

ICANN Cross Community Working Group Accountability (CCWG-Accountability)

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

We write in response to your group's recent [publication](#) of your third draft proposal (the "[Third Draft Proposal](#)"). We have prepared this in our capacities as co-chairs of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship). References below are to the main body of the Third Draft Proposal, unless otherwise indicated. We have also indicated below where we previously raised points in [response](#) to your group's [publication](#) of its second draft proposal (the "[Second Draft Proposal](#)").

First, we would once again like to confirm the quality of the ongoing coordination and collaboration between the co-chairs of our respective groups since the CCWG-Accountability commenced its work. Each of our groups has been regularly engaged with and updated on the progress made, including the interdependency and interrelation between our work, and this has led to the regular exchange of key correspondence to develop and formalize the linkage. As CWG-Stewardship co-chairs, we have discussed with the CCWG-Accountability co-chairs on a regular basis key aspects of the work of both groups.

The CWG-Stewardship [final transition proposal](#) submitted for approval to the chartering organizations on 11 June 2015 is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms by the CCWG-Accountability. Specifically, as recognized in the Third Draft Proposal, the CWG-Stewardship final transition proposal sets forth ICANN accountability requirements regarding Community Empowerment Mechanism, IANA Functions Budget, IANA Function Reviews, Separation Process, Appeals Mechanism, and Post-Transition IANA (PTI), as well as Fundamental Bylaws. Therefore, this document is and should be viewed as an element of the agreed-upon working methods of the CWG-Stewardship and the CCWG-Accountability in determining whether the Third Draft Proposal meets the conditions and requirements of the CWG-Stewardship final transition proposal. In that regard, we kindly request confirmation that the CWG-Stewardship comments reflected in this document are addressed in the next version or variation of the CCWG-Accountability proposal in order to ensure that this next version or variation of the proposal addresses all of the CWG-Stewardship dependencies.

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

1. **Community Empowerment Mechanism**

The CWG-Stewardship final transition proposal requires that the multistakeholder community be empowered with the following rights with respect to the ICANN Board, the exercise of which should be ensured by the creation of a stakeholder community/member group:

- (a) The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;
- (b) The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA Functions) by reviewing and approving: (i) ICANN Board decisions with

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

Comment – The Third Draft Proposal contemplates implementing a “Sole Designator” model, pursuant to which the community would be empowered to act as the Sole Designator to: (a) exercise the community powers described in the Third Draft Proposal, including the power to: (i) remove (in addition to appoint) individual ICANN Directors, and (ii) recall the entire ICANN Board, and (b) enforce decisions and powers of the Community Mechanism as the Sole Designator (i.e., the Empowered Community) through initiating a binding Independent Review Panel process, where a panel decision is enforceable in any court recognizing international arbitration results. In addition, the Third Draft Proposal contemplates that the community would be required to follow the engagement and escalation processes described in the proposal before exercising any of the community powers. Finally, with respect to actions involving individual Directors, the escalation process to remove a Director could 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.

Conclusion – *We believe that the community powers and community empowerment mechanism contemplated by the Third Draft Proposal adequately satisfy the CWG-Stewardship requirements relating to the community empowerment mechanism. Although the community powers are in some cases less direct than in the Sole Member model contemplated by the Second Draft Proposal, we believe the CWG-Stewardship requirements can be met through the community powers and community empowerment mechanism contemplated by the Third Draft Proposal.*

The CCWG-Accountability Third Draft Proposal requires that the community “follow the engagement and escalation processes described in the proposal before exercising any of the community powers.” This is a reasonable requirement but it creates a dependency on the usability of the engagement and escalation processes. If the community and in particular the SOs and ACs are unable to reasonably meet the requirements of those processes, then the community powers will lose their value. The very specific time requirements for various SO and AC actions in the escalation processes may be impossible or at best very difficult to meet; if more than one SO/AC cannot act within the tight time limits, the process will be halted.

