

## Executive Summary

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.

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.

The CCWG-Accountability proposal does not deal directly with the governance of the IANA functions, but nevertheless must have broad public support for the IANA Stewardship Transition to proceed. In addition, the CWG-Stewardship proposal (the domain names component of the IANA Stewardship Transition) is significantly dependent and expressly conditioned on the implementation of specific ICANN-level accountability mechanisms by the CCWG-Accountability.

This 2<sup>nd</sup> draft proposal for public comment represents the latest 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). In the first Public Comment in May 2015, the CCWG-Accountability sought feedback on the direction of its proposal, and preferences among alternatives proposed. Now, the CCWG-Accountability has incorporated the input received and agreed on a way forward which the group believes enhances ICANN's accountability and fulfills the requirements set out by the CWG-Stewardship. In this second Public Comment, the CCWG-Accountability is seeking agreement on whether or not the proposal meets the two conditions described previously.

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.<sup>1</sup>

### Initial Work to Determine Focus of the Work Stream 1 Proposal

The CCWG-Accountability started its work by assessing community comments on accountability from the launch of the Enhancing ICANN Accountability & Governance process from which the group was

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<sup>1</sup> Please see ICANN 52 Board statement at <https://www.icann.org/news/announcement-3-2015-02-12-en>

formed, the Accountability and Transparency Reviews, and the current mechanisms in place at ICANN. From this initial work, the CCWG-Accountability identified four building blocks that establish the foundation for what needs to be in place within the timeframe of the IANA Stewardship Transition. These building blocks are:

- **Principles** (i.e. the Constitution) – The Principles guarantee the Mission, commitments and core values of ICANN through the Bylaws.
- **Empowered Community** (i.e. the People) – This refers to the powers that allow the community Supporting Organizations and Advisory Committees to take action should ICANN breach the Principles.
- **ICANN Board of Directors (i.e. the executive)** – The ICANN Board is responsible for directing ICANN’s affairs and is held accountable to the community through the community’s powers.
- **Independent Appeal Mechanisms** (i.e. the judiciary) – Appeals mechanisms confer the power to review and provide redress, as needed. The CCWG-Accountability recommends a reformed Independent Review Panel that is more accessible and lower cost, with a 7-member standing panel that serves as an independent judiciary and whose decisions are binding on ICANN.

## Changes to ICANN Bylaws

The CCWG-Accountability recommends the following modifications to the ICANN Bylaws:

- Clarifying the **Mission** to reinforce the scope of organizational activities related to the DNS.
- Incorporating the **Affirmation of Commitments** so as to enshrine the community review processes.

## Six Powers to Enhance Community Governance of ICANN

The CCWG-Accountability recommends giving the multistakeholder community more governance powers, detailed below:

1. **Power to reconsider or reject the operating plan and budget:** The community has the ability to consider the operating plans and budgets after they are approved by the Board (but before they come into effect) and reject them.
2. **Power to reconsider or reject changes to ICANN “standard” Bylaws:** The community has the ability to reject proposed Bylaws changes after they are approved by the Board but before they come into effect.
3. **Power to approve changes to “Fundamental” Bylaws:** The community can determine a process for agreeing to any changes of the “Fundamental” Bylaws. The community would have to give positive assent to any change, so the modification of Bylaws becomes a co-decision process between the Board and the community.

4. **Power to appoint and remove individual ICANN directors:** The community organization that appointed a given Director could end their term and trigger another reappointment process. The general approach, consistent with law, is that the appointing body is the removing body, but the process includes community wide discussion before such a step is taken.
5. **Power to recall entire ICANN Board:** as last resort measure, the community can trigger the removal of the entire ICANN Board of Directors. An Interim Board would be set up as part of this power to ensure continuity of operations.

### Reforms to the Independent Review & Request for Reconsideration Processes

In addition to the aforementioned powers, the CCWG-Accountability recommends significantly enhancing ICANN's Independent Review Process to serve as a fully independent judicial/arbitral function for the ICANN community. The Independent Review Panel should become a standing panel of independent panelists. These panelists would be selected through a community driven process. 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 and existing policy, 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 upon the ICANN Board. The CCWG-Accountability also recommends improvements in the accessibility of the Independent Review Process, especially with respect to costs.

The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby any person or entity materially affected by an action (or inaction) of ICANN may request review or reconsideration of that action by the Board. These reforms include:

- Expanding the scope of permissible requests to include Board/staff actions or inactions that contradict established policy, ICANN's Mission, Commitments, or Core Values.
- Requiring the Board as a whole to approve reconsideration decisions.
- Focusing on having the ICANN Ombudsman performing the initial assessments of reconsideration requests in relation to the ICANN legal department.
- Broadening the types of decisions, providing more transparency in the dismissal process while also providing the Board with reasonable right to dismiss frivolous requests
- Engaging more with the Board directors as opposed to ICANN staff.
- Improving the transparency and accessibility to the process, allowing the extension of the time for filing a Request for Reconsideration from 15 to 30 days, and providing a rebuttal opportunity.

