

Board Input to CCWG-Accountability 2nd Draft Proposal Comments Matrix and Notes on Proposed Elements

11 September 2015

Comments Matrix and Notes on Proposed Elements

The Board supports the four building blocks of the CCWG-Accountability Proposal:

- **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 and its Powers) – The Community refers to Supporting Organizations and Advisory Committees, which can jointly 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 Appeals and Review Mechanisms** (i.e. the Judiciary) –
 - The appeals mechanisms confer the power to review and provide redress, as needed.
 - The reformed Independent Review Panel that is more accessible and at lower cost, with a 7-member standing panel that serves and an independent judiciary and whose decisions are binding on ICANN.

The Board recommends that the Powers should be enforceable both through arbitration and, if ever needed, through a court of law. In that way, the Board is fully aligned with the CCWG-Accountability’s proposal to enhance ICANN Accountability. The Board, however, has identified that there could be a different path to achieve the powers, compared to the Sole Member Model proposed by the CCWG-Accountability, that is simpler, while reducing some of the concerns that the Board has voiced throughout the proposal development process.

Requirements Section

NTIA Requirements

As the Board has noted in some of its communications with the CCWG-Accountability, there is a concern with the complexity of the Community Mechanism as Sole Member Model introduced by the CCWG-Accountability. The Board is supportive of a change in the balance of powers among the community and the Board, and in particular providing the multistakeholder community with the ability to impact and have a say in operational matters. The Board is willing and ready to embrace a more empowered community, increasing the *power* of the multistakeholder community to impact ICANN’s operations, as well as *new ways to hold ICANN more accountable* to the community. Where the Community Mechanism as Sole Member Model causes concern is that it is a new form of a multistakeholder governance structure that will

be based upon a fluctuating voting structure, where the balance between different stakeholders may vary.

We believe the Community Mechanism as Sole Member Model as proposed has the potential for changes in the balance of powers between stakeholder groups in ICANN’s multistakeholder model. At any time, the balance of power and influence among any of the “groups” within ICANN can change based upon the willingness or ability to participate in the Community Mechanism as Sole Member Model, changing for example the balance between governments and the private sector and civil society. We believe that if the Community Mechanism as Sole Member Model is the only proposed path forward, it may be prudent to delay the IANA Stewardship Transition until the Community Mechanism as Sole Member Model is in place and ICANN has demonstrated its experience operating the model and ensuring that the model works in a stable manner.

The Board strongly believes that it is useful to offer an alternative approach for the CCWG-Accountability to consider that addresses the broader concerns raised by the Board. While the CCWG-Accountability Proposal meets the NTIA criteria in many ways, it is the collective view of the Board that the removal of the member layer, with a more direct reliance on the current and tested multistakeholder model within ICANN, more directly addresses the first NTIA criteria of supporting and enhancing the multistakeholder model. With the heightened empowerment of the community in important decisions, ICANN can enhance the community’s role to better serve the needs of the multistakeholder community than it does today, without risking the operational stability of the organization.

The stability of ICANN in the IANA Stewardship Transition period is critical in that ICANN is charged with the Mission of maintaining the security, stability and resiliency of the Internet DNS (NTIA Criteria 2). The accountability proposal was drafted alongside, and will be implemented with the proposal on the transition of the stewardship of the IANA Functions. The CCWG-Accountability carefully considered the contingencies from the global customers and partners of the IANA services, and upholding those expectations is key to implementation (NTIA Criteria 3). The reliance upon the multistakeholder model, and preserving the openness of that model, also serves to maintain the openness of the Internet, particularly in the collective responsibility ICANN shares with its community to uphold ICANN’s Mission and Core Values (NTIA Criteria 4). The CCWG-Accountability, and ICANN through the alternative approach, will continue to work to maintain the strong advisory role that governments maintain in the ICANN model today.

CWG-Stewardship Dependencies

The Board remains committed to upholding the CWG-Stewardship dependencies identified within the CCWG-Accountability Proposal, including the necessary changes to the Bylaws to incorporate the necessary protections.

Summary Table

Below is a summary table of the document. The summary table presents the 47 CCWG-Accountability proposal elements and their assessment by the ICANN Board. The Board has assessed these elements with the following key:

- **1A** = The Board supports this element.
- **1B** = The Board supports this element in principle, but with some recommended changes.
- **2** = The Board does not support this element.

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Revised Mission Commitments and Core Values – Section 3 of the CCWG-Accountability Proposal

1. ICANN Mission (paragraph 164, section 1)

Current State

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
 - a) Domain names (forming a system referred to as "DNS");
 - b) Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and
 - c) Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.

CCWG-Accountability Proposal

The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

1. Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.
2. Clarify that ICANN's Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide.
3. Clarify that ICANN's powers are "enumerated" – meaning that anything not articulated in the Bylaws are outside the scope of ICANN's authority. This does not mean ICANN's powers can never evolve – but ensures that any changes will be deliberate and supported by the community.

In addition, the group has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission.

ICANN Board Comments

The Board supports the recommendations above. Specific changes to the text in the Bylaws will need to be thoroughly reviewed before being finalized.

The Board notes that the resulting text of the Mission, Commitments and Core Values needs to unambiguously maintain ICANN's ability to enforce its contracts with registries and registrars.

It should be recognized that the Board's mandate includes a responsibility to act in the global public interest with respect to our primary mission of ensuring the stability, security and resilience of the Internet's unique identifier systems.

We agree that the Affirmation of Commitments (AoC) should be included in the revised Bylaws. The AoC requires ICANN to continue to work for the maintenance of a single, interoperable Internet. This responsibility may well require actions that are not immediately recognized as fulfilling our primary responsibilities, but nevertheless need to be taken, to participate in different fora and spaces to build support for the single, interoperable Internet.

While the Board is committed to upholding human rights as appropriate within its Mission, the inclusion of human rights in the ICANN Bylaws is premature at this time. There continues to be debate both in the CCWG-Accountability on the topic, as well as in the wider ICANN community.

Assessment

1B

2. ICANN Core Values (paragraph 164, section 2)

Current State

In performing its Mission, the following Core Values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's Mission requiring or significantly benefiting from global coordination.
3. 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.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

CCWG-Accountability Proposal

The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):

1. Divide the existing Core Values provisions into Commitments and “Core Values.”
 - a) Incorporate into the Bylaws ICANN’s obligation to operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These obligations are now contained in ICANN’s Articles of Incorporation.
 - b) Designate certain Core Values as “Commitments”. These values are so fundamental to ICANN’s operation that they are intended to apply consistently and comprehensively. Those Commitments include ICANN’s obligations to:
 - i. Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
 - ii. Limit its activities to those within ICANN’s Mission that require or significantly benefit from global coordination;
 - iii. Employ open, transparent, bottom-up, multistakeholder processes; and
 - iv. Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
 - c) Slightly modify the remaining Core Values to:
 - i. Reflect various provisions in the Affirmation of Commitments, e.g., efficiency, operational excellence, and fiscal responsibility;
 - ii. Add an obligation to avoid capture.

ICANN Board Comments

The Board supports the recommendations above. Specific proposed changes to the text in the Bylaws will need to be thoroughly reviewed before being finalized.

It should be recognized that the Board's mandate includes a responsibility to act in the global public interest with respect to our primary mission of ensuring the stability, security and resilience of the Internet's unique identifier systems.

Assessment

1B

3. Core Values – Balancing or Reconciliation Test (paragraph 164, section 3)

Current State

These Core Values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances.

Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven Core Values simultaneously is not possible.

Any ICANN body making a recommendation or decision shall exercise its judgment to determine which Core Values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

CCWG-Accountability Proposal

These Commitments and Core Values are intended to apply in the broadest possible range of circumstances.

The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.

The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated.

Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.

ICANN Board Comments
Agreed.
Assessment
1A

4. ICANN Mission and Core Values – Fundamental (“Durable” or “Enduring”) Bylaws Provisions – (Paragraph 164, section 4)
Current state
Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.
CCWG-Accountability Proposal
The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be adopted as “durable” or “enduring” elements of the ICANN Bylaws. Any modification to these Bylaws provisions would be subject to heightened standards including, for example, community ratification or subject to community veto.
ICANN Board Comments
Agreed.
Assessment
1A

Fundamental Bylaws – Section 4 of the CCWG-Accountability Proposal

5. Fundamental Bylaws – (Section 4.1)

Current state

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

CCWG-Accountability Proposal

The CCWG proposes to make some Bylaw provisions harder to change than others, in two ways:

- by sharing the authority to authorize changes between the ICANN Board and the ICANN community (organized through its SOs and ACs in the Community Mechanism as Sole Member discussed in Section 6),
- and by requiring higher thresholds to authorize changes than is the case for Standard Bylaws (all the other ICANN Bylaws, discussed in Section 7.2).