The CWG-Stewardship recognizes that the escalation processes need to happen in a timely manner but they must also allow sufficient time to accommodate the diverse and complex makeup of SOs and ACs. A key question that should be asked of SOs and ACs is this: what is the minimum time they need to respond to a critical issue that is also very time sensitive? To be more specific, can they respond in 7 days without compromising their bottom-up, multistakeholder model? If they cannot, then the CCWG-Accountability recommended empowerment mechanisms do not meet the CWG-Stewardship requirements. This should not be a hard problem to solve. Time restrictions that are deemed to be too short could be lengthened a little and/or the restrictions could be defined in a more flexible manner to allow for brief extensions when reasonably required.

2. **ICANN Budget and IANA Functions Budget**

The CWG-Stewardship final transition proposal requires that the community have the ability to approve or veto the ICANN Budget after it has been approved by the ICANN Board but before it comes into effect. The community may reject the ICANN Budget based on perceived inconsistency with the purpose, mission and role set forth in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community.

In the final transition proposal, the CWG-Stewardship also recommends that the IANA Functions Operator's comprehensive costs should be transparent and ICANN's operating plans and budget should include itemization of all IANA operations costs to the project level and below as needed. Under the final transition proposal, an itemization of IANA costs would include: direct costs for the operation of the IANA Functions, direct costs for shared resources and support functions allocation. Furthermore, these costs should be itemized into more specific costs related to each specific function to the project level and below as needed. PTI should also have a yearly budget that is reviewed and approved by the ICANN community on an annual basis. PTI should submit a budget to ICANN at least nine months in advance of the fiscal year to ensure the stability of the IANA services. It is the view of the CWG-Stewardship that the IANA Functions Budget should be approved by the ICANN Board in a much earlier timeframe than the overall ICANN Budget. The CWG-Stewardship (or a successor implementation group) will need to develop a proposed process for an IANA Functions Operations-specific budget review, which may become a component of the overall budget review. It is anticipated that the IANA Functions Operations Budget review will include a consultation process with relevant and potentially impacted IANA customers.

Comment – The Third Draft Proposal clarifies that the community would have new powers to reject: (a) ICANN's Annual Operating Plan and Budget, (b) the IANA Functions Operations Budget, (c) ICANN's Five-Year Strategic Plan and (d) ICANN's Five-Year Operating Plan, in each case after approval by the ICANN Board but before they take effect. The Third Draft Proposal specifies that these powers can only be exercised after extensive community discussions and through mandatory escalation processes.

The Third Draft Proposal contemplates that prior to the ICANN Board approving a budget or strategic/operating plan, the ICANN Board must have undertaken a mandatory engagement process pursuant to which the ICANN Board consults with the community. The Third Draft Proposal further specifies that the community could only challenge a budget or strategic/operating plan if there are significant issues brought up in the engagement phase that were not addressed prior to approval.

The Third Draft Proposal specifies that the ICANN and IANA Functions Operations Budgets would be considered separately by the community so that a rejection of the ICANN Budget would not automatically result in a rejection of the IANA Functions Operations Budget, and a rejection of the IANA Functions Operations Budget would not serve as a rejection of the ICANN Budget. It also proposes that if the community power is exercised to reject the ICANN Budget or the IANA Functions Operations

Budget, a caretaker budget would be enacted. The Third Draft Proposal notes that details regarding the caretaker budget are currently under development.

As we noted in our comment letter on the Second Draft Proposal, the Third Draft Proposal does not provide for “approval” by the community of the ICANN Budget and/or IANA Functions Operations Budget, but rather provides for negative authority in the form of a decision by the community to reject the ICANN Budget and/or IANA Functions Operations Budget. As we also noted in that comment letter, the CWG-Stewardship acknowledges that the community’s ability to reject the ICANN Budget and/or the IANA Functions Operations Budget will meet the CWG-Stewardship requirements and that community approval is not required.

We note that unlike the Second Draft Proposal, the Third Draft Proposal does not specifically address: (i) the CWG-Stewardship’s requirement that the budget be transparent with respect to the IANA Functions’ operating costs or (ii) the specific grounds upon which the community could reject a budget or plan. In addition, as we noted in our comment letter on the Second Draft Proposal, the Third Draft Proposal does not specifically address the timeframe for when budgets should be submitted.

