

ALAC Comment on
CCWG-Accountability 2nd Draft Proposal
on Work Stream 1 Recommendations

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27 August 2015

Work In Progress

- Based on v04 dated 26 August 2015
(<https://community.icann.org/x/a45CAw>)
- 90 minute meeting earlier today resulted in a number of changes and additions
- This Webinar
- One or more meetings next week
- Major revisions will end next week

CCWG-Accountability Proposal Documents

<https://community.icann.org/x/pKs0Aw>

- Second Draft Proposal
 - Versions in English, Arabic, Spanish, French, Portuguese, Russian and Chinese
- CCWG Webinar Slide Deck
 - Versions in English, Arabic, Spanish, French, Portuguese, Russian and Chinese

Work Stream 1 & 2

- Work Stream 1
 - Give community the ability to make changes
- Work Stream 2
 - Refine specific powers
 - Complete detailed design

Comment on Multistakeholderism

- Multistakeholder participation, like diversity, is important because we have different backgrounds, expectations, interest and desires
- That implies we often do not agree with each other
- Challenge is to find common ground that comes close to meeting all needs
- True in the CCWG – the Proposal is a compromise
- True in At-Large – the Statement is a compromise

Intent of Statement

- Some issues are being raised because we feel that they must change (or must not change in the case of an issue with alternatives presented).
 - If we fail, we will consider whether we refuse to ratify the final proposal.
- Some issues raised because we want to see them changed, but can accept with the current proposal.
- Some issues being raised just to go on record what our position is.

Overall Position

- We support the Proposal – with some reservations
- It is not what we would have preferred
 - Less legal enforcement – more good will
 - Less complex structure
 - Same mechanisms which deliberately make it difficult for community to override Board also make it difficult to change as the Internet and world evolve

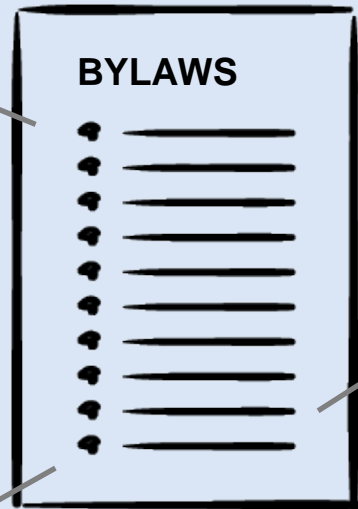
The Principles: ICANN's Mission, Commitments, and Values

ICANN's Bylaws are at the heart of its accountability. They require ICANN to act only within the scope of its limited mission, and to conduct its activities in accordance with certain fundamental principles. The CCWG-Accountability **proposes the following changes be made to the Bylaws.**

ICANN's **Mission Statement**

describes the scope of the organization's activities. The CCWG-Accountability recommends better describing what is in and out of scope for ICANN to do, and to be clear that ICANN can't do anything that isn't specifically allowed in the Bylaws.

ICANN's **Core Values** guide the decisions and actions of ICANN. The CCWG-Accountability recommends dividing the existing Core Values provisions into "Commitments" and "Core Values."



ICANN's **Affirmations of**

Commitments (AoC) requires a periodic review process conducted by the community that results in recommendations for improvement. The CCWG-Accountability proposes to bring aspects of the AoC and the AoC reviews into the ICANN Bylaws.

Change to Core Value 3

Current

To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

Proposed

Delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies.

Change to Core Value 5

Current

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

Proposed

Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.

The Principles: Fundamental Bylaws

ICANN's Bylaws can generally be changed by resolution of the Board with a two-thirds majority. CCWG-Accountability **proposes revising ICANN's Bylaws to establish a set of Fundamental Bylaws**, which would hold special protections and can only be changed based on prior approval by the Community with a higher vote threshold.

