

## Comment on the CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations

On November 30, 2015 the Cross-Community Working Group on Accountability (CCWG-Accountability) published its Draft Proposal on Work Stream 1 Recommendations (Draft Proposal) for public comment.<sup>1</sup> The Draft Proposal is the third report submitted by the CCWG-Accountability for public comment. This comment reflects the positive and negative observations of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (Heritage) to the Draft Proposal. Heritage is a research and educational institution – a “think tank” – focused on U.S. domestic and international public policy and is a member of the Non-Commercial Users Constituency of the Generic Names Supporting Organization.

### Process Issues

To begin with, we believe that the entire process by which the Draft Proposal was created calls into question the validity of the work product and its utility and representativeness. The consideration of new accountability measures has been characterized by a rush to resolution under what appear to be self-imposed deadlines based on perceived political conditions. As NTIA has emphasized over and over again, the U.S. government “has not set any deadline for the transition.”<sup>2</sup> We strongly believe that it is better to get this process done right, that it is to get it done on time.

Indeed, this third CCWG-Accountability report to the community represents a complete revision of the proposed oversight mechanism of ICANN – yet this novel approach has not been fully vetted by the community and is now being subject to an truncated 21-day comment period, with the CCWG-Accountability Co-Chairs urging all commentators to preferentially submit their comments through their supporting organizations and advisory committees (SOs and ACs).

We reject that limitation. This novel proposal still has many open questions that require answers. Indeed, even as we write this comment a vibrant debate continues to occur on the CCWG-Accountability discussion list over exactly how, if at all, the proposed revised Mission Statement will effect existing contractual obligations. This week, it was suggested that this legal question be certified to outside lawyers for answers even though that fundamental question must be answered before the transition moves forward. The Board also submitted detailed comments this week (discussed further below) on the Draft Proposal that, if accepted by the community, would reflect a further fundamental transformation of the accountability proposals.<sup>3</sup>

We recognize that uncertainty about certain specifics in the Draft Proposal during the public comment period may aid in moving the process forward in order to meet a predetermined timeline. But that ambiguity is a critical failure that raises questions about the legitimacy of the CCWG-Accountability process. Moreover, the specific language of new and amended bylaws to implement outlined reforms of ICANN remains at the conceptual stage and has yet to be drafted by CCWG-Accountability legal advisors. Asking the community to give its final support or opposition to an incomplete product is unacceptable.

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<sup>1</sup> ICANN, “CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations,” November 30, 2015, <https://www.icann.org/en/system/files/files/draft-ccwg-accountability-proposal-work-stream-1-recs-30nov15-en.pdf>.

<sup>2</sup> Testimony of Assistant Secretary Strickling before the Senate Committee on Commerce, Science, and Transportation on “Preserving the Multistakeholder Model of Internet Governance,” February 25, 2015, <https://www.ntia.doc.gov/speechtestimony/2015/testimony-assistant-secretary-strickling-senate-committee-commerce-science-and->

<sup>3</sup> ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” December 14, 2015, <http://forum.icann.org/lists/comments-draft-ccwg-accountability-proposal-30nov15/pdfqWpXzRecih.pdf>.

According to the chairs of the CCWG-Accountability, “The CCWG-Accountability considers this Draft Proposal to be the Final proposal unless significant concerns are raised by Chartering Organizations. As the case may be, the CCWG-Accountability might then amend the proposal to address these and post a supplementary report for approval by the Chartering Organizations.”<sup>4</sup> Thus, even though there may be a number of significant objections and concerns raised by individuals, civil society, and businesses during this public comment, there are no plans for another draft to be opened for public comment.

We urge individual members of the ICANN community along with the SOs and ACs to demand that this document be treated as an provisional draft until all outstanding issues are settled, including specific language for bylaw revisions, and instruct the CCWG-Accountability to provide a final draft for public comment that incorporates comments on the Draft Proposal from the ICANN community, the chartering organizations, and the Board of Directors. In our judgment, these process flaws are so significant that the community should insist that final approval of the transition be deferred to ICANN 56. More to the point, if unremedied, these process flaws alone are sufficient for us to urge rejection of the transition, notwithstanding our substantive views on the merits of the transition proposal.

