

**CCWG-ACCOUNTABILITY DRAFT  
PROPOSAL V. 10  
1 May 2015**

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# Executive Summary

- 01 On 14 March 2014 the National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions and related root zone management to the global multistakeholder community. NTIA asked ICANN to convene a multistakeholder process to develop a proposal for the transition.
- 02 As initial discussions of the IANA Stewardship Transition were taking place, the ICANN community raised the broader topic of the impact of the transition on ICANN's current accountability mechanisms. From this dialogue, the Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN attain a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government. This contractual relationship has been perceived as a backstop with regard to ICANN's organization-wide accountability since 1998.
- 03 This report for public comment represents the current work product of the CCWG-Accountability. It is focused on draft Work Stream 1 recommendations (Work Stream 1 is the CCWG-Accountability's work on changes to ICANN's accountability arrangements which must be in place, or committed to, prior to the IANA Stewardship transition), which were the focus of the first five months of work (from December 2014 until May 2015). These recommendations do not reflect CCWG-Accountability consensus at this point. The CCWG-Accountability is seeking confirmation of its approach, and guidance upon several options, from the community.
- 04 The CCWG-Accountability Charter has been endorsed by the GNSO, ALAC, ccNSO, GAC and ASO. The CCWG-Accountability is composed of 25 members, appointed by each endorsing organization, and 154 participants. Participation in the group is open to any party. The CCWG-Accountability work was conducted through weekly conference calls, attended on average by 44 participants and members, and it held face-to-face meetings in Frankfurt (19-20 January 2015), Singapore (9-12 February 2015) and Istanbul (23-24 March 2015) as well as two intense work days (23-24 April 2015) with each 6 hours of telephone conferences.
- 05 The CCWG-Accountability has designed its work so that it may be coordinated with the timeline of the IANA Stewardship Transition. The work stream 1 proposals, when finalized, will be presented to the ICANN Board of Directors for transmission to NTIA along with the ICG assembled transition proposal.
- 06 The CCWG-Accountability has established a set of requirements that need to be fulfilled in order to enhance ICANN's accountability. In order to do so, the CCWG-Accountability has established
  - ❑ An inventory of existing accountability mechanisms;
  - ❑ An inventory of contingencies that ICANN must be safeguarded against; and

- A set of 26 stress tests to establish whether the newly designed accountability architecture efficiently protects ICANN from the contingencies identified.
- 07 The CCWG-Accountability has based its deliberations on requests and suggestions that have been provided by the community during a public comment period conducted last year following the NTIA announcement and added its own findings as well as input from independent advisors to establish a list of requirements that need to be met by an improved accountability system in ICANN. With this report, the CCWG-Accountability is seeking additional input and guidance from the community.
- 08 To date, the CCWG-Accountability has defined the following requirements:
- 09 The CCWG-Accountability identified four building blocks that need to be in place and that would form the accountability mechanisms required to improve accountability. These building blocks are:
- Principles that form the Mission and core values of ICANN
  - The Board of Directors
  - An empowered community
  - Independent appeal mechanisms
- 10 The recommendations include revising ICANN's Bylaws to clarify the scope of ICANN's policy authority, reflect key elements of the Affirmation of Commitments, and establish a set of "Fundamental Bylaws", which enjoy special protection and can only be changed based on prior approval by the Community. The following items shall have the status of Fundamental Bylaws:
- The Mission;
  - The Independent Review Process;
  - The power to veto non-fundamental Bylaw changes and to approve changes to Fundamental Bylaws;
  - Any reviews required by the CWG-Stewardship (e.g. the IANA Function Review and Separation Review);
  - New community powers such as recall of the Board.
- 11 The group also recommends bringing the regular reviews, which are required by the Affirmation of Commitments (such as the accountability and transparency reviews) into ICANN's Bylaws. In response to the recommendation in the CWG-Stewardship proposal, the IANA Function Review and the Separation Review would be added as a Fundamental Bylaw.
- 12 A key recommendation of the CCWG-Accountability is to empower the community to have more influence on certain Board decisions. The group identified powers and associated mechanisms including the ability to:

- ❑ Recall the ICANN Board of Directors;
- ❑ Remove individual Board Directors;
- ❑ Veto or approve changes to the ICANN Bylaws, Mission and Core Values;
- ❑ Reject Board decisions on Strategic Plan and budget, where the Board has failed to appropriately reflect community input in these documents.

In addition to the aforementioned powers, the CCWG-Accountability recommends significantly enhancing ICANN's Independent Review Panel. The Panel should become a standing panel of 7 independent panelists, proposed by the ICANN Board with a confirmation procedure involving the community. Materially affected parties, including in some cases the community itself, would have standing to initiate a procedure in front of the panel. The decisions of the panel would not only assess compliance with process, but also the merits of the case against the standard of ICANN's Mission, Commitments and Core values. Additionally, the decisions of the Panel would be binding for the ICANN Board. The CCWG-Accountability also recommends improvements in the Panel's accessibility, especially the cost of access.

- 13 Finally, the CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process. The key reforms proposed include the expansion of the scope of permissible requests to include Board/staff actions or inactions that contradict ICANN's Mission or Core Values, and the extension of the time for filing a Request for Reconsideration from 15 to 30 days.

14 **IMPLEMENTATION:**

- 15 In its deliberations and in discussion with its independent legal counsel, it has become clear that all requirements established by the CCWG-Accountability may be implemented within ICANN's current setup as a non-profit public benefit corporation based in California. Specifically, ICANN's Articles of Incorporation and Bylaws may be amended to empower the multistakeholder community as proposed by the CCWG-Accountability.

- 16 The CCWG-Accountability proposes the creation of a formal membership with power to hold the ICANN Board accountable. This "SO/AC Membership Model" is the approach that, based on analysis so far, fits requirements best. This model, referred to here as the Reference Mechanism would have the following key characteristics:

1. The ICANN Supporting Organizations (SOs) and Advisory Committees (ACs) who have the right to name directors (as opposed to non-voting observers) to the ICANN board would each establish a "Member Entity" of ICANN to provide these SOs and ACs the legal status required of ICANN's Members. These Member Entities would be established as unincorporated associations. Through these unincorporated associations, the SOs and ACs would exercise the community powers set out in the Report that are reserved to ICANN's Members. No third party and no individuals would become Members of ICANN.

2. There would be no need for individuals or organizations to change the ways in which they participate in ICANN or in the SOs or ACs as a result of creating the new “Member Entities” as “unincorporated associations.”
3. Conversely, the SOs and ACs that designate observers to the Board do not become ICANN Members (and will not have the rights of Members) and do not need to be unincorporated associations to give effect to this Reference Mechanism. In addition, a broader community group (including both Member and non-Member SOs and ACs) would be able to exercise certain community powers, namely, triggering reviews of some Board actions (but not rejection or approval). This broader community would consist of the following bodies, with 29 votes allocated as follows: 5 for the gNSO, the ccNSO, the ASO, the GAC and ALAC; 2 each for SSAC and RSSAC. **[Sidley note: Need to clarify how this group relates to the Members. A fuller description of the relationship between this group and the Members is needed. We have made some edits to Section 2.6 to help clarify.]**
4. Our legal counsel have advised that through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today.

17 The group discussed variations of these mechanisms and seeks guidance from the community regarding the proposed options.

18 An essential part of the CCWG-Accountability Charter calls for stress testing of accountability enhancements. ‘Stress Testing’ is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. The 26 stress tests were grouped into 5 categories: financial crisis or insolvency, failure to meet operational obligations, legal / legislative actions, failure of accountability and failure of accountability to external stakeholders.

19 Applied to the recommendations, the stress tests demonstrate that these Work Stream 1 recommendations increase ICANN's accountability significantly, providing adequate mitigation measures in situations where that was not the case without these recommendations. The requirement that ICANN remains compliant with applicable legislations, in jurisdictions where it operates, is also fulfilled.

20 The stress test exercise demonstrates that Work Stream 1 recommendations do enhance the community’s ability to hold ICANN Board and management accountable, relative to present accountability measures. It is also clear that the CWG-Stewardship proposals are complementary to CCWG-Accountability measures. One stress test regarding appeals of ccTLD revocations and assignments (ST 21) has not been adequately addressed in either the CWG-Stewardship or CCWG-Accountability proposals, awaiting policy development from the ccNSO.

- 21 The CCWG-Accountability's assessment is that its recommendations published for public comment are consistent with the CWG-Stewardship expectations regarding budget, community empowerment, review and redress mechanisms, as well as appeals mechanisms with regards to ccTLD related issues. The group is grateful to the CWG-Stewardship for the constructive collaboration that was set up across the groups.
- 22 During the public comment period, the CCWG-Accountability will pursue its efforts in order to finalize its proposals and facilitate implementation. An indicative, best-case implementation plan is provided in this report.

# 1) Introduction & Background

*Note: This section is a summary. For more information on background, methodology, definitions and scoping, we invite you to refer to Appendix A of this report. An inventory of existing ICANN Accountability Mechanisms may also be found in Appendix A.*

## 1.1 Introduction

- 23 On 14 March 2014 the National Telecommunications and Information Administration (NTIA) [announced](#) its intent to transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions and related root zone management to the global multistakeholder community. NTIA asked ICANN to convene a multistakeholder process to develop a proposal for the transition.
- 24 As initial discussions of the IANA Stewardship Transition were taking place, the ICANN community raised the broader topic of the impact of the transition on ICANN's current accountability mechanisms. From this dialogue, the Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN attain a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government. This contractual relationship has been perceived as a backstop with regard to ICANN's organization-wide accountability since 1998.
- 25 Informed by community discussions and public comment periods, the final [Revised Enhancing ICANN Accountability: Process and Next Steps](#) includes considering how ICANN's broader accountability mechanisms should be strengthened in light of the transition, including a review of existing accountability mechanisms such as those within the [ICANN Bylaws](#) and the [Affirmation of Commitments](#).
- 26 The Cross Community Working Group on Enhancing ICANN Accountability ([CCWG-Accountability](#)) was convened, designed and approved by a Drafting Team (DT) composed of five



ICANN community groups. The CCWG-Accountability [Charter](#) was circulated for adoption on 3 November – see appendix B.

27 The CCWG-Accountability consists of 222 [people](#), organized as 26 [members](#), appointed by and accountable to the CCWG-Accountability chartering organizations, 154 [participants](#), who participate as individuals, and 48 [mailing list observers](#).

28 The CCWG-Accountability also includes:

- ❑ 1 ICANN Board liaison who brings the voice of the Board and Board experience to activities and deliberations<sup>1</sup>;
- ❑ 1 ICANN staff representative who provides input into the deliberations<sup>2</sup>;
- ❑ 1 former ATRT member who serves as a liaison and brings perspective and ensures that there is no duplication of work<sup>3</sup>;
- ❑ 4 ICG members who participate in the CCWG-Accountability, including two who serve as liaisons between the two groups.

29 Seven [Advisors](#) have also been appointed by a [Public Experts Group \(PEG\)](#) to contribute research and advice, and to bring perspectives on global best practices to enrich the CCWG-Accountability discussion, all while engaging with a broader network of accountability experts from around the world.

30 More information on the background, please refer to Appendix A

## 1.2 Definitions & Legal Scoping

31 The CCWG-Accountability scoped out and elaborated a problem statement along with definitions to help refine its understanding of the task it was entrusted with. The group endeavored to produce a definition of what accountability is, listed transparency, consultation, review mechanisms and redress mechanisms as criteria of accountability mechanisms.

32 As a general concept, the group proposed that accountability encompassed processes whereby an actor answers to others for the effects on them of its actions and omissions. For the CCWG-

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<sup>1</sup> Should there be an issue of a consensus call, the Board Liaison would not participate in such a consensus call.

<sup>2</sup> Should there be an issue of a consensus call, the staff representative would not participate in such a consensus call.

<sup>3</sup> Should there be an issue of a consensus call, the ATRT Expert would not participate in such a consensus call.

Accountability, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programs.

- 33 The group proposed that accountability is comprised four dimensions: One, transparency, means that an actor (ICANN) is answerable to its stakeholders by being open and visible to them. A second, consultation, means that the actor (ICANN) continually takes input from and explains its positions to the stakeholders. Third, review means that the actor's actions, policies and programs are subject to outside monitoring and evaluation. The fourth dimension, redress, means that the accountable actor makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.
- 34 Independence and checks and balances were identified as two key qualities of any accountability mechanism. The group defined "checks and balances mechanisms" as a series of mechanisms put in place to adequately address the concerns from the various interested parties in the discussion and decision process, as well as to ensure that the decision is made in the interest of all stakeholders. The group investigated two different non-exclusive views in order to assess independence: independence of persons participating in the decision process, and independence of a specific accountability mechanism with regards to other mechanisms.
- 35 The group flagged to whom should ICANN be accountable as an important component, and assembled a list of stakeholders which distinguished between affected parties and parties affecting ICANN. The following principles were agreed to guide the CCWG-Accountability's activities:
- ❑ ICANN accountability requires that it comply with its own rules and processes (part of "due process", as a quality of fairness and justice);
  - ❑ ICANN accountability requires compliance with applicable legislation, in jurisdictions where it operates;
  - ❑ ICANN should be accountable to achieving certain levels of performance as well as security;
  - ❑ ICANN should be accountable to ensure that its decisions are for the benefit of the public, not just in the interests of a particular set of stakeholders or ICANN the organization.
- 36 *See Appendix C "CCWG-Accountability Accountability – Problem definition" (current version, 13 March 2015) for more information.*

### 1.3 Legal Advice

- 37 The CCWG-Accountability engaged two law firms to provide advice on the feasibility of its proposed frameworks and mechanisms, Adler & Colvin and Sidley Austin LLP. The firms' work

was coordinated through the Legal Sub-Team of the CCWG-Accountability. See Appendix B for more information on the legal sub-team methodology. The legal advice was key to the CCWG-Accountability in formulating its recommendations.

38 The CCWG-Accountability Legal Sub-Team's rules of engagement and working methodologies are described in Appendix D.

## 1.4 Input Gathered from the Community: Required Community Powers

39 As indicated in the methodology section of Appendix A, the group reviewed the collection of public comments received during the development of the Enhancing ICANN Accountability and categorized these as Work Stream 1 and Work Stream 2. Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance ICANN's accountability would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity.

40 The mechanisms were divided in three sections:

1. **Mechanisms giving the ICANN community ultimate authority over the ICANN corporation.** Most of these were initially designated as Work Stream 1, since community members need the leverage of IANA transition to obtain these Bylaws changes.
2. **Mechanisms to restrict actions of the Board and management of the ICANN corporation.** Most of these are initially designated as Work Stream 2, since the Members could veto certain Board decisions reserved for Members if Members are empowered in Work Stream 1 (1, above).
3. **Mechanisms to prescribe actions of the ICANN corporation.** Most of these are initially designated as Work Stream 1, since the Members could veto certain Board decisions reserved for Members if Members are empowered in Work Stream 1 (above). For example, a bottom-up consensus process to change ICANN Bylaws might be rejected by the ICANN Board, but the Members could then veto that decision.

41 Work Stream 1 accountability mechanisms are presented in detail in Section 2.

42 In addition, the CWG-Stewardship has advised the CCWG, including in a [correspondence](#) from the CWG-Stewardship co-chairs dated 15 April 2015, the expectations from their group with regards to CCWG-Accountability accountability Work Stream 1 recommendations. These expectations are:

- ❑ **ICANN budget:** The CWG-Stewardship supports the ability for the community to approve a budget, including on IANA functions' costs. This expectation is dealt with in section 2.6.2.
- ❑ **Community empowerment mechanisms:** The CWG-Stewardship will be relying on the community empowerment and accountability mechanisms that the CCWG-Accountability is currently considering and developing being in place at the time of the stewardship transition. In particular, mechanisms such as: the ability to recall the ICANN Board decisions relating to periodic or special reviews of the IANA functions undertaken through the IANA Function Review (IFR); the ability to approve changes to Fundamental Bylaws as well as the related creation of a stakeholder community / member group in order ensure the ability to exercise these kinds of rights. This expectation is dealt with in section 2.6.
- ❑ **Creation of a customer standing committee:** The CWG-Stewardship will be relying on the creation of a customer standing committee (CSC) within the ICANN Bylaws. Additionally, under the current CWG-Stewardship proposal, if not currently within their mandates, the ccNSO and/or GNSO would be empowered to address matters escalated by the CSC
- ❑ **Review and redress mechanisms:** The CWG-Stewardship would like to have the assurance that an IANA Function Review (or related special review) could be incorporated as part of the AoC mandated reviews integration into ICANN's Bylaws as a Fundamental Bylaw. This expectation is dealt with in section 2.7.2. The CWG-Stewardship is also relying on a mechanism for a separation review once certain remedies are exhausted which would trigger a separation of the Post-Transition Iana entity (PTI) from ICANN.
- ❑ **Appeal mechanisms (especially with regard to ccTLD related issues):** The CWG-Stewardship recommends that the CCWG-Accountability should be mindful of the recommendations of the CWG-Stewardship in relation to an appeals mechanism for ccTLDs in delegation and re-delegation. The CWG-Stewardship has conducted a survey among the ccTLDs as part of the work of our Design Team B, and the results led to a recommendation which notes that ccTLDs may decide to develop their own appeals mechanism regarding re/delegation at a later date (post-transition). As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes. However, the CWG-Stewardship does want to emphasize the importance and need for an appeal mechanism to cover any other issues that may involve IANA and notes that this is option is expected to be specifically called out as one of the possible escalation mechanisms[1] in the draft transition proposal. This expectation is dealt with in section 3.
- ❑ **Fundamental Bylaws:** To address the various matters above, the CWG-Stewardship is also relying on these mechanisms being included as Fundamental Bylaws.

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- 43 [1] As a note of clarification, the CWG-Stewardship has been referring previously to this appeals mechanism as IAP (Independent Appeals Panel) but understands that the CCWG-Accountability is referring to this mechanism as Independent Review Mechanism (IRP) which would also include the option for appeal. As such the CWG-Stewardship will be updating its references.

## 2) Accountability Mechanisms

### 2.1 Description of Overall Accountability Architecture

- 44 The CCWG-Accountability identifies four building blocks that would form the accountability mechanisms required to improve accountability.



- 45 **Drawing a state analogy:**
- ❑ Empowered community refers to the powers that allow the community i.e., the people, to take action should ICANN breach the principles. **Adler note: "i.e. the people" may serve as a source of confusions.**
    - ❑ The group identified powers and associated mechanisms including the ability to:
      - Remove individual directors or recall the ICANN Board of Directors;

- Approve or veto changes to the ICANN Bylaws, Mission, Commitments and Core Values [**Adler note: “Mission” is capitalized inconsistently throughout sections 2.1, 2.2, and 2.3]**]
    - Reject Board decisions on Strategic Plan and budget, where the Board has failed to appropriately consider community input
  - Principles form the Mission, Commitments and Core Values of the organization (i.e., the Constitution).
  - The group proposes changes that should be made to the Mission, Commitments and Core Values in ICANN's Bylaws. For example, the group discussed how key provisions of the [Affirmation of Commitments](#) (AoC) could be reflected into the Bylaws
- ICANN Board represents the executive entity the community may act against, as appropriate
- Independent Review Mechanisms, (i.e., the judiciary) confers the power to review and provide redress, as needed
  - The group proposes to strengthen the existing independent review process suggesting improvements to its accessibility and affordability, and process design including establishment of a standing panel with binding outcomes. The IRP panel decisions would be guided by ICANN's Mission, Commitments and Core Values.

