PUBLIC COMMENT OF EDWARD G. MORRIS ON THE CCWG SECOND DRAFT PROPOSAL ON WORK STREAM 1 RECOMMENDATIONS

I would like to congratulate the many hard working volunteers of the CCWG on Accountability who have produced this impressive and comprehensive voluminous and useful proposal. Special thanks go to Chairs Rickert, Sanchez and Weill for their leadership and to Rapporteurs Carter and Burr for their immense contributions to the effort. This community and indeed this world are indebted to these people for their contributions and efforts on behalf of all of us.

I'd also like to pay special tribute to one volunteer in particular. Through her "never say die" attitude and commitment to the inclusion of human rights language in the Bylaws, Ms. Avri Doria proved to us all that one person truly can make a difference here. Whether one agrees or disagrees with her perspective, one cannot help but be inspired by her tenacity and perseverance. Thank you Avri for your example and inspiration.

This Draft proposal is not perfect. In fact, we'll have to make one change in particular, that involving vote counting, for me to be able to comfortably support it when it comes before me for a vote in my role as a member of the GNSO Council. It's not a perfect proposal, but it is good, and while there are areas it needs to be strengthened in, the greater threat to true accountability at ICANN comes from the accountability phobic who may wish to weaken this proposal. We must resist any such efforts.

POWERS

The CCWG has done a fantastic job enumerating the powers the community needs to ensure that ICANN becomes a truly accountable organization. I fully support giving the following powers to the community:

1. The power to reconsider the Operating Plan and Budget,

2. The power to reconsider or reject changes to ICANN "Standard" Bylaws,

3. The power to approve changes to "Fundamental" Bylaws;

4. The power to appoint and remove Individual Board Members;

5. The power to recall the entire ICANN Board.

The powers chosen are reasonable, proportional to the task at hand and are unquestionably needed if true accountability, through oversight of Board and Staff actions, are to be achieved at ICANN. I particularly commend the CCWG for recognizing that all Bylaws are not equal in importance and prioritizing those of greatest importance for special treatment.

INDEPENDENT REVIEW PROCESS (IRP)

The current Independent Review Process is too limited in scope, too expensive to operate, too remote to actualize and too technical and cumbersome for use by the average user (or anyone without a resident corporate law department and hundreds of thousands of dollars of American currency to spend in pursuit of justice). The IRP needs wholesale change. The current proposal does improve things but more work needs to be done; more improvements need to be made to the IRP process for it to be truly effective.

I generally support the enhancements proposed for the Independent Review Process (IRP) in the Draft proposal. The increased scope for an IRP (to include Board and staff action / inaction a well as violations of ICANN's mission, commitments and core values), the easing of the standing requirement so that community components are extended such rights as a matter of form, and the right of appeal of an IRP decision to a full panel sitting en blanc, are all positives. I do have four areas of concern, though, that I hope will be considered and actioned upon:

- Accessibility and affordability: There is a commitment in the Draft to ensure the IRP is affordable and accessible to all. Regrettably, this work has been scheduled for work stream 2. I find that unfortunate, as affordability was one of five key goals when we first began discussing IRP reform in the subgroups. Merely stating the desire to obtain "pro bono representation" ,for example, for those who would "otherwise be excluded from using the" IRP process is not the same as committing ICANN to do so. I would encourage the CCWG to reprioritize the affordability discussion and place it once again for action where it belongs: in work stream 1. Accountability that is unaffordable is not accountability at all

- Alleged Frivolous / Vexatious Actions: The Draft states that "the Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive". My fear is that the possibility of unpredictable liability would cause certain Complainants to not file legitimate actions for fear of having their Petitions incorrectly labeled frivolous. To prevent this I would encourage the CCWG to provide a system whereby a Complainant may have an initial determination made through an early warning system about whether their proposed Action is or is not deemed not to be frivolous before costs accrue for the Complainant.

- Cooperative Engagement Process (CEP): The CEP is the most obtuse, dark, fundamentally nontransparent and unsound component of all of ICANN's accountability mechanisms. It should have no place in a truly transparent and accountable ICANN.

