

Annex 09 – Recommendation #9: Incorporation of the Affirmation of Commitments

1. Summary

- Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the NTIA, in ICANN's Bylaws. This will ensure that Community Reviews remain a central aspect of ICANN's accountability and transparency framework.
- Specifically, the CCWG-Accountability proposes to:
 - Add the relevant ICANN commitments from the Affirmation of Commitments to ICANN Bylaws.
 - Add the four review processes specified in the Affirmation of Commitments to ICANN Bylaws. Including:
 - Ensuring accountability, transparency and the interests of global Internet users
 - Enforcing its existing policy relating to WHOIS, subject to applicable laws
 - Preserving security, stability and resiliency of the Domain Name System (DNS)
 - Promoting competition, consumer trust, and consumer choice
- In addition, to support the common goal of improving the efficiency and effectiveness of Reviews, ICANN will publish operational standards to be used as guidance by community, staff and Board in conducting future Reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet community's needs.

2. CCWG-Accountability Recommendations



The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments (AOC) (see information about Stress Test 14 in the section, “Detailed Explanation of Recommendations” section below). To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:

Preserve in ICANN Bylaws any relevant ICANN commitments from the AOC.¹

- This includes Sections 3, 4, 7 and 8 of the AOC. Sections 3, 4, 8a and 8c would be included in the Core Values section of the ICANN Bylaws.
- The content of Section 8b of the AOC is already covered by ICANN Bylaws Article XVIII. Article XVIII is to remain a regular bylaw and not to be moved into the Core Values section with material derived from AOC sections 8a and 8b.
- Section 7 of the AOC would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.

¹ Sections 3, 4, 7 and 8 of the AOC contain relevant ICANN commitments. The remaining sections in the AoC are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.

Bring the four AOC review processes into ICANN's Bylaws.

The following four reviews will be preserved in the Reviews section of the Bylaws:

- Ensuring accountability, transparency and the interests of global Internet users
- Enforcing its existing policy relating to WHOIS, subject to applicable laws
- Preserving security, stability and resiliency of the Domain Name System (DNS)
- Promoting competition, consumer trust, and consumer choice

After these elements of the AOC are adopted in the ICANN Bylaws, the following should take place:

- ICANN and the NTIA should mutually agree to terminate the AOC.
- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the AOC to not disrupt any AOC Reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned AOC review should not be deferred simply because the new rules allow up to 5 years between review cycles. If the community prefers to do a review sooner than 5 years from the previous review, that is allowed under new rules.
- To support the common goal of improving the efficiency and effectiveness of Reviews, ICANN will publish operational standards to be used as guidance by community, staff and Board in conducting future Reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet community's needs.

IANA Function Review & Special IANA Function Review

- A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

3. Detailed Explanation of Recommendations

Background

The Affirmation of Commitments (AOC) is a 2009 bilateral agreement between the U.S. Government and ICANN. After the IANA agreement is terminated, the AoC will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.

Elimination of the AOC as a separate agreement would be a simple matter for a post-transition ICANN, since the AOC can be terminated, by either party, with just 120-days' notice. The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the AOC in Stress Test 14, as described below.

Stress Test #14: ICANN or NTIA choose to terminate the Affirmation of Commitments.	
Consequence(s): ICANN would no longer be held to its Affirmation commitments, including the conduct of community reviews and implementation of review team recommendations.	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>The Affirmation of Commitments can be terminated by either ICANN or NTIA with 120 days notice.</p> <p>As long as NTIA controls the IANA contract, ICANN feels pressure to maintain the Affirmation of Commitments.</p> <p>But as a result of the IANA stewardship transition, ICANN would no longer have the IANA contract as external pressure from NTIA to maintain its Affirmation of</p>	<p>One proposed mechanism would give the CMSM standing to challenge a Board decision by referral to an IRP with the power to issue a binding decision. If ICANN cancelled the Affirmation of Commitments, the IRP mechanism could enable reversal of that decision.</p> <p>Another proposed measure is to import Affirmation of Commitments provisions into the ICANN Bylaws, and dispense with the bilateral Affirmation of Commitments with NTIA. Bylaws would be amended to include Affirmation of Commitments 3, 4, 7, and 8, plus the 4 periodic reviews required in paragraph 9.</p> <p>If ICANN's Board proposed to amend the AoC commitments and reviews that were added to the Bylaws, another proposed measure would empower the community to veto that proposed Bylaws change.</p>

Commitments.	Some of the AoC commitments would be designated as Fundamental Bylaws, for which changes would require supermajority approval by the community mechanism. Note: none of the proposed measures could prevent NTIA from canceling the Affirmation of Commitments.
CONCLUSIONS: Existing measures are inadequate after NTIA terminates IANA contract.	Proposed measures in combination are adequate.

If the AOC were to be terminated without a replacement, ICANN would no longer be held to these important affirmative commitments, including the related requirement to conduct community reviews. If this were allowed to occur, it would significantly diminish ICANN's accountability to the global multistakeholder community. This consequence is avoided by adding the AOC reviews and commitments to ICANN's Bylaws.

Objectives of the Recommendations

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 Bylaws:

- Ability to sunset reviews, amend reviews, and create new reviews.
- Community stakeholder groups should appoint their own representatives to review teams. Regarding composition and size of review teams, based on composition of prior Review Teams, 21 Review Team members from Supporting Organizations and Advisory Committees would be more than needed².
- 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 Independent Review Process. 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.

