CCWG-Accountability Third Draft Proposal on Work Stream 1 Recommendations

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30 November 2015

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Summary

1   Over the last year, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is both a call for the Chartering Organizations to consider and a public consultation.

2   This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.

3   The main elements of the proposal are outlined below, supported by additional appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.

- **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.

- An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.

- New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
    - Reject ICANN Budgets, Operating Plans or Strategic Plans.
    - Reject changes to ICANN's Bylaws.
    - Approve changes to new Fundamental Bylaws and Articles of Incorporation (see below).
    - Remove an individual ICANN Director from the Board.
    - Recall the entire ICANN Board.
    - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
    - Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.

- A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.

- An additional new power that gives the community a say in decisions about the IANA **Function Reviews** and any separation process for the IANA Names Functions.

4   All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.

5   The accountability elements outlined above will be supported through:

- Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.

- Core elements of ICANN's governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

6   In addition, further proposed changes include:

- Recognition of **ICANN's respect for Human Rights.**

- Incorporation of ICANN's commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.

- Improved accountability and diversity for ICANN's **Supporting Organizations and Advisory Committees.**

- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016, following implementation of this core set of accountability improvements.

7   To develop these recommendations to improve ICANN's accountability, the Working Group:

- Relied on suggestions and proposals generated inside the Working Group and by the broader Internet multistakeholder community.

- Conducted Public Comment Periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.

- Rigorously "stress tested" ICANN's current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.

- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.

- Made the minimum enhancements to ICANN's accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.

- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.

- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

8   Each central recommendation has a corresponding appendix with additional detail including a summary, CCWG-Accountability[1] Recommendations, Detailed Explanation of Recommendations, Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations,' Stress Tests Related to this Recommendation, how does this meet the CWG-Stewardship[2] Requirements, and how does this address NTIA Criteria. We look forward to your thoughts and feedback on the Third Draft Proposal on Enhancing ICANN Accountability.

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[1] Cross Community Working Group on Enhancing ICANN Accountability

[2] Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

Background

9   On 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the [Internet Assigned Numbers Authority (IANA) functions](#) to the global multistakeholder community. NTIA asked ICANN to convene an inclusive, global discussion to determine a process for transitioning the stewardship of these functions to the Internet community.

10 During initial discussions on how to proceed with the transition process, the ICANN multistakeholder community, recognizing the safety net that the NTIA provides as part of its stewardship role of the IANA functions, raised concerns about the impact of the transition on ICANN's accountability.

11 To address these concerns, the ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process. As a result, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened. The CCWG-Accountability's work consists of two tracks:

12 **Work Stream 1:** Focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition

13 **Work Stream 2**: Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

14 Any other consensus items that are not required to be in place within the IANA Stewardship transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN management or others.

15 The work documented in this 3rd proposal focuses on Work Stream 1, with some references to related activities that are part of Work Stream 2's remit.

Requirements

16   This section provides an overview of the requirements the CCWG-Accountability has to fulfill in developing its recommendations

17   NTIA Requirements

18   The National Telecommunications and Information Administration (NTIA) has requested that ICANN "convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role" with regard to the IANA Functions and related Root Zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- 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.

19   NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

20   Additionally the NTIA also requires the CCWG-Accountability's proposal to clearly document how it worked with the multistakeholder community, which options it considered in developing its proposal and how it tested these.

21   Please Refer to Annex 13 – NTIA Requirements for the details of how the CCWG-Accountability meets these requirements.

22   Cross Community Working Group-Stewardship (CWG-Stewardship) Requirements

23   In the transmittal letter for the CWG-Stewardship transition plan to the ICG[3] the CWG-Stewardship noted the following regarding its dependencies on the CCWG-Accountability work in response to an earlier version of this document:

24   "The CWG-Stewardship proposal is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms proposed by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The co-Chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the

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[3] IANA Stewardship Transition Coordination Group

CWG-Stewardship is confident that the CCWG-Accountability Work Stream 1 recommendations, if implemented as expected, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability. If any element of these ICANN level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship proposal, this proposal will require revision."

25   The CWG-Stewardship requirements of the CCWG-Accountability are detailed on pages 20-21 of the CWG-Stewardship proposal transmitted on 25 June 2015.The Work Stream 1 proposals from the CCWG-Accountability address all of these conditions.

26   These requirements are:

1. ICANN Budget

2. ICANN Board and Community Empowerment Mechanisms

3. IANA Function Review and Separation Process

4. Customer Standing Committee

5. Appeals Mechanism

6. Post-Transition IANA (PTI) Governance

7. Fundamental Bylaws

27   Please refer to Annex 14 – CWG-Stewardship Requirements for details on how the CCWG-Accountability meets these requirements.

The CCWG-Accountability's Findings and Recommendations

28   This section provides an overview of the CCWG-Accountability's findings and recommendations regarding Work Stream 1:

29   **Recommendation #1:** Establishing an Empowered Community for Enforcing Community Powers

30   **Recommendation #2:** Empowering the Community through Consensus: Engage, Escalate, Enforce

31   **Recommendation #3:** Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

32   **Recommendation #4:** Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers

33   **Recommendation #5:** Changing Aspects of ICANN's Mission, Commitments and Core Values

34   **Recommendation #6:** Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries out its Mission

35   **Recommendation #7:** Strengthening ICANN's Independent Review Process

36   **Recommendation #8:** Improving ICANN's Request for Reconsideration Process

37   **Recommendation #9:** Incorporating the Affirmation of Commitments in ICANN's Bylaws

38   **Recommendation #10:** Enhancing the Accountability of Supporting Organizations and Advisory Committees

39   **Recommendation #11:** The advice of the Governmental Advisory Committee on public policy matters (Stress Test 18)

40   **Recommendation #12:** Committing to Further Accountability Work in Work Stream 2

> 41 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental/Standard Bylaws).

Recommendation #1: Establishing an Empowered Community for enforcing Community Powers

Community Enforcement Mechanism

43 Since the publication of '[Second Draft Proposal on Work Stream 1 Recommendations](#)', the CCWG-Accountability has changed its proposed mechanism for ensuring the community can effectively enforce its decisions. The CCWG-Accountability shifted from a "Sole Member" model to "Sole Designator" model. The reasoning for this change and description of the new model are outlined below.

### Concerns with a "Sole Member" model

45 In the Public Comment Period on the 'Second Draft Proposal on Work Stream 1 Recommendations', concerns were raised about the "Sole Member" model. Under California law such "members" have certain statutory powers that cannot be waived. Commenters expressed concern that these rights, such as the ability to dissolve the corporation, could not be adequately constrained and might have unintended and unanticipated consequences.

The "Sole Designator" model

47 To address the concerns described above, the CCWG-Accountability now recommends implementing a "Sole Designator" model. Under California law, the Sole Designator only has the statutory power to appoint and remove individual ICANN Board Directors or the entire Board which is a requirement of the CCWG-Accountability and the CWG-Stewardship. This removes the concerns related to unintended and unanticipated consequences of the additional statutory powers associated with a member.

48 Given that the right to inspect, as outlined in California Corporations Code 6333, is not a statutory right of a designator, and that the community felt this was a critical requirement, the CCWG-Accountability recommends this right be granted to the Sole Designator in the Fundamental Bylaws.

49 The CCWG-Accountability external legal counsel informed the group that adopting a "Sole Designator" model could effectively be implemented while meeting the community's requirements and having minimal impact on the corporate structure of ICANN.
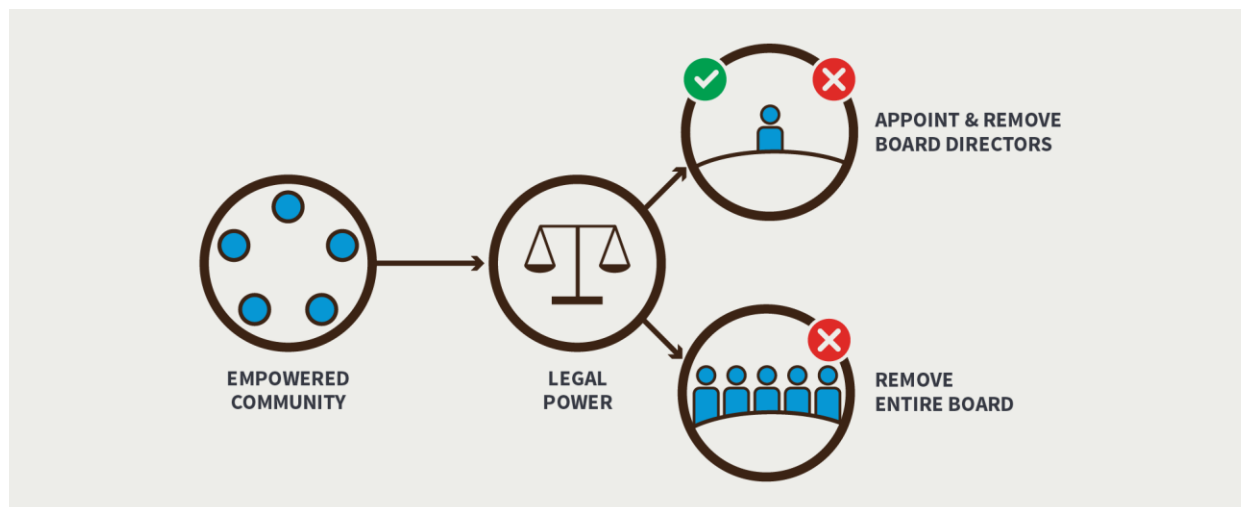
50 Legal advice on implementing the Empowered Community

51 To implement the "Sole Designator" model, ICANN's Supporting Organizations and Advisory Committees would create a unified entity to enforce their Community Powers. This unified entity will be referred to as the "Empowered Community".

52 Under California law, the Sole Designator has the statutory power to appoint and remove ICANN Board directors, whether individually or the entire Board.

53 If the ICANN Board refused to comply with those two community accountability decisions, the refusal could be petitioned in a court that has jurisdiction to force the ICANN Board to comply with that decision.

54 The CCWG–Accountability accepts that only having the above statutory power is sufficient given:

1. **All of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws and protected from any changes without Empowered Community approval.**

- This includes the Independent Review Process, which issues binding decisions and grants the Empowered Community the power to launch an Independent Review Process challenge if it believes the ICANN Board is in breach of its Articles or Bylaws[4].

- The ICANN Board would be in breach of following its own Bylaws if it refused to comply with a decision by the Empowered Community with respect to an accountability mechanism defined in the Fundamental Bylaws.

- If a community Independent Review Process challenge with respect to such a decision is successful and the Board still refused to comply with the decision, the Sole Designator, on

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[4] For example, if the Board were not to accept the decision of the Empowered Community to use one of its Community Powers. Community Powers are documented in Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers.

instructions from the community, could petition a court that has jurisdiction to force the ICANN Board to comply with that decision.

- Alternatively the Sole Designator on instructions from the community could remove the Board with the expectation that the new Board would respect the decision.

2. **The Empowered Community has legal standing as a California-based unincorporated association.**

- The members of the unincorporated association would be representatives of ICANN's Supporting Organizations and Advisory Committees that wish to participate.

3. **The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw along with provisions to protect it from any changes without its own approval.**

4. **The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.**

- Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ICANN Board must consider the community's interpretation of the 'global public interest' as ICANN pursues the charitable and public purposes set forth in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.