***Conclusion** – Similar to our conclusion in our response on the Second Draft Proposal, overall we believe that the Third Draft Proposal’s specifications with respect to the community power to reject budgets is both necessary and consistent with the requirements of the CWG-Stewardship final transition proposal; however, we require that the CCWG-Accountability proposal or the implementation process address the matters that are not sufficiently specified in the Third Draft Proposal (i.e., those relating to budget transparency, grounds for rejection of a budget/plan, timing of budget preparation and development of the caretaker budget, each of which were described in the Second Draft Proposal). In addition, we note, that the CWG-Stewardship (or a successor implementation group) is required to develop a proposed process for the IANA Functions Operations-specific budget review. We require that the proposal specifically acknowledge this.*

3. **IFR**

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

***Comment** – The Third Draft Proposal contemplates incorporating the review system defined in the Affirmation of Commitments into ICANN’s Bylaws. The Third Draft Proposal specifies that the IFR and Special IFR would be incorporated into the ICANN Bylaws based on the requirements detailed by the CWG-Stewardship, and notes that it is anticipated that the ICANN Bylaw drafting process would include the CWG-Stewardship. The Third Draft Proposal also provides that the community be empowered to reject ICANN Board decisions relating to reviews of IANA names function. Prior to making a decision relating to IFRs, the Third Draft Proposal specifies that the ICANN Board must have undertaken a mandatory engagement*

process pursuant to which the ICANN Board must have consulted with the community.

Conclusion – *We believe that the Third Draft Proposal adequately satisfies the CWG-Stewardship requirement relating to the IFR. The community’s ability to reject ICANN Board decisions on recommendations resulting from an IFR or Special IFR will meet the CWG-Stewardship requirements, provided that the final version of the CCWG-Accountability proposal provide that the right to reject can be exercised an unlimited number of times.*

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

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

Comment – The Third Draft Proposal contemplates that the CSC will be incorporated into the ICANN Bylaws. We expect that provisions incorporating the CSC into the Bylaws would be overseen by the CWG-Stewardship (or a successor implementation group).

Conclusion – *We believe that the Third Draft Proposal adequately satisfies the CWG-Stewardship requirement relating to the CSC, provided that the ICANN Bylaw drafting process will continue to include involvement by the CWG-Stewardship (or a successor implementation group).*

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

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

Comment – The Third Draft Proposal contemplates that governance provisions related to PTI will be incorporated into the ICANN Bylaws as Fundamental Bylaws. We note that the Second Draft Proposal contemplated that specifications with respect to PTI governance provisions would be based on requirements to be detailed by the CWG-Stewardship. While this language was not included in the Third Draft Proposal, we continue to expect that PTI governance provisions would be overseen by the CWG-Stewardship (or a successor implementation group).

Conclusion – *We believe that the Third Draft Proposal adequately satisfies the CWG-Stewardship requirement relating to PTI, provided that the ICANN Bylaw drafting process and related PTI governance documents will continue to include involvement by the CWG-Stewardship (or a successor implementation group).*

6. **Separation Process**

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

Comment – The Third Draft Proposal contemplates that the separation process required by the CWG-Stewardship final transition proposal will be incorporated into the ICANN Bylaws. The Third Draft Proposal describes the CWG-Stewardship requirement of a procedure to implement a separation process should it arise from a Special IFR, including provisions for the creation of an SCWG, its functions and voting thresholds for approving the end-result of the SCWG process.

The Third Draft Proposal specifies that the community be empowered to reject ICANN Board decisions relating to reviews of IANA names function; including the triggering of PTI separation. Prior to making a decision relating to IFRs, including the triggering of PTI separation, the Third Draft Proposal specifies that the ICANN Board must have undertaken a mandatory engagement process pursuant to which the ICANN Board must consult with the community.