### **Substantive Issues – General**

With regard to the substance of the Draft Proposal we begin by expressing an overarching concern with was the significant shift away from the “Sole Member” model to the “Sole Designator” model.

We strongly prefer an ICANN governance model based on membership, which was the basis for CCWG-Accountability’s Second Draft Proposal. Under California law, membership would legally grant powers sought by the community as necessary for holding ICANN accountable after the historical contractual relationship with the U.S. government expires. These legal powers would make accountability and enforcement direct and independent of the bylaws.

By contrast, under the designator model, the community would have only one statutory power – its ability to replace individual directors or the entire Board. Enforcement of other powers is indirect and reliant on the threat of removing directors or on mechanisms and measures incorporated into the bylaws, which could be amended, weakened, or eliminated.

That said, the Draft Proposal is greatly improved from earlier drafts in clarity, specificity, and accountability measures. In particular, we note positively the incorporation of the right of inspection for the designator, generally referred to in the draft as the “Empowered Community”, into the bylaws along with the powers to oppose the annual operating plan and budgets and the five year strategic plan and five year operating plan. The right of inspection is a critical patch to address the differences in legal authority created by the shift from a membership model to a designator model. This issue is vitally important and we strongly support its inclusion in the Draft Proposal.

The Independent Review Process (IRP) is more developed and detailed, which is a significant improvement. We note that resolution of claims that ICANN has not met the requirements of the Documentary Information Disclosure Policy (DIDP) is to be included among the scope of issues subject to the IRP process. We are concerned that resolving these DIDP claims through the IRP could be interpreted as restricting such appeals uniquely to the Empowered Community. Appeal of DIDP decisions should be open and available to individuals, groups, businesses, and individual SOs and ACs, especially those who made the original DIDP request. DIDP appeals should not be subject to the engagement,

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<sup>4</sup> CCWG-ACCT Co-Chairs letter: Accountability Draft Report, December 9, 2015, <https://community.icann.org/pages/viewpage.action?pageId=56986053>.

escalation and enforcement staircase nor should they require support from the Empowered Community at any threshold.

We also endorse the specific inclusion of a review of DIDP policies as a work stream 2 objective, but note with concern the absence of a specific requirement to implement public disclosure of ICANN interactions with government officials on public policy related issues. This was agreed in the CCWG-Accountability to be a specific objective in work stream 2 and must be corrected.

We appreciate the specificity and detail spelled out in most of the engage, escalate and enforce process. However, we are concerned about lack of clarity on what exactly are the Board's obligations on community engagement and the very tight time frame for specific steps within the process. Specifically, we question whether one or two weeks is sufficient for communicating concerns to the community (many of whom perform their duties in their spare time) and coalescing support for action. We strongly recommend expanding the time periods for each of the escalation steps.

### **Board Comments**

Members of the Board, in their individual capacity, and the Board, in its corporate capacity, profess continued support for the transition and admiration for the work done by the CCWG-Accountability. While professing such admiration, however, the Board has identified several "fundamental" concerns that it views as "not in the global public interest."<sup>5</sup> In its comments to the community on the Draft Proposal the Board has suggested that these provisions be modified.

As an initial matter, the community should challenge the Board's self-appointed authority to define the "global public interest." There is no existing definition of "global public interest" (as the Board acknowledges) so the assertion of a superior understanding is little more than a self-serving opinion that the 16 members of the Board are wiser than the community and thereby qualified to substitute their judgment for that of the CCWG-Accountability and the broader ICANN community. This assertion is highly dubious. The community, acting through the CCWG-Accountability, is at least as capable (arguably more capable given its broader participation and representation of the ICANN community) of discerning the true global public interest than the Board. In fact, the unjustified assertion by the Board of its "global public interest" judgment is a use-case example for why greater accountability is required.