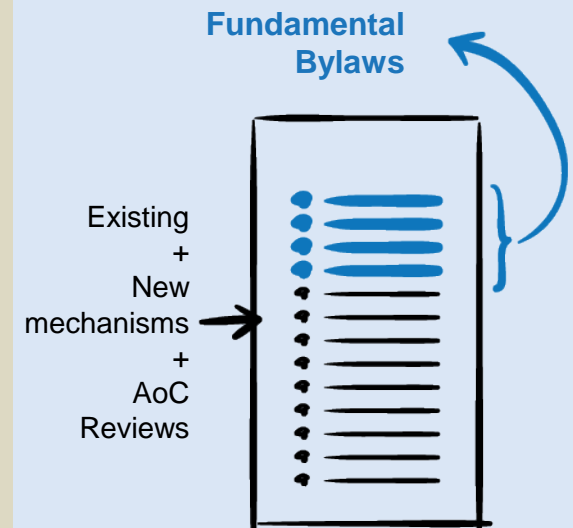
The CCWG-Accountability recommends that the following items be given the status of **Fundamental Bylaws**:

1. The Mission / Commitments / Core Values;
2. The framework for the Independent Review Process;
3. The manner in which Fundamental Bylaws can be amended
4. The Community Mechanism as Sole Member Model
5. The community powers to Reconsider/reject Budget or Strategy/Operating plans, Reconsider/reject Changes to ICANN Bylaws, Remove Individual ICANN Directors and Recall the Entire ICANN Board
6. The IANA Function Review and the Separation Process required by the CWG-Stewardship's proposal;
7. The Post-Transition IANA governance and Customer Standing Committee structures, also required by the CWG-Stewardship's proposal.

Current



Proposed



Fundamental Bylaws

Articles of Incorporation

- We support the proposals
- There are a number of inconsistencies or lack of clarity in the proposed implementation
 - 75% threshold to change Fundamental Bylaws
 - 66% threshold to change Articles of Incorporation
 - Percentage of Board members voting, or holding office?

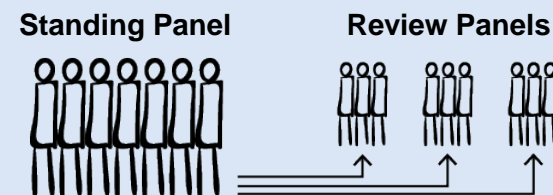
Appeals Mechanisms: Independent Review Process

The CCWG-Accountability **recommends significantly enhancing ICANN’s existing Independent Review Process (IRP)**, whereby any person or entity materially affected by an action (or inaction) in breach of ICANN’s Bylaws by ICANN’s Board may request an independent third-party review of that action.

The core of the recommendation is to institute a **Standing Panel** to serve as a fully independent dispute resolution function for the ICANN Community. For each dispute, a smaller, 3-member **Review Panel** will be drawn from the Standing Panel.

The Role & Scope of the IRP

- Determine whether ICANN has acted (or has failed to act) in violation of its Bylaws
- Reconcile conflicting decisions in process specific “expert panels”
- Hear claims involving rights of the Sole Member



Standing Panel

Composition: 7 members (minimum).

Selection: ICANN to organize a community effort to identify and propose candidate members, Board to confirm.

Expertise: Significant legal expertise; expertise in the workings of ICANN and the DNS; access to other experts upon request.

Diversity: Reasonable efforts to achieve diversity, including no more than 2 panelists from an ICANN region.

Review Panels

Composition: 3 decision makers.

Selection: Selected from Standing Panel. 1 panel member chosen by each party, and those 2 members choose the 3rd member.

Expertise: Relevant to the dispute in question; access to other experts upon request.

Decisions: Are to be binding on ICANN (subject to appeal to full panel) to the extent permitted by law. Possible decisions are:

- 1) Action/inaction is/is not consistent with Bylaws
- 2) Substantive decision on Sole Member rights

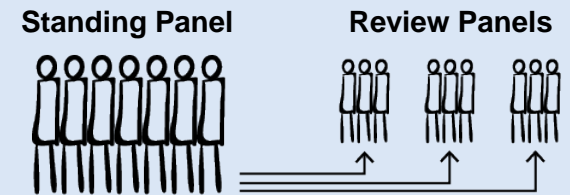
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Independent Review Panel

- We support the IRP
- Concern that an IRP might make decisions on behalf of ICANN instead of just ruling whether a prior decision was not in accordance with Bylaws
 - Could it decide that an action was not allowed, and dictate the remedy instead of telling ICANN to fix the problem
- Note that the IRP may be called upon to reconcile conflicting expert panel decisions, but not mentioned in possible outcomes.
 - This use of the IRP was added at late and not fully implemented.