46 This section of the public comment report details the key recommendations upon which the CCWG-Accountability would like to receive input from the community. These recommendations do not reflect CCWG-Accountability consensus at this point.

## 2.2 Revised Mission, Commitments & Core Values

47 ICANN’s current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN’s accountability: they obligate ICANN to act only within the scope of its limited mission, and to conduct its activities in accordance with certain fundamental principles. As such, these three sections also provide a standard against which ICANN’s conduct can be measured and held accountable through existing and enhanced mechanisms such as Reconsideration and Independent Review.

48 The relevant language in the current Bylaws was adopted in 2003. Based on community input and our discussions since January, the CCWG-Accountability concluded that these provisions should be strengthened and enhanced to provide greater assurances that ICANN is accountable

to its stakeholders and the global Internet community. In particular, the CCWG-Accountability found that:

- ❑ ICANN’s Mission statement needs clarification with respect to the scope of ICANN’s policy authority;
- ❑ The language in the Bylaws describing how ICANN should apply its Core Values is weak and permits ICANN decision makers to exercise excessive discretion;
- ❑ The current Bylaws do not reflect key elements of the Affirmation of Commitments; and
- ❑ The Board should have only a limited ability to change these key accountability provisions of ICANN’s Bylaws.

49 **SUMMARY OF RECOMMENDED CHANGES**

50 **[Note:** Legal counsel have not reviewed the underlying proposed Bylaw revisions at this stage. The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through this comment process, the legal team will need time to draft appropriate language for revisions to the Articles of Incorporation and Bylaws.]

51 The CCWG-Accountability is seeking input on a number of recommended changes to the ICANN Bylaws to address the deficiencies described above. We have deliberately attempted to minimize language changes, and in the charts that follow, we have (i) included the existing language; (ii) provided a redline showing proposed changes; and (iii) identified the source or justification for the proposed changes. Below we provide a summary of the proposed changes.

1. **ICANN Mission Statement.** The CCWG-Accountability recommends the following changes to ICANN’s “Mission Statement,” (Bylaws, Article I, Section 1):
  - a. Clarify that ICANN’s Mission is limited to coordinating and implementing policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.
  - b. Clarify that ICANN’s Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide. Regulation of content is inconsistent with ICANN’s limited technical mission.
  - c. Clarify that ICANN’s powers are “enumerated” – meaning that anything not articulated in the Bylaws are outside the scope of ICANN’s authority. This does not mean ICANN’s powers can never evolve – but ensures that any changes will be deliberate and supported by the community.
  - d. The group discussed how to balance the needs of limiting ICANN’s mission and the necessary ability of the organization to adjust to a changing environment. **[Adler: This is a general observation as opposed to a recommended change to the Mission statement. Consider moving this subsection d to the lead-in paragraph under**

**“ICANN Mission Statement” above.]**

2. **Core Values.** The CCWG-Accountability recommends the following changes to ICANN’s “Core Values” (Bylaws, Article I, Section 2 and Article II, Section 3):
- a. Divide the existing Core Values provisions into Commitments and “Core Values.”
    - i. Incorporate into the Bylaws ICANN’s obligation to operate for the benefit of the Internet community as a whole, carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These obligations are now contained in ICANN’s Articles of Incorporation.
    - ii. Designate certain Core Values as “Commitments”. These values are so fundamental to ICANN’s operation that they should rarely need to be balanced against each other. Those Commitments include ICANN’s obligations to:
      1. Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
      2. Limit its activities to those within ICANN’s Mission and require or significantly benefit from global coordination;
      3. Employ open, transparent, bottom-up, multistakeholder processes; and
      4. Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
    - iii. Slightly modify the remaining Core Values to:
      1. Reflect various provisions in the Affirmation of Commitments, e.g., efficiency, operational excellence, and fiscal responsibility;
      2. Clarify that any decision to defer to input from public authorities must be consistent with ICANN’s Commitments and Core Values. We believe that this is inherent in the current Bylaws, but felt that it was appropriate to call it out clearly for purposes of accountability. This does not interfere with the ability of the GAC to provide input or advice on any topic; rather, it clarifies that ICANN must always



act in compliance with its Bylaws obligations.

3. Add an obligation to avoid capture.

### 3. Balancing or Reconciliation Test

- a. Modify the “balancing” language in the Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:
  - i. In any situation in which one Guarantee must be reconciled with another Guarantee or with a Core Value, the proposed language requires ICANN to ensure that its interpretation is (i) justified by an important, specific, and articulated public interest goal within its Mission; (ii) likely to promote that public interest goal; (iii) narrowly tailored to achieve that goal; and (iv) no broader than necessary to do so; and
  - ii. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest in a way that is substantially related to that interest.
4. Fundamental (Durable or Enduring) Bylaws Provisions. The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be adopted as “durable” or “enduring” elements of the ICANN Bylaws. Any modification to these Bylaws provisions would be subject to heightened standards including, for example, community ratification or subject to community veto.

## DISCUSSION

52 To whom is ICANN accountable? For what is it accountable? Those questions were a necessary starting point for the work of the CCWG-Accountability, and the answers inform all of our recommendations. Our work on Independent Review attempts to answer the first question. The Bylaws changes recommended here are designed to answer the second. Most important, ICANN has a limited mission, and it must be accountable for actions that exceed the scope of its mission. In undertaking its mission, ICANN is also obligated to adhere to an agreed-upon standard of behavior, articulated through its Commitments and Core Values. Taken together, the proposed Mission, Commitments, and Core Values statement articulate the standard against which ICANN’s behavior can be measured and to which it can be held accountable. Because these Bylaws provisions are fundamental to ICANN’s accountability, we propose that they be adopted as Fundamental Bylaws that can only be changed with the approval of the community subject to procedural and substantive safeguards.

**QUESTIONS AND OPEN ISSUES:**

1. Do you agree that these recommended changes to ICANN’s Mission, Commitments and Core Values would enhance ICANN's accountability?
  2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.
- 53 The proposed language is intended to convey the substance of the proposed Bylaws changes related to ICANN’s Mission, Commitments and Core Values. [Legal counsel have not reviewed the underlying proposed Bylaws revisions. The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through this comment process, the legal team will need time to draft appropriate language for revisions to the Articles of Incorporation and Bylaws. Once further developed, the proposed amendments to the Articles of Incorporation and Bylaws](#) will be subject to public consultation.
- 54 The table below compares the current draft proposals with the current language and explains the context in the “Notes” column. We are particularly interested in the community’s view as to the broad approach painted: of providing an almost “constitutional core” for ICANN against which the Board and staff can be held to account – by the community, and by the various review and redress procedures that feature elsewhere in this report.

**MISSION**

<b>Current Bylaws Language</b>	<b>Working Draft New/changed text appears in red or strike-out text</b>	<b>Notes, Comments, Questions</b>
<p>55 The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:</p> <p>1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous</p>	<p>56 The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:</p> <p>1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and</p>	<p>62 <i>The additional language is intended clarify, but not to either diminish or expand ICANN's current Mission. The proposed Mission statement also reflects ICANN's obligation under the <a href="#"><u>Affirmation of Commitments</u></a> (AoC).</i></p>

<p>system ("AS") numbers; and Protocol port and parameter numbers.</p> <p>2. Coordinates the operation and evolution of the DNS root name server system</p> <p>3. Coordinates policy development reasonably and appropriately related to these technical functions.</p>	<p>autonomous system ("AS") numbers; and Protocol port and parameter numbers.</p> <p>2. Coordinates the operation and evolution of the DNS root name server system</p> <p>3. Coordinates policy development reasonably and appropriately related to these technical functions.</p> <p>57 <i>In this role, with respect to domain names, ICANN's mission is to coordinate the development and implementation of policy developed through a bottom-up, consensus-based multistakeholder process that is designed to ensure the stable and secure operation of the Internet's unique names systems, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.</i></p> <p>58 <i>In this role, with respect to IP addresses and AS numbers, ICANN's mission is described in the ASO MoU between ICANN and RIRs</i></p> <p>59 <i>In this role, with respect to protocol port and parameter numbers, ICANN's mission is to [to be provided by the IETF]</i></p> <p>60 <i>In this role, with respect to the DNS root server system, ICANN's mission is to [to be provided by root server operators]</i></p>	
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	<p>61 ICANN shall not undertake any other mission not specifically authorized in these Bylaws. Without in any way limiting the foregoing absolute prohibition it is expressly noted that ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.</p>	<p>63 Some members of the CCWG-Accountability have expressed concern that this language may constrain ICANN's ability to evolve to meeting the changes needs of the DNS. Others, however, point out that this does not preclude such evolution; rather, it merely requires such changes to be agreed upon and formally reflected in the Bylaws.</p>
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## COMMITMENTS AND CORE VALUES

- 64 The CCWG-Accountability proposes to ensure that all elements of the [Affirmation of Commitments](#) are reflected in ICANN's Bylaws and Articles of Incorporation. Some AoC provisions are incorporated as Commitments and Core Values, others are included in other sections of the governing documents. For example,
1. In **AoC Section 8(b)**, ICANN commits to 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.
    - a. Article XVIII, Section 1 of the Bylaws currently provide that *"the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish."*
    - b. As set forth in the current Articles of Incorporation, ICANN's is incorporated as a *"nonprofit public benefit corporation under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes."*
  2. In **AoC Section 7**, ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross community deliberations and responsive consultation procedures, including detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, to publish an annual report of its progress, and to provide thorough and reasoned explanations for its decisions, etc. The CCWG-Accountability proposes to incorporate this commitment into Bylaws Article III, which governs transparency.
  3. In **AoC Section 4**, ICANN commits to perform and publish analysis of the positive and negative effects of its decisions on the public. The CCWG-Accountability proposes to incorporate this commitment into Bylaws Article III, which governs transparency.

65 In each case above, any changes to the relevant governing documents would be subject to rejection by the community or a direction that the Board reconsider the proposed change in accordance with the recommendations set out in Section 2.6.3 of the CCWG-Accountability Draft Report.

Current Bylaws Language	Working Draft New/changed text appears in red or strike-out text	Notes, Comments, Questions
<p>66 Bylaws re reconciling competing Core Values</p> <p>67 In performing its Mission, the following core values should guide the decisions and actions of ICANN: [Core Values Listed]</p> <p>68 These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible</p>	<p>69 <b>Commitments</b> and Core Values</p> <p>70 In <del>performing</del> carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.</p> <p>71 These <b>Commitments</b> and Core Values are <del>deliberately expressed in very general terms, so that they may intended to apply provide useful and relevant guidance</del> in the broadest possible range of circumstances. <del>Because they are not narrowly prescriptive, the</del> The specific way in which they apply, individually and collectively, to each new situation <del>will necessarily may</del> depend on many factors that cannot be fully anticipated or enumerated. <del>and because they are statements of principle rather than practice,</del> Situations may <del>will inevitably</del> arise in which perfect fidelity to all <del>eleven Fundamental</del> <b>Commitments</b> and Core Values simultaneously is not possible.</p> <p>72 <b>To the extent a Commitment must be reconciled with other Commitments and/or one or more Core Values in any particular situation, such reconciliation must be:</b></p>	<p>77 <i>ICANN's Mission Statement articulates WHAT is in scope and includes examples of what is out of scope for ICANN. ICANN's "Core Values" articulate HOW ICANN is to carry out its Mission. The CCWG-Accountability acknowledges that in some situations the Core Values may be in tension with one another, requiring a decision maker to reconcile the competing values to achieve ICANN's Mission. ICANN's current Bylaws describe this process and permit the decision maker to exercise its judgment in order to achieve "an appropriate and defensible balance among competing values."</i></p> <p>78 <i>While some degree of flexibility is needed, the language in the current Bylaws provides no principled basis for reconciling the principles in any particular situation. The proposed language articulates the standard to be applied when an ICANN decision maker is required to reconcile competing values. To facilitate this process and to limit opportunities for abuse, the CCWG-Accountability proposes to create a two-tiered values statement consisting of</i></p>

<p>balance among competing values.</p>	<p>73 Justified by an important, specific, and articulated public interest goal that is within ICANN's Mission and consistent with a balanced application of ICANN's other Commitments and Core Values (a "Substantial and Compelling Reason in the Public Interest");</p> <p>74 Likely to promote that interest, taking into account competing public and private interests that are likely to be affected by the balancing;</p> <p>75 Narrowly tailored using the least restrictive means reasonably available; and No broader than reasonably necessary to address the specified Substantial and Compelling Reason in the Public Interest.</p> <p>76 In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest in a way that is substantially related to that interest.</p>	<p><i>ICANN "Commitments" and "Core Values."</i></p> <p>79 <i>To the extent that this kind of reconciliation would impinge on one or more of the fundamental Commitments, the proposed language would require the decision maker to meet a high bar, demonstrating that any balancing is necessary and likely to achieve an important public interest goal, and narrowly tailored to achieve that goal. The bar is set to be somewhat more flexible with respect to reconciliation of Core Values.</i></p>
<p><b>Section 2. CORE VALUES.</b></p> <p>80 In performing its Mission, the following core values should guide the decisions and actions of ICANN:</p> <ol style="list-style-type: none"> <li>1. Preserving and enhancing the operational stability, reliability, security, and global Interoperability of the Internet.</li> <li>2. Respecting the creativity, innovation, and flow of</li> </ol>	<p>81 <del>Commitments. In performing its Mission, the following core values should guide the decisions and actions of ICANN:</del> ICANN must operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable law and international conventions and through open and transparent processes that enable</p>	<p>83 This additional language is derived from ICANN's current <a href="#">Articles of Incorporation</a>. This language also supports <a href="#">Affirmation of Commitments</a> language, including Section 3, in which ICANN "commits 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</p>

<p>information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.</p> <p>3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.</p> <p>4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. ALSO: Bylaws Section 3: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.</p> <p>5. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.</p>	<p><b>competition and open entry in Internet-related markets, and that reflect the Commitments and Core Values the Fundamental Rights set forth below. Specifically, ICANN's action must:</b></p> <p>82 Preserving and enhancing the operational stability, reliability, security, global interoperability, <b>resilience, and openness</b> of the DNS and the Internet; <b>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> Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and requiring or significantly benefiting from global coordination; Employing open, transparent and bottom-up, private sector led multistakeholder policy development mechanisms processes that (i) <b>seeks input from the public, for whose benefit ICANN shall in all events act,</b> (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process; Making decisions by applying documented policies consistently, neutrally, objectively, and fairly, <del>with integrity and fairness</del> without singling out any particular party for <b>disparate discriminatory</b></p>	<p>of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.”</p> <p>84 In <i>AoC Section 9.2 and AoC Section 3(b)</i> ICANN commits to preserve the security, stability and resiliency of the DNS.</p> <p>85 In AoC Section 8(a), ICANN affirms its commitments to 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.</p> <p>86 In AoC Section 8(c), ICANN commits to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.</p> <p>87 The changes in the current Bylaws for Core Value #8 reflect and incorporate current Bylaws Section 3. On NON-DISCRIMINATORY TREATMENT. The OED defines “disparate” as “Essentially different in kind; not able to be compared.” “Discriminatory” is defined as “making or showing an unfair or <u>prejudicial distinction</u> between <u>different categories</u> of <u>people</u> or things.” This change was suggested by one of the CCWG-Accountability’s independent experts.</p> <p>88 In <i>AoC Section 9.1</i>, ICANN commits to maintain and</p>
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	<p>treatment <del>unless justified by substantial and reasonable cause, such as the promotion of effective competition;</del>  Remaining accountable to the Internet Community through mechanisms <b>defined in the Bylaws</b> that enhance ICANN's effectiveness.</p>	<p>improve robust mechanisms for public input, accountability, and transparency.”</p>
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<p>those entities most affected.</p> <p>95 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.</p>	<p><b>consumer trust and choice.</b></p> <p>100 Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest <b>as identified through the bottom-up, multistakeholder policy development process.</b></p> <p>101 <b>Operate with efficiency and excellence, <del>acting in a fiscally responsible and accountable manner</del> and at a speed that is responsive to the needs of the global Internet community.</b></p> <p>102 While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account <b>the public policy advice of governments and public authorities in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values.</b></p> <p>103 <b>[Not advance] [Refrain from advancing] the interests of one or more interest groups at the expense of others</b></p>	<p>108 AoC 3(c) provides that ICANN will “promote competition, consumer trust, and consumer choice in the DNS marketplace.”</p> <p>109 In <i>AoC Section 9.3</i>, ICANN commits to promote “competition, consumer trust, and consumer choice.” See discussion above re “public interest.”</p> <p>110 In <i>AoC Section 7</i>, ICANN “commits to adhere to transparent and accountable budgeting processes.”</p> <p>111 In <i>AoC Section 8</i>, ICANN commits to “operate as a multi-stakeholder, private sector led organization.” <i>AoC Section 8</i> further provides that ICANN is a private organization and not controlled by any one entity.</p> <p>112 In <i>AoC Section 4</i>, ICANN commits to perform analyses to ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders.</p>
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## 2.3 Fundamental Bylaws

### 2.3.1 What is a “Fundamental Bylaw”

- 113 ICANN’s Bylaws can generally be changed by resolution of the Board. With a 2/3 majority, the Board can change the rules of the game within ICANN. The CCWG-Accountability believes that some aspects of ICANN’s Bylaws should be **harder to change** than others. These would be deemed Fundamental Bylaws. The Mission, Commitments, and Core Values of ICANN, or core

features of the accountability tools set out in this Report, would be examples of things that the Board on its own should not be able to change.

## 2.3.2 Establishing Fundamental Bylaws

114 The CCWG-Accountability therefore proposes the creation of Fundamental Bylaws. They become fundamental by identifying them as such, and by defining a different (and more difficult) process to change them than the process used for general Bylaws changes.

115 **To implement this, a new provision would be added to the Bylaws that sets out:**

1. Which sections of the Bylaws are Fundamental Bylaws (i.e. a list of the articles / sections / subsections that are Fundamental – which would include this new provision)
2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed

116 Legal advice has confirmed this proposition is feasible.

## 2.3.3 Adding new or changing existing Fundamental Bylaws

117 It is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones, as the purpose of these accountability reforms would not be served if ICANN could not change in response to the changing Internet environment. On the other hand, there appears to be consensus that ICANN should be able to expand its Mission only under very limited circumstances. To establish a new Fundamental Bylaw or to change or remove an existing one, the following steps would be followed where the Board (or the staff through the Board) is proposing the addition:

1. The Board would propose the new Fundamental Bylaw or a change to / removal of an existing one through the usual process, but would need to identify it as a Fundamental Bylaw Proposal throughout the process.
2. The Board would need to cast 3/4 of votes in favor of the change (higher than the usual threshold of 2/3).
3. The new community power set out in 2.6.4 to approve changes to Fundamental Bylaws would apply. The threshold to approve the change would be set at a high bar, similar to the level of support needed to recall the entire Board.
4. If the change were agreed, then the new Fundamental Bylaw would appear in the Bylaws wherever it had to, and reference to the text as a Fundamental Bylaw would be added to the part of the Bylaws that lists them. In the case of an amendment, the text would be amended. In the case of a removal, the text would be removed and the reference to that part would be removed.