55 *Additional Powers Granted by Inclusion in the ICANN Bylaws*

56 In addition to the statutory right granted to a Sole Designator under California law, the CCWG-Accountability recommends including in the ICANN Bylaws the right for the Empowered Community to inspect as outlined in California Corporations Code 6333

57 **THE EMPOWERED COMMUNITY**
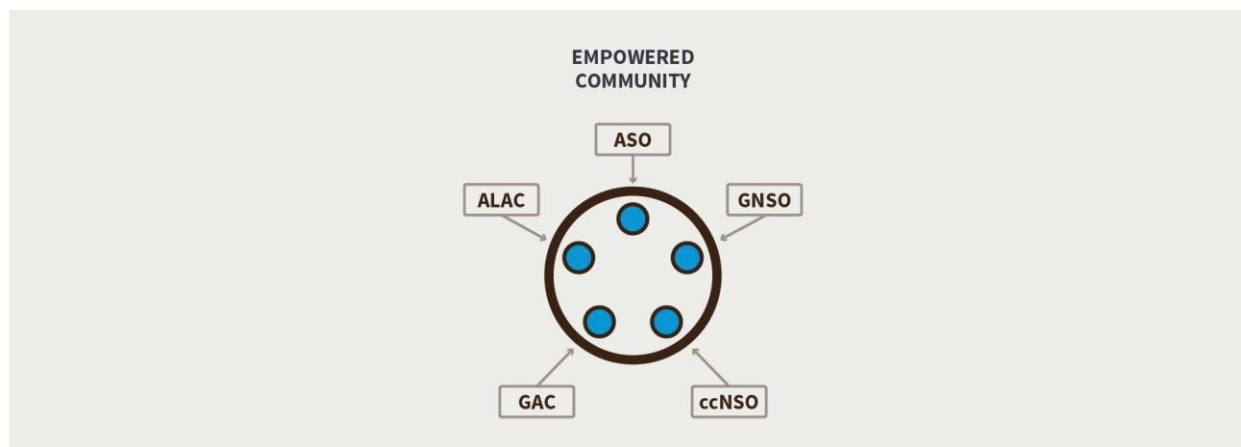
58 Implementation of the Empowered Community currently anticipates that all of ICANN's Supporting Organizations, the At-Large Advisory Committee and Governmental Advisory Committee would participate in the Empowered Community - that is, they will be listed in the Bylaws as the five Decisional Participants. .

59 The thresholds presented in this document were determined based on this assessment. If fewer than 5 of ICANN's Supporting Organizations and Advisory Committees agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ICANN changes to have more Supporting Organizations or Advisory Committees.

60 The CCWG also recommends that in a situation where use of a Community Power only attracts a decision to support or object to that power by four Decisional SOs or ACs, and the threshold is set at four in support (for community powers to block a budget, approve changes to fundamental bylaws or recall the entire ICANN Board), the power will still be validly exercised if three are in support and no more than one objects. This decision has come about considering the considerably extended escalation process now proposed before any use of the Community Powers, and to avoid the risk of powers being un-useable (especially the risk of making changes to ICANN's Fundamental Bylaws effectively impossible).

61 Detailed Recommendations

62 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce community powers:

1. This Empowered Community would act as the "Sole Designator," which has legal standing as a California-based unincorporated association.

2. The Sole Designator will act as directed by participating Supporting Organizations and Advisory Committees of ICANN.

3. This entity will be referred to as the "Empowered Community."

4. The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws').

5. The CCWG-Accountability recommends including in the ICANN Bylaws the right for the Empowered Community to inspect as outlined in California Corporations Code 6333

6. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.

63 Relevant Annexes

64 **Annex 01** – Details on Recommendation #1: Establishing an Empowered Community for enforcing Community Powers

65 **Annex 03** – Details on Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

66 **Annex 03** – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers

Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

67 The CCWG-Accountability expects that disagreements between the ICANN community and the ICANN Board might arise from time to time. In an effort to prevent such disagreements from happening the CCWG is recommending that ICANN be required to engage with the community on any key decisions it is considering such as Budgets or changing Bylaws. Should disagreements arise, the CCWG-Accountability is proposing a series of procedures that ensure all sides have the chance to completely and thoroughly discuss any disagreements and have multiple opportunities to resolve any such issues before having to resort to the powers of the Empowered Community.

68 **This process is referred to as Engagement, Escalation and Enforcement.**

69 Engagement

70 Today, the ICANN Board voluntarily consults with the community on a variety of decisions such as the annual budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an 'engagement process.'

71 The CCWG-Accountability is recommending that this engagement process be constituted in the Fundamental Bylaws. Although the ICANN Board already convenes this process, this recommendation would require the ICANN Board to undertake an extensive 'engagement process' before taking action on any of the following:

   o Approving ICANN's Five-Year Strategic Plan
   o Approving ICANN's Five-Year Operating Plan
   o Approving ICANN's Annual Operating Plan & Budget
   o Approving The IANA Functions Budget
   o Approving any modifications to Standard or Fundamental Bylaws
   o ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

72 Escalation

73 The CCWG-Accountability proposes a set of escalation steps that allow the ICANN Board and community to completely and thoroughly discuss any disagreements. The general escalation process (which may vary in application depending on the Community Power being used) is outlined below:

ESCALATION

ENFORCEMENT

10 — NOTIFY ICANN BOARD OF THE **DECISION**

THRESHOLD MET?

8 — BOARD & EMPOWERED COMMUNITY **RESOLVE?**

9 — EMPOWERED COMMUNITY ESTABLISHES IF IT WISHES TO **USE ITS POWER**

7 **COMMUNITY FORUM**

THRESHOLD MET?

5 — BOARD & EMPOWERED COMMUNITY **RESOLVE?**

6 — EMPOWERED COMMUNITY ESTABLISH IF **COMMUNITY FORUM** SHOULD BE HELD

4 **CONFERENCE CALL**

SUPPORT FROM AN ADDITIONAL SO OR AC?

PETITION **APPROVED** BY SO OR AC?

3 — **ADDITIONAL** ACs AND SOs ESTABLISH IF A **CONFERENCE CALL** SHOULD BE HELD

2 — ACs AND SOs ESTABLISH IF A **CONFERENCE CALL** SHOULD BE HELD

1 — AN INDIVIDUAL BEGINS AN ONLINE **PETITION** IN ANY AC OR SO

ENGAGEMENT

74 **Step 1. Triggering Review by Community Petition (15 days) or by Board Action**

- Note: To exercise any of the rejection powers, such as rejection of a Budget, the 15-day period begins at the time the Board votes on the element to be rejected. If the petition is not successful within 15 days of the Board vote, the rejection process cannot be used.

- Begin a petition in a Supporting Organization or Advisory Committee

- Any individual can begin a petition as the first step to using a Community Power.

- For the petition to be accepted, the Supporting Organization or Advisory Committee, in accordance with its own mechanisms, must accept the petition

- If the Supporting Organization or Advisory Committee does not approve the petition within the 15 days the escalation process terminates

- If the Supporting Organization or Advisory Committee approved the petition, it can proceed to the next step. Committees support the petition within 15-days, a conference call is organized

75 **Step 2. Triggering Review by Community Petition part 2 (6 days from the end of the previous step)**

- ⊙ The Supporting Organization or Advisory Committee that approved the petition contacts the other Supporting Organizations or Advisory Committees to ask them to support the petition. At least one additional Supporting Organization and/or Advisory Committee must support the petition (for a minimum of 2) for a conference call to be organized to discuss the issue.

- ⊙ If a minimum of two Supporting Organizations and/or Advisory Committees support the petition within 15-days, a conference call is organized

- ⊙ If the petition fails to gather the required level of support, the escalation process terminates (except for removal of individual Director)

  Note 2: For ICANN Board resolutions on changes to Standard Bylaws, Budget, Strategic and Operating Plans, the Board would be required to automatically provide a 15-day period before the resolution takes effect to allow for the escalation to be confirmed. If the petition is supported by a minimum of 2 Supporting Organizations and/or Advisory Committees within the 15-day period, the Board is required to put implementation of the contested resolution on hold until the escalation and enforcement processes are completed. The purpose of this is to avoid requiring ICANN to undo things (if the rejection is approved), which could be potentially very difficult to undo.

76 **Step 3. Conference Call (7 days to organize and hold from the date the decision is made to hold the call)**

- ⊙ The petitioning Supporting Organizations and/or Advisory Committees circulate written justification for exercising the community power in preparation for the conference call. Any Supporting Organization or Advisory Committee may contribute preliminary thoughts or questions in writing before the call is held via a specific archived email list set up for this specific issue

- ⊙ ICANN hosts a conference call open to any interested participants and provides support services, including the publishing of recordings and transcripts. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

- ⊙ If the community and the Board can resolve the issue on the conference call, the escalation terminates

- ⊙ If the community and the Board cannot resolve the issue the community must decide if it wishes to hold a Community Forum.

77 **Step 4. Decision to hold a Community Forum (7days from the end of the conference call)**

- ⊙ The Supporting Organizations and/or Advisory Committees must decide if they want to hold a Community Forum. This would be a one or two day event, possibly face-to-face, where the ICANN community would explore in detail the issue between the Board and the community and the potential avenues for resolution or action.

- If three or more Supporting Organizations or Advisory Committees (for the exercise of some powers, at least two) support holding a Community Forum within the 7-day period the Community Forum will be organized

- If the proposal to hold a Community Forum does not obtain the required support during the 7 days the escalation process terminates

78 **Step 5. Holding a Community Forum (15 days to organize and hold the event from the date of the decision to hold it)**

- The **purpose of the Community Forum** is information sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any Supporting Organization or Advisory Committee may circulate in writing their preliminary views on the exercise of this community power.

- It is expected that for most powers this will only involve remote participation methods such as teleconferences and Adobe Connect type meetings over a period of 1 or 2 days at most. . Unless the timing allows participants to meet at a regularly scheduled ICANN meeting there is no expectation that participants will meet face to face. The one exception to this is the power to recall the entire Board which would require a face to face meeting. The three or more SO or ACs that approved holding the Community Forum would decide if holding the Community Forum can wait until the next regularly scheduled ICANN meeting or if a special meeting is required to bring participants together. In both these cases the three or more SO or ACs that have requested the Community Forum will publish the date for holding the event which will not be subject to the 15 day limitation. In this case the Community Forum would be considered completed at the end of the face to face meeting. The Community Forum would be open to all interested participants and ICANN will provide support services. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

- The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any Supporting Organization or Advisory Committee may circulate in writing their preliminary views on the exercise of this community power

- The Community Forum will not make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage. This decision is up to the Supporting Organizations and/or Advisory Committees to determine after the forum

- The Community Forum should be managed/moderated in a fair and neutral manner

- Should the relevant Supporting Organizations or Advisory Committees determine a need for further deliberation, a second and third session of the Community Forum could be held

- Staff will collect and publish a public record of the Forum(s), including all written submissions

- If the Empowered Community and ICANN Board can resolve the issue in the Community Forum, the escalation process terminates

- If the Empowered Community and ICANN Board cannot resolve the issue, the community must decide if it wishes to take further action.

79 **Step 6. Decision to use a Community Power as an Empowered Community (15 days from the conclusion of the Community Forum)**

- ⊙ If four or more (for some powers 3) Supporting Organizations and/or Advisory Committees support and no more than one objects within the 15-day period, the Empowered Community will use its power. The community will also publish an explanation of why it has chosen to do so. The published explanation can reflect the variety of underlying reasons

- ⊙ If the proposal of some of the Supporting Organizations and/or Advisory Committees to use a Community Power as the Empowered Community does not meet the required thresholds during the 15-day period, the escalation process terminates

80 **Step 7. Advising the ICANN Board (1 day))**

- ⊙ If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision

81 ## Enforcement

82 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use a Community Power, the Empowered Community must decide if it wishes to begin the enforcement process.

