



Comments of the U.S. Council for International Business

Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Proposed Accountability Enhancements (Work Stream 1)

General Comments:

The U.S. Council for International Business (USCIB) applauds the CCWG for further refining the proposed Enhanced Accountability Mechanisms. These refinements address many of the issues and concerns raised by stakeholders concerning the first draft for Work Stream 1. USCIB is a trade association composed of more than 300 multinational companies, law firms, and business associations, which includes a broad cross-section of the leading global companies in the information and communications technology (ICT) sector. USCIB members, which include parties to the non-contracted and contracted houses of ICANN, welcome this opportunity to offer a cross-community, cross-sectoral perspective on this critically important development in the Internet ecosystem.

This latest proposal inspires confidence that the final proposal for Work Stream 1 may then be implemented to enable a prudent IANA transition.

As the CCWG finalizes the Work Stream 1 proposal, we offer the following comments concerning elements of the new Enhanced Accountability Framework:

Revised Mission, Commitments & Core Values

Mission:

- **@168-181**), the Mission Statement should continue to limit the scope of ICANN’s mission to coordinating the global Internet’s system of unique identifiers and developing and implementing policies that are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.
- USCIB shares the concerns of the ICANN Business Constituency (BC) about certain proposed revisions to the Mission Statement that might prevent ICANN from creating and enforcing contracts and Public Interest Commitments with registries and registrars (**@187**). USCIB believes that the CCWG’s bylaws text does not provide adequate clarity. On the one hand, CCWG’s text could be read to prevent ICANN from enforcing Public Interest Commitments or from agreeing to other contract provisions implementing consensus policies. On the other hand, CCWG’s text does not effectively limit ICANN from acting outside consensus policy in the implementation of those contracts. USCIB therefore asks the CCWG to resolve the ambiguity with more clarity in the final proposal.
- **@188**, we also urge the following revisions (both the deleted text and the italicized text) to make clear that the ICANN’s mission does not include the regulation of services that use the DNS or the regulation of the content that such services carry or provide: “. . . Without in any way limiting the foregoing absolute prohibition, ICANN shall not engage in or use its powers ~~to attempt to~~ to regulate of services that use the Internet’s unique identifiers, or the content that that *such services* carry or provide.”

- USCIB supports the protection of internationally recognized fundamental human rights. We greatly value the *primarily technical* mission of ICANN in coordinating the global Internet’s system of unique identifiers and ensuring openness, interoperability, resilience, and stability of the DNS. Thus, we urge very careful consideration of how to include a human rights-related Commitment in ICANN’s Bylaws so it does not have the effect of extending ICANN’s core mission. In recognition of the robustness of existing human rights frameworks, the CCWG should rely on existing human rights instruments and work closely with international human rights experts. We understand that a special CCWG working group aims to present a proposal to the Community in the coming weeks and we look forward to reviewing this. In the meantime, USCIB recommends that a human rights Commitment be solidly anchored within the context of ICANN’s technical mission and operations. Of the two possible formulations presented **@151**, our preference therefore is for the following: “Within its mission and operations, ICANN will be committed to respect internationally recognized fundamental rights.”

Commitments & Core Values:

- USCIB supports the designation of certain Core Values as “Commitments,” given their central importance to ensuring the continued stability, reliability, security, global interoperability, resilience, and openness of the DNS, the healthy functioning of multistakeholder processes, and the overall soundness of ICANN’s activities.
- **@219**, USCIB does not support removal of the reference to consumer: Promoting consumer trust should be one of ICANN’s fundamental goals. We further urge that promoting trust in the DNS user community be a clearly stated commitment. Thus, we propose Paragraph 219 read as follows:

“Depend on ~~where feasible and appropriate, depending~~ market mechanisms to promote and sustain a healthy competitive environment in the DNS market that enhances trust and choice of consumers and DNS users.”
- As we noted in our June 2015 submission, USCIB also supports the proposal in the May 4th report (**@337**) to include the following language in the Bylaws Core Values: “ICANN will insure 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.” While several aspects of this paragraph are reflected in the Core Values (**@199** addresses *security, stability and resiliency*; **@218** addresses *competition*), *consumer protection, malicious abuse issues, sovereignty concerns and rights protection* are not addressed in the Core Values as recommended in the first report. While this recommendation was made in the May 4th report it has not been implemented, and should be implemented now.
- **@225**, USCIB appreciates the inclusive reference to stakeholders from business, civil society, the technical community, and academia in this Core Value. However, the proposed text inappropriately suggests that civil society and academia, in particular, are part of the “private sector.” This term is widely understood to refer to profit-making enterprises run by private individuals or organizations. In addition, we disagree with the CCWG’s decision to eliminate language that would require that any decision to defer to input from public authorities must be consistent with ICANN’s Commitments and Core Values. It should never be acceptable for the ICANN Board to accept advice that is not consistent with these Commitments and Core Values. Thus, we urge the following textual revisions **@225**:

“While remaining rooted in a non-government community composed of stakeholders from business, civil society, the technical community, and academia, recognizing that governments and public authorities are responsible for public policy and duly taking into account 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.”

- The need to balance competing Core Values exists in ICANN’s current Bylaws. USCIB is pleased that the CCWG revised this element of its first draft. The revised language requires that in situations where one Core Value must be reconciled with another potential competing Core Value, the balance must “further an important public interest goal within ICANN’s Mission that it identified through the bottom-up, multistakeholder process.” This approach gives guidance to the ICANN Board and staff without creating a bias toward inaction.

Fundamental Bylaws

- USCIB agrees that Fundamental Bylaws (as defined in Paragraphs 228-229) are important for post-IANA transition stability, contribute to ICANN’s accountability, and address legitimate concerns for the integrity of the transition. We further agree that Fundamental Bylaws should hold special protections and only be changed based on prior approval by the Community with the higher, 75 percent, vote threshold. In addition, we are in accord with the CCWG concerning the seven areas that would be made Fundamental Bylaws in the first instance.¹
- Article XVIII of the current ICANN Bylaws requires that ICANN be headquartered in California. This Article helps to ensure the continued stability of ICANN’s operations. Importantly, we note that ICANN’s current Bylaws and the CCWG’s extensive work in developing enhanced accountability mechanisms are based on California laws governing not-for-profit public benefit entities. For this and other reasons, any initiative to incorporate ICANN in a different jurisdiction would be a fundamental change that would impact legal certainty, including the legal foundation upon which the new accountability framework is being established. We realize this topic has been discussed at length in the CCWG, but because of the benefit that Article XVIII presents for legal certainty and operational stability, USCIB encourages the CCWG to further evaluate the merits of strengthening this current California jurisdiction ICANN Bylaw, with the status of a Fundamental Bylaw.

Independent Review Process Enhancement

In general, USCIB agrees with the proposed improvements. Below, we offer some specific comments:

- USCIB supports the creation of a standing pool of seven arbitrators who possess the requisite international arbitration expertise combined with an understanding of ICANN and the DNS. We agree that this should be a fully independent judicial/arbitral function, which is not beholden to ICANN or any of its constituent bodies.
- We suggest a permissive approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event that it identifies a challenge as frivolous. Furthermore, participation in related ICANN public comment processes that are directly related to the issue under review should be a prerequisite for parties seeking relief before an IRP. This allows for a good balance between enabling open access to due process and mitigating delay tactics.

¹ (1) The Mission/Commitments/Core Values; (2) the framework for the Independent Review Process; (3) the manner in which Fundamental Bylaws can be amended; (3) the community powers set out in Section 7 of the Workstream 1 report; (4) the Community Mechanism as the Sole Member Model; (6) the IANA Function Review and the Separation Process required by the CWG-Stewardship proposal; and (7) the Post-Transition IANA governance and Customer Standing Committee structures, also required by the CWG-Stewardship proposal.

- We strongly support the proposed scope of review, in which parties may seek review based on substance and procedure, based on ICANN’s Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values. USCIB agrees that parties should be able to seek review of both substance and procedure. Redress should be available when a particular action or failure to act “violates either (a) substantive limitations on the permissible scope of ICANN’s actions, or (b) decision-making procedures, in each case as set forth in ICANN’s Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies.”
- USCIB agrees that the revised IRP provisions be adopted as Fundamental Bylaws. However, in view of the additional detailed work required to implement the IRP enhancements, USCIB encourages the CCWG to include a deadline and procedures to ensure prompt selection of the special Cross-Community Working Group that will be convened for this purpose. It is critically important this group begin work on the IRP rules of procedures as soon as possible so they are completed within the proposed nine-month window for Work Stream 1 implementation.
- Finally, with respect to enhancements for both the Independent Review Panel and the Reconsideration Process, USCIB recommends providing definitions of “materially affected” and “materially harmed” to clarify if such terms refer to economic harm or would include broader concepts of harm to an entity. Such clarity is important to discourage entities for pursuing remedial action based on inchoate allegations of “harm.”