118 **QUESTIONS AND OPEN ISSUES:**

119 The CCWG-Accountability welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to

be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG-Accountability welcomes feedback on whether the Mission Statement should be subject to even higher bars.

### 2.3.4 Which of the current Bylaws would become Fundamental Bylaws?

- 120 The general approach should be to have only critical matters defined in the Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN's structures. It would harm, not help, accountability to make changes to Bylaws in general face the same thresholds as are proposed for Fundamental Bylaws. In the CCWG-Accountability's view, "critical matters" are those that define the corporation's scope and Mission, and the core accountability tools the community requires. Accordingly, the following would be Fundamental Bylaws in the first instance:
1. The Mission / Commitments / Core Values;
  2. The Independent Review process;
  3. The manner in which Fundamental Bylaws can be amended;
  4. The powers set out in section 2.6 of this report;
  5. Reviews that are part of the CWG-Stewardship's work – the IANA Function Review, the Separation Review and any others they may require, as well as the creation of a customer standing committee;

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#### **QUESTIONS AND OPEN ISSUES:**

- 122 Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

## 2.4 Independent Review Panel Enhancement

### **INTRODUCTION**

- 123 The consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing Independent Review Process (IRP). Commenters called for ICANN to be held to a *substantive standard of behavior* rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for a process that was *binding* rather than merely advisory. Commenters also strongly urged that the IRP be *accessible*, both financially and from a standing perspective, transparent, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

124 The process described below calls for a standing, independent panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and across issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission, whether it is abiding by policies [**Adler note:** The introductory reference to “policies” is important, and should be reflected throughout as part of the IRP’s subject matter jurisdiction, beyond the Bylaws] adopted by the multistakeholder community, and whether in carrying out its mission and applying consensus policies it is acting in accordance with ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values*, or ICANN policies. (See, *Statement of Mission, Commitments, and Core Values*.) [**Sidley note:** we suggest that you standardize language involving the proposed *Statement of Mission, Commitments & Core Values*, or ICANN policies.]

125 The proposal calls for a fully *independent* judicial/arbitral function. The purpose of a standing panel is to ensure that panelists are not beholden to ICANN or any of its constituent bodies – but a core skill of this IRP’s panelists is the need to build a thorough and detailed understanding of how ICANN’s Mission is implemented, and its commitments and values applied – over time and across a variety of situations.

1. **Purpose of the IRP:** The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical mission and, in carrying out that mission, acts in a manner that respects community-agreed fundamental rights, freedoms, and values.
  - a. Empower the community and affected individuals/entities to prevent “mission creep,” enforce compliance with established multistakeholder policies, provide redress for due process violations, and protect the multistakeholder process through meaningful, affordable, access to expert review of ICANN actions.
  - b. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its mission or that violate community-approved standards of behavior, including violations of established ICANN policies.
  - c. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs/ACs, and the community in connection with policy development and implementation.
  
2. **A Standing Panel:** The IRP should be a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN’s action or inaction in violation of commitments made in ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values*, and ICANN policies established to hold ICANN accountable to requirements of nonprofit corporate and charitable laws. This reflects proposed changes and enhancements to ICANN’s existing Independent Review Process. [**Note:** The attorneys suggest referencing compliance with the requirements of California nonprofit corporate and charitable laws, as interpreted by controlling cases.]

3. **Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint alleging that a specified action or inaction is in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values* or ICANN policies. Matters specifically reserved to any “Members” of ICANN in the Articles or Bylaws would be excluded from IRP review. Likewise, the IRP could also not address matters that are so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board.
  
4. **Possible Outcomes of the IRP:** Decision that an action/failure to act in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission Commitments & Core Values* or ICANN policies. The intent is that IRP decisions should be binding on ICANN.
  - a. Decisions of the IRP are not subject to appeal (except for review of very limited issues such whether the outcome exceeded the permissible scope of the arbitration or was procured by fraud or corruption). However, the panel may not direct the Board or ICANN on how to amend specific decisions, it shall only be able to make decisions that confirm a decision by ICANN, or cancel a decision, totally or in parts.
  - b. This balance between the absence of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid that the panel’s outcome overcomes the Board in its fiduciary duties.
  
5. **Standing:** Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values* or ICANN policies.
  - a. Interim (prospective, interlocutory, injunctive, *status quo* preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
  - b. Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken;
  - c. Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
  - d. A balance of hardships tipping decidedly toward the party seeking the relief.

[**Sidley Note:** issues to consider – standing of the ombudsman? Agreement of the party invoking the IRP to be bound by the IRP? Third party intervention rights?]

6. The CCWG-Accountability recommends giving the community, as described in section 2.6.1, the right to have standing before the IRP. In such a case, the burden of the legal fees would be on ICANN. The precise process for such a case is still under development.
7. In their letter dated 15 April 2015, the CWG-Stewardship-Stewardship indicated “As such any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation/re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes”. As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other parties.
8. **Standard of Review:** A party challenging an action or inaction has the burden to demonstrate that the complained-of action violates either (a) substantive limitations on the permissible scope of ICANN’s actions [**Sidley note: This subsection is unclear. Consider deleting the section or specifying the source of these substantive limitations**], or (b) decision-making procedures, in each case as set forth in ICANN’s By-laws, Articles of Incorporation, or *Statement of Mission, Commitments, and Core Values*, or ICANN policies.
9. **Composition of Panel; Expertise:** Significant legal expertise, particularly international arbitration expertise and expertise, developed over time, about the DNS and ICANN’s policies, practices, and procedures. At a minimum, Panelists should receive training on the workings and management of the domain name system. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.
  - a. While most of the working group was comfortable with this formulation, some participants prefer to require that the panelists themselves possess the requisite skill sets – of course, individual panelists need not possess every kind of expertise, rather, they suggest that taken together the panel should possess the requisite skills.
10. **Diversity: Geographic diversity.** English as primary working language with provision of translation services for claimants as needed. The Standing Panel members should have diversity in geographic and cultural representation. Diversity of experience will be considered in completing the composition of the Panel. Reasonable efforts should be undertaken to achieve such diversity.
11. **Size of Panel**
  - a. Standing Panel – 7

- b. Decisional Panel – 1 or 3 Panelists [**Sidley note to consider:** Having a smaller decisional panel than the full panel creates the potential for an en banc rehearing request involving all of the panelists. This may provide an internal “appeal” process.]
- 12. **Independence:** Members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply, and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited.
- 13. **Selection and Appointment:** The selection of panelists would follow a 3-step process:
  - a. Third party international arbitral bodies would nominate candidates
  - b. The ICANN Board would select proposed panelists subject to community confirmation.
  - c. The community mechanism (see section 2.6) would be asked to confirm appointments.
- 14. **Recall or other Accountability:** Appointments made for a fixed term with no removal except for specified cause (corruption, misuse of position for personal use, etc.).
- 15. **Settlement Efforts:**
  - a. Reasonable efforts, as specified in a public policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
  - b. Parties to cooperatively engage informally, but either party may inject independent dispute resolution facilitator (mediator) after initial CEP meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after specified period, that party’s concludes in good faith that further efforts are unlikely to produce agreement.
  - c. The process must be governed by clearly understood and **pre-published rules applicable to both parties** and be subject to strict time limits.
- 16. **Decision Making:**
  - a. In each case, a single or 3 member panel will be drawn from standing panels. In single member panel, ICANN and complaining party agree on panelist. In 3-member panel cases, each party selects one panelist, and those panelists select a third. We anticipate that the Standing Panel would draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.
  - b. Panel decisions will be based on each IRP panelist’s assessment of the merits of the claimant’s case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on

those facts. All decisions will be documented and made public and will reflect a well-reasoned application of the standard to be applied (i.e., Bylaws, the *Statement of Mission, Commitments, and Core Values*, and ICANN policies.

17. **Decision:**

- a. Panel decisions (where there is more than one panelist) would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP itself should be empowered to set.
- b. The CCWG-Accountability recommends that IRP decisions be “precedential” – meaning, that deference should a panel give to prior decisions? By conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers, which is valuable. It also reduces the chances of inconsistent treatment of one claimant or another, based on the specific individuals making up the decisional panel in particular cases. But this makes it more likely that a “bad” decision in one case affects other cases going forward.
- c. It is expected that judgments of the IRP would be enforceable in the court of the US and other countries that accept international arbitration results.

18. **Accessibility and Cost:**

- a. The CCWG-Accountability recommends that ICANN would bear the administrative the costs of maintaining the system (including Panelist salaries). The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access to pro bono representation for community, non-profit complainants.
- b. The Panel should complete work expeditiously; issuing a scheduling order early in the process, and in the ordinary course should issue decisions within a standard time frame.

19. **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws.

20. **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust independent review process. We recommend reviewing and enhancing the DIDP as part of the accountability enhancements in Work Stream 2.



- 127 4) Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.
- 128 A detailed list of questions regarding principles and implementation for the IRP is provided in Appendix I. The CCWG-Accountability Accountability would appreciate detailed community input to guide its work into providing more detailed requirements for the enhanced IRP. A specific community input form is provided.

## 2.5 Reconsideration Process Enhancement

### 129 INTRODUCTION

- 130 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action / inaction by ICANN's Board or staff, and which is provided for in Article IV, section 2 of ICANN's Bylaws. The key reforms proposed include: the scope of permissible requests has been expanded to include Board/staff actions or inactions that contradict ICANN's mission or core values, and the time for filing a Request for Reconsideration has been extended from 15 to 30 days. Additionally, the grounds for summary dismissal have been narrowed and the ICANN Board of directors must make determinations on all requests (rather than a committee handling staff issues). Another proposed change is that ICANN's ombudsman should make the initial substantive evaluation of the requests to aid the Board Governance Committee in its recommendation, and then requesters are provided an opportunity to rebut the BGC's recommendation before a final decision by the entire Board. More transparency requirements and firm deadlines in issuing of determinations are also proposed.

### 131 STANDING

- 132 Amend "who" has proper standing to file a Reconsideration Request to widen its scope by including Board/staff actions/inactions that contradict ICANN's *mission or core values* (was only *policies* before). It is noted that under the existing Bylaws paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Reconsideration Request process.

### 133 ICANN's Bylaws could be revised (added text in red below):

- a. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
- b. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. One or more **ICANN Board or** staff actions or inactions that contradict established ICANN policy(ies), **its mission, core values**; or

- b. One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of ~~material~~ **relevant** information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- c. One or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate ~~material~~ **relevant** information.

134 In their letter dated 15 April 2015, the CWG-Stewardship requested indicated “As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes.” As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

135 **GOALS** [*Sidley note*: It is not accurate to refer to these criteria as the “Standard of Review.” Below are goals or aims of the revised IRP process, but remember that the “standard of review” describes the legal test against which the prior action/inaction is measured. We suggest changing this Section name to something like “Goals.”]

136 The CCWG-Accountability proposals aim to:

- ❑ Broaden the types of decisions, which can be re-examined to include Board/staff action/inaction against ICANN’s mission or core values (as stated in Bylaws / Articles).
- ❑ Provide more transparency in dismissal process
- ❑ Provide Board with reasonable right to dismiss frivolous requests, but not on the grounds that one didn’t participate in ICANN’s public comment or on the claim one is vexatious or querulous, which is too subjective.
- ❑ Propose to amend Paragraph 9 on BGC summary dismissal as follows:

137 The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous ~~querulous or vexatious~~; or (iii) ~~the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable.~~ The Board Governance Committee's summary dismissal of a Reconsideration Request shall be **documented and promptly** posted on the Website.

138 **COMPOSITION**

139 The group considers there is need to rely less on the legal department (who holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More Board member engagement is needed in the overall decision-making process.

140 Requests should no longer go to ICANN’s lawyers (in-house or out-house) for the first substantive evaluation. Instead, the Requests could go to ICANN’s Ombudsman for a first look, who could

make the initial recommendation to the BGC. The Ombudsman may have more of an eye for fairness to the community in looking at these requests. Note the Bylaws charge the BGC with these duties, so BGC would utilize the Ombudsman instead of its current practice of ICANN's lawyers to aid the BGC's in its initial evaluation.

141 All final determinations of reconsideration requests are to be made by the entire Board (not only requests about Board actions as is the current practice).

142 **Amend Paragraph 3:**

c. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- Evaluate requests for review or reconsideration;
- Summarily dismiss insufficient requests;
- Evaluate requests for urgent consideration;
- Conduct whatever factual investigation is deemed appropriate;
- Request additional written submissions from the affected party, or from other parties;
- ~~Make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors;~~ and
- Make a recommendation to the Board of Directors on the merits of the request, as necessary.

143 And delete Paragraph 15 since the Board will make all final decisions regarding requests related to staff action/inaction:

144 **DECISION-MAKING**

145 Transparency improvements are needed regarding the information that goes into the Board's decision-making process and the rationale for why decisions are ultimately taken. Recordings / transcripts should be posted of the substantive Board discussions on the option of the requester.

146 Provide a rebuttal opportunity to the BGC's final recommendation (although requesters can't raise new issues in a rebuttal) before the full Board finally decides.

147 Adding hard deadlines to the process, including final determinations of the Board issued within 120 days from request. although a request for reconsideration will not stay the effect of Board actions.

148 Propose to amend reconsideration rules as follows (in red):

149 The Board Governance Committee shall make a final ~~determination or a~~ recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final ~~determination or~~ recommendation. **In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the Request. The Requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the entire Board for its evaluation.**

150 The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board **and its rationale** shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. **In any event, the Board's final decision shall be made within 120 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the request.** The Board's decision on the recommendation is final.

151 **ACCESSIBILITY**

152 Extend the time deadline for filing a Reconsideration Request from 15 to 30 days from when Requester learns of the decision/inaction.

153 Amend paragraph 5 as follows:

1. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within ~~fifteen~~ **30** days after:
  - a) for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within **30** days from the initial posting of the rationale; or
  - b) for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c) for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

154 **DUE PROCESS**

155 ICANN's Document and Information Disclosure Policy (DIDP) should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

156 Provide all briefing materials supplied to the Board to the Requester should be provided so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality requirements).

157 Final decisions should be issued sooner – hard deadline of 120 days.

158 Requesters should be provided more time to learn of action/inaction and to file the request.

159 Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

160 **QUESTIONS AND OPEN ISSUES**

161 5) Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

162 Are the timeframes and deadlines proposed herein sufficient to meet the community's needs?

163 Is the scope of permissible requests broad / narrow enough to meet the community's needs?

## 2.6 Community Empowerment

### 2.6.1 Mechanism to empower the community

164 Initial legal advice has indicated that the set of powers proposed in this report may be reserved to the ICANN multistakeholder community. More specifically, there are approaches we can take within ICANN to make these powers legally available and enforceable.

165 As overall comments, the CCWG-Accountability is largely agreed on the following:

1. To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers
2. To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO / AC / SG structures (without making it impossible to change these in future)

166 The subsections below explain the CCWG-Accountability’s reference proposal for the Community Mechanism and the major alternative considered to it (2.6.1.1), and the proposed participants in the mechanism and their levels of influence (2.6.1.2).

### 2.6.1.1 The Community Mechanism: SO/AC Membership Model

1. In its deliberations and in discussion with its independent legal counsel, it has become apparent that ICANN as a non-profit public benefit corporation organized under California law is able to reserve to the multistakeholder community the powers the CCWG-Accountability is proposing for the community. To secure the delivery of these powers, however, ICANN needs to make use of membership or designator roles.
2. While the *status quo* has elements of a designator model, efforts to simply expand the powers of the multistakeholder community through the Bylaws would be insufficient because such Bylaws would be unlikely to be enforceable to the degree the global multistakeholder community - or this CCWG-Accountability - would expect. In preparing for the environment that emerges following the end of the post-NTIA contract, our task as a CCWG-Accountability is to strengthen ICANN’s accountability, not to allow it to be weakened. So the *status quo* is not an option.
3. California law, similar to the law of many other jurisdictions, allows for membership of non-profit corporations. Members have certain powers provided by law that may be expanded upon through Articles and Bylaws in a manner that is enforceable.
4. The CCWG-Accountability proposes the creation of a formal membership body with power to hold the ICANN Board accountable. This “SO/AC Membership model” is the approach that, based on analysis so far, fits requirements best. This model, referred to here as the Reference Mechanism, would have the following key characteristics:
  - a. The ICANN Supporting Organizations and the Advisory Committees who currently have the right to elect directors (as opposed to non-voting observers) to the ICANN board would each establish a “Member Entity” of ICANN, and through use of closely affiliated unincorporated associations those SOs and ACs would exercise the community powers proposed in this part of the Report. The other ACs would not become Members, but rather continue as non-voting observers (see subsection c below). This Member structure is to be distinguished from the community mechanism described in Section 2.6.1.2, in which other ACs do not have voting power. No third party and no individuals would become the Members of ICANN.
  - b. In their role as Members, acting through their Member Entities, the Member SOs and ACs would exercise the new community powers set out in 2.6.2-2.6.6 below, in conjunction with the community mechanism described in Section 2.6.1.2. Our legal counsel have advised that the

powers we are proposing can be realized and enforced through this Membership model.

- c. Conversely, the SOs and ACs that designate observers to the Board do not need to become ICANN Members (and will not have the rights of Members) and do not need to have unincorporated associations. In addition to the Member Entities, in this Reference Mechanism, a broader community group (including all SOs and ACs regardless of whether they have Member Entities) would be able to exercise certain community powers, namely, triggering reviews of some Board actions (but not rejection or approval). This broader community group is described in more detail in 2.6.1.2 below, and would consist of the following bodies, with 29 votes allocated as follows: 5 for the gNSO, the ccNSO, the ASO, the GAC and ALAC; 2 each for SSAC and RSSAC.
  - d. All of the existing functions and work of the SOs and ACs would continue being done within the framework of the ICANN Bylaws. It is only the new accountability powers that would require use of the unincorporated association Member Entities.
  - e. There would be no need for individuals or organizations to change the ways in which they participate in ICANN or the SOs or ACs as a result of creating the new “Member Entities” or “unincorporated associations.” Community participants would have the choice of opting in and participating in this new accountability system, or to simply keep on doing what they do today in an ICANN that is more accountable than it is today.
  - f. Our legal advisors have advised that through this structure, there would be no material increase in the risks and liabilities individual ICANN participants face today. In fact, in some respects individual participants would be safer from hostile legal action than they are today.
  - g. A further description of the use of unincorporated associations and a set of practical questions and answers regarding unincorporated associations is also available in Appendix H (Sidley and Adler & Colvin Memo (Unincorporated associations)).
5. The powers proposed can be implemented under the SO/AC Membership model, and it has advantages in terms of enforceability. Because, according to legal counsel, the SO/AC Membership model provides the clearest path for the community to exercise the six community powers explicitly sought by the CCWG-Accountability, it is our Reference Mechanism at this time.

In arriving at this SO/AC Membership Model, the primary alternative the CCWG-Accountability has investigated is a model based on “designators” – an SO/AC Designator Model.

Designators are a construct in California law that can achieve reliable enforcement of four of the six community powers sought, specifically with respect to community

approval or blocking of changes of Bylaws and the selection and removal of Board Directors [**Note:** “Board Directors” are used here as opposed to “Board Members” so as to better distinguish between the persons sitting on the Board of Directors from Members in the SO/AC Membership Model. Consider a conforming change throughout the document]. There is concern however, regarding the ease and reliability with which the other two community powers sought (approval of budget and strategic plan) can be enforced once created under the SO/AC Designator model, according to legal counsel. Legal counsel further advises that those SOs and ALAC who are empowered to select Board Directors and enforce the community powers noted below, should create closely affiliated unincorporated associations in both corporate governance models, whether a designator or membership structure, that would be able to enforce their rights.

