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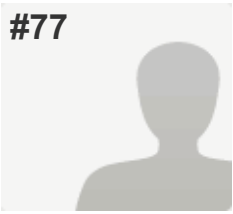**Collector:** Web Link 1 (Web Link)
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PAGE 2: Personal Information

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Q3: **Responding on behalf of**	Non-Commercial Stakeholder Group - GNSO

PAGE 3: Recommendation 1

Q4: Is establishing an Empowered Community for enforcing Community Powers a solution that is acceptable to you?(Please see Annex 1 - Recommendation #1: Establishing An Empowered Community For Enforcing Community Powers for more information)

No, I do not support this recommendation.,

Comment
NCSG opposes Recommendation 1. While NCSG does favor the establishment of an Empowered Community, we strongly disagree with the way the CCWG has constituted it and altered the existing balance between SO/ACs. We want an Empowered Community that reflects the actual designators of board members and policy development authorities in the ICANN community. We also want the Empowered Community's relative powers to maintain the same balance among stakeholder groups that currently exists in ICANN. The CCWG's proposal elevates ICANN's Advisory Committees and it marginalizes Supporting Organizations in ICANN's overall power balance. By including the Governmental Advisory Committee (GAC) as a member of the Empowered Community and giving it the same status and equal voting power as the Supporting Organizations, the CCWG has significantly altered the distribution of authority within ICANN and its own role as an "advisory" committee. The GAC is not by any stretch of the imagination a 'designator' as that term is used in California corporate law. It is barred by ICANN's Articles and bylaws from appointing voting board directors. It is, therefore, inappropriate and odd for it to be included in a process that can remove board members and vote on budget matters. GAC also does not formulate policies, or at least it is not supposed to. Rather, it's role is to provide advice to the board on policies that are supposed to be developed by ICANN's multi-stakeholder Supporting Organizations. To make GAC a voting member of the Community Mechanism is a serious mistake as it alters GAC's historic role from advisory to decision making. That mistake was compounded by the way in which the Empowered Community includes ALAC. While ALAC does directly appoint one board member, it should not have the same status in the Community Mechanism as the Supporting Organizations, which appoint 2 board members and are much larger and more diverse than ALAC. By elevating ALAC to the same status as SOs, the CCWG has again altered the historic balance of influence within ICANN in a way that is not acceptable to NCSG.

PAGE 4: Recommendation 2

Q5: Is empowering the community through consensus: engage, escalate, enforce a solution that is acceptable to you?(Please see Annex 02 - Recommendation #2: Empowering The Community Through Consensus: Engage, Escalate, Enforce for more information)

Yes, I support this recommendation. ,

Comment
The NCSG generally supports recommendation 2, however we do have several questions and concerns that we feel need to be addressed before issuance of the final report. We appreciate the specificity and detail spelled out regarding the Engage, Escalate and Enforce process. However, we are concerned with: the lack of clarity on what exactly are the Board's obligations on community engagement, particularly with the requirements for "a very extensive engagement" process; the lack of clarity as to how a matter is resolved between the Board and the community so that it does not escalate further (when does the dialogue end and a decision is made not to pursue); the assumption that matters of significant governance and accountability can be realistically resolved in a conference call or virtual meeting (the Community Forum); and the very tight and unrealistic time frames for specific steps within the process - for example, 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. Therefore, we strongly recommend the CCWG: 1. Elaborate on what exactly constitutes an "extensive engagement process". 2. Revisit and expand the time periods for each of the escalation steps as appropriate. 3. Clarify how a matter is considered resolved between the community and the Board at the various stages of the escalation process. 4. Revisit the time limits for conference calls and the Community Forum and suggest that they may vary according to the matter under discussion. We note the concerns with regard to the time frames related to the Engage, Escalate and Enforce mechanism raised by the CWG in its communication to the CCWG on whether or not the dependencies are met in v3 of the accountability proposal. The NCSG shares these concerns and asks that the CCWG carefully consider their implications for the transition. We further ask the CCWG to carefully review and incorporate the comments, concerns and suggestions with regard to recommendation 2 (and indeed many other proposal recommendations) made by outside counsel in their e-mail communication on 20 December 2015 entitled: Third Draft Proposal - substantive Comments/Edits.

PAGE 5: Recommendation 3

Q6: Is redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws' a solution that is acceptable to you?(Please see Annex 03 - Recommendation #3: Redefining ICANN's Bylaws As 'Standard Bylaws' And 'Fundamental Bylaws' for more information)