Reconsideration Process Enhancement

We support enhancements to the Reconsideration Process. We support continuing the requirement for prior participation in the directly related public comment process, as this enhances the efficacy of community discussions.

Empowered Community Model and Powers

Community Mechanism as Sole Member Model (CMSM):

- USCIB strongly supports the CMSM model as a means of empowering the ICANN multistakeholder community to hold ICANN accountable on critical governance issues. We agree that this approach provides the required legal enforceability under California laws governing a not-for-profit public benefit corporation and support amending the Bylaws to affect the single-member structural change. We note that the community mechanism is foundational to ensure ICANN’s accountability to the global Internet community. Accordingly, we believe that any change to the community mechanism proposal should require another community-wide vetting process in order to comply with the requirement of a multistakeholder-driven process.
- Importantly, the CMSM model improves upon the earlier Designator models by eliminating the risk of “capture” by a constituent group. It also provides a flexible approach for SOs or ACs – or new SOs/ACs created at a later date – to opt in to participate in this Sole Member Model.
- We further agree with the rationale used in assigning voting weights for the SOs and ACs as outlined @319, in which the ASO, ccNSO, GNSO, At Large, and GAC communities each receive 5 votes, with the SSAC and RSSAC each receiving 2 votes. In terms of administration of the voting system, the straight forward “absolute thresholds” (@345-346) are preferable to a more complex formulation.
- Regarding the creation of an ICANN Community Forum (@348-356), we understand the importance of enabling community-wide discussion before a power under consideration is used. However, we urge the CCWG to provide more detail about how the discussions will be conducted before moving into the

implementation phase of Work Stream 1. We urge the CCWG to develop an approach that enables community members to target their participation in these discussions to those topics directly relevant to their business or organizational interests and/or about which they possess useful expertise. One suggestion would be to create specific list-servs (or mail lists) administered by ICANN, comparable to the ICG and CCWG processes, to which community members could subscribe. We are open to other ideas clarifying how such discussions will be conducted in an organized, accessible, and targeted manner for the various ICANN constituencies.

Community Powers:

- USCIB supports the power for the community to reject a budget or strategic plan, as budgetary oversight often provides a critical check on institutional overreach. We note that the community's rejection of an ICANN budget would require the corporation to operate under a previously approved budget. We support the higher threshold (75 percent) for the community to exercise a possible second veto. This would discourage multiple vetoes that would have the effect of "freezing" the ICANN budget at levels of earlier fiscal years, which may be insufficient to address the corporation's evolving needs. As we noted in our prior comments, USCIB is concerned that such a sustained rejection of ICANN budgets would neither be efficient nor effective. For this reason, we believe that the Community should not have the power to veto a particular budget more than twice.
- USCIB supports the enhanced community powers to reconsider/reject changes to ICANN "Standard" Bylaws and, as stated above, to co-approve changes to Fundamental Bylaws.
- USCIB supports the enhanced community powers to recall individual ICANN Directors.
- USCIB supports the ability of the community to recall the entire ICANN Board. However, because "spilling the board" should be considered a measure of last resort, we support an even higher threshold of 80 percent for this action. In particular, the CCWG should reject the minority view suggesting that "each of the three SOs should be able to exercise the power to recall the entire Board individually."² Allowing any single Supporting Organization to recall the entire ICANN Board would be profoundly destabilizing, and adopting such a proposal is needlessly risky.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

- The AoC currently calls for several reviews that have served as effective tools for reviewing and strengthening ICANN's accountability. USCIB therefore strongly supports the inclusion of the Accountability and Transparency Review (ATRT), the Security, Stability, & Resiliency of the DNS Review, the Competition, Consumer Trust, & Consumer Choice Review, and the WHOIS Policy Review into Article IV of the ICANN Bylaws so that ICANN will be legally bound to continue them on a regular and permanent basis. In sum, we regard incorporation of the AoC into the ICANN Bylaws as a fundamental requirement of the transition. This will provide the Internet user community with greater confidence that the safety, security, and resiliency of the DNS will continue uninterrupted as NTIA's stewardship of the IANA functions is transitioned.