6. Legal Counsel advise that the SO/AC Membership model creates the most straightforward mechanism for the community to attain the proposed powers to hold the ICANN Board accountable. In preparing for the environment that emerges following the end of the post-NTIA contract, our task as a CCWG-Accountability is to strengthen ICANN's accountability, not to allow it to be weakened. So the *status quo* is not an option and the community should select either an SO/AC Membership model or an empowered SO/AC Designator model to achieve that accountability.
7. Variations of these mechanisms were also discussed:
  - a. The notion of creating a permanent CCWG-Accountability or a Community Council that was the sole “member” or “designator” was considered but rejected mainly because it created additional accountability problems and offered no accountability advantages compared with the Reference Mechanism;
  - b. The notion of all SOs and ACs collectively creating an unincorporated association that would be the single member of ICANN was considered. However this model “would add only complexity without contributing real advantages”.
  - c. The group also considered the notion of a first step (in a timeframe consistent with Work Stream 1) focusing on changes in the Bylaws and current mechanisms only, while assessing the opportunity to go one step further as part of Work Stream 2.
8. None of the mechanism possibilities should be considered “off the table”. The work of the CCWG-Accountability has proceeded quickly, and our counsel are rapidly becoming familiar with the complexities of ICANN’s history and current approach to dealing with many of these matters.



9. That said, the CCWG-Accountability is clearly of the view that the SO/AC Membership Model is the currently preferred approach, and relies on this in much of what follows.
10. How the Reference Mechanism operates (e.g., whether the votes are “cast” by the SOs and ACs as organized through a Membership model, whether or there is some community group where there are representatives, how the community’s decisions are implemented through those Soss and ACs that are Member Entities, and/or model rules for the unincorporated associations) is an important implementation detail that will be developed by the CCWG-Accountability and open for thorough community consultation in our second Public Comment report.
11. Please see the additional detail that explains this model set out in Appendix H

167 **QUESTIONS AND OPEN ISSUES**

- 168 6) Do you agree that the introduction of a community mechanism to empower the community over certain Board decisions would enhance ICANN’s accountability?
- 169 7) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

### 2.6.1.2 Influence in the Community Mechanism

170 Apart from the role played by the Members (or Designators) to enforce the six community powers described above, there is also an important accountability role for the larger ICANN community, which for these purposes would include all of the ACs as voting participants. The CCWG-Accountability considered the decision weights of the various parts of the community. The following table sets out the Reference Option, which was the most supported approach among CCWG-Accountability participants. Again, there will need to be an additional process step to translate this community group decision to ICANN Member action (or, with respect to a more limited set of community powers ICANN designator action) directed to the ICANN Board, but that is an implementation detail that will be developed by the CCWG-Accountability and open for thorough community consultation in our second Public Comment report:

Community segment	Reference Option “votes”
ASO	5
ccNSO	5
gNSO	5
At Large	5
GAC	5
SSAC	2
RSSAC	2

171 The CCWG-Accountability also discussed two further approaches, neither of which received significant support:

1. Alternative A - Each SOs receives 4 “votes”; each AC receives 2 “votes”
2. Alternative B - Each SO and AC receives 5 “votes”

- a. The rationale for the Reference Option is that it gives the bulk of influence on an equal basis between the three SOs for which ICANN deals with policy development and the two ACs that are structurally designed to represent stakeholders (Governments and Internet users, respectively) within ICANN, while still guaranteeing a say for the other ACs.
- b. The reasons to allocate a lower number of “votes” to SSAC in the Reference Option is that it is a specific construct within ICANN designed to provide expertise on security and stability, rather than a group representing a community of stakeholders
- c. For RSSAC, the reason is slightly different but relies on the limited size of the community of root server operators as well as the strong focus of their mission on operations (compared with ICANN’s mission being focused mainly on policy).
- d. The rationale for Alternative A is that it gives the bulk of influence to the SOs, while guaranteeing a say for the ACs on an equal basis between them. It is therefore more closely aligned with the existing structure of ICANN.
- e. The rationale for Alternative B is to give equal influence to each of the seven SOs and ACs.
- f. The logic for 5 “votes” in the Reference Option for the higher number is to allow for greater diversity of views, including the ability to represent all the ICANN regions in each SO. The logic for 4 “votes” in Alternative A is to allow for appropriate coverage across SGs in the GNSO.
- g. The Reference Option emerged as part of Work Party 1’s deliberations following up on the CCWG-Accountability’s discussions in Singapore. Alternatives A and B emerged recently in deliberations and of the whole CCWG-Accountability.
- h. The subsidiary option discussed in Istanbul of 2 votes for the first five SOs and ACs, and one vote for the remaining two, has not been pursued.

172 **QUESTIONS AND OPEN ISSUES:**

173 8) What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

### 2.6.1.3 Governance models and community powers

Please refer to appendix H produced by the legal firms.

### 2.6.2 Power: reconsider/reject budget or strategy/operating plans

- 174 The right to set budgets and strategic direction is a critical governance power for an organization. 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 fulfills its role.
- 175 Today, ICANN's Board makes final decisions on strategy, operations plans and budgets. While ICANN consults the community in developing strategic/business plans, there is no mechanism defined in the Bylaws that 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.
- 176 This new power would give the community the ability to consider strategic & operating plans and budgets after they are approved by the Board (but before they come into effect) and reject them based on perceived inconsistency with the purpose, mission and role set out in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community. The full community mechanism could raise concerns; based on that feedback, the Member SOs/ACs would have the power to reject the budget.
- 177 Time would be included in planning and budgeting processes for the community to consider adopted plans and decide whether to reject such plans (timeframe to be determined). These processes would also need to set out the required level of detail for such documents. The CWG-Stewardship has expressed a requirement for the budget to be transparent with respect to the IANA function's costs and clear itemization of such costs. Note that improvements to the community's input into these processes are for consideration by the CCWG-Accountability as part of Work Stream 2 efforts.
- 178 If the community exercised this power, the Board would have to absorb the feedback that came with the decision, 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 power being exercised.
- 179 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. Eventually it will have to reconcile itself to the community's view. If the Board is unable or unwilling to do so, other mechanisms (as set out in this part of the First Public Comment Report) are available if the community wanted to take the matter further.

180 This power does not allow the community to re-write a plan or a budget: it is a 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 raised 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.

181 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.

182 At the appropriate point in the planning cycle the challenge period would be open, and any participant in the community powers mechanism would be able to raise the question. A 2/3 level of support in the mechanism would be required in the mechanism to reject a first time: a 3/4 level of support for subsequent rejection/s.

183 **QUESTIONS AND OPEN ISSUES:**

184 9) Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

### 2.6.3 Power: reconsider/reject changes to ICANN "standard" Bylaws

185 This section applies to "standard" bylaws – all those bylaws that are not Fundamental Bylaws (see 2.6.4 below).

186 ICANN's Bylaws set out many of the details for how power is exercised in ICANN, including by setting out the company's Mission, Commitments 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 the ccNSO's Policy Development Policy, or the SG structure of the GNSO, or the composition of the Nominating Committee.

187 This power would give the Member Soss/ACs (with input from the larger community) the right to reject proposed Bylaws changes after they are approved by the Board (but before they come into effect). This would most likely be where a proposed change altered the Mission, Commitments and Core Values, or had a negative impact on ICANN's ability to fulfill its purpose in the community's opinion, but would be available in response to any proposed Bylaws change.

188 The time required for this power to be exercised would be included in the Bylaws adoption process (probably a two-week window following Board approval). If the community exercises this power, the Board would have to absorb the feedback, make adjustments, and propose a new set of amendments to the Bylaws.

189 It would require a 3/4 level of support in the community mechanism to reject a proposed Bylaw change. [Adler note: Needs to be adjusted since it's the Member SOs/ACs that would have the power to reject. We suggest a very high vote of the Member SOs/ACs to reject a proposed bylaw change]. Note that for the Board to propose a Bylaws change requires a 2/3 vote in favor.

190 This power does not allow the community to re-write a proposed Bylaws change: it is a rejection 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 2.6.1 above, to limit any potential for abuse of this power.

191 **QUESTIONS AND OPEN ISSUES:**

192 10) Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.6.4 Power: approve changes to “Fundamental” Bylaws

193 As outlined in section 2.3, the CCWG-Accountability is proposing that some core elements of the Bylaws be defined as “fundamental”. Fundamental Bylaws will be harder to amend or replace, and through a different process, than the rest of the Bylaws. The intention is to make sure that matters like critical aspects of the powers and processes required to maintain ICANN’s accountability to the community, and the organization’s purpose and core values, are highly unlikely to change.

194 This power would form part of the process set out for agreeing to any changes of the “fundamental” Bylaws. In conjunction with a community mechanism process, the Member SOs/ACs would have to give positive *assent* to any change *before* it was finalized, as part of a co-decision process between the Board and the community.

195 Such changes would require a very high degree of community assent, as the purpose of this power is to make changing items in such Bylaws possible only with very wide support from the community

196 For further information, see section 2.3.3 of this First Public Comment Report, where we set out what the “fundamental” Bylaws are alongside the process for their creation and amendment.

197 **QUESTIONS AND OPEN ISSUES:**

198 11) Do you agree that the power for the community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this

recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.6.5 Power: Removing individual ICANN Directors

- 199 The Board is the governing body of ICANN, with main responsibilities that include employing the President and CEO, appointing the Officers, overseeing organizational policies, making decisions on key issues, defining the organization's strategic and operating plans and holding the staff to account for implementing them.
- 200 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. In addition the Board appoint the President and CEO (confirmed each year at the AGM). The power to remove individual directors of the ICANN Board is available only to the Board itself, and can be exercised through a 75% vote of the Board. There is no limitation<sup>4</sup> on the types of situation for which the Board can remove a director.
- 201 This power would clarify that each specific community organization that appoints a given director may end his or her service in office, and trigger a reappointment process. The general approach, consistent with the law, is that the appointing body is the removing body.
- 202 For the seven directors appointed by the three Supporting Organizations or by the At-Large community (or by subdivisions within them e.g. within the GNSO), a process led by that organization or subdivision would lead to the director's removal.
- 203 For the directors appointed by the Nominating Committee, the CCWG-Accountability seeks the community's views about how to allow for removal. Following the principle of "the appointing body is the removing body", it does need to be the NomCom that takes the decision to remove one of these directors. Consistent with the Reference Mechanism outlined above, we expect that the NomCom will need to obtain legal structure to be able to remove directors, as well as to appoint directors. Our initial view is that such a removal process should only be triggered on the petition of at least two of the SOs or ACs (or an SG from the GNSO). Such a petition would set out the reason/s removal was sought, and then the NomCom would consider the matter. Legal counsel is also considering alternative approaches which would permit NomCom to act without itself becoming a legal entity.
- 204 The CCWG-Accountability sees two options (either of which is legally viable) for the composition of the NomCom when considering removal of a director.

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<sup>4</sup> 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.

1. It could simply be that the NomCom members at the time of a petition being lodged would decide.
2. Alternatively, a special committee of the NomCom could be established to deal with removal petitions when they arise. This is likely to only rarely be used. The composition of such a special committee has not been determined, and input is welcome.

205 The advantage of such a separate committee is that it avoids burdening the ordinary NomCom with such matters. The disadvantage is that it would require a new set of volunteers to populate it, as it would be preferable for the personnel of the two groups to be separate.

- Whether the decision-making body is the SO/AC or the NomCom, removal would require a **[75%]** level of support (or equivalent) to decide in favor of removal.
- The petitioning threshold to start the NomCom consideration of removing a director should be set at least at a majority of the SO/AC's governing body/council

206 **QUESTIONS AND OPEN ISSUES:**

207 12) Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.6.6 Power: Recalling the entire ICANN Board

208 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 recall the entire ICANN Board in one decision.

209 Beyond the power set out above to remove individual directors, this power would allow the community to cause the recall of the entire ICANN Board. The community would initiate use of this power on the petition of two thirds of the SOs or ACs in ICANN, with at least one SO and one AC petitioning. Again, implementation of this community decision will be accomplished through a further step to be developed in conjunction with legal counsel.

210 After a petition is raised, there would be a set period of time for SOs / ACs to individually and collectively deliberate and discuss whether the removal of the Board is warranted under the circumstances. Each SO and AC, following its internal processes, would decide how to vote on the matter. Again, implementation of this community decision will be accomplished through a further step to be developed in conjunction with legal counsel.

211 It would be preferable for a decision of this sort to be the result of cross-community consensus. Where this consensus is not apparent, a suitably high threshold for the exercise of this power, **[75%]** of all the support available within the community mechanism would have to be cast in favor

to implement it. This ensures that non-participation does not lower the threshold required to remove the Board.

212 This threshold was chosen to stop any particular SO or AC being able to prevent the recall of the Board, but to be as high as possible without allowing that to occur. The requirement on all recordable support/opposition to be counted was to avoid non-participation reducing the effective threshold for decision.

213 An alternative option for the threshold is to set it at 80%. This alternative is being considered, but as it would require a unanimous vote by the community, save for one SO or AC. Such a threshold is seen as too high.

214 Ongoing work in the CCWG-Accountability will flesh out how to implement this community decision through the ICANN Members, and how to deal with transitional matters raised, including at least the following:

1. The need to ensure ICANN does have a Board in place after the removal (whether there is:
2. A phase of “caretaker” behavior by the outgoing Board while new members are elected, or
3. A need to elect alternate Board Directors in each Board selection process, or
4. A pre-defined subset of the community that could function as an interim Board;
5. Continuity in the role of Chief Executive were the Board to be removed;
6. “Caretaker” conventions for the CEO to follow in a situation where the Board had been removed.

215 It should be noted that legal advice has confirmed that a caretaker Board mechanism was achievable.

216 **QUESTIONS AND OPEN ISSUES:**

217 13) Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability ? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.7 Incorporating AoC into the ICANN Bylaws

218 The Affirmation of Commitments (AoC) is a 2009 bilateral agreement between the US government and ICANN. 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.



- 219 Elimination of the AoC as a separate agreement 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-Accountability Stress Test Work Party addressed this contingency since it was cited in prior public comments. The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the AoC against existing and proposed accountability measures, including:
- 220 Preserving ICANN commitments from the AoC, including sections 3,4,7, and 8 as well as commitments cited in the section 9 reviews.
- 221 Bringing the four AoC review processes into ICANN’s Bylaws.
- 222 All of the other sections in the AoC are either preamble text or commitments of the US Government. As such they don’t contain commitments by ICANN, and so they cannot usefully be incorporated in the Bylaws.
- 223 Each of the above measures is addressed below.
- 224 The AoC-based reviews and the commitments ICANN has made are being added to the ICANN Bylaws as part of the IANA Stewardship transition process. It is possible that once adopted as fundamental Bylaws, ICANN and the NTIA could consider mutually agreed changes to or ending of some or all of the AoC, since in some respects it will no longer be necessary.
- 225 In reviewing this suggested approach to incorporating the AoC commitments in the Bylaws, the community should consider the degree to which it finds the suggestions implementable and reasonable. The concepts outlined through these changes, rather than the specific drafting quality or precision, are the points to consider at this stage in the CCWG-Accountability’s work.

## Preserving ICANN Commitments from the AoC

- 226 **[Note: All Bylaw text will need significant attention from the Legal Team once the mechanism and power have been decided upon. Legal counsel has not taken on review of this text at this time.]**

ICANN COMMITMENTS IN THE AOC	AS EXPRESSED IN ICANN BYLAWS
<p>227 3. This document affirms key commitments by DOC and ICANN, including commitments to:</p> <p>228 (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;</p>	<p>232 In revised Core Values:</p> <p>233 <i>Proposed core value 6 (with <b>additional text</b>)</i></p> <p>234 Ensure that decisions made related to the global technical coordination of the DNS are made in the <b>global</b> public interest and are accountable, transparent <b>and should respect the bottom-up</b></p>

<p>229 (b) preserve the security, stability and resiliency of the DNS;</p> <p>230 (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and</p> <p>231 (d) facilitate international participation in DNS technical coordination.</p>	<p><b><u>multistakeholder nature of ICANN.</u></b></p> <p>235 <i>Proposed core value 5 (with <b>additional text</b>):</i></p> <p>236 Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment <b><u>that enhances consumer trust and choice.</u></b></p>
<p>237 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.</p>	<p>238 In revised Core Values:</p> <p>239 <i>Proposed new Section 9 in Bylaws Article III Transparency (with <b>additional text</b>)</i></p> <p>240 ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial <b>or non-financial</b> impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.</p>
<p>241 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 ICANN relied.</p>	<p>242 in revised Core Values:</p> <p>243 <i>Proposed insertion of new section 8 in Article III Transparency (this is AoC para 7 in its entirety including <b>additional text</b>):</i></p> <p>244 ICANN <b>shall</b> adhere to transparent and accountable budgeting processes, <b>providing [reasonable] [adequate] advance notice to facilitate stakeholder engagement in policy decision-making</b>, 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</p>

	<p>strategic and operating plans.</p> <p>245 In addition, ICANN <b>shall</b> provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.</p>
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ICANN COMMITMENTS IN AOC	AS EXPRESSED IN ICANN BYLAWS
<p>246 8. ICANN affirms its commitments to:</p> <p>247 (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;</p> <p>251 (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</p> <p>257 (c) to operate as a multi-stakeholder, private sector</p>	<p>248 In revised Core Values:</p> <p>249 <i>Propose inserting 8(a) in full as a new core value in the Bylaws</i></p> <p>250 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.</p> <p>252 The nonprofit commitment in 8b is reflected in ICANN’s ARTICLES OF INCORPORATION:</p> <p>a. “3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. ”</p> <p>253 A change to the Articles would require 2/3 vote of the Board and 2/3 vote of the Members.</p> <p>254 The “<u>headquartered</u>” commitment in 8b is already in current ICANN Bylaws, at Article XVIII Section 1:</p> <p>a. “OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”</p> <p>255 While the Board could propose a change to this Bylaws provision, Members/Designators could block the proposed change (75% vote). <a href="#">[Note: Have thresholds been determined?]</a></p> <p>256 The CCWG-Accountability is considering whether Bylaws Article 18 Section 1 should be keep its current status or be listed as “Fundamental Bylaws”. In the latter case, any Bylaws change would require approval by Members/Designators (75% vote).</p> <p>258 Propose inserting 8(c) in full as a new core value in the Bylaws (including <b>additional text</b>):</p>

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.

259 Operating as a multi-stakeholder, **bottom-up** private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

ICANN COMMITMENTS IN THE AOC	AS EXPRESSED IN ICANN BYLAWS
<p>260 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:</p>	<p>261 See Section 2.6.2 of this document for Bylaws text to preserve commitments to perform these ongoing reviews.</p>

262 **QUESTIONS AND OPEN ISSUES:**

263 14) Do you agree that the incorporation into ICANN’s Bylaws of the AoC principles would enhance ICANN’s accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.7.2 AoC Reviews

264 Suggestions gathered during 2014 comment periods on ICANN accountability and the IANA Stewardship 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 review teams
- Give review teams access to all ICANN internal documents
- Require the ICANN Board to consider approval and begin implementation of review team recommendations, including from previous reviews. The Board’s decision would be subject to challenge through enhanced Reconsideration and IRP processes.