83 The enforcement process can proceed in two ways:

84 **Option 1: Initiate mediation and community Independent Review Process procedures.**
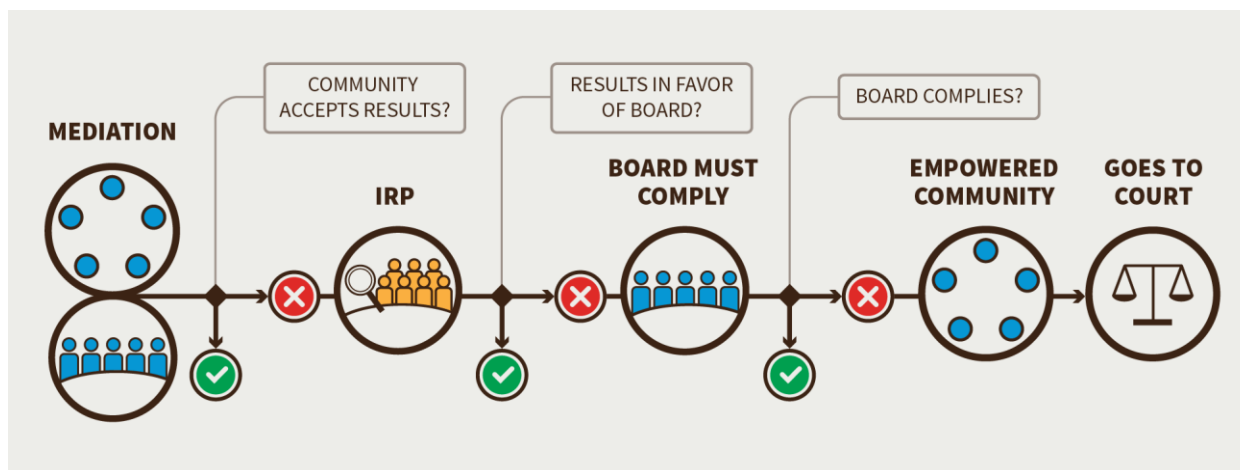
- Representatives from ICANN Board and community undertake a formal mediation phase.
    - If the community accepts the results from the mediation phase, the enforcement process would be terminated.
    - If not, the community will proceed with a community Independent Review Process (that could only be initiated using the escalation process described above.)
- Representatives from the ICANN Board and community undertake a formal and binding Independent Review Process.
    - If the results of the community Independent Review Process are in favor of the ICANN Board, the enforcement process is terminated.
    - If the results of the binding Independent Review Process are in favor of the Empowered Community, the ICANN Board must comply.
- Should the ICANN Board not comply with the decision of the Independent Review Process, the Empowered Community has two options:
    1. The Empowered Community can ask a court with jurisdiction to enforce the results of the Independent Review Process.
    2. The Empowered Community can use the escalation process to use its Community Power to recall the entire ICANN Board.

85 **Option 2: Initiate an escalation process to recall the entire ICANN Board.**

- If the requisite threshold of community support is achieved, the Empowered Community removes all of the members of the ICANN Board (except the CEO) and replaces them with an Interim Board until a new Board can be seated.
- If ICANN staff, the outgoing Board or removed Directors questions the legitimacy of the decision made by the Empowered Community or blocks the Interim Board, the Empowered Community may seek enforcement by a court with jurisdiction

86 ## Detailed Recommendations

87 The CCWG-Accountability recommends:

- Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive 'engagement process' before taking action on any of the following:
    - Approving ICANN's Five-Year Strategic Plan
    - Approving ICANN's Five-Year Operating Plan
    - Approving ICANN's Annual Operating Plan & Budget
    - Approving The IANA Functions Budget
    - Approving any modifications to Standard or Fundamental Bylaws and/or Articles of Incorporation
    - ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

88 Include the 'engagement process' and the 'enforcement process' in the Fundamental Bylaws. Note: The escalation processes for each Community Power is outlined in Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers.

89 **Table: Required thresholds for the various escalation and enforcement processes:**

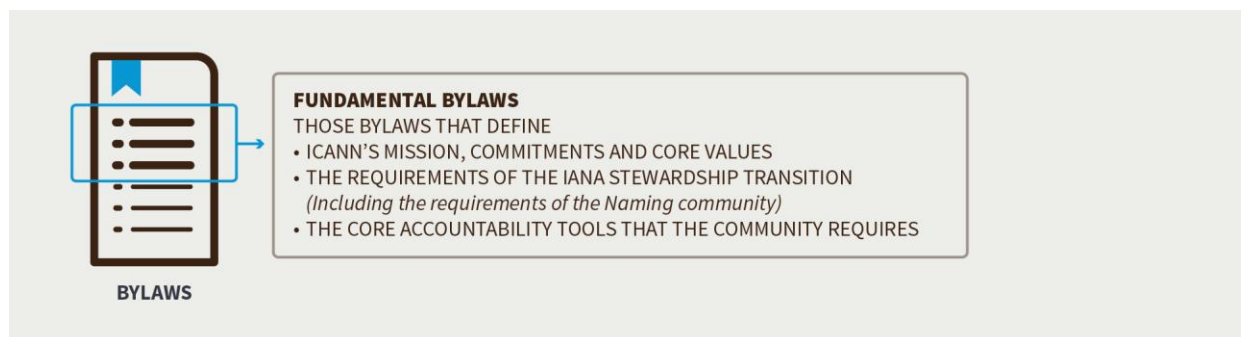| Required Community Powers	Should a conference call be held?	Should a Community Forum be convened?	Is there consensus support to exercise a Community Power?
90 1. Reject a proposed Operating Plan/Strategic Plan/Budget	91 2 AC/SOs support blocking	92 3 AC/SOs support blocking	93 4 support rejection, and no more than 1 objection
94 2. Approve changes to Fundamental Bylaws and Articles of Incorporation	95 2 AC/SOs support approval	96 3 AC/SOs support approval	97 4 support approval, and no more than 1 objection
98 3. Reject changes to regular bylaws	99 2 AC/SOs support blocking	100 2 AC/SOs support blocking	101 3 support rejection, and no more than 1 objection
102 4a. Remove an individual Board Director appointed by a Supporting Organization or Advisory Committee	103 Majority within the appointing AC/SO	104 Majority within appointing AC/SO	105 Invite and consider comments from all SO/ACs. 75% majority within the appointing AC/SO to remove their director
106 4b. Remove an individual Board Director appointed by the Nominating Committee	107 2 AC/SOs support	108 2 AC/SOs support	109 3 support, and no more than 1 objection.
110 5. Recall the entire board of directors	111 2 AC/SOs support	112 3 AC/SOs support	113 4 support, and no more than 1 objection
114 6. Initiate a binding Independent Review Process where a panel decision is enforceable in any court recognizing international arbitration results	115 2 AC/SOs support	116 2 AC/SOs support	117 3 support, and no more than 1 objection. 118 Require mediation before IRP begins 119

Required Community Powers	Should a conference call be held?	Should a Community Forum be convened?	Is there consensus support to exercise a Community Power?
120 7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation	121 2 AC/SOs support	122 3 AC/SOs support	123 4 support, and no more than 1 objection

124 **Relevant Annexes**

125 **Annex 02** – Details on Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

126 **Annex03** – Details on Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

127 **Annex04** – Details on Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers

## Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

128 Today, ICANN Bylaws can be changed by a resolution of the ICANN Board upon a two-thirds (i.e. 66.7%) vote. The CCWG-Accountability believes that the set of key Bylaws fundamental to ICANN's stability and operational continuity and essential for the community's decisions-rights should be given additional protection from changes.

129 The CCWG–Accountability is recommending splitting the ICANN Bylaws into "Fundamental Bylaws" and "Standard Bylaws" where Fundamental Bylaws will be more difficult to change.

FUNDAMENTAL BYLAWS
THOSE BYLAWS THAT DEFINE
• ICANN'S MISSION, COMMITMENTS AND CORE VALUES
• THE REQUIREMENTS OF THE IANA STEWARDSHIP TRANSITION
  (Including the requirements of the Naming community)
• THE CORE ACCOUNTABILITY TOOLS THAT THE COMMUNITY REQUIRES

BYLAWS

130 As such, the CCWG-Accountability proposes to make Fundamental Bylaws harder to change than Standard Bylaws in two ways:

• By sharing the authority to authorize changes between the ICANN Board and the ICANN community (organized through its Supporting Organizations and Advisory Committees in the

"Empowered Community" outlined in "Recommendation #1: Establishing an Empowered Community for enforcing Community Powers"); and

- By requiring a higher threshold to authorize changes to Fundamental Bylaws than for Standard Bylaws.
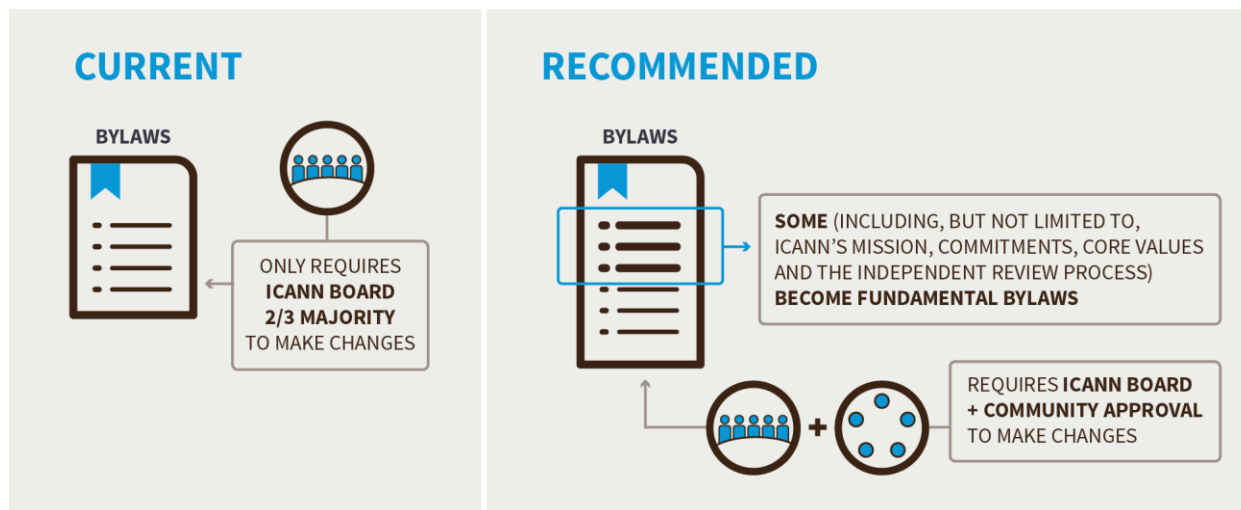
131   Accordingly, the CCWG-Accountability recommends that the following aspects be made Fundamental Bylaws as a part of Work Stream 1:

1. The Mission, Commitments and Core Values

2. The framework for the Independent Review Process

3. The process for amending Fundamental Bylaws and/or Articles of Incorporation

4. The Seven Community Powers

5. The Community Mechanism as the Sole Designator

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

8. The right of inspection be granted to the sole designator, as outlined in the California Corporations Code 6330.

132   The establishment of Fundamental Bylaws would indirectly enhance ICANN's accountability to the global Internet community by sharing the authority of decision-making more widely for, and increasing the difficulty to amend, these integral aspects of ICANN.

