



Comments from the Internet Infrastructure Coalition (i2Coalition)

June 3, 2015

The Internet Infrastructure Coalition (i2Coalition) appreciates the opportunity to comment on Cross Community Working Group on Accountability's (CCWG) Draft Proposal.

The i2Coalition's diverse membership represents both large and small Internet infrastructure providers such as web hosting companies, software services providers, data centers, registrars and registries. The i2Coalition has several key goals with ICANN, but chief among them is continuing to build a voice for underrepresented parts of the Internet ecosystem – in particular web hosts, data centers and cloud infrastructure providers – and ensuring that accountability and transparency are paramount. i2Coalition brings unique representation to ICANN as it is made up of companies representing the whole broad ecosystem of Internet infrastructure companies.

The i2Coalition appreciates the work of the CCWG, and we broadly support the proposal's direction. In particular, we appreciate that the CCWG shares two of our key goals: (1) ensuring that ICANN remains focused on its core mission of coordinating the global Internet's systems of unique identifiers and ensuring the stable and secure operation of the Internet's unique identifier systems, and (2) creating a binding mechanism and enforceable community empowerment by which actions outside of or in contravention of ICANN's bylaws can be challenged.

With those principles in mind, we offer limited comments on the Proposal's treatment of the bylaws pertaining to mission, commitments, and core values and on the proposed Independent Review Panel process.

ICANN's Mission, Commitments, and Core Values

The i2Coalition strongly supports the inclusion of language limiting ICANN's activities to those that further its mission¹, as well as changes to ICANN's Bylaws requiring ICANN to carry out its activities in accordance with applicable law and international law and conventions through an open and transparent process. In particular, it supports clarifying ICANN's Mission Statement to state explicitly that the scope of ICANN's authority does not include the regulation of services that use the domain name system (DNS) or the regulation of content these services carry or provide.

However, the i2Coalition has concerns regarding the inclusion of new criteria associated with balancing commitments and core values. The new language suggests that "strict scrutiny" and "intermediate scrutiny" concepts imported from U.S. constitutional law should guide ICANN in making decisions that implicate multiple commitments or core values. But under U.S. law,

¹ CCWG Proposal at 20.



these tests are typically applied when one fundamental value (e.g., equal protection or freedom of speech) is infringed. They are not designed to provide guidance when balancing multiple compelling interests that lead to different conclusions. For that reason, the tests often favor governmental inaction. But in the face of competing core values, the Internet ecosystem depends on ICANN continuing to make decisions, rather than refrain from acting. The strict scrutiny and intermediate scrutiny tests do not provide ICANN with any guidance for how to address this conundrum. For these reasons, we believe that the existing language regarding balancing and reconciliation of competing core values ought to be retained.

The i2Coalition supports the clarification to the Core Values that any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values. This is important to the goal of accountability; public authorities would have the ability to provide input into ICANN decisions, while ensuring that all ICANN actions are compliant with its Bylaws.

Independent Review Process

The i2Coalition strongly agrees that ICANN's actions should be subject to a binding appeal mechanism. Adoption of a binding appeals process is key to improving ICANN's overall accountability to the Internet community. We also agree that review should be available for actions or failures to act that violate either (a) substantive limitations on the permissible scope of ICANN's activity, or (b) decision-making procedures. And we agree that the substantive limitations and decision-making procedures that should form the basis for relief are those set forth in ICANN's Bylaws; Articles of Incorporation; its Statement of Mission, Commitments, and Core Values; and ICANN policies.

- However, we encourage the CWG-Accountability to consider two modifications to its proposal. First, the i2Coalition has some concern the IRP process, as currently proposed by the CCWG, would allow parties to bring new arguments to the IRP without first vetting them through the community's policy development channels. We are concerned that the process does not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the IRP after policy development has concluded. Such an approach could create operational inefficiency and undermine the bottom-up, consensus-based process for developing policy within ICANN. The i2Coalition suggests that the CCWG carefully consider whether additional safeguards -- such as requiring parties or their trade associations to participate in a public comment process for instances in which there is a challenge to an existing community-developed policy or where ICANN has sought public comment on implementation of an existing policy -- could prevent these eventualities while still preserving an accessible IRP. The requirement to comment publicly would not apply to



instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.

- Second, we believe that actual decisions should be reviewed under an abuse of discretion standard rather than the *de novo* standard currently contemplated by the Proposal. Under this model, failure to follow processes would qualify *per se* as an abuse of discretion. Pure *de novo* review would arguably allow individuals to circumvent the policy process and undermine the finality of consensus-based decisions made by the community. It is critical for the stability and efficiency of the Internet ecosystem for ICANN decisions, properly taken and subject to a transparent and accountable review process, to have a degree of finality and predictability.

Bylaws Changes Suggested by Stress Tests

We support the proposed Bylaw change recommendations arising from stress tests. In particular, we strongly support the results of stress test 18 regarding the Board's response to GAC advice. ICANN Bylaws should stipulate that GAC advice must be issued by consensus in order to compel the ICANN Board to find a mutually acceptable solution when it does not follow GAC advice

Concluding Comments

Again, we appreciate the work of the CCWG and believe it represents a strong starting point for continued discussions on improving ICANN's accountability. We look forward to continuing the work with the group as it moves toward finalizing the proposals.