

U.S. CHAMBER OF COMMERCE COMMENTS ON  
ICANN CROSS-COMMUNITY WORKING GROUP ACCOUNTABILITY DRAFT PROPOSAL

September 2015

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. We greatly appreciate the efforts put forth by the CCWG to develop a strong Accountability plan and look forward to engaging with the CCWG as further drafts are developed to ensure the best possible result.

### **General Comments**

We are pleased that the CCWG Accountability plan has procedures in place to ensure real accountability through legal enforceability. Throughout the CCWG process, based on extensive legal analysis and through the hard work of the multistakeholder community, it is clear that the member model proposed is the best, and quite likely the simplest, method to create meaningful new mechanisms for the community to hold ICANN accountable to stakeholders.

The Chamber is concerned by recent criticism by the ICANN Board that appears to disregard or fundamentally alter many of the key provisions of the Accountability plan, in particular by rejecting the membership model. The CCWG proposal represents a series of compromise positions that incorporates feedback from the ICANN Board and the rest of the multistakeholder community, enjoying broad consensus from across that community. While not perfect, it does achieve key milestones: community empowerment and true accountability through enforceability.

We strongly support the CCWG goal of binding accountability, and we may not be able to support a model similar to that contained in the Board proposal.

We are also greatly concerned by recent requests by the Board to postpone the implementation of key elements of the Accountability plan, namely the IRP, until after the IANA transition. The Chamber cannot support an Accountability plan or an IANA transition plan that are finalized on separate timeframes. We are also opposed to delaying the implementation of any of the parts of the current Accountability Plan, as based on recent experience with the ATRT process, may result in extensive delays and in the potential to permanently delay implementation.

It is essential that the CCWG stay the course. The Board should be considered one voice in the process and not given the authority to override all the hard work towards a community consensus.

### **Principles**

With regard to existing Core Value 11, we believe the clarification of the meaning of "private sector" is appropriate. However, we disagree with the CCWG's decision to eliminate language requiring that any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values (154). It should never be acceptable for the ICANN Board to accept advice that is not consistent with these Commitments and Core Values. This change creates significant concern because the CCWG has removed this language in response to governments, thereby suggesting that some public authorities might in the future seek to issue actionable advice to

the ICANN board that is inconsistent with ICANN's Commitments and Core Values. Nor is it sufficient to rely solely on the IRP to correct such violations; instead, ICANN must uphold its Commitments and Core Values without regard to inappropriate government pressure.

We believe the current draft of ICANN's mission regarding the regulation of services that use the DNS needs further revision. As drafted it could be read to prohibit ICANN from entering and enforcing contract provisions to implement consensus policies, such as Public Interest Commitments. At the same time it provides no meaningful limit on ICANN's interpretation of those contract provisions. In addition, we also think it is important to affirm the commitment for the WHOIS/Directory Services.

We support the protection of internationally recognized fundamental human rights. We greatly value the primarily technical mission of ICANN, and as a result we urge the CCWG to take a cautious approach to the possible inclusion of any human rights-related commitment so that it does not have the effect of extending ICANN's important core mission. If the CCWG comes to consensus on the need to include reference to human rights, we suggest following existing human rights instruments.

## **Bylaws**

The Chamber reiterates our support for raising the retention of California legal jurisdiction to the level of fundamental bylaw. This will ensure long term stability and predictability built upon a large amount of legal precedent. Most importantly, the extensive legal advice used in developing the CCWG Accountability plan is built on a foundation of California non-profit law and there must be assurances that all the additional functions and bylaw changes instituted remain in place and functioning as intended for the long term.

We reiterate our support for the inclusion of a new bylaw aimed at preventing government capture or undue ICANN influence on public policies unrelated to ICANN's core mission. This would be achieved through additional transparency, requiring that ICANN or any individual acting on ICANN's behalf make periodic public disclosure of their relationship with any government official, as well as activities, receipts or disbursement in support of those activities on behalf of ICANN. This important work should be done under the auspices of Work Stream 1.

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.

This addition is aimed to obviate concerns that governments might seek to control ICANN decision-making processes by providing quid pro quos for actions taken by ICANN or that governments could try to advance other goals by intimidation. The additional transparency will remove any appearances of impropriety.

We are concerned that references to maintaining consumer trust have been removed from the previous Accountability plan and we would appreciate reinstating the reference removed from paragraph 219. Second, the May 4th report identified the following language as being added to the Bylaws Core Values (337) "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." This language has not been added and should be.

We also note concern that consumer protection, malicious abuse issues, sovereignty concerns and rights protection are not addressed in the core values as the first report indicated.

### **Stress Tests**

We support the findings of Stress Test 18. We agree that the Bylaws should be amended to clarify that, with respect to instances in which the Board does not accept Governmental Advisory Committee (GAC) advice, the Board is required to find a mutually acceptable solution only when GAC advice is supported by full consensus. We note that NTIA has stated that such a change is necessary to meet its criteria for the transition, and we believe it is particularly prudent given that the GAC will gain additional rights through community powers of the sole member.

We are concerned with the framing of Stress Tests # 29 and 30, which seems to conflate the enforcement of certain mutually-agreed to contractual obligations with that of “content regulation.” ICANN has a duty to enforce and enter into mutually agreeable contractual provisions, that are aimed at preventing malicious, abusive, or illegal conduct and the CCWG should add language clarifying this obligation is not altered by ICANN’s revised Mission statement.

We have a concern that the by-laws can be interpreted to limit ICANN’s ability (or willingness) to enforce existing contract terms and Public Interest Commitments with Registrars, agree to new contracts with strong protection provisions or otherwise participate in other programs designed to promote public interest goals. At the same time, we also agree that ICANN should not use its contracts to expand its mission and jurisdiction. We call upon the CCWG to clarify this language accordingly.

### **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.