133   This recommendation is important in the context of the IANA Stewardship Transition because the historic contractual relationship with the U.S. Government provided assurance to the community that the fundamental nature of ICANN was unlikely to be changed without widespread agreement. Without that relationship, procedural protections and more widely shared decision-rights on core components of ICANN's scope and authority should help

maintain the community's confidence in ICANN.

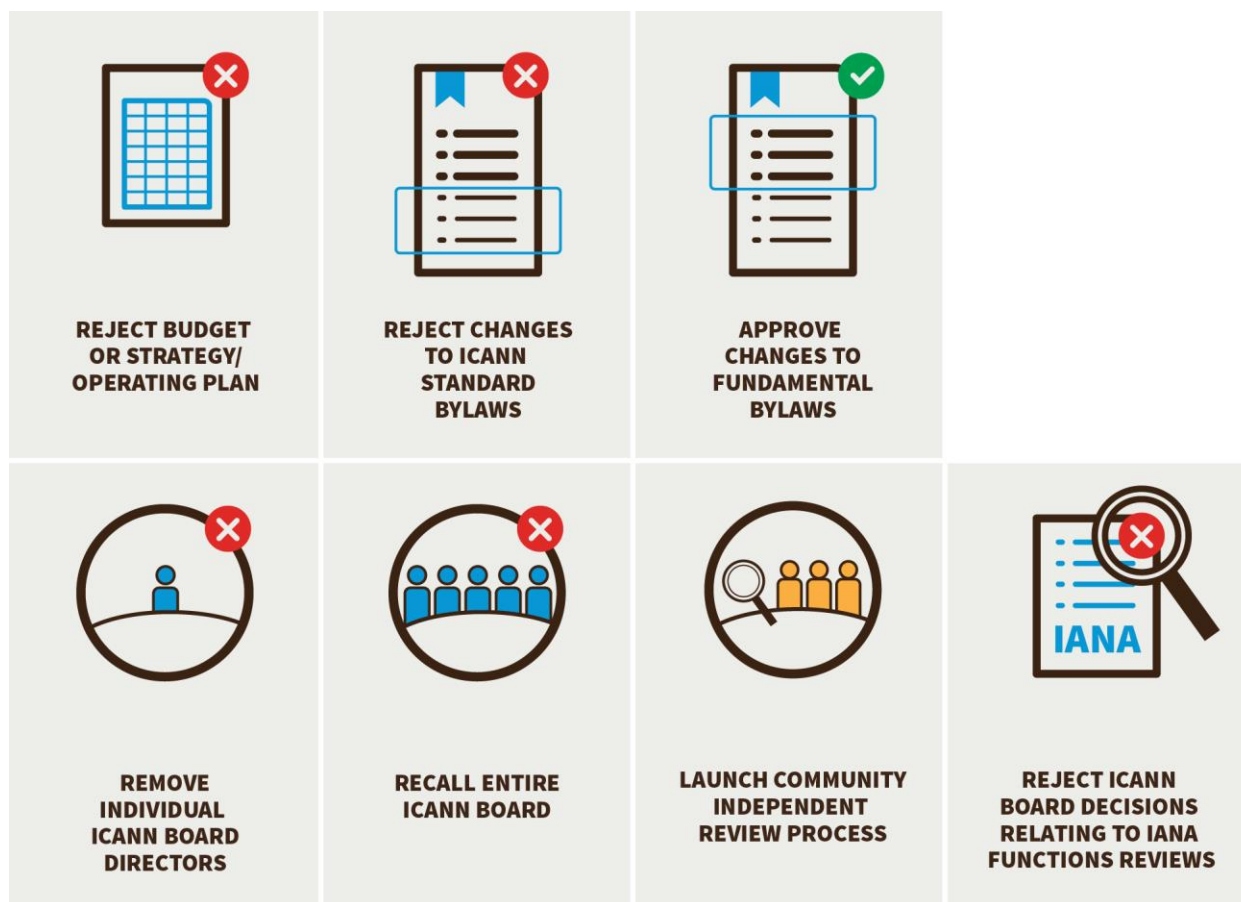## 134 Detailed Recommendations

135 The CCWG-Accountability recommends:

- Splitting the ICANN Bylaws into "Fundamental Bylaws" and "Standard Bylaws". Examples of Fundamental Bylaws include:

    o The Mission, Commitments and Core Values

    o The framework for the Independent Review Process

    o The process for amending Fundamental Bylaws and Articles of Incorporation

    o The seven Community Powers

    o The Community Mechanism as the Sole Designator, i.e. the "Empowered Community"

    o The IANA Function Review, Special IANA Function Review and the Separation Process required by the IANA Stewardship Transition proposal

    o The Post-Transition IANA Governance and Customer Standing Committee also required by the IANA Stewardship Transition proposal

    o The right of inspection be granted to the sole designator, as outlined in the California Corporations Code 6330.

- ICANN Bylaws be designated as "Fundamental Bylaws" that would be more difficult to change. Remaining (or "Standard") Bylaws would also require consultation before they can be changed.

- Requiring approval for any changes to Fundamental Bylaws and Articles of Incorporation from both the ICANN Board and community as outlined in the respective Community Power (See "Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers").

- Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or Articles of Incorporation from two-thirds to 75%.

136 Relevant Annexes

137 **Annex 03** – Details on Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

138 **Annex 04** – Details on Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers

Recommendation #4: Ensuring community engagement in ICANN decision-making: seven new Community Powers

REJECT BUDGET OR STRATEGY/ OPERATING PLAN

REJECT CHANGES TO ICANN STANDARD BYLAWS

APPROVE CHANGES TO FUNDAMENTAL BYLAWS

REMOVE INDIVIDUAL ICANN BOARD DIRECTORS

RECALL ENTIRE ICANN BOARD

LAUNCH COMMUNITY INDEPENDENT REVIEW PROCESS

REJECT ICANN BOARD DECISIONS RELATING TO IANA FUNCTIONS REVIEWS

139 The CCWG-Accountability has proposed a set of five Community Powers designed to empower the community to hold ICANN accountable for the organization's Principles (the Mission, Commitments, and Core Values). The proposed Community Powers are:

The Power to Reject ICANN's Budget or Strategy/Operating Plans

The Power to Reject Changes to ICANN Standard Bylaws

The Power to Remove Individual ICANN Board Directors

The Power to Recall the Entire ICANN Board

The Power to Approve Changes to Fundamental Bylaws and Articles of Incorporation

> The Power to initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results)
>
> The Power to reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

140 It is important to note that the above powers, as well as the launch of a Separation Cross Community Working Group[5], (as required by the CWG-Stewardship dependencies), can be enforced by using the community Independent Review Process or the Power to recall the entire Board.

141 The Power to Reject ICANN's Budget or Strategic/Operating Plans

142 The right to set budgets and strategic direction is a critical governance power for any organization. By allocating resources and defining the goals to which these resources are directed, Strategic Plans, Operating Plans and Budgets have a significant impact on what ICANN does and how effectively it fulfills its role. The ICANN community already plays an active role in giving input into these key documents through participation in the existing consultation processes ICANN organizes.

143 To provide additional accountability safeguards, the CCWG-Accountability has proposed that the community be given the power to reject:

- ICANN's Five-Year Strategic Plan
- ICANN's Five-Year Operating Plan
- ICANN's Annual Operating Plan & Budget
- The IANA Functions Budget

144 The CCWG-Accountability has determined that a separate petition would be required for each Budget or Strategic/Operating plan being challenged. A Budget or Strategic/Operating plan could only be challenged if there are significant issue(s) brought up in the Engagement Phase that were not addressed prior to approval.

145 A Supporting Organization or Advisory Committee petitioning to reject a budget or strategic/operating plan would be required to circulate a rationale and obtain support for its petition from at least one other Supporting Organization or Advisory Committee according to the Escalation Process.

146 The Escalation and Enforcement processes for rejecting any Strategic, Operating or Annual Budget would be the detailed process presented in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

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[5] If the CWG-Stewardship's IANA Function Review determines that a separation process is necessary, it will recommend the creation of a Separation Cross Community Working Group. This recommendation will need to be approved by a supermajority of each of the Generic Names Supporting Organization and the Country-Code Names Supporting Organization Councils, according to their normal procedures for determining supermajority, and will need to be approved by the ICANN Board after a Public Comment Period, as well as a community mechanism derived from the CCWG-Accountability process.

147 Should the power be used to reject the annual budget, a caretaker budget would be enacted (details regarding the caretaker budget are currently under development).

148 The IANA Functions Budget

149 Under this power the community will be able to consider the IANA Functions Budget as a separate budget. The IANA Functions Budget is currently part of ICANN's Annual Operating Plan & Budget.

150 The CCWG-Accountability recommends that there should be two distinct processes with respect to the community's power to reject the IANA Functions Budget and its power to reject the ICANN Budget, meeting the requirements set forward by the IANA Stewardship Transition proposal. The use of the Community Power to reject the ICANN Budget would have no impact on the IANA Budget, and a rejection of the IANA Budget would have no impact on the ICANN Budget.

151 In addition, to reinforce the bottom up, collaborative approach that ICANN currently uses to enable the community to give input into budget documents, the CCWG-Accountability recommends adding such a consultation process into the ICANN Bylaws for the IANA functions Budget.

152 The Escalation and Enforcement processes for rejecting an IANA Functions Budget would be the detailed process presented in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

153 Should the power be used to reject the annual IANA Functions budget, a caretaker budget would be enacted (details regarding the caretaker budget are currently under development).

154 The Power to Reject Changes to ICANN Standard Bylaws

155 In addition to the safeguard against the possibility that the ICANN Board could unilaterally amend Fundamental Bylaws without consulting the community, the CCWG-Accountability recommends that the community be given the power to reject changes to Standard ICANN Bylaws after the Board approves them, but before the changes come into effect. Any changes approved by the Board would take 15 days to come into effect to enable the community to decide whether a petition to reject the change should be initiated.

156 This power, with respect to Standard Bylaws, is a rejection process that is used to tell the ICANN Board that the community does not support a Board-approved change. It does not enable the community to re-write a Standard Bylaw change that has been proposed by the Board.

157 The escalation and enforcement processes for this power are as presented in "Recommendation #2: Empowering the community through consensus: engage, escalate, enforce."

158 The Power to Approve Changes to Fundamental Bylaws and Articles of Incorporation

159 To safeguard against the possibility that the ICANN Board could unilaterally amend Bylaws and/or Articles of Incorporation without consulting the community, the CCWG-Accountability determined that the community consultation process should be reinforced in Fundamental Bylaws. The proposed set of Fundamental Bylaws would be harder to change than the Standard Bylaws for two reasons:

- The authority to change Fundamental Bylaws and/or Articles of Incorporation would be shared between the ICANN Board and the ICANN community

- The required threshold of support to change a Fundamental Bylaw would be significantly higher than the threshold to change a Standard Bylaw

160 The CCWG-Accountability emphasizes the importance for the ICANN Board and ICANN community to be able to define new Fundamental Bylaws and/or Articles of Incorporation over time, or to change or remove existing ones to ensure that ICANN can adapt to the changing Internet environment.

161 The escalation processes for this power is as follows:

162 **Step 1. The ICANN Board publishes its approval of a change to the Fundamental Bylaws and/or Articles of Incorporation**

163 **Step 2. Conference Call (15 days to organize and hold from the date the ICANN Board publishes its approval of a change to the Fundamental Bylaws and/or Articles of Incorporation)**

- ICANN hosts a conference call open to any interested participants and will provide support services. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

164 **Step 3. Decision to hold a Community Forum (7days from the end of the conference call)**

- If three or more Supporting Organizations or Advisory Committees support holding a Community Forum within the 7-day period the Community Forum will be organized

- If the proposal to hold a Community Forum does not obtain the required support during the 7 days the process goes directly to deciding to use the community power.

