

1. Background

1.1 Introduction

On 14 March 2014 the U.S. 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 the Internet Corporation for Assigned Names and Numbers (ICANN) to convene a multistakeholder process to develop a proposal for the transition.

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.

Informed by community discussions and public comment periods, the final [Revised Enhancing ICANN Accountability: Process and Next Steps](#) includes identifying how, if any, 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](#).

Designed and approved by a Drafting Team (DT) composed of five ICANN community groups, the Cross Community Working Group on Enhancing ICANN Accountability ([CCWG-Accountability](#)) was convened in late 2014. The CCWG-Accountability [Charter](#) was circulated for adoption on 3 November 2014 – see Appendix B.

The CCWG-Accountability consists of [166 people](#), organized as [28 members](#), appointed by and accountable to the CCWG-Accountability chartering organizations, [138 participants](#), who participate as individuals, and [99 mailing list observers](#).

The CCWG-Accountability also includes:

- 1 ICANN Board liaison who brings the voice of the Board and Board experience to activities and deliberations;¹
- 1 ICANN staff representative who provides input into the deliberations;²
- 1 former ATRT member who serves as a liaison and brings perspective and ensures that there is no duplication of work;³

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

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

- 2 ICG liaisons who serve between CCWG-Accountability and ICG.

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.

For more information on background please refer to Appendix A.

1.2 Definitions and Legal Scoping

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 worked to produce a definition of what accountability is, and listed transparency, consultation, review mechanisms and redress mechanisms as criteria of accountability mechanisms.

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

The group proposed that accountability is comprised four dimensions:

1. **Transparency**, meaning that an actor (ICANN) is answerable to its stakeholders by being open and visible to them;
2. **Consultation**, meaning that the actor (ICANN) continually takes input from and explains its positions to the stakeholders;
3. **Review**, meaning that the actor's (ICANN's) actions, policies and programs are subject to outside monitoring and evaluation; and
4. **Redress**, meaning that the accountable actor (ICANN) makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.

Further, independence and checks and balances mechanisms 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 with the due consideration of the interests of all stakeholders. Also, 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.

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

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 policies, 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; and
- 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.

1.3 Legal Advice

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.⁴ The firms' work was coordinated through the Legal Subteam of the CCWG-Accountability. The legal advice was key to the CCWG-Accountability in formulating its recommendations.

For more information on the Legal Subteam's rules of engagement and methodology please refer to Appendix C.

1.4 Input Gathered from the Community: Required Community Powers

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 in light of its changing historical relationship with the U.S. Government 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.

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

⁴ When referring to legal advice and counsel, this report refers to joint advice and counsel unless noted otherwise.

- 1 since community Members need the leverage of IANA Stewardship 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 community members could veto certain Board decisions if reserved for them if they 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 community members could veto certain Board decisions if reserved for them if they 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 community members could then veto that decision.

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

In addition, the Cross Community Working Group (CWG) to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship) has advised the CCWG-Accountability, including in a [correspondence](#) from the CWG-Stewardship co-chairs dated 15 April 2015, the expectations from their group with regards to Work Stream 1 recommendations. These expectations are:

- **ICANN budget:** The CWG-Stewardship supported the ability for the community to approve a budget, including on IANA functions' costs. This expectation is dealt with in Section 7.1.
- **Community empowerment mechanisms:** The CWG-Stewardship is relying on the community empowerment and accountability mechanisms under consideration and being developed being in place at the time of the IANA 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 change to Fundamental Bylaws, as well as the related creation of a stakeholder community/member group in order ensure the ability to exercise these rights. This expectation is dealt with in Section 7.
- **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 Affirmation of Commitments mandated reviews integration into ICANN's Bylaws as a Fundamental Bylaw. This expectation is dealt with in Section 4. 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 recommended that the CCWG-Accountability 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 conducted a survey among the ccTLDs as part of the work of Design Team B, and the results led to a recommendation, which noted 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 emphasized the importance and need for an appeal mechanism to cover any other issues that may involve IANA and noted that this is option is expected to be specifically called out as one of the possible escalation mechanisms⁵ in the draft transition proposal. This expectation is dealt with in Section 5.