ICANN Board Comments

The ICANN Board agrees that the authority to change Fundamental Bylaws should be shared between the ICANN Board and community. The Board also agrees with the higher threshold proposed by the CCWG-Accountability for Board approval of Fundamental Bylaws. The Board believes that the shared authority for changing these Fundamental Bylaws can be achieved through empowering the SOs and ACs in the Bylaws without having to move to a Sole Member model. In the event the Board does not follow its Bylaws, then the community may use binding arbitration, and in the event the Board does not abide by this arbitration, it may enforce the arbitration through the courts.

Assessment

1B

6. Establishing Fundamental Bylaws – (Section 4.2, paragraph 233 and 234)
Current state
Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.
CCWG-Accountability Proposal
Parts of ICANN’s Bylaws will become Fundamental Bylaws by identifying them as such in the Bylaws, and by defining a different process to change them than the process used for changes to Standard Bylaws. To implement this, a new provision would be added to the Bylaws that sets out: <ol style="list-style-type: none"> 1. Which sections of the Bylaws are Fundamental Bylaws (i.e. a list of the articles / sections / subsections that are fundamental)? 2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed.
ICANN Board Comments
Agreed.
Assessment
1A

7. Adding New or Changing Existing Fundamental Bylaws – (Section 4.3, paragraph 236)

Current state

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

CCWG-Accountability Proposal

To establish a new Fundamental Bylaw or to change or remove an existing one, the following steps would be followed where the Board (or the staff through the Board) is proposing the addition or amendment:

1. The Board would propose a new Fundamental Bylaw or a change to / removal of an existing one through the usual process, but would need to identify it as a Fundamental Bylaw Proposal throughout the process.
2. The Board would need to approve the addition or amendment by a 75% vote of all Directors then in office (higher than the usual threshold of 66%).
3. Alongside the Board, the community through the Community Mechanism would also need to approve the change. The threshold to approve any changes to Fundamental Bylaws would be set at the same high bar (75% of all votes in the Community Mechanism cast in favor). Further details in Section 4.5 below.
4. If the change were agreed, then the new/revised Fundamental Bylaw would appear in the Bylaws, and appropriate reference to the text as a Fundamental Bylaw would be added (if needed) to the part of the Bylaws that lists them. In the case of a revision to existing Bylaws text, the text would be amended. In the case of a removal, the text would be removed and the reference to that part would be removed.

ICANN Board Comments

The ICANN Board supports the new community power to approve a change to a Fundamental Bylaw, but believes this can be achieved without having to move to a Sole Member model. For example, a resolution supporting the change from each of the SOs, and no advice against the changes received from the ACs. Additionally, the Bylaws should be amended to include a requirement for public comment on all proposed changes to Bylaws.

Assessment**1B**

8. Which of the Current Bylaws Become Fundamental Bylaws – (Section 4.4)

Current state

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

CCWG-Accountability Proposal

The following would be made Fundamental Bylaws in the first instance:

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 powers set out in Section 7 of this report;
5. The Community Mechanism as the Sole Member Model;
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.

ICANN Board Comments

The Board agrees with most of the proposed Fundamental Bylaws identified, but for #5, the “Community Mechanism as the Sole Member Model.” As noted earlier and in the discussion on Section 6 below, this is an area of concern and the Board proposes an alternative approach for Community enforceability.

With regards to Board decisions, the Board agrees with $\frac{3}{4}$ of all Directors as the required threshold.

With regards to community empowerment over decisions, and Articles of Incorporation, the Board agrees that an appropriate threshold of

community support must be demonstrated prior to enactment of any changes to Fundamental Bylaws.

Additionally, for areas where the CCWG-Accountability has identified that additional work remains, such as on the IRP, the Board suggests further community consideration as to whether those items should be included in the Fundamental Bylaws immediately or once there are additional process improvements developed.

Assessment

Assessment on recommended Fundamental Bylaws:

- **The Mission / Commitments / Core Values → 1A**
- **The framework for the Independent Review Process → 1B**
- **The manner in which Fundamental Bylaws can be amended → 1A**
- **The Powers set out in Section 7 of this report → 1B**
- **The Community Mechanism as the Sole Member Model → 2, though recommend that the MEM Bylaws be made Fundamental**
- **The IANA Function Review and the Separation Process required by the CWG-Stewardship's proposal → 1A**

Overall assessment: 1B

9. Power to Approve Changes to the Fundamental Bylaws – (Section 4.5)
Current state
Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.
CCWG-Accountability Proposal
<p>The intention of Fundamental Bylaws is to make sure that critical aspects of the powers and processes required to maintain ICANN’s accountability to the community, and the organization’s purpose and Core Values, can be changed only as a result of a broad consensus that such change is necessary and appropriate.</p> <p>As such, the power to approve changes to the Fundamental Bylaws would form part of the process set out for agreeing to any changes of the Fundamental Bylaws. Through the Community Mechanism as Sole Member, the SOs and ACs would have to give positive assent to any change before it was finalized, as part of a co-decision process between the Board and the community. By creating this special co-decision process, authority to change fundamental aspects of ICANN’s governing framework is shared more broadly than it otherwise would be.</p>
ICANN Board Comments
ICANN Board supports the new community power to approve a change to a Fundamental Bylaw, but believes this can be achieved without having to move to a Sole Member model. For example, instead of a vote within the Community Mechanism, the threshold could be a resolution from each of the SOs approving the Fundamental Bylaws change, and no advice against the changes received from any of the ACs. The escalation mechanism in the event the Board failed to follow the Fundamental Bylaws change process would include reconsideration as appropriate and binding MEM arbitration, with recourse to court for enforcement.
Assessment
1B

Independent Review Process – Section 5.1 of the CCWG-Accountability Proposal

10. Purpose of the IRP – (Section 5.1, paragraph 268)

Current state

In carrying out its Mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the Core Values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

CCWG-Accountability Proposal

The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

1. Empower the community and affected individuals/entities to prevent “mission creep” enforce compliance with the Articles and Bylaws through meaningful, affordable, accessible expert review of ICANN actions.
2. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its Mission or that violate its Articles or Bylaws.
3. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs and ACs, and the community in connection with policy development and implementation.

ICANN Board Comments

ICANN Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

The Board recommends creating a separate process called the Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to seek independent review of actions that are alleged to be inconsistent with or violation with the new community powers. This is separate from and in addition to refining the existing IRP process for individuals/entities to allow for meaningful recourse on individual decisions of the Board.

The Board also supports carrying out a periodic review of the IRP.

Assessment

1B

11. Role of the IRP – (Section 5.1, paragraph 268)

Current state

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.

CCWG-Accountability Proposal

The role of the Independent Review Process (IRP) will be to:

1. Hear and resolve claims that ICANN through its Board of Directors or staff has acted or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization);
2. Reconcile conflicting decisions of process-specific “expert panels”; and
3. Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds).

ICANN Board Comments

The Board supports Role (1).

With respect to Role (2), the Board believes that appeals on the merits of decisions by expert panels should be heard within appeal processes developed as part of the expert panel process. For example, for new gTLDs, the Board supports developing appeal mechanisms within the new gTLD process, as defined with the community. There need to be clear lines to keep the IRP separate from operational matters.

For Role (3) the Board recommends creating a separate binding arbitration process called the Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers.

Assessment

1B

12. A Standing Panel – (Section 5.1, paragraph 268)
Current state
<p>There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's Mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.</p>
CCWG-Accountability Proposal
<p>The IRP should have a standing arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.</p>
ICANN Board Comments
<p>Agreed.</p>
Assessment
1A

13. Initiation of an IRP – (Section 5.1, paragraph 268)

Current state

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

CCWG-Accountability Proposal

An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws. Matters specifically reserved to the Sole Member of ICANN in the Articles or Bylaws would also be subject to IRP review.

ICANN Board Comments

The ICANN Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

The Board supports the need for refining the existing IRP process for individuals/entities.

The Board recommends creating a separate process called the Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers.