The community should recognize the Board's intervention precisely for what it is – a last minute attempt to retain power and veto true accountability. More to the point, the community should recognize that the Board's threat to delay or frustrate the transition based on an asserted global public interest is in violation of its explicit promise not to intervene in this manner. ICANN has committed to presenting a proposal to the NTIA even if it lessens the Board's power or authority.<sup>6</sup> The ICANN community should hold the Board to that commitment and reject the Board's last-minute efforts to weaken oversight of its functions and activities. On this issue, the community should understand that its views ought to prevail over those of the Board, which has an inherent conflict of interest on matters that could impinge on its power or freedom of action.

On the merits, several of the Board's proposals and concerns should be rejected. We note in particular the following:

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<sup>5</sup>ICANN Board of Directors, "ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations."

<sup>6</sup>ICANN CEO Fadi Chehade promised the Senate that "if the stakeholders present [ICANN] with [such] a proposal [w]e will give it to NTIA, and we committed already that we will not change the proposal." U.S. Senate Committee on Commerce, Science and Transportation, "Hearing on Preserving the Multistakeholder Model of Internet Governance," February 25, 2015, <http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance>.

- We strongly oppose the Board’s suggestion that the right of inspection should be exercised only if supported by at least three decisional participants (SOs and ACs) in the Empowered Community and the Board’s effort to narrow that right only to “accounting records and minutes of meetings that are related to the exercise of the Community Powers.”<sup>7</sup> The idea that ICANN records, Board minutes, and other materials should not be readily available to ICANN chartering organizations is a perfect example of how the Board seeks to insulate its conduct from scrutiny. The right of inspection is a critical patch to address the differences in legal authority created by the shift from a membership model to a designator model. In fact, we strongly urge the community to clarify that the right of inspection applies to all SOs and ACs. This issue is vitally important and under no circumstances should the community agree to restrictions that would result in inspection rights less robust than those enjoyed by a member under California law. Transparency is the critical ground of accountability and the Board’s efforts to avoid oversight should be rejected.
- We also strongly oppose the Board’s suggested changes to the Mission statement. In our view, those changes would eliminate carefully constructed constraints on ICANN’s scope and power to regulate outside of its narrow technical Mission and, worryingly, would strike the clear instruction to develop policies through a bottom-up, consensus-based multi-stakeholder process. Taken together, the Board’s suggested loosening of the Mission Statement language and its proposed elimination of the multi-stakeholder process language are consonant with its effort to increase the Board’s discretion at the expense of community accountability and a narrow technical focus for ICANN. Notwithstanding the Board’s assertions, these changes are antithetical to “global public interest.”
- We oppose the Board’s suggestion to add percentage thresholds of support necessary for exercising the powers of the Empowered Community.<sup>8</sup> Considering that the current numerical thresholds were established when the CCWG-Accountability assumed that there would be seven decisional participants in the Empowered Community, this seems unnecessary unless the Board envisions a significant expansion in the number of decisional participants. However, the proposed threshold of 80 percent would, if there were only 4 decisional participants in the Empowered Community, result in creating a *de facto* unanimous requirement for exercising the powers to reject a proposed Operating Plan/Strategic Plan/Budget, approve changes to Fundamental Bylaws and Articles of Incorporation, recall the entire Board of Directors, and reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.
- We also oppose the Board’s suggested changes to the process for removing Board members. These changes seem to be intended solely to make the process more burdensome and provide avenues for potential legal challenge. In addition, the requirement for considering independence as part of the appointment of interim Board members and replacement Board members seems intended to undermine or dissuade community efforts from appointing Board members who would represent their concerns. This is a curious recommendation since a key factor in recalling the entire Board would have to be a strongly and broadly held perception that the Board was not

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<sup>7</sup>ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” p. 3.