Yes, I support this recommendation. ,

Comment
The NCSG supports Recommendation 3 and its proposal to categorize ICANN's Bylaws as being either "standard" or "fundamental". This recommendation empowers the community while at the same time allowing for different approaches to changing those bylaws classified as either fundamental or standard. This allows ICANN to avoid the unnecessary rigidity of a "one approach fits all" approach to bylaws change, prevents unnecessary delays in changing standard bylaws while providing organizational stability through the higher standard for changes to the fundamental bylaws. Currently all ICANN bylaws can be changed by a ⅔ vote of the ICANN Board and do not require a public consultation (though up to now board has done this voluntary). Recommendation 3 proposes to split ICANN bylaws into "Fundamental Bylaws" and "Standard Bylaws" and establishes separate mechanism for changing them. Fundamental Bylaws (such as those setting out the company's Mission, Commitments and Core Values), will be more difficult to amend. Any changes to Fundamental bylaws will require approval of both community and the board. Furthermore, the threshold for board approval for fundamental bylaws is raised from ⅔ to ¾. THe NCSG supports this approach. In accordance with Recommendation 3, public consultations will be required on changes of both classes of Bylaws. The community is then given the power to reject the changes of standard bylaws through processes outlined in Recommendation 4. The NCSG supports this approach to empowering the community with respect to standard bylaws. We also support the more proactive role provided the community with respect to changes to fundamental bylaws. The NCSG supports the classification scheme proposed for the bylaws. We fully support linking the right of inspection for the sole designator to that provided members under California Corporations Code §6333. We endorse the approach for porting these rights from the statute to ICANN's bylaws proposed by the CCWG independent co-counsel, Sidley Austin and Adler & Colvin, in their memo to the CCWG dated December 10, 2015 titled "Developing Bylaws Provisions for Inspection Rights". In keeping with the ICANN's principle of bottom up governance we support allowing a single SO/AC to make the initial request for inspection directly to ICANN, with recourse to the escalating community decisionmaking process only if ICANN ignores or rejects the request. The right of inspection is an important component of these accountability reforms. We recommend that it be included in the bullet point listing of Objectives in Annex 1, paragraph 5 of the Proposal.

PAGE 6: Recommendation 4

Q7: **Is ensuring community involvement in ICANN decision-making: seven new Community Powers a solution that is acceptable to you? (Please refer to Annex 04: Details on Recommendation 4: Ensuring Community Involvement In ICANN Decision-Making: Seven New Community Powers for more information)**

Yes, I support this recommendation.,

Comment
NCSG supports Rec. #4. Looking into detail on the methods and proposals in the draft proposal currently on the table we can see that the community will undoubtedly be empowered by the introduction of this legal mechanism. Granting the community the statutory rights afforded to designators will move the community to a position of increased power and responsibility within the corporate governance structure of ICANN going forward into the future. NCSG has since its inception supported the stronger manner in which the community would have had a role in the membership model however we agree that the indirect enforcement model presented through the Sole Designator is a viable model to enforce the community powers. We note the absolute linkage between the ability to enforce the community powers via the Independent Review Process and recommendation 4. The availability of a competent, accessible and empowered IRP process is vital to ensure that an enforcement method other than the removal or spilling of board members is available in order to reduce the level of instability and security stability and resiliency risk that may accompany a board removal action. We support the two pronged approach to the budget mechanism, simultaneously integrating the community into the budget and strategic plan development lifecycle and giving the community the ability to reject in the case where the engagement process has failed to meet the community expectations we believe will result in a stable financial process for ICANN. We note that upon the creation of PTI the process to create a budget at PTI level will be equally critical to the stable running of the IANA functions and express our hope that a similar process will be constructed at PTI level. We support the proposed method for rejecting changes to standard bylaws. We support the proposed methods for assessing fundamental bylaws; we note that this process is one of the most critical in ensuring the stability of ICANN's future governance posture. The ability for the community, ICANN staff and the ICANN board to respect and meet the deadlines and timeframes involved in the process descriptions is critical to managing this control. Slipping on the deadlines and milestones within the processes around fundamental bylaw changes cannot be acceptable and all stakeholders must be willing to commit to the responsibility that is being entrusted to them in order for this to be a viable governance process. We support the process to remove individual directors. We note that this process is currently designed to be only able to be utilized once in a director's term if the process reaches the step of holding a community forum. We do not disagree with the recommendation given the current director term lengths, however this matter should be revisited as part of any process to change the terms of directors to ensure its continued

applicability. We further note the importance of the fact that the removal must be at the request of the appointing SO/AC, and must not be required to meet a list of pre-defined conditions. The SO/AC may be asked to provide justification for their actions but this will be guiding and supporting information only and cannot be used to block or impede the removal process. We support the ability for the community to remove the ICANN board in its entirety. We believe that the requirement to serve on the interim board of ICANN should be defined in WS2 as a specific skillset will be required to lead ICANN through this time of immense instability, the ability of the interim board to secure the stability of the internet through this period of change must be paramount. We support the proposals to initiate the community IRP process. While we support the recommendations related to the power to reject the decision of the ICANN board relating to IANA issues we feel that the recommendations require further clarification as to the ability for the community to enforce a 'co-decision' this remains an outstanding issue for many areas of the community with the process needing clarifications and more certainty in the areas of where the community has enforcement requirements as identified in the CWG process.