Assessment

1B

14. Possible Outcomes of the IRP – (Section 5.1, paragraph 268)

Current state

The IRP Panel shall have the authority to:

1. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
2. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
3. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
4. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
5. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
6. determine the timing for each proceeding.

CCWG-Accountability Proposal

An IRP will result in a declaration that an action/failure to act complied or did not comply with ICANN's Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions should be binding on ICANN.

1. Decisions of a three-member decisional panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented via the IRP Sub Group process.
2. This balance between the limited right of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.
3. The limited right to appeal is further balanced by the community powers, relevant policy development process, and advice from ACs, each as set forth in the Bylaws.
4. IRP panelists will consider and may rely on prior decisions of other IRPs addressing similar issues.
5. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff

action where a complainant can demonstrate:

- a) Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken;
- b) Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
- c) A balance of hardships tipping decidedly toward the party seeking the relief.

ICANN Board Comments

Agreed. The Board notes that several areas may need refinement based on CCWG-Accountability discussions on IRP developments. The Board is supportive of interim relief limited to status quo preservation.

Separately, the Board notes that the proposed MEM arbitration process will be binding.

Assessment

1B

15. Standing – (Section 5.1, paragraph 268)

Current state

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.

In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.

Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

CCWG-Accountability Proposal

Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.

They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them.

The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws.

Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.

ICANN Board Comments

The ICANN Board agrees that any person/group/entity materially affected by an alleged violation of ICANN's Bylaws or Articles of Incorporation should have the right to file a complaint under the IRP. Until agreement is reached across the community on different time periods the Board recommends that the current time period of 30 days remains.

Separately, the Board recommends creating a separate binding arbitration process called the Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers.

Assessment**1B**

16. Community IRP – (Section 5.1)
Current state
There is no concept of a Community IRP in the current Bylaws.
CCWG-Accountability Proposal
The CCWG-Accountability recommends giving the community the right to have standing with the IRP. In such cases, ICANN will bear the costs associated with the Standing Panel, although the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.
ICANN Board Comments
The Board recommends creating a separate process called the Multistakeholder Enforcement Mechanism (MEM) to meet the needs for the community to review and enforce claims that the Board is not abiding by the community powers. ICANN will fund MEM arbitrations.
Assessment
1B

17. Exclusions; ccTLD Delegation/Redelegation and Numbering Resources – (Section 5.1, paragraph 268, clause 8 and 9)
Current state
ccTLD delegation/redelegations are presently not excluded.
CCWG-Accountability Proposal
As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms. The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.
ICANN Board Comments
Agreed. The IAB, which has oversight of the protocol parameters IANA function for the IETF, has requested a similar exclusion for disputes related to protocol parameters in its public comment on the CCWG-Accountability Proposal, in accordance with the March 2000 MoU between the IAB, IETF, and ICANN. The Board agrees with that limitation as well.
Assessment
1A

18. Standard of Review – (Section 5.1, paragraph 268, clause 10)

Current state

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

1. did the Board act without conflict of interest in taking its decision?;
2. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
3. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

CCWG-Accountability Proposal

The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on their own independent interpretation of the ICANN Articles and Bylaws in the context of applicable governing law. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles and Bylaws. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.

ICANN Board Comments

Agreed that the standard of review requires modification. As an initial step, the Board recommends rolling back the standard of review to the standard that was in place pre-April 2013, stating: "Requests for such independent review shall be referred to an Independent Review Panel (IRP) which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Additionally, the Board proposes continuing consideration of the standard of review in the IRP enhancement work that will be ongoing.

Assessment

1B

19. Composition of Panel and Expertise, Diversity and Size – (Section 5.1, paragraph 268, clause 11, 12, 13)

Current state

There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's Mission and work from which each specific IRP Panel shall be selected. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

CCWG-Accountability Proposal

Composition of Panel: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration. Panelists should also possess expertise, developed over time, about the DNS and ICANN's policies, practices, and procedures. At a minimum, panelists should receive training on the workings and management of the domain name system. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.

Diversity: English as primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal tradition diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).

Size of Panel:

1. Standing Panel – a minimum of 7 panelists
2. Decisional Panel – 3 panelists

ICANN Board Comments

Agreed. The Board recommends that no Standing Panel be empanelled until the scope of the IRP is clarified. The Board agrees with the CCWG-Accountability's recommendation to require 3-member decisional panels.

Assessment

1B

20. Independence – (Section 5.1, paragraph 268, clause 14)

Current state

All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider").

The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.

Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel.

All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

CCWG-Accountability Proposal

Members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP.

1. Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for IRP, beginning by consulting the community on a draft tender document.
2. ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; conduct an initial review and vetting of applications; and work with ICANN and community to develop operational rules for IRP.
3. The community would nominate a slate of proposed panel members.
4. Final selection is subject to ICANN Board confirmation.

ICANN Board Comments
Agreed.
Assessment
1A

21. Recall or Other Accountability – (Section 5.1, paragraph 268, clause 15)

Current state

The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the Standing Panel shall be appointed for a term not to exceed three years.

CCWG-Accountability Proposal

Appointments made for a fixed term of five (5) years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the IRP Sub Group.

ICANN Board Comments

The ICANN Board supports 5-year terms and agrees that a recall process should be developed to ensure accountability.

Assessment

1A

22. Settlement Efforts – (Section 5.1, paragraph 268, clause 16)

Current state

Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the Standing Panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

CCWG-Accountability Proposal

1. Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
2. Parties to cooperatively engage informally, but either party may inject independent dispute resolution facilitator (mediator) after initial CEP meeting. Either party can terminate informal dispute resolution efforts (Cooperative Engagement Process or mediation) if, after specified period, that party's concludes in good faith that further efforts are unlikely to produce agreement.
3. The process must be governed by clearly understood and pre-published rules applicable to both parties and be subject to strict time limits. In particular, the CCWG-Accountability will review the Cooperative Engagement Process as part of Work Stream 2.

ICANN Board Comments

Agreed. We note that the CCWG-Accountability Proposal does not contain a lot of detail on how the mediation piece would fit into the timelines, and other process points, but agree with the CCWG-Accountability that these details can be worked through.

Assessment**1A**

23. Decision Making – (Section 5.1, paragraph 268, clause 17)

Current state

Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the Standing Panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

CCWG-Accountability Proposal

1. In each case, a 3-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the third. We anticipate that the Standing Panel would draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.
2. Panel decisions will be based on each IRP panelist’s assessment of the merits of the claimant’s case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and made public and will reflect a well-reasoned application of the standard to be applied.

ICANN Board Comments

Agreed.

Assessment

1A

24. Decisions – (Section 5.1, paragraph 268, clause 18)
Current state
The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.
CCWG-Accountability Proposal
<ol style="list-style-type: none"> 1. Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set. 2. The CCWG-Accountability recommends that IRP decisions be “precedential” – meaning, that panelists should consider and may rely on prior decisions. By conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers, which is valuable. It also reduces the chances of inconsistent treatment of one claimant or another, based on the specific individuals making up the decisional panel in particular cases. 3. The CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board’s fiduciary judgment with its own judgment. 4. It is intended that judgments of a decisional panel or the Standing Panel would be enforceable in the court of the U.S. and other countries that accept international arbitration results.
ICANN Board Comments
Agreed. Decisions should be binding unless there is a conflict with the Board’s fiduciary responsibilities.
Assessment
1A

25. Accessibility and Cost – (Section 5.1, paragraph 268, clause 19)

Current state

The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest.

Each party to the IRP proceedings shall bear its own expenses.

CCWG-Accountability Proposal

The CCWG-Accountability recommends that ICANN would bear all the administrative costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

ICANN Board Comments

ICANN will fund the costs of Multistakeholder Enforcement Mechanism (MEM) binding arbitration, including legal fees. Because of the availability of a funded MEM through which the community empowerment tools can be enforced, the Board recommends that the more individualized IRP proceedings should be subject to the current cost-shifting process.