<sup>8</sup>ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” p. 6-7.

responding to community concerns --- otherwise the Empowered Community would not have taken actions to replace it.<sup>9</sup>

- The Board’s attempt to narrow the scope of work stream 2 and weaken requirements that it implement all work stream 2 recommendations should rekindle concerns voiced in the CCWG-Accountability that any issues or reforms relegated to work stream 2 will not be implemented. Those concerns were the reason that this recommendation was included in the Draft Proposal and the Board’s comments only underscore the need for this explicit requirement.<sup>10</sup>

In addition, we were surprised to see that the Board expressed support for recommendation 11,<sup>11</sup> which would increase the threshold for Board rejection of Government Advisory Committee advice from a simple majority to a 2/3 majority considering that ICANN CEO Fadi Chehade testified to the U.S. Senate that the Board opposed such a change.<sup>12</sup>

### **Role of the GAC**

Finally, a concern that we have held since the National Telecommunications and Information Administration (NTIA) first announced its intent to end America’s historical contractual arrangement with ICANN is the issue of the role of governments in any revised ICANN governance structure. Resolving that issue is critical to fulfillment of the NTIA’s requirement that the transition proposal not “replace[] the NTIA role with a government-led or intergovernmental organization solution.”<sup>13</sup>

In our judgement the Draft Proposal does not go far enough in ensuring that governments do not enhance their authority within ICANN as compared to the status quo.

Annex 11 paragraph 1 of the Draft Proposal recommends amending Article XI, Section 2 (j) of the ICANN bylaws to state:

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 Governmental Advisory Committee advice approved by a full Governmental Advisory Committee 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 of the Board, and the Governmental Advisory Committee and the ICANN

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<sup>9</sup>ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” pp. 12-13.

<sup>10</sup>ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” p. 26-27.

<sup>11</sup>ICANN Board of Directors, “ICANN Board Comments on Third CCWG---Accountability Draft Proposal on Work Stream 1 Recommendations,” p. 25.

<sup>12</sup>U.S. Senate Committee on Commerce, Science and Transportation, “Hearing on Preserving the Multistakeholder Model of Internet Governance,” February 25, 2015, <http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance>.

<sup>13</sup>National Telecommunications and Information Administration, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” March 14, 2014, <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.<sup>14</sup>

We welcome and support as a significant improvement over the second CCWG-Accountability draft the changes to limit special consideration of GAC advice by the Board to consensus advice *and* defining that advice as general agreement without formal objection.

While we understand that the 2/3 majority of the Board threshold to reject consensus GAC advice was agreed to by the Stress Test 18 working group after lengthy and difficult negotiations, we are concerned that the inclusion of that change in the Draft Proposal would be an affront to the U.S. Congress, which was assured by ICANN CEO Fadi Chehade at a February 2015 Senate hearing that requiring a 2/3 Board majority to reject GAC advice was “off the table.”<sup>15</sup> We believe that this change needs to be reversed to honor commitments made to Congress by Mr. Chehade on a matter that that has drawn close attention by that body.

Moreover, there are several additional areas of remaining concern must be addressed:

- As currently drafted, the Board must accept GAC consensus advice unless 2/3rds of the Board opposes that advice. Even then, the Board must try in good faith to find a compromise solution. This potentially could include GAC advice that goes beyond or is contrary to ICANN’s scope and mission. The bylaw should clarify that Board approved GAC advice, even if adopted by consensus, is subject to IRP appeal.
- Paragraph 28 of Annex 11 states that the “Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.” It should be made clear that GAC “advice” for Board purposes is defined as consensus advice, i.e. broad support without formal objection. Any views, communiques, or decisions of the GAC lacking this level of support should require only Board consideration. In other words, it should be made explicit that non-consensus GAC communications are not considered “advice” by the Board and do not in any way require a formal Board vote or trigger the obligation to “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”

In addition, following the suggested bylaw text in Annex 11 is paragraph 2 which states:

The Governmental Advisory Committee 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 Governmental Advisory Committee seeks to receive special consideration, the Governmental Advisory Committee has the obligation to confirm the lack of any formal objection.

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<sup>14</sup> ICANN, “CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations: Annex 11 – Recommendation #11: Board Obligations with Regards to Governmental Advisory Committee Advice (Stress Test 18),” November 30, 2015, <https://www.icann.org/en/system/files/files/draft-ccwg-accountability-proposal-annex-11-01dec15-en.pdf>.