### Designing a Community Mechanism for Legitimacy and Enforceability

Numerous legal structures, or mechanisms, have been explored by which the community could organize to have "legal personhood" (or legal standing) in California. The CCWG-Accountability is

recommending the Sole Member Model. This is the Community Mechanism in which ICANN's Supporting Organizations and Advisory Committees jointly participate to exercise their community powers via the Sole Member of ICANN. In this model, community decisions in the Community Mechanism would directly determine exercise of the rights. ICANN Bylaws would establish the Community Mechanism as the Sole Member of ICANN with legal personhood and describe the composition and powers of the Community Mechanism Sole Member. Together, the Supporting Organizations and Advisory Committees who wish to participate in the Community Mechanism act as a legal person of ICANN.

Each decision of the Sole Member would be made by the SOs and ACs through their own formal decision making processes, after a community-wide debate. No SO or AC, or any individual, has to 'join' ICANN or the Sole Member in order to exercise their rights, and no new legal obligations arise for any ICANN participant.

The GNSO, ASO, ccNSO and ALAC have confirmed their intention to participate as voting members in this community mechanism. The community mechanism is designed in a sufficiently open fashion so that other ACs as well as potential new groups in ICANN can join and participate in a voting scheme at a later stage.

## Fundamental Bylaws

ICANN's Bylaws can generally be changed by resolution of the Board with a two-third majority. The CCWG-Accountability proposes revising ICANN's Bylaws to establish a set of Fundamental Bylaws, which would hold special protections and can only be changed with 75% approval from the Board, based on prior approval by the community (see Power #3, above). The CCWG-Accountability recommends that following items have the status of Fundamental Bylaws:

- The Mission, Commitments, and Core Values
- The Independent Review Process
- The six community powers
- The manner in which Fundamental Bylaws can be amended
- The community mechanism as the Sole Member Model
- The IANA Function Review and the Customer Standing Committee, and any other requirements from the CWG-Stewardship.

## Stress Testing the Recommended Enhancements

An essential part of the CCWG-Accountability Charter calls for stress tests to determine the stability of ICANN and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community. The CCWG-Accountability developed a series of 37 stress tests in its proposal, addressing financial crisis or insolvency; failure to meet operational expectations or to account of external stakeholders; and legal action.

## Implementation and Next Steps

Work Stream 1 changes must be implemented or committed to before any transition of IANA Stewardship from NTIA can occur. The CCWG-Accountability roughly estimates that nine months will be required for implementation, understanding that several parallel tracks of effort and change will be required, with some requiring multiple public comment periods.

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 while ICANN remains a public benefit corporation (also known as a not-for-profit organization in other jurisdictions) based in California. However, modifications will be required to ICANN's Articles of Incorporation and Bylaws in order to empower the multistakeholder community as proposed by the CCWG-Accountability.

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 (including the specific requirements related to ccTLDs). The group is grateful to the CWG-Stewardship for the constructive and continued collaboration that was set up and held since 12 December 2014.

## Elements for Consideration in Work Stream 2

Work Stream 2 is focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition. In working through Work Stream 1, the CCWG-Accountability has produced a list of elements to be considered in Work Stream 2, including:

- Refining the operational details of Work Stream 1 proposals, including but not limited to:
  - Establishing rules of procedure for the enhanced Independent Review Process
  - Improving ICANN's budgeting and planning process to guarantee the ability for the community to have input, and for that input to be given due consideration
  - Clarifying the expected behaviors for Board Directors
  - Defining ICANN Community Assembly practical modalities
  - Clarifying understanding of the fiduciary duties of Board Directors and related expectations concerning Director behavior for the Board
- Further assessing enhancements to governments participation in ICANN
- Considering the issue of jurisdiction as described in Section 9.3
- Enhancing SO/AC accountability (see Section 5C)
- Instituting a culture of accountability within the ICANN organization:
  - Limiting ICANN's ability to deny transparency and disclosure requests
  - Enhancing the Ombudsman's role and function
  - Enhance ICANN's whistleblower policy
  - Increasing transparency about ICANN interactions with governments

- Defining security audits and certification requirements for ICANN's IT systems
- Considering improvements to diversity in all its aspects at all levels of the organization (see Section 5C)
- (ensuring that ICANN does human rights impact analyses, within its mission).