Assessment

2

26. Time for Resolving IRPs – (Section 5.1, paragraph 268, clause 19)
Current state
The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review.
CCWG-Accountability Proposal
The Panel should complete work expeditiously; issuing a scheduling order early in the process, and in the ordinary course should issue decisions within a standard time frame (six months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.
ICANN Board Comments
Agreed.
Assessment
1A

27. Implementation – (Section 5.1, paragraph 268, clause 20)
Current state
N/A
CCWG-Accountability Proposal
<p>The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional, detailed work.</p> <p>Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG-Accountability (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p> <p>They may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review</p>
ICANN Board Comments
<p>The Board agrees that IRP provisions should be adopted as Fundamental Bylaws, and also agrees that detailed rules will need to be developed. As an initial step, the Board recommends rolling back the modification of standard of review to the standard that was in place before 2013. The Board also recommends that as the IRP was identified as an area of additional work, the community considers whether it should be included in the Fundamental Bylaws immediately or once there are additional process improvements developed.</p>
Assessment
1A

28. Transparency – (Section 5.1, paragraph 268, clause 21)

Current state

ICANN has a Documentary Information Disclosure Policy (DIDP) available at: <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

CCWG-Accountability Proposal

The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust independent review process. We recommend reviewing and enhancing the Documentary Information Disclosure Policy (DIDP) as part of the accountability enhancements in Work Stream 2.

ICANN Board Comments

Agreed. The Board is aware of concerns raised by some members of the community, and believes that the DIDP process should be reviewed and enhanced, including additional process in how the community can challenge a denial of public release of a document/part of a document. The Board agrees that this is appropriate for continuing improvements work within ICANN.

Note: the DIDP process is not intended as a process for community members to obtain information for their personal use on a confidential basis.

Assessment

1A

Reconsideration Process – Section 5.2 of the CCWG-Accountability Proposal

29. Standing – (Section 5.2, paragraph 271)

Current state

ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

1. one or more staff actions or inactions that contradict established ICANN policy(ies); or
2. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
3. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

CCWG-Accountability Proposal

Amend "who" has proper standing to file a Reconsideration Request to widen its scope by including Board/staff actions/inactions that contradict ICANN's Mission or Core Values (was only policies before). The CCWG-Accountability Proposal states that under the existing Bylaws paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Reconsideration Request process.

Decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other interested parties

ICANN Board Comments

Agreed with suggested expansion of scope. The Board notes that the expansion of the scope of the Reconsideration could help embed the Reconsideration Process within a clear escalation path for individual claimants raising concerns with the organization's actions or decisions. The Board suggests that the Reconsideration Process could be improved if the Reconsideration Process could be further expanded to allow for standing when actions of the Board/staff are alleged to be unfair or illogical to permit an opportunity for review of matters beyond the basic process level.

Assessment**1A**

30. Goals - Summary Dismissal – (Section 5.2, paragraph 277)

Current state

The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the website.

CCWG-Accountability Proposal

The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated.

The Board Governance Committee may summarily dismiss a Reconsideration Request if:

1. the requestor fails to meet the requirements for bringing a Reconsideration Request; or
2. it is frivolous.

The Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the website.

ICANN Board Comments

Agreed.

Assessment

1A

31. Preparation of Information to Reach Recommendations – (Section 5.2, paragraph 278-283)
Current state
No specified process.
CCWG-Accountability Proposal
Requests should no longer go to ICANN’s lawyers (in-house or out-house) for the first substantive evaluation. Instead, the Requests shall go to ICANN’s Ombudsman who would make the initial recommendation to the BGC. The Ombudsman may have more of an eye for fairness to the community in looking at these requests. Note the Bylaws charge the BGC with these duties, so BGC would utilize the Ombudsman instead of its current practice of ICANN’s lawyers to aid the BGC’s in its initial evaluation.
ICANN Board Comments
Agreed. Note: ICANN will need to add staff to the Office of Ombudsman, which will increase the cost of the Ombudsman function. There are details that the CCWG-Accountability may wish consider such as how does the CCWG-Accountability envisage this to work if the Ombudsman has already separately reviewed the complaint? How is the Ombudsman to balance his duties of confidentiality with the transparent nature of the Reconsideration Process?
Assessment
1A

32. Decision Making – (Section 5.2, paragraph 284-290)

Current state

For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required.

Board Governance Committee Recommendations expected within 30 days of request, and Board action as practicable within 90 days.

CCWG-Accountability Proposal

The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the Request. The Requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the entire Board for its evaluation.

The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. In any event, the Board's final decision shall be made within 120 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website. In any event, the Board's final decision shall be made within 120 days of decision on the recommendation is final.

ICANN Board Comments

Agreed in principle.

Note: there are some practical details that need to be considered before a rebuttal should be included as part of the process. Those include questions such as: what are the limitations of the scope of a rebuttal? How would it be limited so as not to be an opportunity to introduce new arguments? How does it impact the timeframe? How can it have safeguards so as to not delay? What are the Board's obligations in considering a rebuttal?

The Board notes that the inclusion of the rebuttal process, and clarity around it, may impact the timelines presented.

Assessment**1B**

33. Accessibility – (Section 5.2, paragraph 291-293)
Current state
<p>All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:</p> <ol style="list-style-type: none"> 1. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or 2. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or 3. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
CCWG-Accountability Proposal
Extend the time deadline for filing a Reconsideration Request from 15 to 30 days.
ICANN Board Comments
Agreed.
Assessment
1A

34. Due Process – (Section 5.2, paragraph 294-299)

Current state

The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.

The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.

The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

CCWG-Accountability Proposal

ICANN's Document and Information Disclosure Policy (DIDP) is an important issue to be addressed in Work Stream 2 and should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

All briefing materials supplied to the Board should be provided to the Requester so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality and privilege requirements).

Final decisions should be issued sooner – changes will include an affirmative goal that final determinations of the Board should be issued within sixty days from request filing wherever possible, and in no case more than 120 days from the date of the request.

Requesters should be provided more time to learn of action/inaction and to file the request.

Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

ICANN Board Comments

Agreed. There should be an additional refinement of the DIDP process as part of the continuing improvements work within ICANN.

Note: the DIDP process is not intended as a process for community members to obtain information for their personal use on a confidential basis.

More transparency in the rationale for Reconsideration decisions is valuable and to the timing considerations of posting recommendations and final decisions on the ICANN website, as well as assuring that fulsome rationale accompanies decisions.

Assessment**1A**

Community Mechanism as Sole Member Model – Section 6 of the CCWG-Accountability Proposal

35. Sole Member Model – (Section 6)

Current state

ICANN currently does not have a membership structure.

CCWG-Accountability Proposal

Establish a Community Mechanism as a Sole Member Model.

ICANN Board Comments

The ICANN Board does not support this proposal. While the Board is supportive of a change in the balance of power among the community and the Board on operational matters, and agrees with the CCWG-Accountability Proposal elements that enhance those community powers, the Board believes that a Sole Member Model may introduce too much change and may lead to a delay in the IANA Stewardship Transition until that model has been working in practice. We refer to the other documents in our public comment for further detail.

There is great value in, and the Board agrees in principle with, the process of petitioning, discussion and decision among the multistakeholder community to achieve the community powers.

To support and enforce the new community powers that are proposed within the CCWG-Accountability Proposal, the ICANN Board proposes for consideration an alternative called the Multistakeholder Enforcement Mechanism (MEM) that leverages the ICANN’s existing governance structure as well as the existing structure of SOs and ACs within ICANN. The MEM ensures that that the community has access to binding arbitration to enforce the new community powers, without requiring the formation of a member or a community voting mechanism. The binding arbitration will be enforceable under the laws of the State of California, and other courts as appropriate. Please see the MEM summary and FAQ for more details.

The Board’s approach relies on the broader SO and AC multistakeholder model to reach ultimate decisions to influence operational matters, as opposed to the collection of whatever grouping of SOs or ACs that happen to be part of (or are eligible to be part of) the Sole Member at a particular time. This provides simplicity as well as predictability on the scope of the community that is able to take these decisions at any time.

Assessment

2

Community Powers – Section 7 of the CCWG-Accountability Proposal

36. Petition – (Section 7, paragraph 365 – 368)
Current state
N/A
CCWG-Accountability Proposal
<p>The petition step is to test whether there is enough support to start the formal discussion and decision-making about whether to exercise a community power.</p> <p>A window of time to allow a petition will be built into relevant ICANN processes, but will generally be a maximum period of fifteen days from the announcement¹ of the decision that might trigger the power's use.</p> <p>To trigger community consideration for the use of a community power, an SO or AC has to agree by a resolution of its governing body that the power should be used – the threshold to agree the resolution is a simple majority (enough votes to exceed 50%).²</p>
ICANN Board Comments
Agreed, subject to further discussions on the threshold.
Assessment
1B

¹ Work Stream 1 implementation will work out processes to make sure such announcements are clearly known to the community.