During WP2 subgroup sessions it was agreed that: 1) either party would have the option of mediation in lieu of the CEP, with all attendant benefits and 2) a group

would be established in work stream 2 to further evaluate the CEP with the goal of either eliminating it entirely or transforming it through, for example, the inclusion of a neutral third party / mediator on all calls and / or in all meetings. It was agreed that the current CEP procedure was untenable going forward.

This Draft does not reflect that agreement and I am unaware of any CCWG plenary session, public comment or full WP2 session that considered this matter and rejected the work of the WP2 subgroup on this issue. I strongly suggest that the mediation option be reinstated into our Proposal and that the CEP be re-evaluated in it's entirety as part of work stream 2.

- I applaud the CCWG for recognizing potential conflicts of interest of IRP panelists following their tenure on the standing panel. A prohibition on post term appointments of panelists, for an as yet unspecified term, to the Board, NomCom or any other position in ICANN is a first good step. It is not, however, enough.

The Milton Parks Restrictions Act of 1990 (California Government Code §87406(b) should serve as a guide for future contact between former IRP panelists and ICANN. The Parks Act reads, in part:

"No legislator, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance, or by making any oral or written communication, before the Legislature, any committee or subcommittee thereof, any present legislator or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing legislative action."

IRP panelists must be above reproach. Prohibition of post term lobbying of ICANN by former IRP panelists must be part of any accountability mechanism. A simple rewriting of the Parks Act, substituting Panelist for legislature and ICANN for Legislature along with other appropriate substitutions, would be a good addition to the provisions already drafted that are designed to counter the propensity for a "revolving door" in institutions like ICANN.

RECONSIDERATION REQUEST ENHANCEMENT

The CCWG has done an admirable job in restructuring the Reconsideration Request process. I completely support the proposed increased scope of the subject matter for Requests and the restoration of the 30-day time limit for filing Requests. The introduction of a dialogue between the Requestor and the Board Governance Committee, prior to the Reconsideration Request going before the full Board, is a very good idea and hopefully will result in mutual understanding of the concerns of both parties.

My one concern with the proposed changes in the Reconsideration process concerns the role of the Ombudsman. The Ombudsman's remit traditionally is limited to ensuring that all parties are treated fairly. While that certainly may be true of aspects

of some Reconsideration Requests, historically that has not been the case with all such Requests. I would suggest that careful consideration be given to limiting input of the Ombudsman to areas where he or she has traditionally had competence or if this competency is to be expanded it be do so explicitly when drafting the Bylaws and procedural language. In addition, making Ombudsman involvement an "opt in" option of the Requestor is something that would give greater flexibility and efficiency to the proposed Reconsideration process and should be considered.

HUMAN RIGHTS LANGUAGE

As a private firm with a public function ICANN is an unusual organizational hybrid. It does not necessarily have all of the positive obligations to respect human rights that a government may have, yet these obligations very much applied to the United States government which through its oversight of ICANN guaranteed implicit respect of same. That oversight is about to end.

Article 4 of ICANN's Articles of Incorporation obliges it to act "in conformity with relevant principles of international law and applicable international conventions and local law ". The panel in ICM v ICANN held that this language required ICANN to act in accordance with customary international law with respect to due process. Local law, particularly that of the European Union, should require ICANN to safeguard the privacy rights of registrants. Due process, privacy and free speech are the three principle human rights integrally involved in ICANN's mission. As such, I support the following language, per the Draft, for inclusion in ICANN's Bylaws with respect to human rights:

"Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information."

Although ICANN is already required to respect human rights in its operations by virtue of Article 4 of ICANN's Article of Incorporation, I do believe that special mention of free expression and the free flow of information in the Bylaws is needed to ensure that he withdrawal of the N.T.I.A. does not negatively impact ICANN's respect of these specific rights. The U.S. government's backstop role in ICANN governance has given some de facto assurance that the notion of free expression, as typified by the first amendment of the United States Constitution, was an inviolable part of the ICANN ethos. A nonspecific mention to adherence to "internationally recognized fundamental human rights", the alternate language that has been proposed, gives no such assurance. Some would challenge the notion, for example, that the "free flow of information" is, in fact, an internationally recognized human right. To ensure that free speech and the free flow of information is respected throughout ICANN's operations the more specific reference to it provided by the cited definition should be included in the Bylaws.

