for stress test 18 does not interfere with the GAC's method of decision-making. If the GAC decided to adopt advice by majority voting or methods other that today's consensus, ICANN would still be obligated to give GAC advice due consideration: "advice shall be duly taken into account, both in the formulation and adoption of policies."

Moreover, ICANN would still have to explain why GAC advice was not followed: "In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice"

The only effect of this bylaws change is to limit the kind of advice where ICANN is obligated to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution". That delicate and sometimes difficult consultation requirement would only apply for GAC advice that was approved by consensus – exactly the way GAC advice has been approved since ICANN began.

NTIA gave specific requirements for this transition, and stress test 18 is the most direct test of the requirement to avoid significant expansion of the role of governments in ICANN decision-making. Unless and until there are other proposed measures that address this stress test, the proposed bylaws change should remain in consideration as an important part of the community's proposal.

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
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.	This commitment is reflected in Bylaws Core Values
In this review, particular attention will be paid to:	
(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;	Rephrased to avoid implying a review of GAC's effectiveness
(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.	
The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.	Moved from AoC text into this list
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.	New
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.	New: Community chooses its own representatives

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. 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.	New: experts New: access to documents More explicit about action required by board AoC required every 3 years.

Proposed bylaws text for this Affirmation of Commitments review	Notes
2. **Preserving security, stability, and resiliency.** 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. In this review, 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 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. 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. 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 five years, measured from the date the Board received the final report of the prior review team.	This commitment is reflected in Bylaws Core Values New: Community chooses its own representatives New: experts New: access to documents More explicit about action required by board

	AoC required every 3 years.

Proposed bylaws text for this Affirmation of Commitments review	Notes
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.	This commitment could be added to Bylaws Core Values
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.	Re-phrased to cover future new gTLD rounds.
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: (a) the gTLD application and evaluation process; and (b) safeguards put in place to mitigate issues involved in the expansion.	
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.	New: Community chooses its own representatives New: experts
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.	New: access to documents
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.	More explicit about action required by board

Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented. 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.	New AoC also required a review 2 years after the 1 year review

Proposed bylaws text for this Affirmation of Commitments review	Notes
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. 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. **[Robin Gross & Bruce Tonkin suggested adding OECD privacy principles to the criterion of this review]** 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. 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. 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.	New New: Community chooses its representatives New: experts New: access to documents More explicit about action required by board AoC also required

	every 3 years.