265 In Bylaws Article IV, add a new section for **Periodic Review of ICANN Execution of Key Commitments**, with an overarching chapeau for the way these reviews are conducted and then one subsection for each of the four current Affirmation Reviews.

266 These proposals are presented beginning on the next page.

267 **POSSIBLE BYLAW THAT PROVIDES A CHAPEAU FOR ALL PERIODIC REVIEWS**

268 All of the reviews listed in this section 2.6.2 would be governed by the following:

PROPOSED BYLAW TEXT	COMMENT
<p>269 ICANN will produce an annual report on the state of improvements to Accountability and Transparency.</p> <p>270 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.</p> <p>272 All reviews 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. The group must be as diverse as possible.</p> <p>273 Review teams 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>274 To facilitate transparency and openness in ICANN's deliberations and operations, the review teams shall have access to ICANN internal documents, and the draft 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 forwarding the recommendations to the Board.</p> <p>275 The final output of all reviews will be published for public comment. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.</p>	<p>271 This is new. It is a recommendation based on one in ATRT2 and becomes more important as reviews are spread further apart.</p> <p>276 AoC requires Board to 'take action' within 6 months</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>277 <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>280 This commitment is reflected in Bylaws Core Values</p>
<p>278 In this review, particular attention should be paid to:</p>	
<p>279 (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>281 (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>286 Rephrased to avoid implying a review of GAC's effectiveness</p>
<p>282 (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);</p>	
<p>283 (d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and</p>	
<p>284 (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.</p>	
<p>285 The review team shall assess the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section</p>	
<p>287 The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews. <u>Note: should not include ability to terminate IFR.</u></p>	<p>288 New</p>
<p>289 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>290 AoC required every 3 years.</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>291 <b>2. Preserving security, stability, and resiliency.</b></p> <p>292 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>293 In this review, particular attention will be paid to:</p> <p>294 (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;</p> <p>295 (b) ensuring appropriate contingency planning; and</p> <p>296 (c) maintaining clear processes.</p> <p>297 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>299 The review team shall assess the extent to which prior review recommendations have been implemented.</p> <p>301 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>298 This commitment is reflected in Bylaws Core Values</p> <p>300 Make this explicit</p> <p>302 AoC required every 3 years.</p>



PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>303 <b>3. Promoting competition, consumer trust, and consumer choice.</b></p> <p>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>304 This commitment will be added to Bylaws Core Values</p>

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
<p>305 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>309 Re-phrased to cover future new gTLD rounds.</p>
<p>306 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>	
<p>307 (a) the gTLD application and evaluation process; and</p>	
<p>308 (b) safeguards put in place to mitigate issues involved in the expansion</p>	
<p>310 The review team shall assess the extent to which prior review recommendations have been implemented.</p>	<p>311 Make this explicit</p>
<p>312 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>313 New</p>
<p>314 These periodic reviews shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the relevant review team. <u>[Note: CWG-Stewardship contemplates first IANA Function Review at 2 years post-transition and then periodic reviews every 5 years thereafter.]</u></p>	<p>315 AoC also required a review 2 years after the 1 year review.</p>

<p>316 <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></p>	
<p>317 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>318 Such existing policy also includes the requirements that legal constraints regarding privacy, as defined by OECD in <a href="#">1980</a> as amended in <a href="#">2013</a>. “  <a href="http://www.oecd.org/sti/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm">http://www.oecd.org/sti/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm</a>  <a href="http://www.oecd.org/internet/ieconomy/privacy-guidelines.htm">http://www.oecd.org/internet/ieconomy/privacy-guidelines.htm</a></p>	<p>320 New</p>
<p>319 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>321 The review team shall assess the extent to which prior review recommendations have been implemented.</p>	<p>322 Make this explicit</p>
<p>323 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>324 AoC required every 3 years.</p>

325 The CWG-Stewardship has also proposed an IANA Function Review that should be added to the ICANN Bylaws, as a Fundamental Bylaw.

## **IANA FUNCTION REVIEW**

- 326 The CWG-Stewardship recommends that the SOW review be done as part of the IANA Function Review (IFR). The IFR would not only take into account performance against the SOW, but would be obliged to take into account multiple input sources into account including community comments, CSC evaluations, reports submitted by the Post-Transition IANA entity (PTI), and recommendations for technical or process improvements. The outcomes of reports submitted to the CSC, reviews and comments received on these reports during the relevant time period will be included as input to the IFR.
- 327 The first IFR is recommended to take place no more than 2 years after the transition is completed. After the initial review, the IFR should occur every 5 years.
- 328 The IFR should be outlined in the ICANN Bylaws and included as a Fundamental Bylaw as part of the work of the CCWG-Accountability and would operate in a manner analogous to an Affirmation of Commitments (AOC) review. The Members of the IANA Function Review Team (IFRT) would be selected by the Supporting Organizations and Advisory Committees and would include several liaisons from other communities. While the IFRT is intended to be a smaller group, it will be open to participants in much the same way as the CWG-Stewardship.
- 329 While the IFR will normally be scheduled based on a regular 5 year cycle with other ICANN reviews, a Special Review may also be initiated following the CSC raising concerns with the GNSO and/or the ccNSO or by concerns raised by TLDs directly with the ccNSO or the GNSO. In the event of a Special Review being proposed, the ccNSO and GNSO should consult with both Members and non-member TLDs, in the light of the consultations, the Councils can decide by a supermajority to call for a special review.

- 330 The CWG-Stewardship has also proposed a separation review.

## **SEPARATION REVIEW**

- 331 The CWG-Stewardship recommends that a fundamental Bylaw be created to define a Separation Review that can be triggered by an IFR, if needed. This would only occur if other escalation mechanisms and methods have been exhausted. The CWG-Stewardship proposal contemplates a process that may include a cross community of the ICANN Supporting Organizations and Advisory Committees which would be formed to review the issues and make recommendations. The recommendations would need to be approved by the ICANN Board and would be subject to all escalations and appeals mechanisms.
- 332 There would be no prescribed action for the Separation Review. It would be empowered to make a recommendation ranging from “no action required” to the initiation of an RFP and the

recommendation for a new IANA functions operator.

333 **QUESTIONS AND OPEN ISSUES:**

- 334 17) Do you agree that the incorporation into ICANN's Bylaws of the AoC reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

## 2.8 Bylaws changes suggested by Stress Tests

335 **[Note: Sidley Austin LLP and Adler & Colvin are not reviewing Bylaw text at this stage of review.]**

- 336 The CCWG-Accountability Charter calls for stress testing of accountability enhancements in both Work Streams 1 and 2. Among deliverables listed in the charter are:

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

- 338 Review of possible solutions for each Work Stream including stress tests against identified contingencies.

- 339 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.

- 340 The CCWG-Accountability 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.

- 341 The exercise of applying stress tests identified changes to ICANN Bylaws that might be necessary to allow the CCWG-Accountability to evaluate proposed accountability mechanisms as adequate to meet the challenges uncovered.

## 2.8.1 Forcing the Board to respond to Advisory Committee formal advice

- 342 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).
- 343 The CCWG-Accountability 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.
- 344 Recommendation 9 from ATRT2<sup>5</sup> may answer this need:
- 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.*
- 345 This ATRT2 recommendation has not yet been reflected in ICANN Bylaws, so this change should be required before the IANA stewardship 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-Accountability and CWG-Stewardship are waiting on legal advice as to that question.

## 2.8.2 Require consultation and mutually acceptable solution for GAC advice that is backed by consensus

- 346 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:

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<sup>5</sup> See page 11 of this PDF: <https://www.icann.org/en/system/files/files/draft-recommendations-15oct13-en.pdf>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>347 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.</p> <p>348 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.</p>	<p>349 Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try to find “a mutually acceptable solution.”</p> <p>350 This is required for any GAC advice, not just for GAC consensus advice.</p> <p>351 Today, GAC adopts formal advice according to its Operating Principle 47: “<i>consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection</i>”<sup>6</sup>. But the GAC may at any time change its procedures to use majority voting instead of its present consensus.</p>	<p>352 One proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.</p> <p>The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN Bylaws would require trying to find a mutually agreeable solution only on advice that had GAC consensus.</p> <p>353 GAC can still give ICANN advice at any time, with or without consensus</p>

354 The CCWG-Accountability 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. (Addition here ***bold, italic and underlined***) Clause k is also shown for completeness but is not being amended.

355 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***

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<sup>6</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

*and in a timely and efficient manner, to find a mutually acceptable solution.*

356 *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.*

357 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 than 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."

358 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"

359 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.

360 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.

361 **QUESTIONS AND OPEN ISSUES:**

362 18) Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

# 3) Stress Tests

## Introduction

363 An essential part of our CCWG-Accountability Charter calls for stress testing of accountability enhancements in both Work Streams 1 and 2. ‘Stress Testing’ is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. In the financial industry for example ‘stress testing’ is routinely run to evaluate the strength of institutions.

## Purpose & Methodology

364 The purpose of these stress tests is to determine the stability of ICANN in the event of consequences and/or vulnerabilities, and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community.

### **AMONG DELIVERABLES LISTED IN THE CCWG-ACCOUNTABILITY CHARTER ARE:**

365 Identification of contingencies to be considered in the stress tests

366 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

1. Analysis of potential weaknesses and risks
2. Analysis of existing remedies and their robustness
3. Definition of additional remedies or modification of existing remedies
4. Description of how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies

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

368 In addition, the CCWG-Accountability chairs asked our work party to consider this yes/no question:

*While this is not a gating factor, is the threat directly related to the transition of the IANA stewardship?*

369 Also, note that the CCWG-Accountability charter does not ask that probability estimates be assigned for contingencies. The purpose of applying tests to proposed accountability measures is to determine if the community has adequate means to challenge ICANN’s reactions to the



contingency.

370 CCWG-Accountability Work Team 4 gathered an inventory of contingencies identified in prior public comments. That document was posted to the wiki at <https://community.icann.org/display/acctcrosscomm/ST-WP+---+Stress+Tests+Work+Party>

371 We consolidated these into five 'stress test categories' listed below, and prepared draft documents showing how these stress tests are useful to evaluate ICANN's existing and CCWG-Accountability's proposed accountability measures.

## I. Financial Crisis or Insolvency (Scenarios #5, 6, 7, 8 and 9)

372 ICANN becomes fiscally insolvent, and lacks the resources to adequately meet its obligations. This could result from a variety of causes, including financial crisis specific to the domain name industry, or the general global economy. It could also result from a legal judgment against ICANN, fraud or theft of funds, or technical evolution that makes domain name registrations obsolete.

## II. Failure to Meet Operational Obligations (Scenarios #1, 2, 11, 17, and 21)

373 ICANN fails to process change or delegation requests to the IANA Root Zone, or executes a change or delegation over the objections of stakeholders, such as those defined as 'Significantly Interested Parties' [<http://ccnso.icann.org/workinggroups/foi-final-07oct14-en.pdf>]

## III. Legal/Legislative Action (Scenarios #3, 4, 19, and 20)

374 ICANN is the subject of litigation under existing or future policies, legislation, or regulation. ICANN attempts to delegate a new TLD, or re-delegate a non-compliant existing TLD, but is blocked by legal action.

## IV. Failure of Accountability (Scenarios #10, 12, 13, 16, 18, 22, 23, 24 and 26)

375 Actions (or expenditure of resources) by one or more ICANN Board Directors, CEO, or other Staff, are contrary to ICANN's mission or Bylaws. ICANN is "captured" by one stakeholder segment, including governments via the GAC, which either is able to drive its agenda on all other stakeholders, or abuse accountability mechanisms to prevent all other

stakeholders from advancing their interests (veto).

## V. Failure of Accountability to External Stakeholders (Scenarios #14, 15, and 25)

376 ICANN modifies its structure to avoid obligations to external stakeholders, such as terminating the Affirmation of Commitments, terminating presence in a jurisdiction where it faces legal action, moving contracts or contracting entities to a favorable jurisdiction. ICANN delegates, subcontracts, or otherwise abdicates its obligations to a third party in a manner that is inconsistent with its Bylaws or otherwise not subject to accountability. ICANN merges with or is acquired by an unaccountable third party.

### 377 **Applying Additional Stress Tests**

378 Public comment participants may conceive of other contingencies and scenario risks beyond the 26 stress tests identified in this section. In that case, we encourage commenters to apply their own stress test analysis. To do so, a commenter can examine ICANN's present accountability mechanisms to determine whether they adequately address the contingency. Then, the commenter can examine the proposed accountability enhancements in this document, and assess whether they give the community adequate means to challenge Board decisions and to hold the Board accountable for its actions.

379 For example, the stress test team evaluated contingencies that could generally be described as external events (cyber attack, financial crisis, etc.). We discovered that while some risk mitigation was possible, it became clear that no accountability framework could entirely eliminate the risk of such events nor thoroughly alleviate their impact. Instead, it was critical to explore the ability of the community to hold ICANN Board and management accountable for their preparation and reaction to the external events. The proposed accountability measures do provide adequate means to do so.

380 Note that we cannot apply stress tests definitively until CCWG-Accountability and CWG-Stewardship have defined mechanisms/structures to test. This draft applies stress tests to a 'snapshot' of proposed mechanisms under consideration at this point in the process.

381 Also, note that several stress tests can specifically apply to work of the CWG-Stewardship regarding transition of the IANA naming functions contract (see Stress Tests #1 & 2, 10, 11, 14, 15, 16, 17, 19, 22, 24, 25)

382 The stress test exercise demonstrates that Work Stream 1 recommendations do enhance the community's ability to hold ICANN Board and management accountable, relative to present accountability measures. It is also clear that the CWG-Stewardship proposals are

complementary to CCWG-Accountability measures. One stress test regarding appeals of ccTLD revocations and assignments (ST 21) has not been adequately addressed in either the CWG-Stewardship or CCWG-Accountability proposals, awaiting policy development from the ccNSO.

- 383 The following table shows the stress test scenarios for each of our five categories of risk, alongside existing accountability mechanisms and measures and proposed accountability measures. Conclusions have been drawn after discussion and exploration of each hypothetical situation, and the table also lists whether a) if the ‘threat’ is or is not directly related to the transition of IANA stewardship; b) if and to what extent existing measures and mechanisms are deemed adequate; and c) the adequacy and effectiveness of any proposed measures or mechanisms.
- 384 Public comment participants may conceive of other contingencies and scenario risks beyond the 26 stress tests identified in this section. In that case, we encourage commenters to apply their own stress test analysis. To do so, a commenter can examine ICANN’s present accountability mechanisms to determine whether they adequately address the contingency. Then, the commenter can examine the proposed accountability enhancements in this document, and assess whether they give the community adequate means to challenge Board decisions and to hold the Board accountable for its actions.
- 385 For example, the stress test team evaluated contingencies that could generally be described as external events (cyber attack, financial crisis, etc.). We discovered that while some risk mitigation was possible, it became clear that no accountability framework could entirely eliminate the risk of such events nor thoroughly alleviate their impact. Instead, it was critical to explore the ability of the community to hold ICANN Board and management accountable for their preparation and reaction to the external events. The proposed accountability measures do provide adequate means to do so.
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- 388 The stress test exercise demonstrates that Work Stream 1 recommendations do enhance the community’s ability to hold ICANN Board and management accountable, relative to present accountability measures. It is also clear that the CWG-Stewardship proposals are complementary to CCWG-Accountability measures. One stress test regarding appeals of ccTLD revocations and assignments (ST 21) has not been adequately addressed in either the CWG-Stewardship or CCWG-Accountability proposals, awaiting policy development from the

ccNSO.

389 The following table shows the stress test scenarios for each of our five categories of risk, alongside existing accountability mechanisms and measures and proposed accountability measures. Conclusions have been drawn after discussion and exploration of each hypothetical situation, and the table also lists whether a) if the ‘threat’ is or is not directly related to the transition of IANA stewardship; b) if and to what extent existing measures and mechanisms are deemed adequate; and c) the adequacy and effectiveness of any proposed measures or mechanisms.

### Stress test category I: Financial Crisis or Insolvency

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
390 5. Domain industry financial crisis. Consequence: significant reduction in domain sales generated revenues and significant increase in registrar and registry costs, threatening ICANN’s ability to operate.	395 ICANN could propose revenue increases or spending cuts, but these decisions are not subject to challenge by the ICANN community.	399 One proposed measure would empower the community to veto ICANN’s proposed annual budget. This measure enables blocking a proposal by ICANN to increase its revenues by adding fees on registrars, registries, and/or registrants.
391 6. General financial crisis.	396 The Community has input in ICANN budgeting and Strat Plan.	400 Another proposed mechanism is community challenge to a Board decision using a reconsideration request and/or referral to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a revenue or expenditure decision outside the annual budget process, the Reconsideration or IRP mechanisms may be able to reverse that decision unless it was deemed vital to ICANN.
392 7. Litigation arising from private contract, e.g., Breach of Contract.	397 Registrars must approve ICANN’s variable registrar fees. If not, registry operators pay the fees.	
393 8. Technology competing with DNS.	398 ICANN’s reserve fund could support operations in a period of reduced revenue. Reserve fund is independently reviewed periodically.	
394 Consequence: loss affecting reserves sufficient to threaten business continuity.		
401 <b>Conclusions:</b> 402 a) This threat is not directly related to the transition of IANA stewardship.	403 b) Existing measures would be adequate, unless the revenue loss was extreme and sustained.	404 c) Proposed measures are helpful, but might not be adequate if revenue loss was extreme and sustained.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>405 9. Major corruption or fraud.</p> <p>406 Consequence: major impact on corporate reputation, significant litigation and loss of reserves.</p>	<p>407 ICANN has annual independent audit that includes testing of internal controls designed to prevent fraud and corruption.</p> <p>408 ICANN maintains an anonymous hotline for employees to report suspected fraud.</p> <p>409 ICANN Board can dismiss CEO and/or executives responsible.</p> <p>410 The community has no ability to force the Board to report or take action against suspected corruption or fraud.</p>	<p>411 One proposed measure is to empower the community to force ICANN's Board to consider a recommendation arising from an AoC Review. An ATRT could make recommendations to avoid conflicts of interest. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>412 Another proposed measure would empower the community to veto ICANN's proposed annual budget. This measure enables blocking a budget proposal that is tainted by corruption or fraud.</p> <p>413 If ICANN's Board were involved, or if the Board did not act decisively in preventing corruption or fraud (for instance by enforcing internal controls or policies), a proposed measure empowers the community to remove individual Directors or recall the entire Board.</p>
<p>414 <b>Conclusions:</b></p> <p>415 a) This threat is not directly related to the transition of IANA stewardship</p>	<p>416 b) Existing measures would not be adequate if litigation costs or losses were extreme and sustained.</p>	<p>417 c) Proposed measures are helpful, but might not be adequate if litigation costs and losses were extreme and sustained.</p>