- **Fundamental Bylaws:** To address the various matters above, the CWG-Stewardship is also relying on these mechanisms being included as Fundamental Bylaws. This expectation is dealt with in Section 4.

1.5 Summary of Key Changes Since the Initial Draft Report (May 2015)

The following is a summary of the key changes the CCWG-Accountability has made to its proposal between the First Draft Report in May and this Second Draft Report. **The changes are significant.** They have been made in response to comments received during the public consultation on the Initial Draft Report, during numerous interactions with the ICANN community at the ICANN 53 meeting held in Buenos Aires in June 2015, and through further refinement and debate centered on the face-to-face meeting of the CCWG-Accountability in Paris in July 2015.

The reference model to empower the multistakeholder community

Although effective in meeting the requirement of empowering the multistakeholder community the Empowered SO/AC Membership Model also created a number of critical problems, including:

- The requirement for some SOs and ACs to establish legal persons, through which they participate as a member in the Empowered SO/AC Membership Model or to enforce rights was a significant issue for a number of SOs and ACs.
- The differential statutory rights between SOs and ACs that become members and SOs and ACs that were not members (chose not to participate in the Model).

⁵ 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.

- The significant risks associated with to the statutory rights of members, which allows them to dissolve ICANN and bring derivative suits.
- After considering various possible models and discussing options with external legal counsel the CCWG-Accountability has developed the “Community Mechanism as Sole Member” Model as its proposed model for empowering the community. This Model builds upon the more favorable concepts in the other models and simplifies certain implementation aspects.⁶⁶ Decisions of the SOs and ACs made through their existing processes would directly determine exercise of the rights of the Community Mechanism as Sole Member (Section 6) – in other words, no new decision-making group or committee is formed in this model.
- The selection of this model directly influences how the Community will exercise its powers as a member and has required the elaboration of the Community Mechanism, which now includes a community discussion phase before the exercise of any community powers (Section 7).

Additional stress tests

Assistant Secretary Larry Strickling’s [statement](#) of 16 June 2015 suggested four additional stress tests to the CCWG-Accountability:

- **NTIA-1:** Test preservation of the multistakeholder model if individual ICANN’s SOs and ACs opt out of having votes in community empowerment mechanism(s).
- **NTIA-2:** Address the potential risk of internal capture. ST 12 and 13 partly address capture by external parties, but not for capture by internal parties in an SO or AC.
- **NTIA-3:** Barriers to entry for new participants.
- **NTIA-4:** Unintended consequences of “operationalizing” groups that to date have been advisory in nature (e.g. GAC).

Refinements to key elements

Along with the changes above, key elements of the proposal evolved and matured, some in significant fashion, but did not modify their fundamental concepts. These refinements include:

- Mission & Core Values, especially balancing of Core Values.
- Board removal and recall through the Community Mechanism as Sole Member.
- Independent Review Process by clarifying a community-driven [panelist] selection process, and providing further detail on the panels and the ability to appeal.

⁶⁶ In making this decision, the CCWG-Accountability relied on expert legal advice from its retained firms. The memo and other documentation provided to the CCWG-Accountability on this topic are available in Appendix G.

- Community power with regard to budget so as to provide continuity of operations and a PTI-IANA Budget veto as requested by the CWG-Stewardship.
- Work plan for Work Stream 2 to:
 - Enhance diversity and the culture of transparency within ICANN
 - Further address concerns about community accountability. The 2nd Draft Report includes a recommendation for regular structural reviews of SOs and ACs to assess their accountability towards their participants as well as towards the stakeholders they are designed to represent.
 - Elaborate on a Commitment to human rights in the ICANN Bylaws.
- Details on an implementation plan for Work Stream 1, including a Bylaws drafting process.

The CCWG-Accountability thanks everyone who offered comments, input and feedback in response to the Initial Draft Report. That input and the discussions since have driven the significant changes to the initial model that underpin the Community Mechanism as Sole Member model proposed in this report. The significant concerns raised by the community have successfully been resolved, and the CCWG-Accountability looks forward to the scrutiny this report will encourage in teasing out remaining issues.