Recommended Changes to ICANN Bylaws

There are four areas of change required to the ICANN Bylaws to enshrine the AOC reviews:

- Principles language to be added to Bylaws
- Bylaws to provide a framework for all periodic reviews
- Proposed Bylaws text for this Affirmation of Commitments review
- Bylaws to add an IANA Function Review and Special IANA Function Review

These are specified in detail below in [Annex 05 – Details on Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values](#).

Note: Legal counsel has not reviewed the proposed Bylaw revisions at this stage. The proposed language for Bylaw revisions is conceptual in nature; once there is consensus about direction developed through this comment process, legal counsel will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.

<p>ATRT1 (14 people; 12 from AC & SOs):</p> <ul style="list-style-type: none"> 1 ALAC 2 GAC 1 ASO 3 ccNSO 5 GNSO ICANN Board Chair or designee Assistant Secretary for NTIA 	<p>ATRT2 (15 people; 11 from AC &SOs)</p> <ul style="list-style-type: none"> 2 ALAC 3 GAC 1 SSAC 1 ASO 2 ccNSO 2 GNSO 2 Experts ICANN Board Chairman or designee Assistant Secretary for NTIA
<p>SSR (15 people; 12 from AC & SOs):</p> <ul style="list-style-type: none"> 1 ALAC 1 GAC 2 SSAC 1 RSSAC 2 ASO 3 ccNSO 2 GNSO 2 Experts ICANN CEO or designee 	<p>WHOIS (13 people; 9 from AC & SOs):</p> <ul style="list-style-type: none"> 2 ALAC 1 GAC 1 SSAC 1 ASO 1 ccNSO 3 GNSO 3 Experts/Law Enforcement ICANN CEO or designated nominee

4. Changes from the ‘Second Draft Proposal on Work Stream 1 Recommendations’

Following community feedback received during the Second Public Comment Period, the CCWG-Accountability is recommending that Section 8b of the AOC, which is reflected in the existing content of ICANN Bylaws Article XVIII, is not to be made a Fundamental Bylaw, but is to remain a regular bylaw. See Annex 03 - Recommendation #3: Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws.’

DRAFT

20 NOVEMBER 2015

Section 7 of the AOC has been added to the list of AOC paragraphs that the CCWG-Accountability is recommending be included in the ICANN Bylaws. This recommendation was included in the First Draft Proposal, but was omitted from the Second Draft Proposal. Following a comment received during the Second Public Comment Period, this text has been included again.

Following a query during the Second Public Comment Period, the recommendations section now clarifies that new review rules apply as soon as the ICANN Bylaws have been adopted, and that the new rules will also apply, to the extent practicable, to any reviews already underway.

In the second row of proposed Bylaw text in the table, "Bylaws to Provide a Framework for All Periodic Reviews", the text has been updated to take into account comments during the second comment period that the proposed composition of AOC Review Teams in the Second Draft Report (three members per SO and AC) could reduce the number of AOC Review Team Members, and that it did not take into account the possible need to increase the representation of affected Constituencies.

Commenters expressed a wish to have each individual Review Team determine whether to recommend amending or sunset of its own review. This has been reflected in the clarifying notes accompanying the third last row of the table of proposed Bylaws for the section, Accountability & Transparency Review.

In the "Reviewing effectiveness of WHOIS/Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust" table of proposed Bylaw changes, the first paragraph has been replaced with proposed text from the ICANN Board during the Second Public Comment Period. No change was made to the review cycle timing in the last row of that table, however, to ensure that reviews would occur every five years at a minimum; in contrast, the Board's proposed text for that section could have resulted in six or seven years between reviews.

In the "Promoting Competition, Consumer Trust, and Consumer Choice" table, in the second last row of the table, the proposed Bylaw text has been amended to respond to comments by the ICANN Board that, in making a decision about the next round of gTLDs, it would make its decision based on input from the Review Team as well as input from the community and staff.

5. Stress Tests Related to this Recommendation

6. How does this meet the CWG-Stewardship Requirements?

The CWG-Stewardship has proposed an IANA Function Review that should be added to the ICANN Bylaws, as a Fundamental Bylaw. The CCWG-Accountability's recommendations include this as part of the reviews to be added to ICANN Bylaws.

7. How does this address NTIA Criteria?

Support and enhance the multistakeholder model

- Reinforcing multistakeholder nature of organization by incorporating into its principles the commitment to remaining a nonprofit public benefit corporation that operates under transparent and bottom-up, multistakeholder policy development processes, includes business stakeholders, civil society, the technical community, academia, and end users, and seek input from the public, for whose benefit ICANN shall in all events act
- Reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy-development and decision-making to ensure that the bottom-up, multistakeholder policy development process fully addresses this criteria

Maintain the security, stability, and resiliency of the Internet DNS

- Maintaining nonprofit public benefit corporation status and headquarters in the U.S
- Adding Bylaw requirement that ICANN produce an annual report on the state of improvements to Accountability and Transparency
- Publishing analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS
- Including the commitment to preserve and enhance the neutral and judgment free

operation of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet

- Incorporating AOC reviews into Bylaws and in particular the Security, Stability, and Resiliency of the DNS Review

Meet the needs and expectation of the global customers and partners of the IANA services

- Transferring AOC commitments that ICANN preserve and enhance the neutral and judgment free operation of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet as well Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet
- Solidifying commitment to maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet. The criteria is also addressed through the Bylaw addition: ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection
- Visibility in finance and accountability reporting

Maintain the openness of the Internet

- Convening a Community Forum where all would be welcome to participate as a potential step
- All are welcome to participate in the consultation process that organized to elaborate these key documents.

NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution

- Adding commitment to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder

policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.

- Producing an annual report on the state of improvements to Accountability and Transparency and adhering to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making.