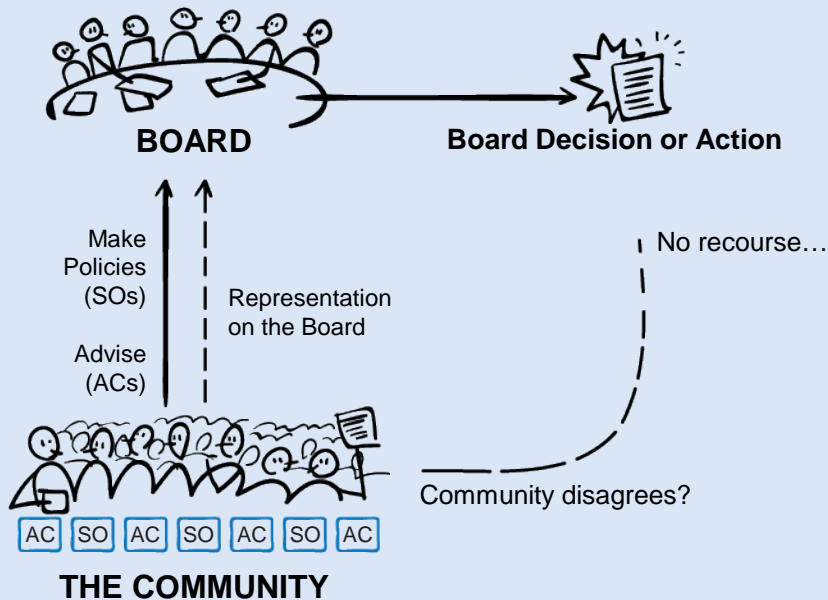
Community Mechanism as Sole Member Model

Many corporate structures and legal mechanisms have been thoroughly explored for organizing the community and enabling it to have enforceable powers, which generally requires “legal personhood” in any jurisdiction. **The CCWG-Accountability is recommending the Community Mechanism as Sole Member Model.**

The Community Mechanism in which SOs/ACs participate jointly to exercise their community powers would be built into ICANN’s Bylaws and be the Sole Member of ICANN. Decisions of the SOs/ACs per the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member (CMSM).

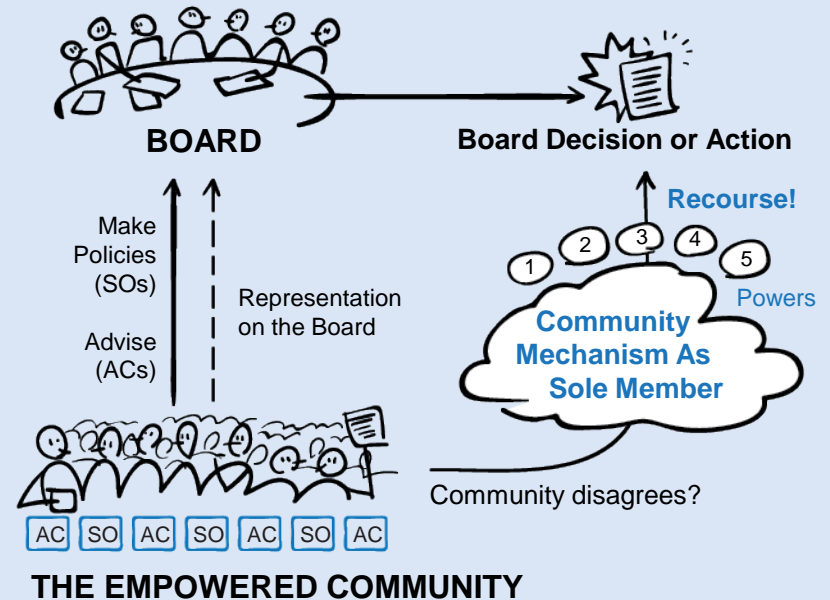
Current

If the community disagrees with a Board decision or action, they have no recourse to challenge it.