<sup>15</sup> Senator Fischer asked Mr. Chehade directly about a proposal to require a 2/3 vote to reject GAC advice. Mr. Chehade responded, that such a requirement “would be incongruent with the stated goals. The board has looked at that matter and has pushed it back, so it’s off the table.” Senator Fischer followed up and asked, “It’s off the table?” Mr. Chehade affirmed, “It’s off the table.” U.S. Senate Committee on Commerce, Science and Transportation, “Hearing on Preserving the Multistakeholder Model of Internet Governance,” February 25, 2015, exchange beginning at the 1:12:23 mark of the video record, <http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance>.



It is unclear if this paragraph is intended solely to help clarify the intent of the amended bylaw in the Draft Proposal or if it would be included in the bylaws. If the later, we strongly object to the inclusion to the example in parentheses as it implies, seemingly in approving terms, a roadmap for evading the bylaw language restricting the Board's special treatment of consensus GAC advice. Specifically, the GAC is obligated to "to confirm the lack of any formal objection." But it also states that the GAC could disallow "a single country to continue an objection on the same issue if no other countries will join in an objection." It is appropriate for the GAC to define consensus for its internal processes, but when communicating advice to the Board, the GAC should not be able to assert that consensus has been achieved when it has not. Even if only one country objects to GAC advice sent to the Board, the GAC must make the fact of that objection clear to the Board when communicating that advice.

To address our concerns, we recommend the following amended text:

The **advice views** 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 Governmental Advisory Committee advice approved by a full Governmental Advisory Committee 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 **majority** vote of ~~two-thirds~~ of the Board. ***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,*** 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. ***As with all Board decisions, those based on Governmental Advisory Committee consensus advice shall be subject to appeal through the Independent Review Process.***

If paragraph 2 in Annex 11 is to be included in the bylaws, we recommend the following edited version:

The Governmental Advisory Committee 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~~). ~~W~~ ***However,*** when transmitting consensus advice to the Board for which the Governmental Advisory Committee seeks to receive special consideration, the Governmental Advisory Committee has the obligation to confirm the lack of any formal objection.

It is important to note, however, that these changes would be insufficient in that they would not preclude GAC participation in the Empowered Community. Such participation would represent an expansion of GAC authority in ICANN by granting it powers that it does not currently possess.

Combined with the preservation of the GAC's current privileged status as an advisory committee that can oblige the Board to "try, in good faith" to find a mutually acceptable solution in the case of disagreement about GAC advice, the Draft Proposal would represent a clear increase in government influence in ICANN for several reasons:

- ICANN cannot be viewed in isolation. The power of governments means that they can put pressure on individuals, businesses, registrars and registries, ICANN, the Board, and the SOs and ACs that is not reciprocal. As U.S. Secretary of Commerce Penny Pritzker warned at ICANN 51,

We all know that multistakeholder governance, and institutions like ICANN, are under intense and unprecedented pressure and scrutiny. Yet we are confident that the multistakeholder model offers the greatest assurance that the Internet will continue to thrive. And we must work together to ensure that the Internet remains an engine for economic growth, innovation, and free expression. We must continue to work hard to sustain multistakeholder governance, because it has enemies who want to reduce Internet governance to a meeting of governmental technocrats promoting narrow national interests.<sup>16</sup>

If NTIA's principle of not replacing the current U.S. role with a government-led solution is to be meaningful, the ICANN community must be insulated from government influence to the extent possible. The community cannot be shielded from government influence outside of ICANN, so it must be extensively protected within ICANN. Allowing GAC to participate in the empowered community in anything other than an advisory role is contrary to this goal.