165 **Step 4. Holding a Community Forum (15 days to organize and hold the event from the date of the decision to hold it)**

- It is expected that this will only involve remote participation methods such as teleconferences and Adobe Connect type meetings over a period of 1 or 2 days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting there is no expectation that participants will meet face to face. The Community Forum would be open to all interested participants and ICANN will provide support services, including the publishing of recordings and transcripts. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

- The Community Forum would be open to all interested participants and ICANN will provide support services. Representatives of the ICANN Board are expected to attend and be prepared to address the issues raised.

- The purpose of the Community Forum is information-sharing (the rationale for the petition, etc.) and airing views on the petition by the community. Accordingly, any Supporting

Organization or Advisory Committee may circulate in writing their preliminary views on the exercise of this community power

- ⊙ The Community Forum will not make decisions nor seek consensus. It will not decide whether to advance the petition to the decision stage. This decision is up to the Supporting Organizations and/or Advisory Committees to determine after the forum

- ⊙ The Community Forum should be managed/moderated in a fair and neutral manner

- ⊙ Should the relevant Supporting Organizations or Advisory Committees determine a need for further deliberation, a second and third session of the Community Forum could be held

- ⊙ Staff will collect and publish a public record of the Forum(s), including all written submissions

166 **Step 5. Decision to use a Community Power as an Empowered Community (15 days from the conclusion of the Community Forum)**

- ⊙ If four or more Supporting Organizations and/or Advisory Committees support and no more than one objects within the 15-day period, the Sole Designator will use its power to approve the change to the Fundamental Bylaws.

- ⊙ If the required thresholds during the 15-day period, are not met the escalation ends without the changes to the Fundamental Bylaws being approved.

167 **Step 6. Advising the ICANN Board (1 day)**

- ⊙ The Empowered community will advise the Board of its decision.

168 # The Power to Remove Individual ICANN Board Directors

169 The proposed power to Remove Individual ICANN Board Directors would allow for the removal of a Director before the Director's current term comes to an end. This was a formal requirement from the CWG-Stewardship. Currently, the power to remove Individual Directors is only available to the Board itself as per the existing Bylaws.

170 Given that ICANN Board Directors can be nominated in two significantly different ways, specific Supporting Organization or Advisory Committee nomination or by the Nominating Committee, the process for removing each type of Director will be different.

171 In cases where the nominating Supporting Organization or Advisory Committee perceives that there is a significant issue with its nominated Director it can use the following escalation process to determine if removal of the Director is recommended. It is important to note that this process can only be used once during a Director's term if the process reaches the step of holding a community forum or above and then fails to remove the Director:

172 **Directors Nominated by the Nominating Committee (detailed process available in Annex 04)**

- ⊙ In cases where the community perceives that there is a reason to remove a Director appointed by the Nominating Committee it could use the engagement and escalation process to decide if the Sole Designator should remove the Director. It is important to note that this process can only be used once during any single term a Director is in office if the process reaches the step of holding a Community Forum or above and then fails to remove the Director.

- ⊙ Only require 2 Supporting Organizations or Advisory Committees to convene a Community Forum

- ⊙ Only require 3 Supporting Organizations or Advisory Committees, and not more than one objecting, for the Empowered Community to use the power.

- ⊙ Naming a replacement

  - ○ The Nominating Committee may instruct the Sole Designator to appoint a new Director. It is expected that the Nominating Committee will amend its procedures so as to have several "reserve" candidates in place.

  - ○ Replacement Directors will fill the same "seat" and their term will come to an end when the term of the original Director was to end.

173 **Directors Nominated by a Supporting Organization or Advisory Committee (detailed process available in Annex 04)**

174 In cases where the nominating Supporting Organization or Advisory Committee believes there is a reason to remove a Director it nominated, it can use the following escalation process to determine whether the Empowered Community will remove the Director. It is important to note that this process can only be used once during a Director's term if the process reaches the step of holding a Community Forum or above and then fails to remove the Director.

- The petition can only be started in the Supporting Organization or Advisory Committee that nominated the Director.

- The petition to hold a conference call is successful if the Supporting Organization or Advisory Committee that nominated the Director approves it.

- If a petition is accepted, the Chair of the relevant Supporting Organization or Advisory Committee will meet promptly in private (by phone or in-person) with the concerned Director to discuss the approved petition. If no resolution is found, the Supporting Organization or Advisory Committee schedules a conference call within 7 days of the petition being accepted. The relevant Supporting Organization or Advisory Committee will circulate written justification prior to the conference call.

- The process proceeds directly to a Community Forum following the conference call if the parties have not resolved their differences.

- At the end of the Community Forum the Community Forum Chair will issue a formal call for comments and recommendations from the community, and input received will be sent to the relevant Supporting Organization or Advisory Committee and posted publicly within 7 day

- Supporting Organizations and/or Advisory Committees publish their comments and recommendations (7 days)

- Decision to use its power as an Empowered Community (7 days from the conclusion of the comment period) is the responsibility of the nominating Supporting Organization or Advisory Committee only. As such the threshold is 1.

- Naming a replacement
  - The respective Supporting Organization or Advisory Committee is responsible for nominating an individual to fill the vacancy on the ICANN Board through its usual process (as set out in Article VI, Section 12.1 of the Bylaws).
  - Replacement Directors will fill the same "seat" and their term will come to an end when the term of the original Director was to end. 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.

175 ## The Power to Recall the Entire ICANN Board

176 The CCWG-Accountability believes there may be situations where removing Individual Directors from ICANN's Board may not be a sufficient accountability remedy for the community.

177 In cases where the community perceives that a set of problems has become impossible to resolve, the community may wish to signal its lack of confidence in the Board by petitioning for a recall (i.e. the removal) of the entire ICANN Board (except the CEO who is appointed by the Board). The power to recall a Board is a critical enforcement mechanism for the community under the Sole Designator model because it can be used to support the other Community Powers and provide a final and binding accountability mechanism.

178 By exercising this power, the entire ICANN Board (except the CEO) could be removed by the community. However, it is unlikely that the community would use this power lightly, and the engagement and escalation pathways are designed to encourage agreement between the Board and the community. If the ICANN Board were to be recalled, an Interim Board would be put in place. Interim Directors would be named with the exercising of the Community Power to ensure continuity.

179 The CCWG-Accountability expects that this power would only be exercised as a last resort after all other attempts at resolution have failed. As a recall of the Board would be extremely disruptive for the entire organization, the CCWG-Accountability has included several safeguards in the proposed escalation process to ensure that this decision reaches the maturity and level of support needed before it can be used.

180 The Escalation and Enforcement processes for recalling the entire Board would be the detailed process presented in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce except for the fact that Supporting Organizations, Advisory Committees and the Nominating Committee must have Directors ready to stand in to be the Interim Board prior to deciding to use the power to recall the entire Board:

Threshold for calling a Community Forum is three Supporting Organizations or Advisory Committees supporting.

Threshold for using the power is four Supporting Organizations or Advisory Committees supporting and no more than one objecting.

181 Interim Board

182 The CCWG-Accountability proposes that a Bylaw be added that states that if the Board is removed the Interim Board will be in place only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations, Advisory Committees and the Nominating Committee will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

183 The ICANN Bylaws will state that, except in circumstances of where urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the Supporting Organization and Advisory Committee leadership before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies, or management, including replacement of the serving President and CEO.

184 The Power to initiate a Community Independent Review Process

185 A community Independent Review Process may be launched for reasons outside of enforcing a decision as described in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce. One example could be to require ICANN to provide documents as required under the right of inspection requirement.

186 A community Independent Review Process may be launched for any of the following reasons:

1. To 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 ICANN Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization)

2. To reconcile conflicting decisions of process-specific "expert panels"; and

3. To hear and resolve claims involving rights of the Empowered Community under the Articles of Incorporation or ICANN Bylaws (subject to voting thresholds).

187 The escalation and enforcement processes for rejecting an IANA Functions Budget are detailed in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

188 The Power to reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

189   The IANA Functions Review, Special IANA Function Review and the Separation Cross-Community Working Group are all structures that the CWG-Stewardship has requested the CCWG-Accountability constitute in the Fundamental Bylaws to oversee the operations of the IANA Functions Operator. As such, these structures will exist within ICANN and many of their recommendations will require ICANN Board approval before implementation (i.e. change in the Statement of Work for the IANA Functions Operator). The CWG-Stewardship determined it was critical that the recommendations of these various bodies be respected by the ICANN Board, and so further required that the CCWG-Accountability provide mechanisms to ensure that the recommendations from these bodies could be enforced.[6]

190   The escalation and enforcement processes for rejecting an IANA Functions Budget are detailed in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

191   ## Detailed Recommendations

192   The CCWG-Accountability recommends defining the following community powers as Fundamental Bylaws:

   - Reject Budget or Strategy/Operating Plans

   - Reject changes to ICANN "Standard" Bylaws

   - Approve changes to "Fundamental" Bylaws and/or Articles of Incorporation

   - Remove individual ICANN Board Directors

   - Recall the entire ICANN Board

   - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).

   - Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.

193   The CCWG-Accountability proposes that a Bylaw be added that states that if the entire ICANN Board is removed, an Interim Board will established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations, Advisory Committees and the Nominating Committee will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

   - The ICANN Bylaws will state that, except in circumstances of where urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the Supporting Organization and Advisory Committee leadership before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies, or management, including replacement of the serving President and CEO.

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[6]   Consult the CWG-Stewardship Final Report for further details.

- Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2 – Details on Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

194 **Relevant Annexes**

195 **Annex 02** – Details on Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

196 **Annex 03** – Details on Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

197 **Annex 04** – Details on Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers

Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values
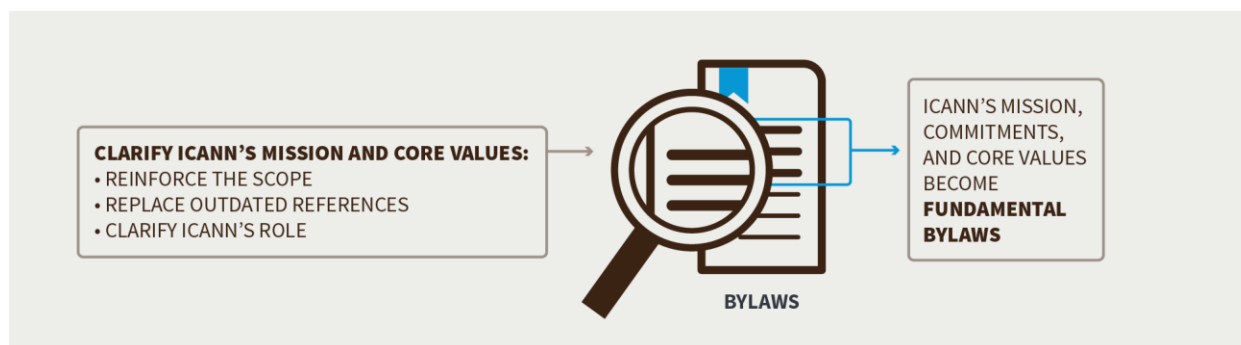
198 ICANN's current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN's accountability: they obligate ICANN to act only within the scope of its limited Mission, and to conduct its activities in accordance with certain fundamental principles. As such, these three sections also provide a standard against which ICANN's conduct can be measured and held accountable through existing and enhanced mechanisms such as Reconsideration and Independent Review.

