

September 12, 2015

ICANN Cross Community Working Group Accountability (CCWG-Accountability)

Dear CCWG-Accountability members, participants and co-chairs,

This submission is in response to your group's recent [publication](#) of your 2<sup>nd</sup> draft proposal, open for public comment on 3 August 2015. We submit these comments in our capacities as co-chairs of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship).

First, we would like to confirm the quality of the ongoing coordination and collaboration between the co-chairs of our respective groups that has been taking place since the launch of your group. Each of our groups has been updated regularly on progress made, as well as issues faced, including the interdependency and interrelation between our work, and this has led to key correspondence being exchanged on a regular basis to develop and formalize the linkage. As CWG-Stewardship co-chairs, we have had the opportunity to speak directly with the CCWG-Accountability group and have also discussed with the CCWG-Accountability co-chairs on a regular basis key aspects of the work of both groups.

The CWG-Stewardship [final transition proposal](#) submitted for approval to the chartering organizations on 11 June 2015 is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms by the CCWG-Accountability. Specifically, as recognized in the CCWG-Accountability 2<sup>nd</sup> draft proposal, the CWG-Stewardship final transition proposal sets forth ICANN accountability requirements regarding budget, community empowerment mechanism, IANA function reviews, separation process, appeals mechanism (including the specific requirements related to ccTLDs), and post-transition IANA (PTI), as well as fundamental bylaws (Paragraphs 21, 92-112).

Our comments focus on the specific ICANN accountability requirements set forth in the CWG-Stewardship final transition proposal:

**1. ICANN Budget and IANA Budget**

The CWG-Stewardship final transition proposal requires that the community have the ability to approve or veto the ICANN Budget after it has been approved by the ICANN Board but before it comes into effect. The community may reject the ICANN Budget based on perceived inconsistency with the purpose, mission and role set forth 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.

In the final transition proposal, the CWG-Stewardship also recommends that the IANA functions operator's comprehensive costs should be transparent and ICANN's operating plans and budget should include itemization of all IANA operations costs to the project level and below as needed. An itemization of IANA costs would include "Direct Costs for the IANA department", "Direct Costs for Shared resources" and "Support functions allocation". Furthermore, these costs should be itemized into more specific costs related to each specific function to the project level and below as needed. PTI should also have a yearly budget that is reviewed and approved by the ICANN community on an annual basis. PTI should submit a budget to ICANN at least nine months in advance of the fiscal year to ensure the stability of the IANA services. It is the view of the CWG-Stewardship that the IANA Budget should be approved by the ICANN Board in a much earlier timeframe than the overall ICANN

Budget. The CWG-Stewardship (or a successor implementation group) will need to develop a proposed process for the IANA-specific budget review, which may become a component of the overall budget review. It is anticipated that the IANA Budget review will include a consultation process with IANA customers.

**Comment** – The CCWG-Accountability draft proposal introduces new powers for the community to reject and/or cause reconsideration of the ICANN Budget, the IANA Budget or the ICANN-wide strategic plan and operating plans, after the ICANN Board approves them but before they take effect (Section 7.1). CCWG-Accountability further proposes that the community could reject a budget or plan on the same grounds as contemplated by the CWG-Stewardship final transition proposal as described above. As proposed by the CCWG-Accountability, the ICANN and IANA Budgets would be considered separately by the community so that a veto of the ICANN Budget would not automatically result in a veto of the IANA Budget, and a veto of the IANA Budget would not serve as a veto of the ICANN Budget. It is also proposed that the veto right could be exercised an unlimited number of times and that provision for a caretaker budget would come into effect under certain circumstances.

We note that the CCWG-Accountability draft proposal does not require community “approval” of the ICANN Budget and/or IANA Budget, but rather provides for negative authority to require ICANN Board reconsideration and/or provide a veto in the form of a decision by the community to reject the ICANN Budget and/or IANA Budget. The CWG-Stewardship acknowledges that the community’s ability to veto the ICANN Budget and/or the IANA Budget will meet the CWG-Stewardship requirements and that community approval is not required. The CCWG-Accountability draft proposal does not address the timeframe for when budgets should be submitted. The draft proposal acknowledges the CWG-Stewardship’s requirement that the budget be transparent with respect to the IANA function’s operating costs as described above.

We believe that the CCWG-Accountability draft proposal on budgets is both necessary and sufficient to adequately satisfy these requirements of the CWG-Stewardship final transition proposal. We note, however, that the CWG-Stewardship (or a successor implementation group) is required to develop a proposed process for the IANA-specific budget review; this process could also include the process to determine a caretaker budget if the IANA Budget is subject to a veto in the first year following the transition.