Conclusion – *We believe that the Third Draft Proposal adequately satisfies the CWG-Stewardship requirements relating to the separation process. The community’s ability to reject ICANN Board decisions on Special IFR/SCWG recommendations, which would include the selection of a new IANA Functions Operator or any other separation process will meet the CWG-Stewardship requirements, provided that (i) the final version of the CCWG-Accountability proposal provide that the right to reject can be exercised an unlimited number of times, and (ii) the ICANN Bylaw drafting process and related the Separation Process will continue to include involvement by the CWG-Stewardship (or a successor implementation group).*

7. **Appeals Mechanism**

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

Comment – The Third Draft Proposal contemplates significant enhancements of ICANN’s existing appeals mechanisms, including the IRP. It is proposed that the IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA names function (with the exception of ccTLD delegations and redelegations, which appeals mechanisms are to be developed by the

ccTLD community post-transition, in coordination with other parties), and that the Empowered Community can use the IRP to challenge an ICANN Board decision if it believes that the ICANN Board is in breach of its Articles or Bylaws (for example, if the ICANN Board determines not to accept the decision of the Empowered Community to use one of its community powers or if the ICANN Board determines not to implement a recommendation of the IFR team).

The Third Draft Proposal does not explicitly contemplate that the IRP would hear claims relating to actions (or inactions) of PTI. The CWG-Stewardship final transition proposal requires an independent review process for issues relating to the IANA names function. This is intended to be a process that is independent of ICANN and PTI, and that would address actions (or inactions) of PTI.

***Conclusion** – As we noted in our comment letter to the Second Draft Proposal, the Third Draft Proposal does not explicitly address the CWG-Stewardship requirement that an independent review process be available for claims relating to actions or inactions of PTI. This requirement could be addressed in a number of ways. For example, a provision could be added to the ICANN Bylaws that would require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work (SOW), with a failure by ICANN to address a material breach by PTI under the contract being grounds for an IRP process by the Empowered Community (after engagement and escalation). Another approach would be to expand and modify, as appropriate, the IRP process currently contemplated by the Third Draft Proposal to cover claims relating to actions or inactions of PTI, with the ICANN Bylaws and PTI governance documents expressly confirming that the IRP process is binding on PTI (which provisions would be Fundamental Bylaws that could not be amended without community approval). Regardless of approach, the CWG-Stewardship requires that this dependency be addressed in the final CCWG-Accountability proposal in order for the CWG-Stewardship to confirm that the conditions of the CWG-Stewardship final transition proposal have been adequately addressed.*

8. **Fundamental Bylaws**

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

***Comment** – The Third Draft Proposal contemplates that the following, among others, would be made Fundamental Bylaws as part of Work Stream 1:*

- Each of the community powers (including in relation to ICANN and IANA Functions Operations Budgets, ICANN Director removal/Board recall, and amendments to Fundamental Bylaws);
- The Empowered Community and the rules by which it is governed;
- The framework for the IRP;
- The IFR, Special IFR and the separation process;
- The CSC; and
- PTI governance.

Prior to approving any Bylaw amendment, the Third Draft Proposal specifies that the ICANN Board must have undertaken a mandatory engagement process pursuant to which the ICANN Board must consult with the community. The Third Draft Proposal specifies that establishing new Fundamental Bylaws or amending or removing Fundamental Bylaws will require: (i) approval by the ICANN Board (with a three-quarters vote of all standing Directors) and (ii) a decision by the Empowered Community to exercise the Community Power to approve changes to fundamental Bylaws. The Third Draft Proposal also specifies the threshold for the exercise of the Community Power to approve changes to Fundamental Bylaws.

***Conclusion** – We believe that the Third Draft Proposal adequately satisfies the CWG-Stewardship requirements relating to Fundamental Bylaws.*

Looking forward, we continue to be committed to retaining the link between the work of the two groups. Thank you for taking the lead in responding to the CWG-Stewardship requirements in the Third Draft Proposal and indeed for all related work. As we have communicated with your group on several occasions, we rely on your work and our trust in the work of your group is vital in permitting us to focus on the essential aspects of our work on the stewardship transition. We look forward to your confirmation that the issues raised above will be resolved in the CCWG-Accountability Proposal.

Best regards,

Lise Fuhr and Jonathan Robinson

Co-chairs, CWG-Stewardship