TRANSPARENCY

There can be no accountability without transparency. I am delighted to see that the CCWG is committed to revising and updating ICANN's Documentary Information Disclosure Policy (DIDP) in work stream 2. The DIDP is a failed policy instrument due to staff overuse of the Defined Conditions of Nondisclosure (DCND), resulting in virtually all-public requests for information being denied on often-questionable grounds. This needs to be fixed.

One of the benefits of being a membership-based corporation is that under California laws Member(s) have the right to inspect certain specified corporate records. For example, California Corporate Code §6333 provides:

> " The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member".

The Inspection rights, which the CCWG has proposed (§1493) will be activated upon a majority vote within the Single Member, are very different than the other statutory rights associated with membership. They are likely to be requested and utilized far more often than any other right. Inspection of records is not and should not be considered an extraordinary event.

As such, I strongly encourage the CCWG to create a Transparency working group as part of work stream 2 that encompasses **both** DIDP reform and the implementation of the Inspection right. These two modalities are related and an effective corporate policy and strategy of transparency and openness will be best be achieved through procedures designed to best utilize both processes.

DEFINITION OF "PRIVATE SECTOR"

I strongly support the minority view referenced in paragraph 154 that includes "individual end users" in the definition of private sector. To merely include organized groups in the definition, as is done in the reference definition, does a disservice to the wider internet community and feeds into the perception of ICANN as a closed and exclusive club.

COMMUNITY MECHANISM: MODEL

The California Corporations Code (§5310) provides for two basic types of public benefits corporations (PBC): that with members and that without members. The difference is quite simple: a PBC without members is Board-centric: the Board of

Directors is the final decision maker. A PBC with members is quite different: in this model the Members, in our case the community, is the final decision maker.

One model is bottom up, the other model is top down. If we are truly a bottom up multi-stakeholder community the membership model of the California PBC is the clear choice. To claim otherwise is to support a hierarchical corporate structure that owes more to the top down organization design espoused by Plato in *The Republic* than it does to true economic democracy.

I preferred the true multimember membership model that served as our reference in the first CCWG draft. I was saddened to see that model attacked through the use of half-truths and innuendo by those who feared the power of true economic democracy. The single member model will not provide the same degree of accountability or democracy as the original proposition but it is vastly superior to any other proposal that has been offered during this nine month proposal and as a model has my full support.

COMMUNITY MECHANISM: INFLUENCE

The transition should not be used to change the power equation or the purpose of specific groups within the ICANN community. Sadly, this Draft proposal does exactly that. Advisory Committees and Supporting Organizations have different functions and purposes. ICANN benefits from having this diversity in its organizational structure and it saddens me that this diversity is under attack by the very groups that most benefit from it.

I do not believe any of the Advisory groups should have voting power within the Community Mechanism. Rather, structures should be set in place that would allow the Advisory Committees to advise the Community Mechanism much as they advise the Board and the greater ICANN community today.

As this option is not presented in the Draft, I lend my tepid support for the "third view" contained in paragraph 334 that would give 4 votes to each of the SO's, 2 votes to ALAC and advisory only roles to the remaining AC's. I do this without great joy. Indeed, it is my view as a GNSO Counselor that any Advisory Committee that obtains direct voting powers in the Community mechanism should be stripped of any liaison position they now enjoy in the GNSO. A group can be advisory or a direct participant inn the community mechanism but it cannot be both.

COMMUNITY MECHANISM: VOTE COUNTING AND QUORUM

Despite my support for the Model, Powers and much of the substance of this Draft proposal, if the procedures for quorums and vote counting (paragraphs 345 – 347) are not reconsidered changed I will have great difficulty voting in favour of the proposal when it comes up for consideration before the GNSO Council next month, and in other forums. For all the good work that has been done on this proposal the vote

counting mechanism contained in this Draft is so archaic and sets such unrealistically high thresholds that I fear real accountability will not be achieved should this proposal go forward. Accountability in appearance is no substitute for accountability in reality.