## Stress test category II: Failure to Meet Operational Expectations

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>418 1. Change authority for the Root Zone ceases to function, in part or in whole.</p> <p>419 2. Delegation authority for the Root Zone ceases to function, in part or in whole.</p> <p>420 Consequence: interference with existing policy relating to Root Zone and/or prejudice to the security and stability of one or several TLDs.</p>	<p>421 Under the present IANA functions contract, NTIA can revoke ICANN's authority to perform IANA functions and re-assign to different entity/entities.</p> <p>422 After NTIA relinquishes the IANA functions contract, this measure will no longer be available.</p>	<p>423 The CWG-Stewardship proposal includes various escalation procedures to prevent degradation of service, as well as a framework (operational) for the transition of the IANA function.</p> <p>424 The CWG-Stewardship proposes that IANA naming functions be legally transferred to a new Post-Transition IANA entity (PTI) that would be a subsidiary or affiliate of ICANN.</p> <p>425 The CWG-Stewardship proposes a multistakeholder IANA Function Review (IFR) to conduct reviews of PTI. Results of IFR are not prescribed or restricted and could include recommendations to the ICANN Board to terminate or not renew the IANA Functions Contract with PTI. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>426 The CWG-Stewardship proposes the ability for the multistakeholder community to require, if necessary and after other escalation mechanisms and methods have been exhausted, the selection of a new operator for the IANA Functions.</p> <p>427 Suggestions for Work Stream 2:</p>

		428 Require annual external security audits and publication of results.
		429 Require certification per international standards (ISO 27001) and publication of results.
430 <b>Conclusions:</b>		
431 a) This threat is directly related to the transition of IANA stewardship	432 b) Existing measures would be inadequate after NTIA terminates the IANA contract.	433 c) Proposed measures are, in combination, adequate to mitigate this contingency

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
434 11. Compromise of credentials.	436 Regarding compromise of internal systems:	444 Regarding compromise of internal systems:
435 Consequence: major impact on corporate reputation, significant loss of authentication and/or authorization capacities.	437 Based upon experience of the recent security breach, it is not apparent how the community holds ICANN management accountable for implementation of adopted security procedures.	445 No measures yet suggested would force ICANN management to conduct an after-action report and disclose it to the community.
	438 It also appears that the community cannot force ICANN to conduct an after-action report on a security incident and reveal that report.	446 Nor can the community force ICANN management to execute its stated security procedures for employees and contractors.
	439 Regarding DNS security:	447 Regarding DNS security:
	440 Beyond operating procedures, there are credentials employed in DNSSEC.	448 One proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an AoC Review – namely, <i>Security Stability and Resiliency</i> . An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.
	441 ICANN annually seeks <a href="#">SysTrust</a> Certification for its role as the Root Zone KSK manager.	
	442 The IANA Department has <a href="#">achieved</a> EFQM Committed to Excellence certification for its Business Excellence activities.	449 A proposed Bylaws change would require ICANN Board to respond to formal advice from

	443 Under C.5.3 of the IANA Functions Contract, ICANN has undergone annual independent audits of its security provisions for the IANA functions.	<p>advisory committees such as SSAC and RSSAC. If the Board took a decision to reject or only partially accept formal AC advice, the community could be empowered to challenge that Board decision to an IRP.</p> <p>450 Suggestions for Work Stream 2:</p> <p>451 - Require annual external security audits and publication of results.</p> <p>452 - Require certification per international standards (ISO 27001) and publication of results.</p>
453 <b>Conclusions:</b> 454 a) This threat is directly related to the transition of IANA stewardship	455 b) Existing measures would not be adequate.	456 c) Proposed Work Stream 1 measures, in combination, would be helpful to mitigate the scenario, but not to prevent it. W2 suggestions might provide risk mitigation measures.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>457 17. ICANN attempts to add a new top-level domain in spite of security and stability concerns expressed by technical community or other stakeholder groups.</p> <p>458 Consequence: DNS security and stability could be undermined, and ICANN actions could impose costs and risks upon external parties.</p>	<p>459 In 2013-14 the community demonstrated that it could eventually prod ICANN management to attend to risks identified by SSAC. For example: dotless domains (SAC 053); security certificates and name collisions such as .mail, .home (SAC 057)</p> <p>460 NTIA presently gives clerical approval for each delegation to indicate that ICANN has followed its processes. NTIA could delay a delegation if its finds that ICANN has not followed its processes. Not clear if that would/could have</p>	<p>461 One proposed measure is to empower the community to force ICANN's Board to respond to recommendations arising from an AoC Review – namely, 9.2 Review of Security, Stability, and Resiliency. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p> <p>462 A proposed Bylaws change would require ICANN Board to respond to formal advice from advisory committees such as SSAC and RSSAC. If the</p>



	been a finding if ICANN attempted to delegate a new TLD such as .mail or .home.	Board took a decision to reject or only partially accept formal AC advice, the community could be empowered to challenge that Board decision to an IRP.
463 <b>Conclusions:</b> 464 a) This threat is partially related to the transition of IANA stewardship	465 b) Existing measures were adequate to mitigate the risks of this scenario.	466 c) Proposed measures enhance community's power to mitigate the risks of this scenario.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>467 21. A government official demands ICANN rescind responsibility for management of a ccTLD from an incumbent ccTLD Manager.</p> <p>468 However, the IANA Functions Manager is unable to document voluntary and specific consent for the revocation from the incumbent ccTLD Manager.</p> <p>469 Also, the government official demands that ICANN assign management responsibility for a ccTLD to a Designated Manager. But the IANA Functions Manager does not document that: Significantly Interested Parties agree; that other Stakeholders had a voice in selection; the Designated Manager has demonstrated required capabilities; there are not objections of many Interested Parties and/or Significantly Interested Parties.</p> <p>470 This stress test examines the community's ability to hold ICANN accountable to follow established policies. It does not deal with the adequacy of</p>	<p>472 Under the present IANA contract with NTIA, the IANA Department issues a boilerplate report to the ICANN Board, which approves this on the Consent Agenda and forwards to NTIA, which relies on the Board's certification and approves the revocation, delegation or transfer.</p> <p>473 There is presently no mechanism for the incumbent ccTLD Manager or the community to challenge ICANN's certification that process was followed properly.</p> <p>474 See GAC Principles for delegation and administration of ccTLDs. GAC Advice published in 2000 and updated in 2005 specifically referenced to Sections 1.2 &amp; 7.1</p> <p>475 See <a href="#">Framework of Interpretation</a>, 20-Oct-2014</p>	<p>476 From the CWG-Stewardship draft proposal: "CWG-Stewardship recommends not including any appeal mechanism that would apply to ccTLD delegations and redelegations in the IANA Stewardship Transition proposal."</p> <p>477 From CWG-Stewardship co-chair correspondence on 15-Apr-2015: "As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes."</p> <p>478 Regarding CCWG-Accountability proposed measures:</p> <p>479 One proposed CCWG-Accountability measure could give the community standing to request Reconsideration of management's decision to certify the ccTLD change. Would require a standard of review that is more specific</p>

<p>policies in place.</p> <p>471 Consequence: Faced with this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.</p>		<p>than amended ICANN Mission, Commitments and Core Values.</p> <p>Another proposed CCWG-Accountability mechanism is community challenge to a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to revoke or assign management responsibility for a ccTLD, the IRP mechanism might be enabled to review that decision. Would require a standard of review.</p>
<p>480 <b>Conclusions:</b></p> <p>481 a) This threat is directly related to the transition of IANA stewardship</p>	<p>482 b) Existing measures would not be adequate.</p>	<p>483 c) Proposed measures do not adequately empower the community to address this scenario until the appropriate processes develop appropriate mechanisms.</p>

### Stress test category III: Legal/Legislative Action

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>484 3. Litigation arising from existing public policy, e.g., Antitrust suit</p> <p>485 In response, ICANN Board would decide whether to litigate, concede, settle, etc.</p> <p>486 Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>487 The community could develop new policies that respond to litigation challenges.</p> <p>488 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>489 Reconsideration looks at process but not substance of a decision.</p> <p>490 ICANN must follow orders from courts of competent jurisdiction.</p>	<p>491 After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>492 The community could develop new policies that respond to litigation challenges.</p> <p>493 Another measure would give the community standing to file for Reconsideration or IRP, based on amended Mission, Commitments and Core</p>

		<p>Values.</p> <p>494 Another measure would allow each AoC review team to assess implementation of prior recommendations, and renew the recommendations. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
<p>495 <b>Conclusions:</b></p> <p>496 a) This threat is not directly related to the transition of IANA stewardship</p>	<p>497 b) Existing measures are inadequate.</p>	<p>498 c) Proposed measures would help the community hold ICANN accountable, but might not be adequate to stop interference with ICANN policies.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>499 4. New regulations or legislation.</p> <p>500 For example, a government could cite anti-trust or consumer protection laws and find unlawful some rules that ICANN imposes on TLDs. That government could impose fines on ICANN, withdraw from the GAC, and/or force ISPs to use a different root, thereby fragmenting the Internet.</p> <p>501 In response, ICANN Board would decide whether to litigate, concede, settle, etc.</p> <p>502 Consequence: significant interference with existing policies and/or policy development relating to relevant activities</p>	<p>503 The community could develop new policies that respond to new regulations.</p> <p>504 An ICANN Board decision on how to respond to the regulation (litigate or change policy/implementation) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>505 Reconsideration looks at process but not substance of a decision.</p> <p>506 ICANN must follow orders from courts of competent jurisdiction.</p>	<p>507 After ICANN Board responded to the regulation (litigate or change policy/implementation), the community would have several response options:</p> <p>508 The community could develop new policies that respond to regulation.</p> <p>509 Another measure would give the community standing to file for Reconsideration or IRP, based on amended Mission, Commitments and Core Values.</p> <p>510 Another measure would allow each AoC review team to assess implementation of prior recommendations, and renew the recommendations. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
<p>511 <b>Conclusions:</b></p>		

512 a) This threat is not directly related to the transition of IANA stewardship	513 b) Existing measures are inadequate.	514 c) Proposed measures would be an improvement but might still be inadequate.
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STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
515 19. ICANN attempts to re-delegate a gTLD because the registry operator is determined to be in breach of its contract, but the registry operator challenges the action and obtains an injunction from a national court.	518 Under the present agreement with NTIA, the entity performing root zone maintenance is protected from lawsuits since it is publishing the root per contract with the US Government. [pending verification]	524 While it would not protect the root zone maintainer from lawsuits, one CCWG-Accountability proposed mechanism is community challenge of ICANN decision to re-delegate or its decision to acquiesce or litigate the court order. This challenge would take the form of a Reconsideration or IRP.
516 In response, ICANN Board would decide whether to litigate, concede, settle, etc.	519 However, the IANA stewardship transition might result in root zone maintainer not operating under USG contract, so would not be protected from lawsuits.	525 After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the decision could be challenged via Reconsideration or IRP, based on standard of review in amended Mission, Commitments and Core Values.
517 Consequence: The entity charged with root zone maintenance could face the question of whether to follow ICANN re-delegation request or to follow the court order.	520 A separate consideration: 521 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP. 522 Reconsideration looks at process but not substance of a decision. 523 ICANN must follow orders from courts of competent jurisdiction.	
526 <b>Conclusions:</b> 527 a) This threat is directly related to the transition of IANA stewardship	528 b) Existing measures might not be adequate.	529 c) At this point, CWG-Stewardship's recommendations are still in development.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
530 20. A court order is issued to block ICANN's delegation of a	534 Before delegation, the community lacked standing to	538 Preventive: During policy development, the community

<p>new TLD, because of complaint by existing TLD operators or other aggrieved parties.</p> <p>531 For example, an existing gTLD operator might sue to block delegation of a plural version of the existing string.</p> <p>532 In response, ICANN Board would decide whether to litigate, concede, settle, etc.</p> <p>533 Consequence: ICANN's decision about how to respond to court order could bring liability to ICANN and its contract parties.</p>	<p>object to string similarity decisions. Reconsideration requests looks at process but not at <i>substance</i> of the decision.</p> <p>535 An ICANN Board decision (litigate or settle) could not be challenged by the community at-large, which lacks standing to use IRP.</p> <p>536 Reconsideration looks at process but not substance of a decision.</p> <p>537 ICANN must follow orders from courts of competent jurisdiction, and may consider factors such as cost of litigation and insurance.</p>	<p>would have standing to challenge ICANN Board decisions about policy and implementation.</p> <p>539 A future new gTLD Guidebook could give the community standing to file objections.</p> <p>540 Remedial: After ICANN Board responded to the lawsuit (litigating, changing policies or enforcement, etc.) the community would have several response options:</p> <p>541 One measure would give the community standing to file for Reconsideration or IRP, according to standard of review in amended Mission, Commitments and Core Values.</p> <p>542 One proposed measure empowers the community to force ICANN's Board to consider a recommendation arising from an AoC Review – namely, <i>Consumer Trust, Choice, and Competition</i>. An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.</p>
<p>543 <b>Conclusions:</b></p> <p>544 a) This threat is not directly related to the transition of IANA stewardship</p>	<p>545 b) Existing measures would be inadequate.</p>	<p>546 c) Proposed measures would be an improvement but might still be inadequate.</p>

## Stress test category IV: Failure of Accountability

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
547 10. Chairman, CEO or officer	550 As long as NTIA controls the	553 One proposed measure

<p>acting in a manner inconsistent with the organization's mission.</p> <p>548 24. An incoming Chief Executive institutes a "strategic review" that arrives at a new, extended mission for ICANN. Having just hired the new CEO, the Board approves the new mission / strategy without community consensus.</p> <p>549 Consequence: Community ceases to see ICANN as the community's mechanism for limited technical functions, and views ICANN as an independent, <i>sui generis</i> entity with its own agenda, not necessarily supported by the community. Ultimately, community questions why ICANN's original functions should remain controlled by a body that has acquired a much broader and less widely supported mission.</p>	<p>IANA functions contract, ICANN risks losing IANA functions if it were to expand scope too broadly.</p> <p>551 The Community has some input in ICANN budgeting and Strat Plan, and could register objections to plans and spending on extending ICANN's mission.</p> <p>552 California's Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>empowers the community to veto ICANN's proposed strategic plan or annual budget. This measure could block a proposal by ICANN to increase its expenditure on extending its mission beyond what the community supported.</p> <p>554 Another proposed measure is empowering the community to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. The IRP decision would be based on a standard of review in the amended Mission Statement, including "ICANN shall not undertake any other mission not specifically authorized in these Bylaws".</p>
<p>555 <b>Conclusions:</b></p> <p>556 a) This threat is directly related to the transition of IANA stewardship</p>	<p>557 b) Existing measures are inadequate after NTIA terminates the IANA contract.</p>	<p>558 c) Proposed measures in combination are adequate.</p>

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>559 12. Capture by one or several groups of stakeholders.</p> <p>560 Consequence: major impact on trust in multistakeholder model, prejudice to other stakeholders.</p>	<p>561 Regarding capture by governments, 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.</p>	<p>562 CCWG-Accountability proposals for community empowerment rely upon supermajority to veto ICANN budgets and strategic plans, to remove ICANN Board director(s). A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough.</p>

		563 Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.
		564 To prevent capture by governments, another proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to obligate trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.
565 <b>Conclusions:</b>		
566 a) This threat is not directly related to the transition of IANA stewardship	567 b) Existing measures would be inadequate	568 c) Proposed measures would be adequate.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
569 13. One or several stakeholders excessively rely on accountability mechanism to “paralyze” ICANN.	571 Current redress mechanisms might enable one stakeholder to block implementation of policies. But these mechanisms (IRP, Reconsideration, Ombudsman) are expensive and limited in scope of what can be reviewed.	573 CCWG-Accountability proposals for community empowerment rely upon supermajority to veto ICANN budgets and strategic plans, to remove ICANN Board director(s). A supermajority requirement is an effective prevention of capture by one or a few groups, provided that quorum requirements are high enough.
570 Consequence: major impact on corporate reputation, inability to take decisions, instability of governance bodies, loss of key staff	572 There are no present mechanisms for a ccTLD operator to challenge a revocation decision.	574 Each AC/SO/SG needs accountability and transparency rules to prevent capture from those outside that community.
		575 However, some CCWG-Accountability proposals may make redress mechanisms more accessible and affordable to individual stakeholders, increasing their

		<p>ability to block implementation of policies and decisions.</p> <p>576 It should be noted that proposed measures for Reconsideration and IRP include the ability to dismiss frivolous or abusive claims and to limit the duration of proceedings.</p>
<p>577 <b>Conclusions:</b></p> <p>578 a) This threat is not directly related to the transition of IANA stewardship</p>	<p>579 b) Existing measures seem to be adequate.</p>	<p>580 c) Improved access to Reconsideration and IRP could allow individuals to impede ICANN processes, although this risk is mitigated by dismissal of frivolous or abusive claims.</p>

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>581 16. ICANN engages in programs not necessary to achieve its limited technical mission. For example, uses fee revenue or reserve funds to expand its scope beyond its technical mission, giving grants for external causes.</p> <p>582 Consequence: ICANN has the power to determine fees charged to TLD applicants, registries, registrars, and registrants, so it presents a large target for any Internet-related cause seeking funding sources.</p>	<p>583 As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to expand scope without community support. But as a result of IANA stewardship transition, ICANN would no longer need to limit its scope in order to retain IANA contract with NTIA.</p> <p>584 Community was not aware of ICANN Board's secret resolution to initiate negotiations to create NetMundial. There was no apparent way for community to challenge/reverse this decision.</p> <p>585 The Community has input in ICANN budgeting and Strat Plan.</p> <p>586 Registrars must approve ICANN's variable registrar fees, though Registrars do not</p>	<p>588 One proposed measure is empowering the community to veto ICANN's proposed strategic plan and budget. This measure could block a proposal by ICANN to increase its expenditure on initiatives the community believed were beyond ICANN's limited mission. However, this would be an extreme measure since the entire budget would have to be vetoed.</p> <p>589 Another proposed mechanism is a challenge to a Board decision, made by an aggrieved party or the Community as a whole. This would refer the matter to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN made a commitment or expenditure outside the annual budget process, the IRP mechanism enables reversal</p>



	<p>view this as an accountability measure.</p> <p>587 California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.</p>	<p>of that decision.</p> <p>590 Another proposal is to amend ICANN Bylaws to prevent the organization from expanding scope beyond ICANN’s amended Mission and Core Values.</p> <p>591 If ICANN’s Board proposed to amend/remove these Bylaws provisions, another proposed measure would empower the community to veto that proposed Bylaws change.</p>
<p>592 <b>Conclusions:</b></p> <p>593 a) Threat is directly related to the transition of IANA stewardship</p>	<p>594 b) Existing measures are inadequate.</p>	<p>595 c) Proposed measures in combination may be adequate.</p>

<b>STRESS TEST</b>	<b>EXISTING ACCOUNTABILITY MEASURES</b>	<b>PROPOSED ACCOUNTABILITY MEASURES</b>
<p>596 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.</p> <p>597 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 online expression, for example.</p>	<p>598 Current ICANN Bylaws (Section XI) give due deference to GAC advice, including a requirement to try and find “a mutually acceptable solution.”</p> <p>599 This is required for any GAC advice, not just for GAC consensus advice.</p> <p>600 Today, GAC adopts formal advice according to its Operating Principle 47: “<i>consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</i>”<sup>7</sup> But the GAC may at any time</p>	<p>601 One proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.</p> <p>The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN Bylaws would require trying to find a mutually agreeable solution only on advice that had GAC consensus.</p> <p>602 GAC can still give ICANN advice at any time, with or</p>