## 2. **Community Empowerment Mechanism**

The CWG-Stewardship final transition proposal requires that the multistakeholder community be empowered with 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;
- (b) The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board’s oversight of the IANA functions) by reviewing and approving (i) ICANN Board decisions with

- respect to recommendations resulting from an IANA Function Review (IFR) or Special IFR and (ii) the ICANN Budget; and
- (c) The ability to approve amendments to ICANN’s “fundamental bylaws,” as described below.

**Comment** – The CCWG-Accountability draft proposal introduces new powers for the community to remove individual ICANN directors (Section 7.3) and to recall the entire ICANN Board (Section 7.4). The CCWG-Accountability draft proposal contemplates a Community Mechanism as Sole Member Model under which the decisions and powers of the Community Mechanism could be enforced through the internal IRP process with the force of binding arbitration and, if necessary, further backed through judicial proceedings (Paragraph 316).

We believe that the powers provided by the CCWG-Accountability draft proposal as described above and the community empowerment mechanism described in the proposal together adequately satisfy these CWG-Stewardship requirements, including by ensuring that the community powers specified in the CWG-Stewardship final transition proposal are legally enforceable. We refer you to our comments relating to Item 1 (ICANN Budget), Item 3 (IFR) and Item 8 (fundamental bylaws) regarding the implementation of certain of those rights.

### 3. **IFR**

The CWG-Stewardship final transition proposal requires the creation of an IFR which is empowered to conduct periodic and special reviews of the IANA functions. The CWG-Stewardship proposal contemplates the ability of the community to exercise oversight with respect to ICANN Board decisions on recommendations resulting from an IFR or Special IFR by reviewing and approving those ICANN Board decisions.

**Comment** – The CCWG-Accountability draft proposal incorporates the review system defined in the Affirmation of Commitments into ICANN’s Bylaws (Section 9) and references the CWG-Stewardship proposal to include the IFR and Special IFR process in the ICANN Bylaws that would operate in a manner analogous to an Affirmation of Commitments review (Paragraphs 589-594). The CCWG-Accountability also proposes that the community be empowered to “[r]econsider/reject Board decisions relating to reviews of the IANA functions” (Paragraph 300).

We believe that the CCWG-Accountability draft proposal adequately satisfies this CWG-Stewardship requirement. The community’s ability to veto ICANN Board decisions on recommendations resulting from an IFR or Special IFR will meet the CWG-Stewardship requirements provided that the veto can be exercised an unlimited number of times.

### 4. **Customer Standing Committee (CSC)**

The CWG-Stewardship final transition proposal requires the creation of a CSC which is empowered to monitor the performance of the IANA functions and escalate non-remediated issues to the ccNSO and GNSO. The ccNSO and GNSO should be empowered to address matters escalated by the CSC.

**Comment** – The CCWG-Accountability draft proposal contemplates that the CSC will be incorporated into the ICANN Bylaws (Paragraph 240).

We believe that the CCWG-Accountability draft proposal adequately satisfies this CWG-Stewardship requirement given that the CWG-Stewardship will be actively involved in the ICANN Bylaw drafting process.

## 5. **Post-Transition IANA (PTI)**

The CWG-Stewardship final transition proposal contemplates the formation of a PTI as a new legal entity. PTI will have ICANN as its sole member and PTI will therefore be a controlled affiliate of ICANN. As a result, the ICANN Bylaws will need to include governance provisions related to PTI, in particular as it relates to ICANN’s role as the sole member of PTI.

**Comment** – The CCWG-Accountability draft proposal contemplates that governance provisions related to PTI will be incorporated into the ICANN Bylaws, that specifications with respect to these PTI governance provisions will be based on the requirements to be detailed by the CWG-Stewardship and the ICANN Bylaw drafting process will include involvement by the CWG-Stewardship (Paragraph 108). We note that PTI articles and bylaws will also be required, which the CWG-Stewardship (or a successor implementation group) would oversee.

We believe that the CCWG-Accountability draft proposal adequately satisfies this CWG-Stewardship requirement.

## 6. **Separation Process**

The CWG-Stewardship final transition proposal contemplates that a Special IFR will be empowered to determine that a separation process between ICANN and PTI is necessary and, if so, to recommend that a Separation Cross-Community Working Group (SCWG) be established to review the identified issues and make recommendations. Annex L of the CWG-Stewardship final proposal sets forth more detailed information as to approval requirements with respect to the formation of an SCWG and approval of SCWG recommendations, including any selection of a new IANA functions operator or any other separation process, in each case these actions require approval by a community mechanism derived from the CCWG-Accountability process.