Proposed

If the community disagrees with a Board decision or action, they can challenge it exercising their powers through the CMSM.

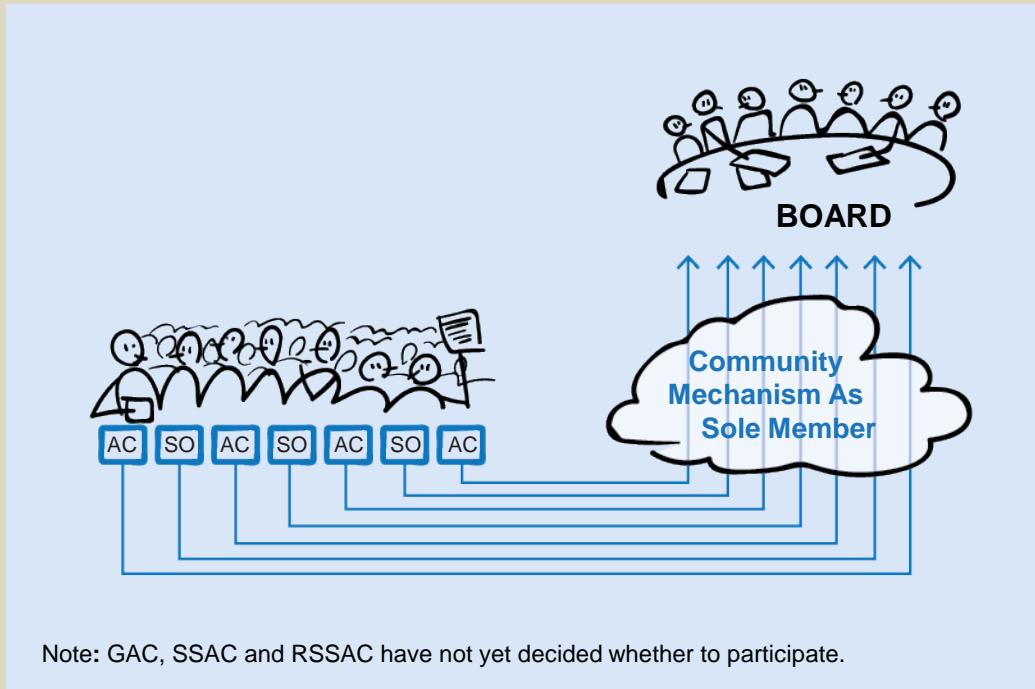
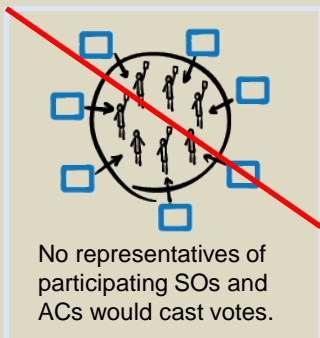


Influence in the Community Mechanism

The CCWG-Accountability considered the decision weights of the various parts of the community. The table on the right sets out the voting distribution proposed by the CCWG-Accountability.

The SOs/ACs that participate in voting in the Sole Member would do so according to a set of rules described in the ICANN Bylaws that would be created specifically for this purpose. Each SO/AC would be responsible for defining their processes for voting under these rules. The chair of each SO/AC would be responsible for communicating the votes or decisions of the SO/AC to the ICANN Board. This pass-through of cumulative votes and decisions would become the act of the Sole Member.