² The exception is for exercising the power to Recall the Entire ICANN Board – see the petitioning detail for this power in Section 7.4 below.

37. Discussion – (Section 7, paragraph 370-372)
Current state
N/A
CCWG-Accountability Proposal
<p>Where a petition succeeds, the whole community through its SOs and ACs discusses the proposed use of the power, including through the proposed ICANN Community Forum (see Section 6.3 for the concept of the Forum).</p> <p>This Discussion Period lasts for fifteen days, starting the day after a valid petition has been received. It will include online discussion and a specific online meeting of the ICANN Community Forum called within the discussion window.</p> <p>All SOs and ACs would be participants in the ICANN Community Forum, and so there will be a mixture of formal and informal discussion, advice and consideration going on – within the Forum and informally within SOs and ACs during this period.</p>
ICANN Board Comments
Agreed.
Assessment
1A

38. Decision – (Section 7, paragraph 373-376)
Current state
N/A
CCWG-Accountability Proposal
<p>After the discussion window has closed, a specified time period for SOs and ACs that have voting rights in the Community Mechanism begins. This Decision Period lasts for fifteen days, starting the day after the conclusion of the discussion window period.</p> <p>The process by which SOs and ACs vote, quorum requirements, and other associated matters are described in Section 6.2 of this report. The threshold of votes required to exercise a power is described alongside each power in the following sub-sections.</p>
ICANN Board Comments
<p>With respect to a decision on exercising a community power, the Board agrees with the process proposed, including the time periods set out. However, the Board does not support the need for a Community Mechanism as a centralized place where the multistakeholder participants are to vote on a decision, nor the need for a Sole Member to act upon the decision. Instead, the Board recommends that the threshold to exercise a community power be set based upon the existing SO and AC structures. For example, a decision to exercise the community power could require at least two SOs to support exercising the community power, and no more than one AC providing advice against exercising the community power.</p>
Assessment
1B

39. Power Reconsider or Reject Budget or Strategic Plan/Operating Plan – (Section 7.1)

Current state

N/A

CCWG-Accountability Proposal

Accordingly, this new power would give the community the ability to consider strategic and operating plans and budgets (both ICANN general and, separately, with respect to the budget for the IANA Functions) after they are approved by the Board (but before they come into effect) and reject them. The rejection could be of the proposed ICANN Budget or the IANA Budget, or of a proposed ICANN-wide strategic or operating plan. The petition would state which Budget or plan was being subject to veto. A separate petition is required for each Budget or plan being challenged.

If the exercise of this power leads to no budget for either or both of ICANN and the IANA Functions being in place at the start of a new financial year, a caretaker budget struck at the same level as the previous year's budget will apply, to allow for continued operation of ICANN and/or of the IANA Functions while the budget disagreement is resolved.

A community decision to reject a Budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community. The rationale for any community veto should be Consensus based. The veto could only concern issues that had been raised in the consultations conducted before the Board approved the budget or plan. New issues could not be raised for a second veto – all issues must be raised for consideration in a first veto process.

The petitioning, discussion and decision timelines for this power are the defaults set out in the previous sub-section.

To account for this timeline, 40 days minimum should be added to the budget / operating planning process. If this time cannot be added for practical reasons due to the nature of the budget approval process, the consequence as noted above is that a rejection would see ICANN and/or the IANA Functions operating on the previous year's budget until the disagreement was resolved.

Because time pressures are less acute for strategic plans, a period of 30 days can be allowed for each stage when the veto relates to a strategic plan. On the same basis, 60 days should be added to the strategic planning process.

If the community exercised its veto power with respect to any budget, operating or strategic plan, the Board would have to absorb the feedback that came with the decision, make adjustments and propose an amended budget or plan. If the community does not accept the

revised proposal as suitable, it can exercise a second veto (at the higher threshold noted below).

No limit is proposed to the number of times the community can veto a strategic plan, but the CCWG-Accountability recommends that the Board and the community enter into dialogue above and beyond established processes should a strategic plan be vetoed more than once.

Where a budget or operating plan has been rejected for a second time, ICANN will operate on the previous year's budget for the new fiscal year. The Board will propose a new budget for the subsequent financial year in the usual way. The Board will continue to have the ability to make out-of-budget funding decisions on the same basis as it does today.

If the community regards the Board's response to a second veto as unacceptable, the other community powers (as set out in this Section) are available for use.

To succeed, a veto would require a 66% level of support in the Community Mechanism. A 75% level of support is required for a second veto on the same budget or plan.

ICANN Board Comments

The Board supports the community's requirement for additional and formalized involvement in the processes to develop Budgets, Operating and Strategic Plans, and having a strong voice in raising objections against any proposed final Budget or Plan that does not duly take community consideration into account.

The Board agrees with enshrining the community input process on Budget/Operating/Strategic plan developments into the Bylaws.

However the Board does not support the CCWG-Accountability's proposed process.

The Board proposes that, after a robust community input process on the annual budget and on the Annual Operating Plan, the community should have a maximum of two opportunities to raise a collective concern and tell the Board that a Budget should not go through, initiating a consultation requirement to see if the community concern can be addressed. The process would be similar to situations where the Board has determined that it needs to act inconsistently with GAC Advice:

- The Board would engage in a consultation with the community to attempt to resolve the area of disagreement.
- In the event the Budget cannot be adjusted to take into account the community's view, the Board may proceed to approve a Budget. The budget accepted over that community concern may not include new, substantial items not accepted by the community, and may not represent an increase of more than 10% over the previous year's Budget (taking into account any inflation at the time). This would allow ICANN to continue its operations with Budgets/Plans more appropriately allocated for its current operating/fiscal year than would be possible under a requirement that ICANN simply maintain an historical Budget/Plan.

- The Board may also approve long-term Operating Plans and Strategic Plans through this consultation method, however the Board agrees with the CCWG-Accountability proposal that those long-term planning documents should be developed jointly and with more time built into the process to provide for plans that are supported by the community.
- The Board must provide reasons in the global public interest for not accepting the community's view.

In the event the Board fails to abide by these processes, or the community believes that the Board has taken a decision in these areas that is inconsistent with the Mission and Core Values, the MEM will provide binding arbitration over that issue. In addition, the community will have the ability to remove individual Board Directors or recall the Board.

Assessment

2

40. Power – Reconsider/Reject Changes to ICANN Standard Bylaws – (Section 7.2)

Current state

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

CCWG-Accountability Proposal

This power would give the SOs and ACs who participate in the Community Mechanism as Sole Member (with input from the larger community) the right to reject proposed changes to Standard Bylaws after they are approved by the Board (but before they come into effect). This power would be available in response to any proposed change to Standard Bylaws.

The timeframes and processes required for this power to be exercised (petition, discussion and decision) are the default ones set out in the introduction to this Section, with the petition window of fifteen days starting when the Board’s decision to make a change to a Standard Bylaw is announced.

Before initiating the process to reject changes to the Standard Bylaws, we expect there will be, as there is today, a public comment period (40 days is the standard period) for the community to provide feedback to the proposed changes. Therefore, the relatively short petitioning window is acceptable.

To succeed, a veto would require a 66% level of support in the Community Mechanism. Note that for the Board to propose a Standard Bylaws amendment, two-thirds (66%) of the Board must vote in favor of the change.

Where a veto was successful, the Board would have to absorb the feedback, make adjustments, and propose a new set of amendments to the Bylaws as per its usual processes.

This power does not allow the community to re-write a Board-proposed Bylaw change: it is a rejection process where the Board gets a clear signal that the ICANN community is not supportive.

There is no limit to the number of times a proposed change can be rejected, but the threshold for sending one back is the high threshold set out above, which is high enough to limit any potential for abuse of this power by a small number of SOs or ACs.

The impact of this power is to keep ICANN operating under the existing Bylaws despite changes proposed by the Board unless the community

by inaction in response to an amendment does not object. If the petitioning period expires with no valid petition, fifteen days after a Standard Bylaws change is announced, the change goes into effect.

ICANN Board Comments

Agreed. The Board should not be instituting Bylaws changes that are not supported by the community.

The community threshold to demonstrate an objection to a Bylaws change needs to be agreed upon, using the current SO/AC structure as opposed to the voting mechanism proposed in the CCWG-Accountability Proposal.