**Comment** – The CCWG-Accountability draft proposal contemplates that the separation process as required by the CWG-Stewardship final transition proposal will be incorporated into the ICANN Bylaws (Paragraph 240). The CCWG-Accountability draft proposal describes the CWG-Stewardship requirement of a procedure to implement a separation process should it arise from a Special IFR, including provisions for the creation of an SCWG, its functions and voting thresholds for approving the end-result of the SCWG process (Paragraph 100). The CCWG-Accountability proposes that the community be empowered to “[r]econsider/reject Board decisions relating to reviews of the IANA functions; including the procedure to implement a separation process relating to PTI” (Paragraph 300).

We believe that the CCWG-Accountability draft proposal adequately satisfies these CWG-Stewardship requirements. The community’s ability to veto ICANN Board decisions on Special IFR/SCWG recommendations, including the selection of a new IANA functions operator or any other separation process will meet the CWG-Stewardship requirements provided that the veto can be exercised an unlimited number of times.

## 7. **Appeals Mechanism**

The CWG-Stewardship final proposal contemplates an appeals mechanism, for example in the form of an Independent Review Panel (IRP), for issues relating to the IANA functions. For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC will have access to an IRP. The appeal mechanism will not cover issues relating to ccTLD delegation and re-delegation, which mechanism is to be developed by the ccTLD community post-transition through the appropriate processes.

*Comment* – The CCWG-Accountability proposes significant enhancement of ICANN’s existing appeals mechanisms, including the IRP. It is proposed that the IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA functions (with the exception of ccTLD delegations and redelegations, which processes are to be developed by the ccTLD community post-transition and incorporated into ICANN governance once determined) (Paragraph 105). The proposal contemplates that the IRP would:

- (a) hear and resolve claims that ICANN, through its Board or staff, has acted or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the ICANN Bylaws resulting from action taken in response to advice/input from any AC or SO);
- (b) reconcile conflicting decisions of process-specific “expert panels;” and
- (c) hear and resolve claims involving rights of the Sole Member under the ICANN Articles or Bylaws (subject to voting thresholds) (Section 5.1).

The CCWG-Accountability draft proposal does not explicitly contemplate that the IRP would hear claims relating to actions (or inactions) of PTI. The CWG-Stewardship final transition proposal requires an independent review process for issues relating to the IANA functions. This is intended to be a process that is independent of ICANN and PTI, and that would address actions (or inactions) of PTI. The IRP process contemplated by the CCWG-Accountability draft proposal could be expanded to meet this requirement. Alternatively, a different appeals mechanism could be created. In either event, additional work will need to be done to adequately satisfy this CWG-Stewardship requirement.

## 8. **Fundamental Bylaws**

The CWG-Stewardship final transition proposal contemplates that all the foregoing mechanisms will be provided for in the ICANN Bylaws as “fundamental bylaws.” A “fundamental bylaw” may only be amended with the prior approval of the community and may require a higher approval threshold than typical Bylaw amendments (for example, a supermajority vote).

**Comment** – The CCWG-Accountability draft proposal contemplates that the following, among others, would be made fundamental bylaws in the first instance: all Bylaws relating to community powers (including ICANN and IANA Budget and ICANN director removal/Board recall), the framework for the IRP, the IFR, the separation process, the PTI governance and the CSC (Paragraph 110 and Section 4.4). The CCWG-Accountability proposes that amending fundamental bylaws will require approval of the Board (by a 75% vote of the directors then in office) and the approval of the Sole Member (by a 75% vote of all votes in the Community Mechanism) (Sections 4.3 and 4.5).

We believe that the CCWG-Accountability draft proposal adequately satisfies these CWG-Stewardship requirements. We note that the CCWG-Accountability draft proposal refers to “IANA Function Review” as a fundamental bylaw. We interpret this to cover both regular reviews (IFRs) and special reviews (Special IFRs).

Looking forward, we remain committed to retaining the link between the work of the two groups. We would like to thank you for taking the lead in responding with care and diligence to the CWG-Stewardship requirements in the CCWG-Accountability draft proposal and indeed for all related work. As we have made clear to you in many of our discussions, we are dependent on your work and our trust in the work of your group is vital in permitting us to focus on the essential aspects of our work on the stewardship transition.

Best regards,

Lise Fuhr and Jonathan Robinson

Co-chairs, CWG-Stewardship