- If the GAC provides consensus advice to the Board that is opposed by other SOs and ACs and that advice is adopted by the Board, the Empowered Community would be able to block that advice only by utilizing its powers. GAC participation in the Empowered Community as a decisional participant would make meeting the threshold for exercising those powers much more challenging, particularly those powers that require support from four of the five participating SOs and ACs.<sup>17</sup>
- Although it could amend its operating principles to circumvent the consensus requirement for the purposes of exercising its decisional power in the Empowered Community, the GAC could end up abstaining or being unable to reach agreement on most issues raised in the Empowered Community. This could mitigate the above concern, but it also raises a practical complication. There would be technically 5 decisional participants, but the Empowered Community could be actually dealing with only 4 potential votes most of the time -- even though exercising the most significant powers require 4 SO/ACs expressing support. In essence, this would establish a *de facto* unanimity standard for exercising those powers, which the community has previously stated that it would like to avoid. The lack of clarity in paragraph 60 of the Draft Proposal, which apparently seeks to address this complication, needs to be rectified.

We understand, and appreciate, that the members of the GAC have yet to determine a unified position on the question of their participation in the Enhanced Community. However, in our view, the Draft Proposal sets the stage for enhanced government influence and authority within the post-transition ICANN.

The failure to forestall this possibility could threaten the transition. A 2014 letter from Senator John Thune and Senator Marco Rubio made clear that, from their perspective, government influence should not be expanded in the transition:

First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that “[r]eplacing NTIA’s role with another governmental organization would be disastrous

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<sup>16</sup> U.S. Secretary of Commerce Penny Pritzker Delivers Remarks at the Internet Corporation for Assigned Names and Numbers Meeting in Los Angeles, October 13, 2014, <https://www.commerce.gov/news/secretary-speeches/2014/10/us-secretary-commerce-penny-pritzker-delivers-remarks-internet>.

<sup>17</sup> As detailed in the table on page 22 of the Draft Proposal, paragraphs 89 through 123, those powers include rejecting a proposed Operating Plan/Strategic Plan/Budget, approving changes to Fundamental Bylaws and Articles of Incorporation, recalling the entire Board of Directors, and rejecting ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation.



and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN’s Board, limiting government participation to advisory roles, such as through the Government Advisory Committee (GAC), and amending ICANN’s bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. *The IANA transition should not provide an opportunity for governments to increase their influence.*<sup>18</sup>

Secretary of Commerce Penny Pritzker echoed those sentiments at ICANN 51, stating that the goal of the U.S. was to make ICANN accountable to the “customers of the IANA functions and to the broader Internet community” and that the U.S. would oppose at every turn “proposals to put governments in charge of Internet governance.”<sup>19</sup> Likewise, Senators Thune and Schatz, in a bipartisan letter to the Chair of the ICANN Board, noted, “It is no exaggeration to say that community empowerment over government control is the bedrock for Congressional support of the multistakeholder system of Internet governance.”<sup>20</sup>

We strongly believe that an acceptable proposal that preserves the privileged advisory role of the GAC to the Board must not allow the GAC to be a decisional participant in the Empowered Community. Specifically, the GAC role must be limited to a non-decisional advisory role in the Empowered Community similar to that which has been voluntarily adopted by the Security and Stability Advisory Committee (SSAC) and the Root Server System Advisory Committee (RSSAC).

On this substantive matter, as with our concern about the process that we noted at the outset, our views are that the Draft Proposal is fundamentally flawed. Unless this matter is resolved, we regretfully must oppose this proposal.

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<sup>18</sup> Emphasis added. Letter from Senator John Thune and Senator Marco Rubio to Dr. Stephen Crocker, Chairman ICANN Board of Directors, July 31, 2014, <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf>.

<sup>19</sup> U.S. Secretary of Commerce Penny Pritzker Delivers Remarks at the Internet Corporation for Assigned Names and Numbers Meeting in Los Angeles, October 13, 2014, <https://www.commerce.gov/news/secretary-speeches/2014/10/us-secretary-commerce-penny-pritzker-delivers-remarks-internet>.

<sup>20</sup> Letter from Senator John Thune and Senator Brian Schatz to Dr. Stephen Crocker, Chairman, ICANN Board of Directors, October 15, 2015, <https://www.icann.org/en/system/files/correspondence/thune-schatz-to-crocker-15oct15-en.pdf>.