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<sup>7</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

	change its procedures to use majority voting instead of consensus.	without consensus
603 <b>Conclusions:</b> 604 a) This threat is not directly related to the transition of IANA stewardship	605 b) Existing measures are inadequate.	606 c) Proposed measures are adequate.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
607 22. ICANN Board fails to comply with Bylaws and/or refuses to accept the decision of a redress mechanism constituted under the Bylaws.  608 Consequence: Community loses confidence in multistakeholder structures to govern ICANN.	609 As long as NTIA controls the IANA contract, ICANN would risk losing IANA functions if it were to ignore Bylaws. But as a result of IANA stewardship transition, ICANN would no longer need to follow Bylaws in to retain IANA contract with NTIA.  610 Aggrieved parties can ask for Reconsideration of Board decisions, but this is currently limited to questions of whether process was followed.  611 Aggrieved parties can file for IRP, but decisions of the panel are not binding on ICANN.  612 California’s Attorney General has jurisdiction over non-profit entities acting outside Bylaws or Articles of Incorporation.	613 One proposed measure is to change the standard for Reconsideration Requests, so that substantive matters may also be challenged.  614 Another proposed measure empowers the community to force ICANN’s Board to consider a recommendation arising from an AoC Review – namely, the <i>Accountability and Transparency Review Team</i> . An ICANN Board decision against those recommendations could be challenged with a Reconsideration and/or IRP.  615 One proposed measure is empowering the community to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN failed to comply with its Bylaws, the IRP mechanism enables a reversal of that decision.  616 If the ICANN Board were to ignore binding IRP decisions, another proposed measure would empower the community to force resignation ICANN Board member(s).
617 <b>Conclusions:</b> 618 a) This threat is directly related	619 b) Existing measures are	620 c) Proposed measures in

to the transition of IANA stewardship	inadequate.	combination are adequate because the community has power to spill the Board.
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STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
621 23. ICANN uses RAA or other agreements to impose requirements on third parties, outside scope of ICANN mission. (e.g. registrant obligations)	626 During policy development, affected third parties may participate and file comments.	631 A proposed measure to empower an aggrieved party (e.g. registrants and users) to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision, based on standard for review in the amended Mission, Commitments and Core Values.
622 Affected third parties, not being contracted to ICANN, have no effective recourse.	627 Affected third parties may file comments on proposed changes to registry and registrar contracts.	
623 Contracted parties, not affected by the requirements, may choose not to use their ability to challenge ICANN's decision.	628 Affected third parties (e.g. registrants and users) have no standing to challenge ICANN on its approved policies.	632 Another proposed measure is empowering the community to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. That IRP decision would be based on a standard of review in the amended Mission statement, including "ICANN shall not undertake any other mission not specifically authorized in these Bylaws."
624 This issue occurs in policy development, implementation, and compliance enforcement.	629 Affected third parties (e.g. registrants and users) have no standing to challenge ICANN management and Board on how it has <i>implemented</i> approved policies.	
625 Consequence: ICANN seen as a monopoly leveraging power in one market (domain names) into adjacent markets.	630 If ICANN changes its legal jurisdiction, that might reduce the ability of third parties to sue ICANN.	
633 <b>Conclusions:</b>	635 b) Existing measures are inadequate.	636 Proposed measures would be adequate.
634 a) This threat is not directly related to IANA transition		

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
637 26. During implementation of a properly approved policy, ICANN staff substitutes their preferences and creates processes that effectively change or negate the policy developed. Whether staff do	639 The reconsideration review mechanism allows for appeal to the Board of staff actions that contradict established ICANN policies. However, reconsideration looks at process but not substance of a	641 If the staff action involved a Board decision, there are proposed improvements to challenge a Board decision by reconsideration or referral to an Independent Review Panel (IRP) with the power to issue a

<p>so intentionally or unintentionally, the result is the same.</p> <p>638 Consequence: Staff capture of policy implementation undermines the legitimacy conferred upon ICANN by established community based policy development processes.</p>	<p>decision.</p> <p>640 An ICANN Board decision could not be challenged by the community at-large, which lacks standing to use IRP.</p>	<p>binding decision.</p>
<p>642 <b>Conclusions:</b></p> <p>643 a) This threat is not directly related to IANA transition</p>	<p>644 b) Existing measures are inadequate.</p>	<p>645 c) Proposed measures would, in combination, be adequate.</p>

## Stress test category V: Failure of Accountability to External Stakeholders

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>646 14. ICANN or NTIA choose to terminate the Affirmation of Commitments. (AoC)</p> <p>647 Consequence: ICANN would no longer be held to its Affirmation commitments, including the conduct of community reviews and required implementation of review team recommendations.</p>	<p>648 The AoC can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>649 As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the AoC.</p> <p>650 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>651 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>652 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.</p> <p>653 If ICANN's Board proposed to amend the AoC commitments and reviews that were added to the Bylaws, another</p>

		<p>proposed measure would empower the community to veto that proposed Bylaws change.</p> <p>654 Note: none of the proposed measures could prevent NTIA from canceling the AoC.</p>
655 <b>Conclusions:</b>		
656 a) This threat is directly related to IANA transition	657 b) Existing measures are inadequate after NTIA terminates the IANA contract.	658 c) Proposed measures in combination are adequate.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
659 15. ICANN terminates its legal presence in a nation where Internet users or domain registrants are seeking legal remedies for ICANN's failure to enforce contracts, or other actions.	661 As long as NTIA controls the IANA contract, ICANN could risk losing IANA functions if it were to move in order to avoid legal jurisdiction.	664 ICANN's present Bylaws include a commitment to maintain headquarters in California with offices around the world.
660 Consequence: affected parties might be prevented from seeking legal redress for commissions or omissions by ICANN.	662 Paragraph 8 of the AoC requires ICANN to remain headquartered in the US, but the AoC can be terminated by ICANN at any time	665 If ICANN's Board proposed to amend this Bylaws provision, one proposed measure would empower the community to veto that proposed Bylaws change.
666 <b>Conclusions:</b>		
667 a) This threat is directly related to the transition of IANA stewardship	668 b) Existing measures are inadequate once NTIA terminates IANA contract.	669 c) Proposed measures improve upon existing measures, and may be adequate.

STRESS TEST	EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
670 25. ICANN delegates or subcontracts its obligations under a future IANA agreement to a third party. Would also include ICANN merging with or allowing itself to be acquired by another organization.	672 The present IANA contract ( <a href="#">link</a> ) at C.2.1 does not allow ICANN to sub-contract or outsource its responsibilities to a 3rd party without NTIA's consent.	675 The CWG-Stewardship planning the IANA stewardship transition could require community consent before ICANN could sub-contract or outsource its IANA responsibilities to a 3rd party.
	673 NTIA could exert its control over ICANN's decision as long	

<p>671 Consequence: Responsibility for fulfilling the IANA functions could go to a third party that was subject to national laws that interfered with its ability to execute IANA functions.</p>	<p>as it held the IANA contract. But not after NTIA relinquishes the IANA contract.</p> <p>674 Nor would NTIA's required principles for transition be relevant after transition occurred.</p>	<p>676 The CCWG-Accountability is proposing to empower the community to challenge a Board decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN failed to comply with its Bylaws, the IRP mechanism enables a reversal of that decision.</p> <p>677 Note: This would not cover re-assignment of the Root Zone Maintainer role, which NTIA is addressing in a parallel process.</p>
<p>678 <b>Conclusions:</b></p> <p>679 a) This threat is directly related to the transition of IANA stewardship</p>	<p>680 b) Existing measures would not be adequate after NTIA relinquishes the IANA contract.</p>	<p>681 c) Proposed measure are adequate to allow community to challenge ICANN decisions in this scenario.</p>

## 4) Items for Consideration in Work Stream 2

- 682 The CCWG-Accountability Charter states that:
- 683 In the discussions around the accountability process, the CCWG-Accountability will proceed with two Work Streams:
- Work Stream 1: focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition;
  - Work Stream 2: focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.
- 684 While Work Stream 2 is not necessary to be implemented or committed to before the transition takes place, the Charter insists that they should remain firmly within the scope of the CCWG-Accountability. The items listed below should therefore be considered as no less important than the Work Stream 1 items.

## Commitment to Work Stream 2 proposal consideration

- 685 However, concerns were raised within the CCWG-Accountability about the incentives for ICANN to implement Work Stream 2 proposals when they are finalized after the transition has taken place. The CCWG-Accountability's recommendation to achieve sufficient commitment from ICANN is to rely on an interim Bylaw provision, noting that such provisions have been successfully used in the past.
- 686 ICANN has, where appropriate, used transitional articles within its Bylaws to identify issues that are necessary to address on a transitional basis, but will expire upon the occurrence of another event. The broadest use of a transitional article was in 2002, after the large ICANN Evolution and Reform effort, which made commitments to future occurrences such as a new MoU between ICANN and a group of Regional Internet Registries at the time when new obligations would come into force for the ASO, or obligations that would be taken on by the ccNSO once formed. See <https://www.icann.org/resources/unthemed-pages/Bylaws-2002-12-15-en#XX>.
- 687 There is also precedent for the use of transitional terms after the GNSO was restructured, and the Board seat selected by the At-Large Community was implemented.
- 688 To ensure the Board's due consideration and implementation of the outcomes of Work Stream 2 accountability mechanisms, the proposal would not require the level of the complexity of the 2002 reform effort.
- 689 The CCWG-Accountability recommends that the Board adopt a transitional article in its Bylaws which would commit ICANN to implement the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to the following list of issues (see below). **This transitional article must be incorporated in the Bylaws as part of Work Stream 1 - prior to the IANA stewardship transition.**

## Items for consideration within Work Stream 2

- 690 During the course of its deliberations, the CCWG-Accountability encountered several items that it considered should be resolved as part of Work Stream 2. The list of items considered for Work Stream 2 at the date of this report is the following:
1. Enhancements to ICANN's accountability based on the law(s) applicable to its actions;
  2. Alternative options for ICANN's jurisdiction (understood as 'place of legal establishment') based on possible accountability limitations related to the current jurisdiction of ICANN;
  3. Enhancements to the Ombudsman's role and function;

4. Limiting ICANN's ability to deny transparency / disclosure requests;
5. Improvements to ICANN's budgeting and planning process that guarantee the ability for the community to have input, and for that input to be given due consideration;
6. Define security audits and certification requirements for ICANN's IT systems;
7. Institute a culture of default transparency at ICANN, including guidelines for when it is acceptable to classify information, requirements for logging decisions to classify information and procedure for de-classifying information;
8. Improve diversity in all its aspects at all levels of the organization; and
9. Enhancements to ICANN's whistleblower policy.

691 Proposed additional paragraph: The CCWG-Accountability will take into account the community's feedback arising from this report and the ongoing analysis of ICANN's accountability as it continues to develop Work Stream 2. It is important to note that as a result, the above list of topics for Work Stream 2 is not fixed and additional issues may be dealt with in Work Stream 2.

692 **QUESTIONS AND OPEN ISSUES:**

693 19) The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Accountability Work Stream 2. If need be, please clarify what amendments would be needed.

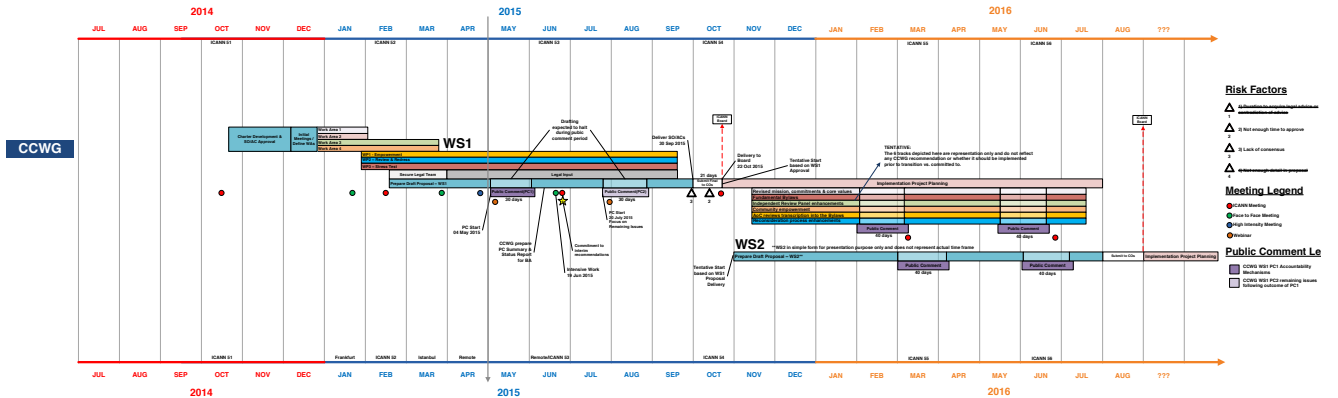
## 5) Implementation Plan Including Timing

### 5.1 Timeline

694 The timeline below is a combination of the CWG-Stewardship and the CCWG-Accountability. The reason for combining both is that the completion of the CCWG-Accountability's Work Stream 1 effort is an essential component for the IANA Stewardship Transition to occur. Note that this timeline only focuses on Work Stream 1 and its corresponding implementation. Work Stream 2 remains in basic form until there is more clarity on what accountability mechanisms will make up its scope. **[Adler note: should the timeline include the face-to-face meeting in Buenos Aires?]**



CCWG Timeline – 30 Apr 2015



695 A full view version of this timeline exists on the [CCWG-Accountability wiki](#).

## 5.2 Next Steps

- 696 The first Public Comment Report sets out the CCWG-Accountability’s initial thinking. After the Public Comment period closes, the CCWG-Accountability will reconvene and continue its work, aiming to finalize Work Stream 1 proposal(s) for submission to Chartering Organizations and eventually to the ICANN Board. Key milestones include:
- ❑ CCWG-Accountability reviews Public Comment #1 and adjusts proposal as agreed
  - ❑ CCWG-Accountability prepares materials in preparation for ICANN 53 and hosts several sessions to further inform the community of its progress and understand the community’s views on its proposal(s). The CCWG-Accountability will hold a full day of face-to-face meeting on 19 June.
  - ❑ CCWG-Accountability prepared its second draft proposal and readies it for a second public consultation. This second consultation will focus on outstanding issues, provide further details regarding the Work Stream 1 proposal(s), and will highlight any changes to proposal(s) arising from the feedback received in the first Public Comment consultation.
  - ❑ CCWG-Accountability reviews Public Comment #2 and refines its proposal to prepare the final version
  - ❑ CCWG-Accountability delivers the final proposal to SOs/ACs for approval
  - ❑ CCWG-Accountability delivers the final proposal to the ICANN Board
  - ❑ Upon proper notification, the CCWG-Accountability begins Implementation Oversight of Work Stream 1 and on or around this time begins its work on Work Stream 2

## 5.3 Implementation

697 The CCWG-Accountability views the oversight of Work Stream 1 implementation as crucial to its mandate. Work Stream 1 accountability changes have to be implemented or committed to before any transition of IANA Stewardship from NTIA can occur. At the time of this publication, it is difficult to provide details of the effort required for Work Stream 1 implementation, and it is not possible to provide an exact timeline or duration beyond the information below and in the timeline in section 5.1 of this report. However, the CCWG-Accountability roughly estimates nine months for implementation understanding that several tracks of effort and change will be required, some of which will require multiple public comment periods. The CCWG-Accountability has tentatively outlined the following six tracks for implementation of Work Stream 1:

- ❑ Revised Mission, Commitments and Core Values
- ❑ Fundamental Bylaws establishment
- ❑ Independent Review Panel enhancements
- ❑ Community empowerment mechanism establishment and incorporation of powers into Bylaws
- ❑ AoC reviews transcription into the Bylaws
- ❑ Reconsideration process enhancements

698 As the CCWG-Accountability progresses closer to its final Work Stream 1 Proposal, implementation planning will become clearer. Once approval has been obtained, implementation can begin.

699 A significant number of CCWG-Accountability Accountability Work Stream 1 recommendations involve updating the ICANN Bylaws. A best case timeline for implementation can be found below. About 105 days appear necessary until approval of the Bylaw changes, which appear as a key milestone.

### 700 **STEP 1 – ESTABLISHMENT OF BYLAW PROPOSALS – AROUND 45 DAYS**

701 Assuming that lawyers have very clear direction and guidance, the legal work of preparing proposed amendments to ICANN's Articles and Bylaws could be accomplished in as little as two weeks. However, in the drafting process issues may become apparent that have not been anticipated and need additional guidance, which would slow the drafting process down.

702 Similarly, assuming clear direction and guidance on the ACs/SOs and assuming that these entities do not have assets or revenues, the documents for the unincorporated associations (assuming 6) could be drafted in another two weeks.

703 Thus, the drafting of amendments to the core ICANN governance documents and creation of basic streamlined unincorporated association documents should take about four to six weeks total, to have solid first drafts for review. [Sidley note: Need to build in time for CCWG review. This only covers the law firms' delivery of first drafts.]




704 **STEP 2 – POSTING AND APPROVAL OF BYLAWS – AROUND 60 DAYS INCLUDING 40 DAYS PUBLIC COMMENT**

705 The general process for the posting and approval of Bylaws amendments is as follows:

- ❑ The Board considers the proposed revisions for posting for public comment. The Board typically receives items for consideration approximately 7 calendar days before action. Given the import of the CCWG-Accountability work, a special Board meeting could be called (upon proper notice - 48 hour minimum) in order to address the implementation work.
- ❑ So long as the Board approves the posting, staff can prepare the posting as soon as possible. We could aim at making sure that any public comment opening text [Sidley note: "opening text" here is unclear] would be completed no later than the day the Board is scheduled to consider the posting, so that there is no undue delay.
- ❑ Public comment is typically for 40 days. There is the opportunity for a shorter period of time, though practice has been to never go below 30 days for Bylaws changes. ICANN would only shorten that period if there were community consensus that a less than 30-day window was more appropriate.
- ❑ The public comment would have to be considered and provided to the Board for consideration and approval. We could work to identify what types of timeframes would be appropriate for this, though typically there is a need for at least two weeks to prepare the matter for the Board's further consideration/approval, depending on the complexity of the comments.
- ❑ Assuming there is nothing within the public comment that requires substantial modification (which could require further public comment), once the Board considers and approves the revisions, they are made effective immediately.
- ❑ What this means is that from the time the Bylaws are provided to the Board for consideration for posting for public comment, we're looking at approximately 60 days (assuming a 40 day public comment and that Board meetings are convened as needed for this purpose) to implementation.

706 **STEP 3 – SETTING UP THE MECHANISMS - DURATION DEPENDS ON SO/AC PROCESSES**

- 707 In terms of regulatory filings, with both the designator and Membership models all that is required is that the new Articles of Incorporation be filed with the State of California. There is no approval process to factor in at the state or federal level.
- 708 Each SO/AC would need to make appropriate arrangements to fully participate within the community mechanism.
- 709 In terms of setting up the IRP, a process to nominate, select and confirm the initial panelists would have to be convened. The engagement of International Arbitration Bodies and the nomination phase of this process could actually start before approval of the relevant Bylaws. However, the launch of an IRP is likely to take 3 to 6 months.