199 The relevant language in the current Bylaws was adopted in 2003. Based on community input and discussions since January 2015, the CCWG-Accountability concluded that these provisions should be strengthened and enhanced to provide greater assurances that ICANN is accountable to its global Internet community. In particular, the CCWG-Accountability found that:

- ICANN's Mission statement needs clarification with respect to the scope of ICANN's policy authority;

- The language in the Bylaws describing how ICANN should apply its Core Values is weak and permits ICANN decision makers to exercise excessive discretion;

- The current Bylaws do not reflect key elements of the Affirmation of Commitments; and

- The Board should have only a limited ability to change these key accountability provisions of ICANN's Bylaws.

200 Detailed Explanation

201 The proposed language for Bylaw revisions is conceptual in nature at this stage; the legal team will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.

202 The CCWG-Accountability is recommending changes to the ICANN Bylaws to address the deficiencies described above. The CCWG-Accountability deliberately attempted to minimize language changes, and in the charts that follow, has included the existing language and provided a redline showing proposed changes. The CCWG-Accountability discussed how to balance the needs of limiting ICANN's Mission and the necessary ability of the organization to adjust to a changing environment. Below we provide a summary of the proposed changes.

203 **ICANN Mission Statement.** The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):
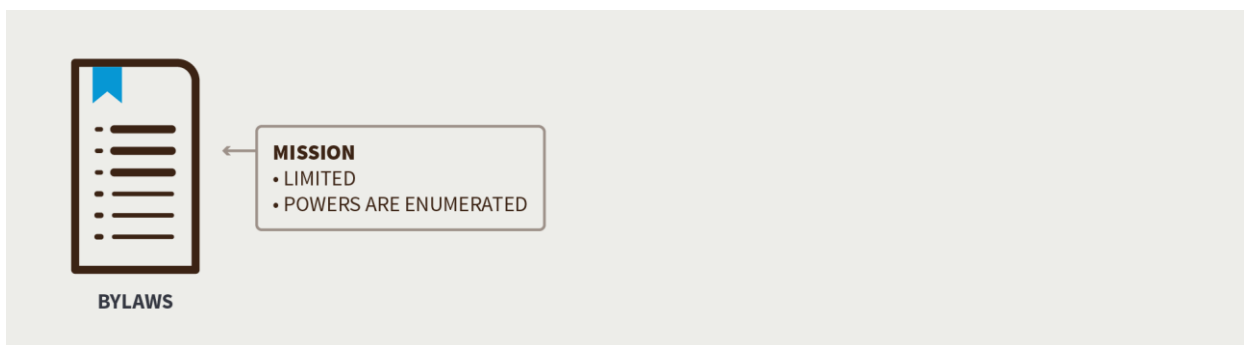
- Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.

- 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.

- Note: For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.

- 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.

204 **Core Values.** The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):
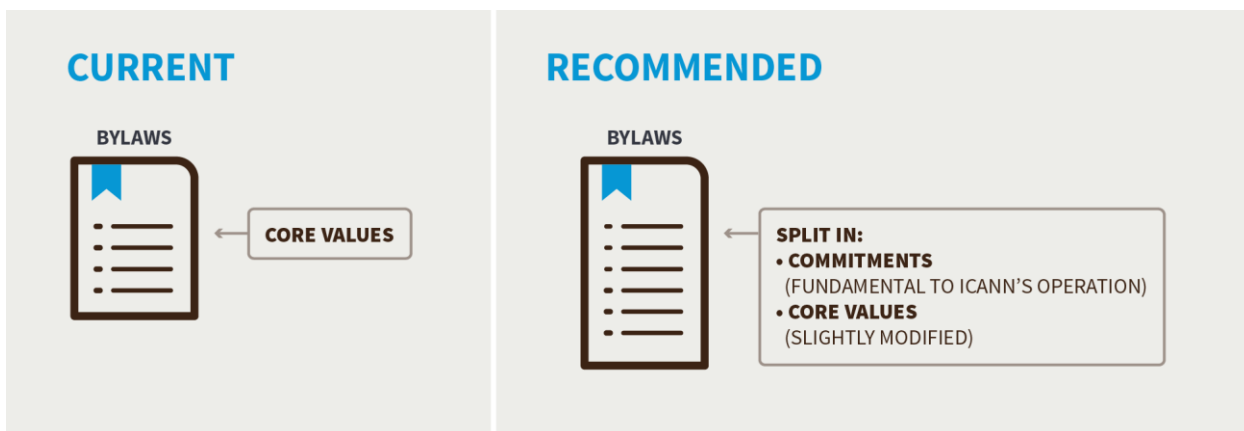
205 Divide the existing Core Values provisions into Commitments and "Core Values."

- 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.

- 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:

  o Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;

  o Limit its activities to those within ICANN's Mission that require or significantly benefit from global coordination;

  o Employ open, transparent, bottom-up, multistakeholder processes; and

  o Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.

- Slightly modify the remaining Core Values to:

  o Reflect various provisions in the Affirmation of Commitments, e.g., efficiency, operational excellence, and fiscal responsibility; (Note for more information on incorporating the various provisions of the AoC into the Core Values please see Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws)

- Add an obligation to avoid capture.

206 **Balancing or Reconciliation Test**

207 Modify the "balancing" language in the Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

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.

208 **Fundamental Bylaws Provisions.**

The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. (See: Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws')

209 Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations'

210 The CCWG-Accountability has attempted to minimize changes to current ICANN Bylaw language. Annex 5 includes a redline of the existing Bylaw language to show its proposed changes.

211 Detailed Recommendations

212 The CCWG-Accountability recommends:

- Modifying ICANN's Fundamental Bylaws to implement the following:
  - 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 Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
  - Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
  - Clarify that ICANN's powers are "enumerated." Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN's authority.
  - Divide ICANN's existing Core Values provisions into Commitments and "Core Values."
  - Designate certain Core Values as "Commitments."
  - Slightly modify ICANN's remaining Core Values.
  - Modify the "balancing" language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place.
  - Constitute the revised Mission Statement, Commitments and Core Values as Fundamental Bylaws.
  - Note: For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.
  - Relevant Annexes

213 **Annex 05** – Details on Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values

Recommendation #6: Reaffirming ICANN's commitment to respect internationally recognized Human Rights as it carries out its mission

214 The subject of including a Commitment to Human Rights in the ICANN Bylaws has been extensively discussed by the CCWG-Accountability.

215 The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA Functions Contract between ICANN and the NTIA, ICANN's specific Human Rights obligations could be called into question. It was found that, upon termination of the Contract, there would be no significant impact on ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a commitment to Human Rights **should be included** in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet.
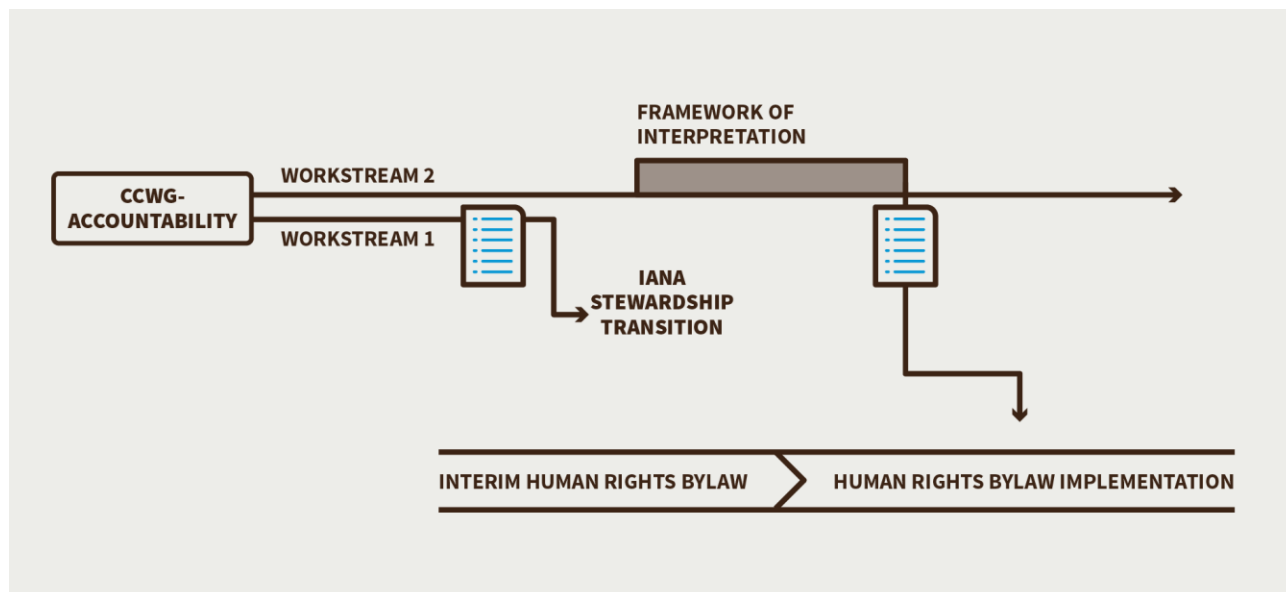
216 This proposed Draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its narrow scope and Mission, and would clarify ICANN's commitment to respecting Human Rights.

217 Amendments to the proposed Draft Bylaw text since Draft 2 aim to prevent Mission expansion or 'Mission creep' by stating that ICANN's commitment to respect internationally recognized Human Rights is conducted "within its mission and in its operations".

218 The proposed Draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.

219 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to Human Rights, including the development of a Framework of Interpretation.

220 To ensure that the work assigned to Work Stream 2 takes place, the CCWG-Accountability proposes that an interim Bylaw that outlines the specific areas to be addressed is added to the current Bylaws. This interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.

221 ## Detailed Recommendations

222 The CCWG-Accountability recommends:

- Including a Bylaw with the following intent in Work Stream 1 Recommendations:
  - o *"**Within its mission and in its operations**, ICANN will respect internationally recognized human rights. This commitment does not in any way create an obligation*

for ICANN, or any entity having a relationship with ICANN, to protect or enforce human rights <u>beyond what may be required by applicable law</u>. In particular, this does not create any <u>additional</u> obligation for ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN."

o In order to ensure that the Human Rights related tasks that are allocated to Work Stream 2 take place, the CCWG-Accountability proposes a draft interim Bylaw, which must be adopted as part of Work Stream 1. The interim Bylaw would convey the following:

"Bylaw xx will be implemented in accordance with the framework of interpretation to be developed as part of "Work Stream 2" by the CCWG-Accountability or another cross-community working group chartered for such purpose by one or more Supporting Organizations or Advisory Committees. This group must be established promptly, in order to develop an appropriate framework of interpretation as promptly as possible, but in no event later than one year after Bylaw xx is adopted." (This interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.)