Stress Tests

Overall, we agree with the changes suggested by Stress Tests. Below are some specific comments:

² [Proposal at 63.]

- Stress Test #18 considers a potentially concerning scenario in which Governments in ICANN's Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to the Board. USCIB believes the GAC should continue to perform its advisory role on public policy issues to the ICANN Board. However, it is critical that the GAC provide such advice based on consensus. A numerical vote would deprive GAC advice of its current legitimacy. Thus, USCIB supports the proposed accountability measure **@615-616**, which would amend Article XI of ICANN Bylaws to require ICANN to find a mutually acceptable solution for GAC advice only where such advice is supported by GAC consensus. We believe this is consistent with the first Accountability and Transparency Review Team's (ATRT) Recommendations pertaining to the GAC. The proposed accountability measures to Stress Test #18 also are appropriate and necessary to meet the requirement that the IANA transition not yield a government-led or intergovernmental replacement for NTIA's current stewardship role.
- Stress Tests #29 and #30 were added comparatively later in the CCWG's development of the second draft and have not yet been considered by the broader ICANN community. They consider the ramifications if ICANN were to enforce certain contractual provisions with registrars concerning abusive or illegal conduct of certain domain names. USCIB disagrees with the underlying premise, as presented by commenters during the first round of comments, that such contractual enforcement (and the provisions themselves) will always be outside the bounds of ICANN's Mission now or in the future.

Meeting the Requirements of the CWG

- The ICG report states that the creation of a Separation Cross-Community Working (SCWG) requires approval "by both of the ccNSO and GNSO Councils (each by a supermajority vote, according to their normal procedures for determining supermajority), and will need to be approved by the ICANN Board after a public comment period, as well as a community mechanism derived from the CCWG-Accountability process." The CCWG report, however, only provides a mechanism, through the IRP, to challenge a decision by the board to not implement a recommendation of the IANA Function Review team. It does not appear to offer a mechanism for community approval of an SCWG. This power should be clearly detailed as a community power in order to meet the requirements of the CWG.

Additional Issues of Concern:

Transparency related to Potential Government Capture:

- Governments could seek to control ICANN decision making processes in a variety of ways, for example, by providing *quid pro quos* for actions taken by ICANN. Such influence could cause ICANN to make policy decisions based on what would benefit ICANN as a corporation rather than what is in the best interest of the ICANN community. In addition, ICANN could use its resources and influence to interfere with public policies that are outside the scope of its technical obligations.
- Therefore, USCIB suggests again that the CCWG adopt an additional Bylaw that requires ICANN or any individual acting on ICANN's behalf (i.e., ICANN staff or third-party individuals hired by ICANN) to make periodic public disclosure of their relationship with any government official, as well as activities, receipts, and disbursements in support of those activities on behalf of ICANN. Disclosure of the required information facilitates evaluation by the multistakeholder community of the statements and activities of

such persons in light of their function as representatives of ICANN. Ideally, consideration of this bylaw should occur under the auspices of Work Stream 1.

“Accountability Fatigue:”

- USCIB has extraordinary respect for the CCWG Chairs and Community members who have devoted hundreds of hours to conceiving, drafting, and refining an Accountability framework that ultimately will ensure that ICANN remains a high-quality technical organization responsive to the interests and needs of its various constituencies. These individuals – quite understandably – will need and deserve a break from the grueling schedule required by this effort. Nevertheless, there will be considerable important work required in Work Stream 2 and we worry that the possible onset of “accountability fatigue” may hamper such work.
- USCIB agrees with the need for appropriate accountability mechanisms for any entity exercising significant influence within the Internet governance ecosystem. We do have some concerns, however, with suggestions for additional ongoing reviews pertaining to ICANN staff and the SO/ACs. We are not opposed to the practice of accountability reviews, but we worry that the ICANN community is assuming a burdensome level that may make it difficult for the community to complete substantive work in the face of recurring procedural work. We therefore request that the CCWG carefully consider and seek to properly balance any future recurring obligations of the ICANN community.

Thank you for your consideration.



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