Assessment

1A

41. Power: Removing Individual Board Directors – (Section 7.3)

Current state

Any Director may be removed, following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a voting member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director. If the Director was selected by a Supporting Organization, notice must be provided to that Supporting Organization at the same time notice is provided to the Director. If the Director was selected by the At-Large Community, notice must be provided to the At-Large Advisory Committee at the same time notice is provided to the Director.

CCWG-Accountability Proposal

This power would allow for the removal of a Director before his or her fixed term comes to an end, with no rules set as to limitations on such removal or requirements for a particular cause for such removal. It is expected that this power would only be exercised in cases of serious difficulty with a particular Director.

For the seven Directors appointed by one of the three SOs or by the At-Large Community), a process led by that organization or subdivision would decide on the Director's removal. Only the SO or AC that appointed the Director could decide on that director's removal. For the purposes of such a removal process, SO means the SO or for the case of the GNSO, the GNSO House that has the Bylaw right to appoint a director.

The following process applies for removing a Director appointed by an SO or AC:

1. A decision to start consideration of a Director's removal requires a call to do so, approved by a simple majority in the SO or AC which originally appointed the director.
2. Where such a call to remove a Director meets the required threshold is announced, within fifteen days a meeting of the ICANN Community Forum (see Section 6.3 for the concept) will be convened. At that meeting:
 - a) The Chair of the forum must not be associated with the petitioning SO or AC or with the Director involved;
 - b) Representatives of the appointing/removing SO or AC must explain why they seek the Director's removal;
 - c) The Director has the opportunity to reply and set out his or her views; and

- d) Questions and answers can be asked of the appointing/removing SO or AC and of the Director involved by all the other participants in the forum.
3. Within fifteen days after the meeting of the forum, the SO or AC which originally appointed the Director makes its decision through its usual process.
4. The threshold to cause the removal of the director is 75% of the votes cast in the SO or AC which originally appointed the Director.
5. If the threshold is met, then, as will be set out in the Bylaws, the Community Mechanism as Sole Member automatically implements this decision, and the Director is removed.
6. If no decision is made within fifteen days, the process lapses and the director remains in place.
7. No new call to consider the removal of that same director can be made during the term they are serving on the Board following a vote to remove them failing or no decision being made.

For Directors appointed by the Nominating Committee, the SOs and ACs participating in the Community Mechanism as Sole Member would make a decision on the director's removal through the process detailed below. Any participating SO or AC would be able to petition for the removal of a Director appointed by the Nominating Committee.

The following process applies for removing a director appointed by the Nominating Committee:

1. A petition to start consideration of a director's removal requires a simple majority in one of the participating SOs or ACs.
2. Where a petition to remove a director meets the required threshold is announced, within fifteen days a meeting of the ICANN Community Forum will be convened. At that meeting:
 - a) The Chair of the Forum must not be associated with the petitioning SO or AC or with the Director involved;
 - b) Representatives of the petitioning SO or AC must explain why they seek the Director's removal;
 - c) The Director has the opportunity to reply and set out his or her views; and
 - d) Questions and answers can be asked of the petitioning SO/s or AC/s and of the director involved by all the other participants in the Forum.
3. Within fifteen days after the meeting of the Forum, the Community Mechanism as Sole Member, through votes of participating SOs and ACs, makes a decision as to whether the Director is removed or not.

4. The threshold to cause the removal of the Director is 75% of the votes available in the Community Mechanism.
5. If the threshold is met, the Community Mechanism as Sole Member has made its decision and the Director is removed.
6. If no decision is made within fifteen days, the process lapses and the Director remains in place.

No new call to consider the removal of that same Director can be made during the term they are serving on the Board following a vote to remove them failing or no decision being made.

Where a Director who had been appointed by an SO or AC is removed, that SO or AC is responsible for filling the vacancy through the usual process (as set out in Article VI, Section 12.1 of the Bylaws).

Where a Director who has been appointed by the Nominating Committee is removed, the Nominating Committee may appoint a new Director. It is expected that the Nominating Committee will amend its procedures so as to have several “reserve” candidates in place, should any or all of its Directors be removed under this power (or as part of the recall of the entire ICANN Board described in Section 7.4).

In all cases, Directors appointed to replace Directors removed by this power fill the same “seat” and their term will come to an end when the term of the Director they are replacing would have done. A Director appointed in such circumstances will not have their remaining time in the role counted against any term limits, to which they would otherwise be subject.

As part of Work Stream 2, the CCWG-Accountability is recommending the development of community standards that will guide Board members, SOs, and ACs regarding expected behavior of Directors, and the expectations which if not met could be expected to lead to a petition for their removal. Such standards would help establish common expectations across the community – they would not be criteria for, nor limitations on, the exercise of this power, or give any grounds for a director subject to removal to appeal or challenge the decision. The development of such standards should be a matter of priority in Work Stream 2.

ICANN Board Comments

The ICANN Board supports a Community Mechanism to remove individual Directors. We believe that there should be intermediate steps or options available and recommended the development of tiered sanctions for continuous violations. We have provided further detail below.

The Board strongly supports the development of standards of behavior for Board Directors and notes that such standards have already been developed by the Board Governance Committee. See: <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en> for the documents including the Board code of conduct, code of conduct guidelines, conflicts of interest policy, and Governance guidelines.

The Board suggests the development of pre-service letters to be signed as a condition of serving on the ICANN Board. These letters would indicate cause for removal from the Board upon the occurrence of specific events, including:

- Serious violations of governance standard, including statutory causes for removal (such as fraud).
- Refusal to abide by the processes set forth to enable new community empowerment areas.
- Failure to abide by outcome of Multistakeholder Enforcement Mechanism.

This would be a singular process, with no differentiation as to the appointing body. Thresholds for petitioning for individual Director removal pursuant to the pre-service letter could be as indicated in the CCWG-Accountability Proposal for NomCom Directors (2 SO or ACs to petition/75% of all SO/ACs to remove). The petitioning groups should state publicly and within the petition the grounds for seeking removal.

With the development of the pre-service letters, the Board would no longer have the ability to remove individual Directors without cause. The Board would also be limited by the pre-service letters in initiating Board member removal, and the Board's existing governance documentation could still serve as guide for identifying when pre-service letter process could be initiated by the Board. This upholds the Board's role in maintaining high governance standards amongst Directors.

With regards to Board Member 'due process', the Board agrees on the need for some level of right to reply from the Director, including the ability to confront those seeking removal. The process proposed by the CCWG-Accountability is a good starting point, including a lapse in the petition if a vote does not take place in a timely fashion. We further suggest the consideration of developing interim measures prior to removal, as it may be worth considering whether removal is always the appropriate step. Tiered sanctions could be developed for continuous violations.

The Board supports the CCWG-Accountability Proposal that there should not be a call for removal of any individual Director more than once in the same term. If there is a path to tiered sanctions, the limitation may need to be reconstructed to allow sanctions to be imposed.

Assessment

1B

42. Power – Recalling the Entire Board – (Section 7.4)

Current state

N/A

CCWG-Accountability Proposal

This power would allow the community to consider and cause the recall of the entire ICANN Board (with the exception of the President of ICANN, who serves on the Board ex officio). The community would initiate use of this power by petition of SOs or ACs as set out below. Implementation of this community power would be set out in Bylaws as below, which incorporates the general petition and notice procedures set out in the introduction to this Section.

- A petition of at least two of the SOs or ACs, at least one of which must be an SO, (indicated by signature following the decision of a simple majority of that SO or AC’s governing body) (a “Valid Petition”) is received.
- Upon receipt of the Valid Petition, within a time that will be defined in the Bylaws (probably 7 days) the responsible person will:
 - Provide notice to the SOs and ACs of any issue identified with respect to the validity of the Valid Petition, with an unlimited period to cure; or
 - Provide notice to all SOs and ACs participating in the Community Mechanism as Sole Member that (a) a Valid Petition has been received, including a copy of the Valid Petition, (b) setting forth a Discussion Period of 15 days and a Decision Period of 15 days thereafter, and (c) calling for all SOs and ACs that have the right to appoint Directors to select one (or two, depending on their allocation) Directors to notify by the close of the Discussion Period of the person[s] it has selected to serve on an Interim Board (for only so long as necessary until a replacement election could be held) should a vote in favor of recall of the entire Board occur, such notice to include a signed statement from the candidate(s) of their willingness to serve and any other information that the Bylaws require Board candidates to provide prior to election. SOs and ACs must nominate at least one such prospective Director.
 - A Director that is a member of the Board subject to the recall vote is not eligible to serve on the Interim Board.