The CCWG appears to have ignore decades of research into corporate voting and proxy battles, it seems to have ignored the shareholders rights movements that have dominated corporate governance during the past quarter century and instead has come up with their own whimsical mode of vote counting based not upon empirical research but rather upon "the simplest possible administration" they could think of (paragraph 345). We deserve better.

The model chosen by the CCWG to count votes is a variation of what is known in corporate governance as the "Delaware Model". It's an old fashioned model favored by self perpetuating Boards. Under this model, in corporate proxy battles votes were counted as follows:

For= For
Against = Against
Abstain = Against
Broker Non Votes = Against

To win a proxy battle which had a simple majority victory requirement shareholders would need a vote total where the number of votes "For" would have to be greater than the combined votes of "Against + Abstain + Broker Non Votes". That rarely happened.

The CCWG proposes a formula nearly identical to the Delaware Model for ICANN. The CCWG suggests we count votes as follows:

Yes = Yes
No = No
Abstain = No
No vote = No

This is a threshold that is so Board friendly and so impossible to reach in reality that is was disallowed in corporate proxy battles in 2009 by the New York Stock Exchange! Might I suggest that the purpose of this accountability project within ICANN is not to create a voting structure that is so Board friendly that the establishment capitalists of the New York Stock Exchange have rejected it. That, however, is what the CCWG has proposed.

To fix this flawed idea we just need to modify the voting system we use in the Community Mechanism so that it is based upon that required by the Securities and Exchange Commission (S.E.C.) for determining resubmission eligibility of shareholder-sponsored proxy proposals: it's called simple majority vote counting.

From the S.E.C. , Division of Corporation Finance, Staff Legal Bulletin No. 14 (13 July 2001):

4. How do we count votes under rule 14a-8(i)(12)?
Only votes for and against a proposal are included in the calculation of the shareholder vote of that proposal. Abstentions and broker non-votes are not included in this calculation.

Example

A proposal received the following votes at the company's last annual meeting:

- **5,000 votes for the proposal;**
- **3,000 votes against the proposal;**
- **1,000 broker non-votes; and**
- **1,000 abstentions.**

How is the shareholder vote of this proposal calculated for purposes of rule 14a-8(i)(12)?
This percentage is calculated as follows:

Applying this formula to the facts above, the proposal received 62.5% of the vote.

I would respectfully ask the CCWG to reconsider the vote counting system it has selected for the community mechanism. I would hope that the CCWG does not seriously suggest we use a system that is virtually identical to one banned by the New York Stock Exchange.

Instead might I suggest a vote counting system based upon that required by the Securities and Exchange system, adjusted in a more conservative, Board friendly direction to meet our needs at ICANN:

Yes = Yes
No = No
Abstain = Abstain (counted towards quorum but not towards any particular position)
Not Voting = No

My proposal is more conservative than that mandated by the SEC. Given the limited number of voters, I'm content with equating "no vote" to "no". The only difference in

my proposal, compared with that offered by the CCWG, is the treatment of the vote "abstain".

Abstain does not mean no, it means "no opinion" or "no preference". To equate it with a "no" vote or a "non vote" is misleading and wrong. ICANN to a degree is made up of individual silos. We each have expertise in various areas. I could conceive, for example, of the ASO having a dispute with the Board that those of us in the GNSO were unsure about. We'd like to support our colleagues in the ASO but after studying the matter we weren't sure of how we felt on the specific issue involved. We in the GNSO voted to "abstain" in the dispute.

Under the CCWG proposal our abstention would be equated with a no vote. That was not our intention. Abstain, in the system I propose, means we defer to our community colleagues who have greater knowledge on the matter to decide. It is neither a yes nor a no vote: it is an abstention. It is not and should not be counted as a non-vote or as vote siding with the Board.

I respectfully ask that the CCWG re-examine the vote counting method chosen, consults experts if need be, and get this right. For all the good this CCWG has done, it will all be for naught if a flawed and discredited vote counting system, such as the one proposed, insulates the Board and ICANN corporate from real accountability.

Thank you for considering my comments. I look forward to continue to working with everyone to create a transparent and accountable ICANN we can all be proud of.

Kind Regards,

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