- Including the following in Work Stream 2 Activities

  The CCWG-Accountability identified several work areas that it recommends should be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to Human Rights:

- Development of a Framework of Interpretation for the Human Rights Bylaw

- Consider which specific Human Rights conventions or other instruments should be used by ICANN in interpreting and implementing the Human Rights Bylaw

- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights

- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process

- Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC)

- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out

- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

223 **Relevant Annexes**

224 **Annex 06** – Details on Recommendation #6: Reaffirming ICANN's commitment to respect internationally recognized Human Rights as it carries out its mission

Recommendation #7: Strengthening ICANN's Independent Review Process

225 The overall purpose of the Independent Review Process is to ensure that any ICANN action or inaction does not exceed the scope of its limited technical mission and complies with both its Articles of Incorporation and Bylaws.
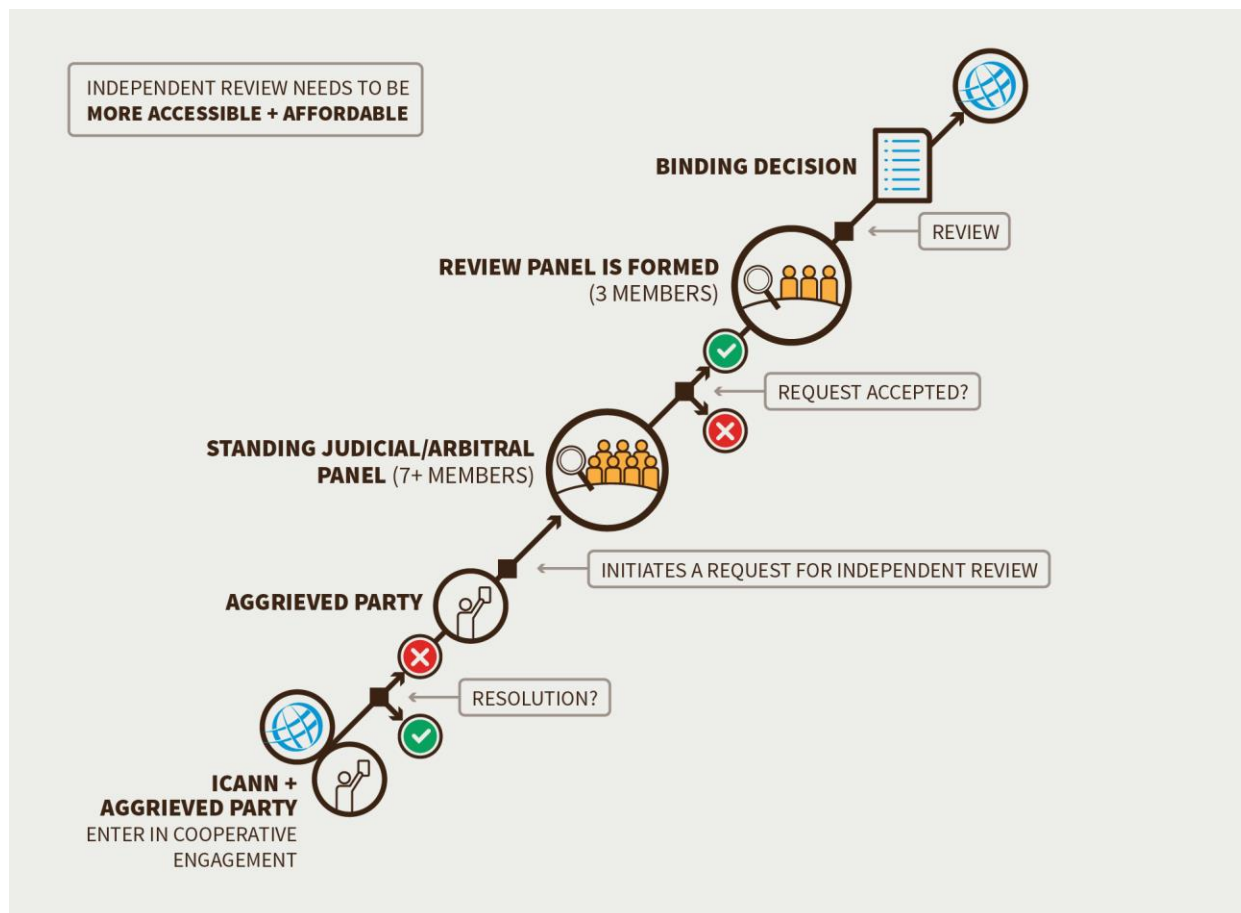
226 The CCWG-Accountability recommends that the existing Independent Review Process be modified to:

227 **Hear, resolve and reconcile the following:**

- 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)

- Reconcile conflicting decisions of process-specific "expert panels";

- Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds); and

- Hear and resolve claims that ICANN has not met the requirements of the Documentary Information Disclosure Policy

SELECTION
- COMMUNITY IDENTIFIES AND PROPOSES CANDIDATES
- BOARD TO CONFIRM

EXPERTISE
- LEGAL EXPERTISE
- ICANN + DNS EXPERTISE
- ACCESS TO OTHER EXPERTS

DIVERSITY EFFORTS
- INCL. NO MORE THAN 2 PER ICANN REGION

IRP STANDING PANEL (7 MIN.)

DISPUTE A

REVIEW PANEL (3)

DISPUTE B

REVIEW PANEL (3)

SELECTION
- FROM STANDING PANEL
- EACH PARTY CHOOSES 1 PANEL MEMBER
- THIRD CHOSEN BY OTHER 2 MEMBERS

EXPERTISE
- RELEVANT TO DISPUTE
- ACCESS TO OTHER EXPERTS

DECISIONS
- BINDING ON ICANN

228 **Have a standing judicial/arbitral panel:** Tasked with reviewing and adjudicating complaints lodged 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.

229 **Composition of Panel and Expertise:** Minimum of 7 panelists 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). 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.

230 **Standard of Review:** 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 or inaction 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

231 **Be more accessible:** 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. The CCWG-Accountability requires also giving the Empowered Community the right to have standing with the IRP

232 **Be more affordable:** The CCWG-Accountability recommends that ICANN would bear all the administrative the 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. Details of IRP procedure rules will be identified by a subgroup of the Cross-Community Working Group. Legal costs for a community Independent Review Process would be paid for by ICANN

233 **Result in a binding decision 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, the Independent Review Process decisions would be binding on ICANN. The powers of the Independent Review Process are strictly limited to confirming or rejecting ICANN's decisions; it has no mandate to enforce specific outcomes of these decisions.

It is important to note that the ccTLD Delegations and Redelegations as well as Numbering resources are excluded from the IRP at their respective SO's request. The ccNSO will be undertaking work to consider how an appeal mechanism could apply to the Delegation and Redelegation of ccTLDs.

> As requested by the CWG-Stewardship, the Empowered Community can use the Independent Review Process to challenge a decision by the Board not to implement a recommendation of the IANA Function Review team.

234 The CCWG-Accountability's enhancements to the Independent Review Process ensure that the Independent Review Process will not be empowered to circumvent the bottom-up, multistakeholder-driven nature of ICANN's processes.

## 235 Detailed Recommendations

The CCWG-Accountability recommends:

- Modifying the Fundamental Bylaws to implement the following modification to the IRP process:
    - Including a standing judicial/arbitral panel
    - Putting together a Panel composed of experts in various fields
    - Applying a Standard of Review
    - Making the Independent Review Panel more accessible
    - Making the Independent Review Panel more affordable
    - Ensuring that the process Results in a binding decision
    - Ensuring that the process does not circumvent the bottom-up, multistakeholder-driven nature of ICANN's processes

236 Relevant Annexes

237 **Annex 07** – Details on Recommendation #7: Strengthening ICANN's Independent Review Process

Recommendation #8: Improving ICANN's Request for Reconsideration Process
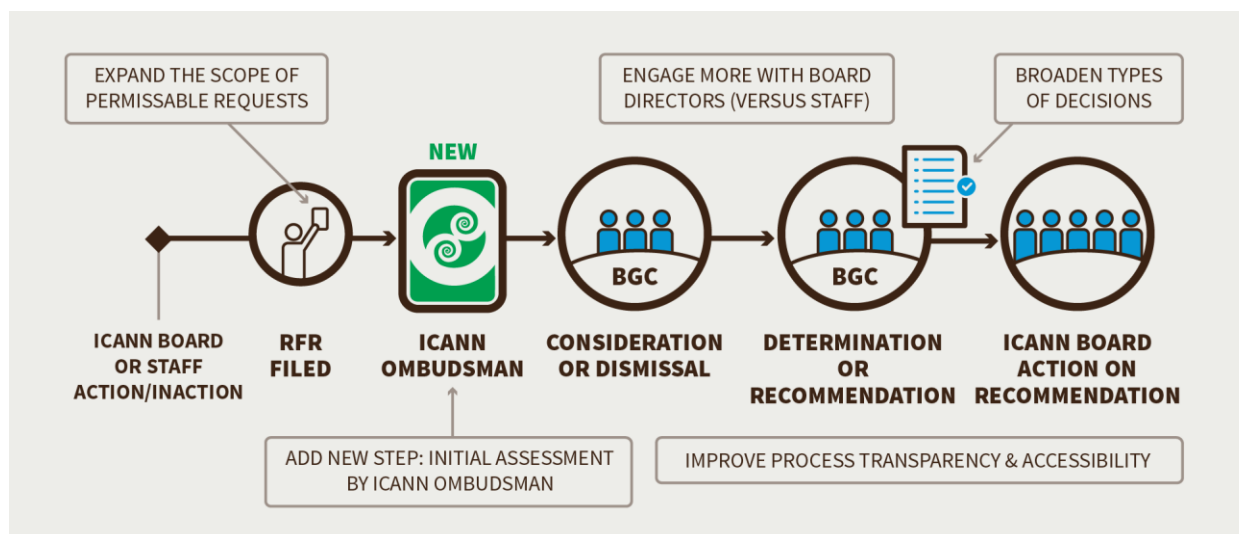
238 ICANN's current [Request for Reconsideration](#) process is a prominent feature of its appeals mechanisms. The RFR is an internal process to ICANN overseen by the Board Governance Committee where decisions by the Board that affect a party can be appealed. If the request is found to have merit, the Board Governance Committee could recommend that the Board review its decision.

239 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action / inaction by ICANN's Board or staff, including:

- Expanding the scope of permissible requests

- Extending the time period for filing a Request for Reconsideration from 15 - 30 Days

- The grounds for summary dismissal have been narrowed

- The ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues)

- ICANN's Ombudsman should make the initial substantive evaluation of the requests

240 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations are also proposed, including:

- Recordings/transcripts of board discussion should be posted

- Provision of a rebuttal opportunity to the Board Governance Committee's final recommendation

- Hard deadlines should be added to the process, including an affirmative goal that final determinations of the Board be issued within 60 days from request filing wherever possible, and in no case more than 120 days from the date of the request.

241 ICANN's Document and Information Disclosure Policy will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

242 **Detailed Recommendations**

243 The CCWG-Accountability recommends:

- Modifying Article IV, Section 2 of ICANN's Bylaws to reflect the following changes:
  - Expanding the scope of permissible requests
  - Extending the time period for filing a Request for Reconsideration from 15 days to 30 days
  - The grounds for summary dismissal have been narrowed
  - The ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues)
  - ICANN's Ombudsman should make the initial substantive evaluation of the requests
  - Recordings/transcripts of board discussion should be posted
  - Provision of a rebuttal opportunity to the BGC's final recommendation
  - Hard deadlines should be added to the process, including an affirmative goal that final determinations of the Board are issued within 60 days from request filing wherever possible, and in no case more than 120 days from the date of the request.

244 **Relevant Annexes**

245 **Annex 08** – Details on Recommendation #8: Improving ICANN's Request for Reconsideration Process

Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws

246 Based on stress test analysis, specifically Stress Test #14, 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.

247 Specifically, the CCWG-Accountability proposes to:

1. Add the relevant ICANN commitments from the Affirmation of Commitments to ICANN Bylaws.

2. 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

248 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.