After a Valid Petition is raised, the Discussion Period would provide fifteen days for SOs and ACs to individually and collectively deliberate and discuss whether the recall of the entire ICANN Board is warranted under the circumstances – including through a meeting of the proposed

ICANN Community Forum.

At the end of the Discussion Period, each SO and AC would then have the fifteen calendar days of the Decision Period to follow its own internal processes to decide how to vote on the matter, with its vote certified in writing by the Chair of the SO or AC.

It would be preferable for a decision of this sort to be the result of cross-community consensus. Therefore, a suitably high threshold for the exercise of this power, [75%] of all the votes available within the Community Mechanism as Sole Member Model (see Section 6) would have to be cast in favor of recall for the recall to be effective.

This threshold was chosen to stop any particular SO or AC from being able to prevent the recall of the Board, based on initial voting participation by four SOs and/or ACs in the Community Mechanism, but to be as high as possible without allowing that to occur.

It is expected that recall of the entire ICANN Board would rarely, if ever, occur. Should it occur, however, there must be a Board immediately in place to serve as a fiduciary caretaker for ICANN until an election can be held for Replacement Board Directors.

As previewed above, in the event that the threshold is met for a recall of the entire Board, simultaneous with that vote, Directors to serve on the Interim Board will be selected automatically. The Interim Board will consist of the group of candidates that each SO and AC was required to provide by the end of the Discussion Period, and it would replace the ICANN Board upon the threshold being met.

In addition, the NomCom will amend its processes so as to be able to supply two candidates to serve on such an Interim Board if required (such candidates to be confirmed by the NomCom each year at the time of ICANN's Annual General Meeting, and to be available for service on an Interim Board or if required due to community recall of an individual Director, until the date of the next Annual General Meeting). The NomCom would only name such Directors to serve on the Interim Board should a vote to recall the Board succeed.

Due to its short term, this Interim Board is not subject to the diversity requirements that apply to the ICANN Board generally.

Since the President serves on the Board by virtue of his or her executive position and is not subject to the usual election/selection processes, recall of the entire Board would not affect the President's position either as President or as a Director serving on the ICANN Board.

- The Bylaws shall provide that the Interim Board will be in place only so long as required for the selection/election process for the Replacement Board and in no event longer than [120 days].
 - In selecting a Replacement Board, SOs and ACs and the NomCom may, if they so choose, select Directors who were recalled and/or Directors serving on the Interim Board. In other words, service on the recalled Board or the Interim Board does not disqualify service on the Replacement Board.
 - The Directors selected for the Interim Board, and later those selected for the Replacement Board, will step into the terms that were vacated by the recalled Directors. Each SO and AC and the NomCom shall determine which of the terms the interim and

replacement Directors shall fill. In this way there will be no disruption to the staggered terms of the ICANN Board.

- The Interim Board will have the same powers and duties as the Board it replaces because it is critical to the stability of ICANN (and required by law) that at all times there is a fiduciary in place. However, the Bylaws will provide that absent compelling circumstances it is the expectation that the Interim Board will consult with the community (at least through the SO and AC leadership and including where practicable through the ICANN Community Forum) before taking any action that would be a material change in strategy, policies or management, including without limitation, replacement of the President.
- Under the Community Mechanism as Sole Member Model, the collective results of the vote of the SOs and ACs becomes the action of the Community Mechanism as Sole Member Model without any further Board action; the Interim Board would be in place as of the time that it is determined that the community vote satisfied the threshold for recall, and both the CMSM and the Interim Board would have the power to enforce their rights in relation to that vote.

Finally, the CCWG-Accountability acknowledges the dependency between this community power in Section 7.4 and the CWG-Stewardship reference as follows:

1. Community Empowerment Mechanisms. The empowerment of the multistakeholder community to have the following rights with respect to the ICANN Board, the exercise of which should be ensured by the related creation of a stakeholder community / member group:
 - a) The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;

There was one minority view filed regarding this Section 7.4, as follows:

The majority view within CCWG-Accountability was that the threshold for the use of this power should be set very high, requiring achievement of a $\frac{3}{4}$ voting threshold to be exercised. As the majority view states: "This threshold was chosen to stop any particular SO or AC being able to prevent the recall of the Board, but to be as high as possible without allowing that to occur."

This reflects the view of the majority that recalling the entire Board would be highly destabilizing to the organization, and should only occur as a last resort. However, this procedure does raise the possibility that recall of the entire Board could be requested by one or more SOs and still not attract sufficient support to take effect. The minority viewpoint is that such an outcome would be even more destabilizing to ICANN than Board recall. If an entire operational community, as established within an SO, had formally stated that it had lost confidence in the Board, and yet the Board remained in office nonetheless, that would cause a crisis of confidence in ICANN as an institution. Confidence in ICANN can only be maintained if the operational communities it serves each have confidence in the Board.

ICANN Board Comments

Agreed, please see item 41 above discussing Section 7.3 of the CCWG-Accountability Proposal.

We agree that the community should have a right to remove every voting director in extraordinary circumstances. The Board notes that the availability of the pre-service letters, as proposed by the Board in item 40 (above) gives a path to voting each individual Director out of their position. There is nothing to stop those 15 votes from happening concurrently.

The Board agrees with the CCWG-Accountability's concept of a rigorous process and threshold for the recall of the entire Board. As the removal of a majority of the Board at one time would be a very significant event for the credibility of the organization, the Board suggests that the removal of 8 or more Directors should be subject to the more rigorous thresholds proposed by the CCWG-Accountability for the removal of the entire Board.

The Board recognizes the need for a swift mechanism for seating of the Interim Board, and believes framework of the proposed approach is workable. However, the crisis situation that would be reached if the entire Board were unseated at the same time should be met with an insistence upon some key criteria, such as, a high level of independence and professionalism among the Interim Board, and the insistence on operational core competencies such as in finance, risk, audit and governance. There should also be an important role for those familiar with the work of ICANN, but that should not predominate.

At no time should the Board not meet the regulatory aspirations of a predominance of independent Directors.

The Board notes that the development of a unified, objective removal process across all Directors helps reduce the potential for the Board to become more of a representational entity serving individualized interests.

Assessment

1B

Accountability Requirements – Section 8 of the CCWG-Accountability Proposal

43. Accountability Requirements – Diversity (Section 8.1, paragraph 466)

Current state

ICANN has existing requirements for diversity as reflected in its Bylaws, the Affirmation of Commitments and ATRT1 recommendations, ATRT2 recommendations, and the SO and AC documents.

CCWG-Accountability Proposal

Therefore, the CCWG-Accountability recommends the following actions with the view to enhancing (further) ICANN’s effectiveness in promoting diversity:

1. Include diversity as an important element for the creation of any new structure, such as the IRP (see Section 5.1 for diversity requirements for the panel) and the ICANN Community Forum (see Section 6.3 for diversity requirements for the Forum).
2. Evaluate a proposed evolution of the ATRT into Accountability, Transparency and Diversity Reviews and of the Structural Reviews into Structural Accountability, Transparency and Diversity Reviews of SOs and ACs as part of Work Stream 2.
3. Perform, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program and other ICANN outreach programs), as after an initial review of the current documents, it is clear that they do not address the full concerns raised by the larger community on the diversity issue.
4. Identify the possible structures that could follow, promote and support the strengthening of diversity within ICANN.
5. Carry out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2.
6. Strengthen commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions.

ICANN Board Comments

Agreed. The Board agrees that ICANN will need a path for continual evolution and improvement, including the areas laid out above. More information about that continuing improvements process is discussed at item 47 below.