710 <b>The following tables suggests implementation milestones and dates for Work Stream 1 recommendations</b>		<b>Complete</b> ✓ or  <b>xx</b> <b>Progress</b> ○ or  <b>xx In</b> <b>Planning</b> ◇ or  <b>xx In</b>	
		<b>CCWG- Accountability- ACCT Rec #</b>	<b>Description/Imple mentation Summary</b>
711 <b>Community Empowerment</b>		712	
713	714	715	716
717 <b>Review &amp; Redress</b>		718	
719	720	721	722

## 6) Public Comment Input

- 723 Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

724 Do you have any general feedback or suggestion on the interim Work Stream 1 proposals?

725 Insert deadline + practical suggestions here.

726 **Revised Mission, Commitments & Core Values**

1. Do you agree that these recommended changes to ICANN's *Mission, Commitments and Core Values* would enhance ICANN's accountability?
2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

727 **Fundamental Bylaws**

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?
4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

728 **Independent Review Panel Enhancement**

5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

729 Please refer to Appendix I – Independent Review Panel Enhancement – Questions & Open Issues

730 **Reconsideration Process Enhancement**

6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

731 **Mechanism to empower the Community**

7. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the community mechanism?

Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

732 **Power: reconsider/reject budget or strategy/operating plans**

8. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

733 **Power: reconsider/reject changes to ICANN “standard” Bylaws**

9. Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

734 **Power: approve changes to “Fundamental” Bylaws**

10. Do you agree that the power for the community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

735 **Power: Recalling individual ICANN Directors**

11. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

736 **Power: Recalling the entire ICANN Board**

12. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

737 **Incorporating AoC into the ICANN Bylaws**

13. Do you agree that the incorporation into ICANN's Bylaws of the AoC principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.
14. Do you agree that the incorporation into ICANN's Bylaws of the AoC reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

738 **Bylaws changes suggested by Stress Tests**

15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend to amend these requirements.

739 **Items for Consideration in Work Stream 2**

16. The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Accountability Work Stream 2. If need be, please clarify what amendments would be needed.

# Glossary

740 See also <https://www.icann.org/resources/pages/glossary-2014-02-03-en>

741 **Advisory Committee**

742 An Advisory Committee is a formal advisory body made up of representatives from the Internet community to advise ICANN on a particular issue or policy area. Several are mandated by the ICANN Bylaws and others may be created as needed. Advisory committees have no legal authority to act for ICANN, but report their findings and make recommendations to the ICANN Board.

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743 **Affirmation of Commitments Reviews**

744 The Affirmation of Commitments contains specific provisions for periodic review of four key ICANN objectives. These reviews provide a mechanism to assess and report on ICANN's progress toward fundamental organizational objectives; they are: 1) Ensuring

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745 **ALAC – At-Large Advisory Committee**

746 ICANN's At-Large Advisory Committee (ALAC) is responsible for considering and providing advice on the activities of the ICANN, as they relate to the interests of individual Internet users (the "At-Large" community). ICANN, as a private sector, non-profit corporation with technical management responsibilities for the Internet's domain name and address system, will rely on the ALAC and its supporting infrastructure to involve and represent in ICANN a broad set of individual user interests.

747 On 31 October 2002, the ICANN Board adopted New Bylaws that establish the ALAC and authorize its supporting At-Large organizations. (Article XI, Section 2(4) of the New Bylaws.) The New Bylaws, which are the result of ICANN's 2002 reform process, went into effect on 15 December 2002. ALAC is to eventually consist of ten members selected by Regional At-Large Organizations, supplemented by five members selected by ICANN's Nominating Committee. To allow the ALAC to begin functioning immediately, the Transition Article of the Interim Bylaws provides for the Board to appoint ten members (two from each of ICANN's five regions) to an Interim ALAC.

748 Underpinning the ALAC will be a network of self-organizing, self-supporting At-Large Structures throughout the world involving individual Internet users at the local or issue level. The At-Large Structures (either existing organizations or newly formed for this purpose) will self-organize into five Regional At-Large Organizations (one in each ICANN region – Africa, Asia-Pacific, Europe, Latin America/Caribbean, and North America). The Regional At-Large Organizations will manage outreach



and public involvement and will be the main forum and coordination point in each region for public input to ICANN.

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749	<b>ASO — Address Supporting Organization</b>	750	The ASO advises the ICANN Board of Directors on policy issues relating to the allocation and management of Internet Protocol (IP) addresses. The ASO selects two Directors for the ICANN Board.
751	<b>Bottom-up Processes</b>	752	A fundamental principle of ICANN's decision-making processes is that policy analysis and decisions progress from a stakeholder level (made up of directly affected parties, Internet users, companies and anyone else who wishes to participate in the process) to the ICANN Board level. The process provides the opportunity for open and equal participation at all levels, as practical and possible.
753	<b>Board Directors</b>	754	Natural persons who direct the activities and affairs of a nonprofit corporation and exercise all of its corporate powers. Board Directors are distinguished from observers, who can attend Board meetings but cannot vote.
755	<b>ccNSO — The Country-Code Names Supporting Organization</b>	756	The Country Code Names Supporting Organization (ccNSO) is a body within the ICANN structure created for and by ccTLD managers. Since its creation in 2003, the ccNSO has provided a forum for country code Top Level Domain (ccTLD) managers to meet and discuss topical issues of concern to ccTLDs from a global perspective. The ccNSO provides a platform to nurture consensus, technical cooperation and skill building among ccTLDs and facilitates the development of voluntary best practices for ccTLD managers. It is also responsible for developing and recommending global policies to the ICANN Board for a limited set of issues relating to ccTLDs, such as the introduction of Internationalised Domain Name ccTLDs (IDN ccTLDs). Membership in the ccNSO is open to all ccTLD managers responsible for managing an ISO 3166 country-code top-level domain.
757	<b>ccTLD — Country Code Top Level Domain</b>	758	Two letter domains, such as .uk (United Kingdom), .de (Germany) and .jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country.
		759	Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in .biz, .com, .info, .name, .net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services.

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760 For more information regarding registering names in ccTLDs, including a complete database of designated ccTLDs and managers, please refer to <http://www.iana.org/cctld/cctld.htm>.

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761 **CCWG-  
Accountability-**

762 The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) that was convened to design a proposal that ensures that ICANN's accountability and transparency commitments to the global Internet community are maintained and enhanced in the absence of the historical relationship with the U.S. Government

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763 **Consensus**  
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765 Consensus is a form of decision-making employed by various supporting organizations within ICANN. The method to establish whether one has reached consensus differs per supporting organization, for example, the following method is used in the GNSO:

766 Full consensus - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as Unanimous Consensus.

767 Consensus - a position where only a small minority disagrees, but most agree.<sup>8</sup>

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768 **Consolidated  
RIR IANA  
Stewardship  
Proposal Team**

769 The Consolidated RIR IANA Stewardship Proposal Team (CRISP Team) was established by the Internet Number Community through the Regional Internet Registries to produce a proposal for IANA activities related to the allocation of blocks of Internet Number Resources, the IANA Number Registries, administration of the special-purpose "IN-ADDR.ARPA" and "IP6.ARPA" DNS zones, and other related registry management tasks.

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770 **CWG-  
Stewardship**

771 The Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship) main goal is to produce a consolidated transition proposal for the elements of the IANA Functions related to the Domain Name System.

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772 **Designator**

773 A person who is given the power in the Articles of Incorporation and/or Bylaws to fill one or more seats on the Board of Directors. Generally, a designator also has the right to remove the directors it designated with or

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01 <sup>8</sup> For those that are unfamiliar with ICANN usage, you may associate the definition of "Consensus" with other definitions and terms of art such as rough consensus or near consensus. It should be noted, however, that in the case of a GNSO PDP originated Working Group, all reports, especially Final Reports, must restrict themselves to the term "Consensus" as this may have legal implications.

without cause. Designated directors cannot be removed by the Board or Members without the designator's consent. Designators may also be given the right through the Articles or Bylaws to consent to any changes in those governing documents. California corporate law is unclear whether a designator must be a legal person (an individual or entity that is recognized under law such as a corporation or an unincorporated association); however, unless a designator is a legal person, it will not be able to enforce any rights in court.

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774	<b>DNS — Domain Name System</b>	775	The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address – just like a telephone number – which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.
776 777	<b>Five-Year Operating Plan</b>	778	Five Year Operating Plan is a means of planning and executing portfolios of ICANN work in alignment to the strategic objectives and goals articulated in the Strategic Plan. This plan serves as a link between strategy and the one year operating plan and budget, setting out planned outcomes (key success factors), means of measuring progress (key performance indicators), operational risks, dependencies and resources needed to accomplish goals.
779	<b>Fundamental Bylaw</b>	780	The concept of fundamental Bylaw is used to represent a Bylaw provision which the community wishes to protect from change by requiring a higher standard of community approval and ICANN Board voting threshold before it can be changed or removed.
781	<b>GAC — Governmental Advisory Committee</b>	782	The GAC is an advisory committee comprising appointed representatives of national governments, multi-national governmental organizations and treaty organizations, and distinct economies. Its function is to advise the ICANN Board on matters of concern to governments. The GAC will operate as a forum for the discussion of government interests and concerns, including consumer interests. As an advisory committee, the GAC has no legal authority to act for ICANN, but will report its findings and recommendations to the ICANN Board. The Chairman of the GAC is Thomas Schneider of Switzerland.
783	<b>GNSO — Generic Names Supporting Organization</b>	784	The GNSO is the successor to the responsibilities of the Domain Name Supporting Organization (DNSO; see below) that relate to the generic top-level domains.

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785 The GNSO is the body of six constituencies, as follows: the Commercial and Business constituency, the gTLD Registry constituency, the ISP constituency, the non-commercial constituency, the registrar's constituency, and the IP constituency.

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786 **gTLD —  
Generic Top  
Level Domain**

787 Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below.

788 In the 1980s, seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created. Domain names may be registered in three of these (.com, .net, and .org) without restriction; the other four have limited purposes.

789 Over the next twelve years, various discussions occurred concerning additional gTLDs, leading to the selection in November 2000 of seven new TLDs for introduction. These were introduced in 2001 and 2002. Four of the new TLDs (.biz, .info, .name, and .pro) are unsponsored. The other three new TLDs (.aero, .coop, and .museum) are sponsored.

790 Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy- formulation responsibilities over many matters concerning the TLD.

791 A Sponsor is an organization to which is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.

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792 **IANA —  
Internet  
Assigned**

793 ICANN has performed the IANA (Internet Assigned Numbers Authority) Functions on behalf of the global Internet community since 1998. The IANA functions have historically included: the maintenance of the registry

<b>Numbers Authority</b>	of technical Internet protocol parameters; the administration of certain responsibilities associated with Internet DNS root zone and the allocation of Internet numbering resources.
794 <b>IANA Stewardship Transition Coordination Group (ICG)</b>	<p>795 The IANA Stewardship Transition Coordination Group (ICG) was formed to coordinate the development of a proposal among the communities affected by the IANA functions. The creation of the ICG was initiated and facilitated by ICANN, and the membership of the ICG has been defined by the Internet communities participating in it. The groups' sole deliverable is a proposal to the NTIA recommending a transition plan of NTIA's stewardship of IANA functions to the Internet community, consistent with the key principles outlined in the NTIA March 14 announcement.</p> <p>796 ICG's proposal will combine recommendations developed by the three operational communities affected by the IANA functions: the IANAPLAN WG representing the protocol parameters community, the Consolidated RIR IANA Stewardship Proposal Team (CRISP Team) representing the IP address communities, and CWG-Stewardship for the Naming community.</p> <p>797 The ICG is focused on delivering a proposal to transition the stewardship of the IANA functions to the multistakeholder community.</p>
798 <b>IANAPLAN Working Group</b>	799 The IETF established the IANAPLAN Working Group (IANAPLAN WG) to produce a proposal for the transition of IANA functions related to the maintaining of the codes and numbers contained in a variety of Internet protocols developed by the IETF.
800 <b>ICANN — The Internet Corporation for Assigned Names and Numbers</b>	801 The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. Originally, the Internet Assigned Numbers Authority (IANA) and other entities performed these services under U.S. Government contract. ICANN now performs the IANA function. As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes. The DNS translates the domain name you type into the corresponding IP address, and connects you to your desired website. The DNS also enables email to function properly, so the email you send will reach the intended recipient.

802 <b>IETF — Internet Engineering Task Force</b>	803 The Internet Engineering Task Force (IETF) is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet 2 . It is open to any interested individual. The IETF develops Internet Standards and in particular the standards related to the Internet Protocol Suite (TCP/IP).
804 <b>Independent Review Process Panel</b>	805 Independent Review Process Panel (IRP Panel), is an independent panel of neutrals which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.
806 <b>Internet Protocol (IP)</b>	807 The communications protocol underlying the Internet, IP allows networks of devices to communicate over a variety of physical links. Each device or service on the Internet has at least one IP address that uniquely identifies it from other devices or services on the Internet. An IP address is the numerical address and DNS naming uses user-friendly names to locate the devices and services.
808 <b>Member</b>	809 A person who under the Articles of Incorporation and/or Bylaws of a nonprofit corporation has the right to vote to elect one or more directors. Members have extensive rights and protections under California corporate law, including the collective rights to amend the Bylaws, approve any amendment to the Articles of Incorporation, and approve the disposition of substantially all the corporation's assets or any merger or dissolution; the class right to remove directors they elected; and the individual right to inspect certain corporate records. In addition to the rights members have under law, the law permits the Articles and Bylaws to specify additional corporate governance rights that may or must be exercised by the members. Members may be divided into classes with different voting and other rights. Members must be legal persons, and they have standing to enforce their rights.
810 <b>Multistakeholder Approach</b>	<p>811 The Multistakeholder Approach is an organizational framework or structure for governance and policymaking which aims to bring together all stakeholders to collaborate and participate in the dialogue, decision-making and implementation of solutions to identified problems or goals.</p> <p>812 The Multistakeholder Model at ICANN, is comprised of a diverse set of stakeholders with an interest in Internet numbering, naming and protocols from around the world who have organized into various Supporting Organizations, Constituencies and Advisory Committees, and agree to operate in an open, bottom-up, consensus-driven, and transparent manner.</p>

813 <b>NETmundial Principles</b>	814 The NETmundial meeting, which took place in Sao Paolo, Brazil on 23-24 April 2014, was the first multistakeholder-designed event to focus on the future of Internet governance. NETmundial identified a set of common principles and important values that contribute to an inclusive, multistakeholder, effective, legitimate, and evolving Internet governance framework, and recognized that the Internet is a global resource which should be managed in the public interest.
815 <b>Nominating Committee</b>	816 The Nominating Committee (NomCom) is an independent committee tasked with selecting eight members of the Board of Directors, five members of the At-Large Advisory Committee, three members of the Generic Names Supporting Organization (GNSO), and three members of Country-Code Names Supporting Organization (ccNSO). (See Bylaws Article VII, Section 1.)
817 <b>NTIA</b>	818 The U.S. Department of Commerce National Telecommunications and Information Administration (NTIA) is the Executive Branch agency that is principally responsible for advising the President on telecommunications and information policy issues. NTIA maintains a contract with ICANN for the technical coordination of the Internet's domain name and addressing system.
819 <b>Ombudsman</b>	820 The ICANN Ombudsman investigates and addresses complaints brought by the ICANN community. The Ombudsman is independent, impartial, and neutral, a reviewer of facts and an investigator of complaints about unfairness.
821 <b>PDP — Policy Development Process</b>	822 A set of formal steps, as defined in the ICANN Bylaws, to guide the initiation, internal and external review, timing and approval of policies needed to coordinate the global Internet's system of unique identifiers.
823 <b>Reconsideration Process</b>	824 Reconsideration Process is a mechanism to challenge staff action taken against ICANN policies, or Board actions taken without consideration of material information or based upon false or inaccurate information.
825 <b>Registrar</b>	826 Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of these companies appears in the Accredited Registrar Directory.  827 The registrar you choose will ask you to provide various contact and technical information that makes up the registration. The registrar will then keep records of the contact information and submit the technical information to a central directory known as the "registry." This registry provides other computers on the Internet the information necessary to send you e-mail or to find your web site. You will also be required to

enter a registration contract with the registrar, which sets forth the terms under which your registration is accepted and will be maintained.

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828	<b>Registry</b>	829	The "Registry" is the authoritative, master database of all domain names registered in each Top Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Internet users don't interact directly with the registry operator; users can register names in TLDs including .biz, .com, .info, .net, .name, .org by using an ICANN- Accredited Registrar.
830	<b>Review Mechanisms</b>	831	A review mechanism is a process to assess how a decision or policy is being put in place. ICANN has a series of review mechanisms mandated in its Bylaws to ensure its accountability and transparency.
832	<b>RIR — Regional Internet Registry</b>	833	There are currently five RIRs: AfriNIC, APNIC, ARIN, LACNIC and RIPE NCC. These non-profit organizations are responsible for distributing and managing IP addresses on a regional level to Internet service providers and local registries.
834	<b>Root Servers</b>	835	The root servers contain the IP addresses of all the TLD registries – both the global registries such as .com, .org, etc. and the 244 country-specific registries such as .fr (France), .cn (China), etc. This is critical information. If the information is not 100% correct or if it is ambiguous, it might not be possible to locate a key registry on the Internet. In DNS parlance, the information must be unique and authentic.
836	<b>Root Server System Advisory Committee</b>	837	The role of the Root Server System Advisory Committee ("RSSAC") is to advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.
838	<b>Root Zone</b>	839	The root zone is the central directory for the DNS, which is a key component in translating readable host names into numeric IP addresses. For more information see: <a href="http://www.iana.org/domains/root/files">www.iana.org/domains/root/files</a> .
840	<b>SO — Supporting Organizations</b>	841	The SOs are the three specialized advisory bodies that will advise the ICANN Board of Directors on issues relating to domain names (GNSO and CCNSO) and, IP addresses (ASO).
842	<b>SSAC — Security and Stability Advisory Committee</b>	843	The President's standing committee on the security and stability of the Internet's naming and address allocation systems. Their charter includes a focus on risk analysis and auditing. SSAC consists of approximately 20 technical experts from industry and academia as well as operators of Internet root servers, registrars, and TLD registries.
844	<b>Stakeholders</b>	845	A stakeholder has been defined as any individual or group affected by the actions of the organization. Stakeholders at ICANN include Country

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Code top level domain name registries; generic top-level domain registries and registrars; regional internet registries who manage the regional distribution of Internet number resources including IP address and Autonomous System Numbers; the thirteen root name server operators; commercial interests - including those representing large and small businesses, intellectual property interests and providers of internet and other communications services; non-commercial interests – including non-commercial users and not-for-profit organizations; governmental interests – including national governments, multi-national governmental organizations and treaty organizations, and distinct economies; technical experts from industry and academia; and representatives of Internet users worldwide.

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846 **Stress Test**

847 Stress Testing is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. The CWG-Stewardship is using stress tests to analyse certain ICANN and DNS ecosystem risks or contingencies can be mitigated by applying the accountability mechanisms available to the CCWG-Accountability.

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848 **TLD –  
Top-level  
Domain**

849 TLDs are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (rightmost) ".", such as "net" in "www.example.net". The administrator for a TLD controls what second-level names are recognized in that TLD. The administrators of the "root domain" or "root zone" control what TLDs are recognized by the DNS. Commonly used TLDs include .com, .net, .edu, .jp, .de, etc.

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850 **Work Streams**

851 Work Stream 1: focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

852 Work Stream 2: focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.