SO or AC	# of Votes
Address Supporting Organization (ASO)	5
Generic Names Supporting Organization (gNSO)	5
Country Code Names Supporting Organization (ccNSO)	5
Governmental Advisory Committee (GAC)	5
At-Large Advisory Committee (ALAC)	5
Security and Stability Advisory Committee (SSAC)	2
Root Server System Advisory Committee (RSSAC)	2



Community Mechanism (CMSM)

- We support the CMSM
- Weighting is not fully resolved
- CCWG Proposal:
 - GNSO, ccNSO, ASO, ALAC, GAC: 5
 - SSAC, RSSAC: 2
- Alternative 1:
 - GNSO, ccNSO, ASO, ALAC, GAC, SSAC, RSSAC: 5
- Alternative 2:
 - GNSO, ccNSO, ASO: 4
 - ALAC, GAC, SSAC, RSSAC: 2

Community Mechanism (CMSM)

- We support the CMSM
- Weighting is not fully resolved
- CCWG Proposal:
 - GNSO, ccNSO, ASO, ALAC, GAC: 5  (SSAC => 5)
 - SSAC, RSSAC: 2
- Alternative 1:
 - GNSO, ccNSO, ASO, ALAC, GAC, SSAC, RSSAC: 5 
- Alternative 2:
 - GNSO, ccNSO, ASO: 4 
 - ALAC, GAC, SSAC, RSSAC: 2

The Empowered Community's Powers

The CCWG-Accountability recommends the ICANN community be empowered with five distinct powers.



1. Reconsider/reject Budget or Strategy/Operating Plan

This 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.



2. Reconsider/reject changes to ICANN "Standard" Bylaws

This power would give the community the ability to reject proposed Bylaws changes after they are approved by the Board but before they come into effect.



3. Approve changes to "Fundamental" Bylaws

This power would form part of the process set out for agreeing any changes of the "Fundamental" Bylaws. It requires that the community would have to give positive assent to any change, a co-decision process between the Board and the community and that such changes would require a higher vote.



4. Remove individual ICANN Board Directors

The community organization that appointed a given director could end their term and trigger a replacement process. The general approach, consistent with the law, is that the appointing body is the removing body.



5. Recall entire ICANN Board

This power would allow the community to cause the removal of the entire ICANN Board. (expected to be used only in exceptional circumstances).

Budget Rejection

- The ALAC has significant concerns
- Given attitude of some parts of the community towards At-Large and other ACs, potential for using it as a tool to control.
- Insufficient focus of process prior to rejection
 - Intended to be carried out in Work Stream 2
 - Needs more definition at this stage

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Removal Of Individual Directors

- Directors appointed by SO/AC
 - At-Large community divided on whether this should be a power of the appointing SO/AC or the overall community
 - Regardless, a removed Director must not be able to claim unfair treatment or have legal recourse to claim libel, slander or defamation

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Recall of Entire Board

- The ALAC has strong concerns about this power
 - It's use would indicate something VERY wrong with ICANN
- That notwithstanding, a requirement to replace Board members within 120 days is likely not implementable.
- Cannot support a minority proposal to have a single SO remove entire Board

Diversity

- Diversity extremely important, and needs to be monitored, but the Accountability and Transparency Review may not be the proper home for such a review if we want to ensure that it is done and done well.

Incorporation of Affirmation of Commitment into Bylaws

- Affirmation of Commitments (AoC) is an agreement between ICANN and NTIA which can be unilaterally terminated
- Issues raised by it are important and it needs to be institutionalized within ICANN
- Reviews specified by the AoC are similarly important and need to be institutionalized.
 - But updating them to today's needs as opposed to those perceived in 2009.

AoC Reviews

- WHOIS Review was probably not appropriately worded in 2009 and certainly is not now.
 - Some terms that it makes mandatory are contrary to national laws
 - Our views of what WHOIS should be used for have changed
 - Needs to be updated before being put into Bylaws
- All Review Teams should be able to recommend changes to their respective Bylaws
 - Proposal calls for only Accountability and Transparency Review to recommend changes.

Resources

- ALAC Statement Wiki

<https://community.icann.org/x/a45CAw>

- IANA-Issues Mailing List

<https://mm.icann.org/mailman/listinfo/iana-issues>

- CCWG Document Wiki

<https://community.icann.org/x/pKs0Aw>

- Second Draft Proposal
- CCWG Webinar Slide Deck

QUESTIONS?