Assessment**1A**

<p>44. Accountability Requirements – Staff Accountability (Section 8.2, paragraph 484)</p>
<p>Current state</p>
<p>ICANN management and staff are held accountable through a range of requirements, including complying with ICANN’s rules and processes; existing legislation, conflict of interest provisions, performance requirements. Management, through the CEO is also accountable to the Board.</p>
<p>CCWG-Accountability Proposal</p>
<p>Having reviewed and inventoried the existing mechanisms related to Staff Accountability, areas of improvement include clarifying expectations from staff as well as establishing appropriate redress mechanisms. The CCWG-Accountability recommends taking the following actions as part of its Work Stream 2: 1. Develop a document that clearly describes the role of ICANN staff vis-a-vis the ICANN Board and the ICANN community. This document should include a general description of the powers vested in ICANN staff by the ICANN Board of Directors that need, and do not need, approval of the ICANN Board of Directors. 2. Consider the creation of a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by Staff in relation to their interactions with all stakeholders, establishment of regular independent (internal + community) surveys/audits to track progress and identify areas that need improvement, establish appropriate 8. Accountability Requirements CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations 3 August 2015 70 processes to escalate issues that enable both community and staff members to raise issues. This work should be linked closely with the Ombudsman enhancement item of Work Stream 2.</p>
<p>ICANN Board Comments</p>
<p>The Board is committed to continuing to build on existing accountability of all stakeholders as part of the organization’s work, including clear identification of the roles and responsibilities of the Board, staff and the community in their interactions. Any improvements that relate to internal practices/policies governing an employment relationship, or that impact the management or evaluation of staff need to be coordinated to respect the proper reporting lines. More information about the continuing improvements process is discussed at item 47 below.</p>
<p>Assessment</p>
<p>1B</p>

45. Accountability Requirements – SO and AC Accountability (Section 8.3, paragraph 500)

Current state

ICANN’s SO and Acs have existing internal operating procedures that address some items of internal accountability, as well as include statement of interest provisions.

CCWG-Accountability Proposal

Having reviewed and inventoried the existing mechanisms related to SO/AC accountability, it is clear that current need to be enhanced in light of the new responsibilities associated with the Work Stream 1 proposals. The CCWG-Accountability recommends the following steps:

1. As part of Work Stream 1 proposals:

- Include the review of SO and AC accountability mechanisms into the independent periodical structural reviews performed on a regular basis. These reviews should include consideration on the mechanisms that each SO/AC, as the case may be, has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:
 - The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

2. As part of the Work Stream 2 proposals:

- The subject of SO and AC accountability should be included in the purview of the Accountability and Transparency Review process as part of Work Stream 2 working plan.
- Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and if viable, and undertake the necessary actions to implement it.
- A detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
- Assess whether the Independent Review process would also be applicable to SO and AC activities as well.

ICANN Board Comments

Agreed. The Board encourages the CCWG-Accountability to continue to identify paths for continuous improvements, particularly in the issues set out in this section. One of the areas where more work still needs to be done is in addressing the issues of community accountability, both within the community and in exercising the community powers. The lack of progress on this conversation is one of the key areas of gaps within the CCWG-Accountability Proposal. While the Board is supportive and endorses the work of making the Board more accountable to the community and giving the community more say, that conversation is not complete without an evaluation of how community leaders will remain more accountable to the members within their structures, and that the structures continue to remain open to new members. The potential imbalances that could arise from a member structure, without rigor around how those in the member structure would make sure that the multistakeholder nature of the processes would be maintained and upheld, contributes to the instability of that model at this time. The Board notes that even the dialogue surrounding the allocation of votes in the voting model at times devolved into a “my group is more important than your group” fight, where the broader value of the multistakeholder model was not recognized or respected. The discussion of community accountability must be had in conjunction with the design of a new model – the conversations cannot be separated. The Board is committed to working with the community to continue the advance of this issue.

As will be discussed more fully under item 47, addressing Section 11, the Board is committed to working with the community to define the continuous improvement efforts that will flow from this report. The Board will make appropriate contributions to that definitional work as well as to the specific items under consideration at the appropriate times.

Assessment

1B

Incorporation of the Affirmation of Commitments – Section 9 of the CCWG-Accountability Proposal

46. Incorporation of the Affirmation of Commitments - (Section 9)

Current state

The Affirmation of Commitment Reviews are currently contained in the AoC and the AoC is subject to a 120 day cancellation notice.

CCWG-Accountability Proposal

Suggestions gathered during comment periods in 2014 on ICANN accountability and the IANA Stewardship Transition suggested several ways the AoC Reviews should be adjusted as part of incorporating them into ICANN's Bylaws:

- Ability to sunset reviews, amend reviews, and create new reviews.
- Community stakeholder groups should appoint their own representatives to review teams.
- Give review teams access to ICANN internal documents.
- Require the ICANN Board to consider approval and begin implementation of review team recommendations, including from previous reviews. The CCWG-Accountability concluded that some review team recommendations could be rejected or modified by ICANN, for reasons such as feasibility, time, or cost. If the community disagreed with the Board's decision on implementation, it could invoke a Reconsideration or IRP to challenge that decision, with a binding result in the case of an IRP. In addition, CCWG-Accountability independent legal counsel advised that ICANN Bylaws could not require the Board to implement review team recommendations because that could conflict with fiduciary duties or other Bylaws obligations.
- In Bylaws Article IV, add a new section for Periodic Review of ICANN Execution of Key Commitments, with an overarching framework for the way these reviews are conducted and then one subsection for each of the four current AoC Reviews.

ICANN Board Comments

Agree with the incorporation of the relevant ICANN commitments from the AoC into the ICANN Bylaws. In general, the Board is supportive of the incorporation of the reviews into the Bylaws. A few implementation paths diverge, including recognizing that there should be coordination among the community and the staff that are currently working on a review standardization effort to develop documentation to

address review administrative review considerations, including:

- Review team size and composition
- Budget
- Access to experts
- Access to ICANN documentation
- Expectations on process for adoption and implementation of reviews
- Optimization and standardization of review team processes

The outcomes of this standardization work would also include agreement upon how it could be changed, so that there is always assurance of community input.

While the idea of being able to sunset and introduce new reviews is necessary, part of any of the AoC reviews should include consideration of their future use. The community should consider how to identify future reviews and agree upon scope.

On the Competition, Consumer Choice & Consumer Trust review, the bar of future rounds of introduction of new gTLDs until prior recommendations are implemented poses a risk of a barrier to entry, and the Board is not supportive of that change.

There is agreement upon changing the review cycle to every 5 years, though the cycle initiation should be discussed with as part of the community/staff conversation.

The Board reserves the right to consult with the community on specific issues that may arise in the Bylaws drafting process on the AoC importation into the Bylaws.

The Board also agrees with proposing new text to capture current status of directory services work in ongoing review.

The Board also supports the new IANA functions review, to be incorporated as part of the AoC related reviews into the Bylaws.

Assessment

1B

Stress Tests – Section 10 of CCWG-Accountability Proposal

The Board notes the work involved in the development of Stress Tests, which identified potential contingencies for which the CCWG-Accountability wished to demonstrate it had identified solutions. Most of those Stress Tests did not result in the identification of additional requirements beyond those already addressed in the proposal. However, there are two, reflected in Section 10.2 (incorporate ATRT2 recommendation to respond to advice from Advisory Committees) and Section 10.3 (Institutionalize current practice that Board consultation requirement applies only to consensus advice from the GAC) that stand apart. The Board fully supports these recommendations.

Assessment
1A

Items for Consideration in Work Stream 2 - Section 11 of the CCWG-Accountability Proposal

47. Items for Consideration in Work Stream 2 - (Section 11)

Current state

ICANN Bylaws and AoC have specific reviews identified, but no specific commitments.

CCWG-Accountability Proposal

Propose the Board adopt a transitional provision committing ICANN to implement CCWG-Accountability recommendations over a list of issues identified as WS2, with recognition that those recommendations must be consensus based.

ICANN Board Comments

The Board supports the principle of continuous improvements, and recognize that ICANN will always be under a path of continuous improvement, even after the transition occurs, and set out a process (including the community and Board) of defining what improvements should be considered and standards against which continuous improvements would be measured.

The Board supports the utilization of existing mechanisms, such as future ATRT reviews, as the “home” for topics where appropriate, or identify other mechanisms for continuous improvement. For example, the IRP enhancements should likely have their own work group kicked off; the AoC review standardization should be its own community staff effort; Enhancements to the DIDP could fall neatly under the next ATRT work, etc.

Institute a Bylaws requirement that continuous improvement ideas must be supported by a high threshold of the community and to uphold the following criteria consistent with the lines of the NTIA criteria, which are:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services;
- Maintain the openness of the Internet; and

- Not result in ICANN becoming a government-led or an inter-governmental organization.

The Board is concerned that treating areas that are naturally part of continuous improvements work as a part of the conditions for the IANA Stewardship Transition may serve as a bar to a successful conclusion of the IANA Stewardship Transition effort.

Assessment

1B