249 Detailed Recommendations

250 The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments (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:

251 **Preserve in ICANN Bylaws any relevant ICANN commitments from the AOC.** [7]

- This includes Sections 3, 4, 7 and 8 of the Affirmation of Commitments. 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 Affirmation of Commitments 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.

252 **Bring the four Affirmation of Commitments 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

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[7] Sections 3, 4, 7 and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments 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.

- 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

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

- ICANN and the NTIA should mutually agree to terminate the Affirmation of Commitments.

- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments Reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments 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.

254 **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.

255 ## Relevant Annexes

256 **Annex 09** – Details on Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws

Recommendation #10: Enhancing the accountability of Supporting Organizations and Advisory Committees

257 ICANN Supporting Organizations and Advisory Committees constitute a key component of the ICANN ecosystem. The CCWG-Accountability recommends that a review of Supporting Organizations' and Advisory Committees' accountability mechanisms be included as part of these entities' existing periodic Structural Reviews (see article IV, section IV of ICANN's Bylaws).

258 Structural Reviews are intended to review the performance and operation of ICANN Supporting Organizations and Advisory Committees. The CCWG-Accountability expects that consideration of accountability issues will be added to Structural Reviews as part of Work Stream 1.

259 Concerns

260 During the Public Comment Period on the 'CCWG-Accountability Second Draft Proposal regarding Work Stream 1 Recommendations', the community presented several concerns and suggestions on how the accountability of the Supporting Organizations and Advisory Committees could be enhanced. As the focus of Work Stream 1 recommendations is to ensure that the accountability enhancements necessary for the IANA Stewardship Transition to occur are in place, the CCWG-Accountability will discuss other aspects of this topic as part of Work Stream 2.

261 Detailed Recommendations

262 Having reviewed and inventoried the existing mechanisms related to Supporting Organization and Advisory Committee accountability, it is clear that current provisions need to be enhanced in light of the new responsibilities associated with the Work Steam 1 proposals.

263 The CCWG-Accountability recommends:

264 **In Work Stream 1, include the review of Supporting Organization and Advisory Committee accountability mechanisms into the independent periodical structural reviews performed on a regular basis.**

- These reviews should include consideration of 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.

265 **In Work Stream 2, include the subject of Supporting Organization and Advisory Committee accountability as part of the Accountability and Transparency Review Process**

- Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and if viable, and undertake the necessary actions to implement it.

- Develop a detailed working plan on enhancing Supporting Organization and Advisory Committee accountability.

- Assess whether the Independent Review process would also be applicable to Supporting Organization and Advisory Committee activities.

266 Relevant Annexes

267 **Annex 10** – Details on Recommendation #10: Enhancing the accountability of Supporting Organizations and Advisory Committees

Recommendation #11: Enshrine the Governmental Advisory Committee's commitment to consensus (Stress Test 18)

268 Currently GAC advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:

> *j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

269 Stress test 18 considers a scenario where ICANN's Government Advisory Committee (GAC) would amend their operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that ICANN's board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters. In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community, some stakeholders believe that this could increase government influence over ICANN.

270 In order to mitigate these concerns the CWG-Accountability is recommending changes be made to the ICANN Bylaws relating to the GAC as described in the following Detailed Recommendations.

271 Detailed Recommendations

272 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2:

> j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice.   Any GAC advice approved by a full GAC consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of two-thirds (2/3) of the Board, and the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

> The GAC has the autonomy to refine its Operating Procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.

Notes:

- Insert the mention: "the Advisory Committee will make every effort to ensure that the advice provided is clear and supported by a rationale".

- The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental/Standard Bylaws)

273 **Relevant Annexes**

274 **Annex 11** – Details on Recommendation #11: The advice of the Governmental Advisory Committee on public policy matters (Stress Test 18)

Recommendation #12: Committing to further accountability work in Work Stream 2

275 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

276 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms and processes and to refine the operational details associated with some of its recommendations for Work Stream 1.

277 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming ICANN 55 Meeting in March 2016. It is intended that Work Stream 2 will be completed by the end of 2016.
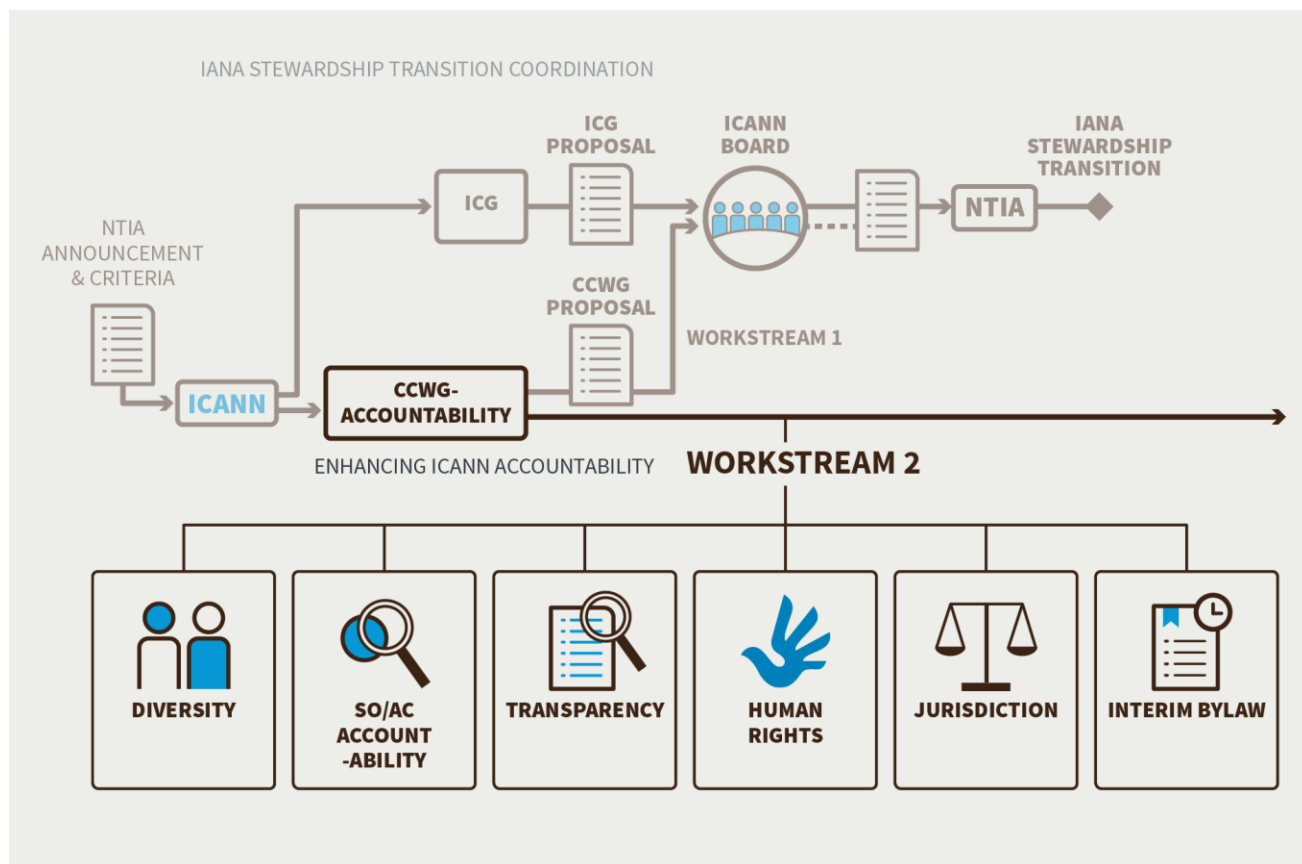
278 The community raised concerns that, post-Transition, there may be a lack of incentive for ICANN to implement the proposals arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopts an interim Bylaw that would commit ICANN to implementing the CCWG-Accountability Work Stream 2 recommendations. In a letter dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

279 ## Detailed Recommendations

280 The CCWG-Accountability recommends that the Board adopt an interim Bylaw that would commit ICANN to implementing the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to, the Work Stream 2 list of issues:

- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure policies
  - Transparency of ICANN's interactions with governments
  - Improvements to the existing Whistleblower policy
  - Access rights to ICANN documents
- Considering improvements to ICANN's standards for diversity at all levels

- Addressing jurisdiction related questions, namely: Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements

- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw

- Considering enhancements to Ombudsman's role and function.

281 **Relevant Annexes**

282 **Annex 11** – Details on Recommendation #11: Committing to further accountability work in Work Stream 2

Conclusion

283   The CCWG-Accountability believes that the set of accountability mechanisms it has proposed, outlined above, empowers the community through the use of the bottom-up, multistakeholder model by relying on each of the stakeholders within ICANN's existing and tested community structures. Furthermore, the CCWG-Accountability believes that this community-driven model is appropriate for replacing the accountability inherent in ICANN's historical relationship with the U.S. Government.

Community Powers are an effective replacement of the safety net provided by the U.S Government's current IANA stewardship role

284   The CCWG-Accountability believes that the five Community Powers, as a package, can effectively replace the safety net that the U.S. Government has provided to date as part of its oversight role. It is recommended that these powers need to be enforced by a court of law only as a last resort. The CCWG-Accountability has based its recommendations on existing structures and recommends:

- ⊙ Considering the entire community as ICANN's Empowered Community

- ⊙ Ensuring no part of the community has more rights than another part, either by having the ability to push through its individual interests or by blocking community consensus. The CCWG-Accountability has ensured that no Community Powers or statutory rights can be exercised singlehandedly

- ⊙ Ensuring the community can only jointly exercise its powers using a consensus-based model

The CCWG-Accountability believes that the recommended accountability frameworks provided in this proposal meet the requirements of the Domain Names Community and the IANA Stewardship Transition proposal

285   The CCWG-Accountability will seek confirmation from the Cross Community group that developed the IANA Stewardship Transition that this proposal meets its requirements.

286   The CCWG-Accountability believes that its proposal also meets the requirements the NTIA published for the transition and will present its analysis of this in the full proposal

List of Appendices

- **Annex 1 -** Recommendation #1: Establishing an Empowered Community for enforcing Community Powers

- **Annex 2 -** Recommendation #2: Empowering the community through consensus: engage, escalate, enforce

- **Annex 3 -** Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

- **Annex 4 -** Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers

- **Annex 5 -** Recommendation #5: Changing aspects of ICANN's Mission, Commitments and Core Values

- **Annex 6 -** Recommendation #6: Reaffirming ICANN's commitment to respect internationally recognized Human Rights as it carries out its mission

- **Annex 7 -** Recommendation #7: Strengthening ICANN's Independent Review Process

- **Annex 8 -** Recommendation #8: Improving ICANN's Request for Reconsideration Process

- **Annex 9 -** Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN's Bylaws

- **Annex 10 -** Recommendation #10: Enhancing the accountability of Supporting Organizations and Advisory Committees

- **Annex 11 -** Recommendation #11: Enshrine the Governmental Advisory Committee's commitment to consensus (Stress Test 18)

- **Annex 12 -** Recommendation #12: Committing to further accountability work in Work Stream 2

- **Appendix A -** Documenting consensus

- **Appendix B -** Charter

- **Appendix C -** Background and methodology

- **Appendix D -** Engagement and participation summaries

- **Appendix E -** Initial Work to determine Focus of the Work Stream 1 Proposal

- **Appendix F -** Legal Counsel

- **Appendix G -** Legal documents

- **Appendix H -** Bylaws draft process and implementation timeline

- **Appendix I -** Affirmation of Commitments

- **Appendix J -** Glossary