PAGE 7: Recommendation 5

Q8: Is changing aspects of ICANN's Mission, Commitments and Core Values a solution that is acceptable to you?(Please refer to Annex 05 - Details on Recommendation #5: Changing Aspects Of ICANN's Mission, Commitments And Core Values for more information)

Yes, I support this recommendation.,

Comment
NCSG supports Recommendation #5 and the clarification of ICANN's mission, commitments and core values as outlined in the 3rd draft report. However, Annex 5 to the CCWG 3rd draft report still reflects only general principles, intended to guide the lawyers charged with drafting the actual language that proposed for inclusion in the ICANN Bylaws. There are several points at which the principles are neither entirely straightforward or unequivocal, and much will depend on precisely how they are implemented in Bylaws language in the next round. It is critical that we review that language with a fine-tooth comb when it is ready for circulation. The Report itself, and all of the accompanying transcripts and memoranda and supporting papers, are all extremely important as part of the overall drafting process but at the end of the day, if and when the transition is effected, it will be the Bylaw language that will govern ICANN's conduct. Annex 5 aims to set forth the fundamental limitations of ICANN's power – the "picket fence" beyond the borders of which ICANN cannot act. The recommendations, generally speaking, are designed to ensure, to the extent possible, that ICANN does not leverage its power over the DNS to stray significantly beyond the narrow confines of DNS policy-making. Enforcement of those limitations will fall primarily on the shoulders of the newly-constituted Independent Review Panel, and whatever language ultimately

Review Panel, and whatever language ultimately appears in the Bylaws, the limitations contained in the Mission, Commitments and Core Values will only be as effective as the IRP is able to give them effect. The CCWG's recommendations for the IRP are in Annex 7, and the Annex 5 recommendations need to be read in conjunction with the IRP process. Annex 5 seeks to accomplish this primarily through clarifying ICANN's Mission Statement, and then providing that ICANN has no power to act outside of the Mission. The Report, in language intended to be implemented as a Fundamental Bylaw[1], states that ICANN's Mission, "in its role of coordinat[ing] the allocation and assignment of names in the root zone of the Domain Name System ("DNS"),"[2] is to "coordinate the development and implementation of policies: [a] For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability [of the DNS][3]; and [b] That are developed through a bottom-up, consensus-based multi-stakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems." It also states that "ICANN shall act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission." Those constitute a very important and very useful statement of the fundamental principle. ICANN's powers are tied to policies that are related to operational stability and security of the DNS itself, and they must further be developed through consensus procedures. It is a marked improvement, in my opinion, over the current Bylaws, which are considerably less clear on this point. Several additional clarifications are added. The participants in the CCWG discussions agreed that these were not intended to derogate from the limitations set forth in the Mission Statement, or somehow to enlarge the Mission, but rather to clarify how the limitations should work in practice. "ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide. ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission." And a "Note to drafters" adds: "In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to reflect the following considerations: The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called "Picket Fence") are intended and understood to be within the scope of ICANN's Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is attached for reference. For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered." The reference to Specification 1 of the Registry Agreement and Specification 4 of the Registrar

Accreditation Agreement appear to be an attempt to import the definition of "Consensus Policies" from those documents into the Bylaws[4]. The precise meaning and import of the third item is somewhat less clear, and the implementation language to be provided by the lawyers will need to be scrutinized carefully to determine whether it represents, or can be interpreted as implying, an expansion of ICANN's powers outside of the Mission Statement limitations. The following is to be communicated to the drafters regarding the meaning of "grandfathering" the existing registry and registrar accreditations agreements: "This means that the parties who entered into existing contracts intended (and intend) to be bound by those agreements. It means that neither a contracting party nor anyone else should be able to bring a case that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party's right to challenge the other party¹s interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission. The prohibition on ICANN expanding its mission into Internet content regulation or other matters is critical to NCSG's support for the CCWG recommendations. We strongly object to the board's comment, which urged the CCWG to allow broad mission creep in ICANN's Articles and Bylaws. NCSG's overall acceptance of the CCWG recommendations is predicated upon this limited mission for ICANN post-IANA transition and the rejection of the board's counter-proposal on this issue. And it is important that GAC, as a committee of ICANN, likewise not be permitted to exceed the scope of ICANN's limited mission, and that this point be clarified in the Final Draft. One additional concern that remains is the effect of the board's so-called "global public interest" veto over bottom-up consensus-developed policies in carrying out ICANN's mission. ICANN's Articles of Incorporation should be amended to clarify that "the global public interest" will be determined through a multi-stakeholder bottom-up process. Without such a clarification, ICANN's board is able to unilaterally substitute its own judgment for that of the community in determining what is in the global public interest as ICANN interprets its mission. As we have seen with the ICANN board claiming that respect for human rights and providing transparency at ICANN are "against the global public interest", without this key clarification, the invocation of that phrase can be used as "carte blanche" for the board to take any position it likes, and overturn the position reached through a democratic multi-stakeholder process. The Articles' clarification of "global public interest" to be determined through a multi-stakeholder bottom-up process, and not via board edict, is a critical issue that must be addressed in the Final Report. ---------------------------------- [1] A "Fundamental Bylaw" is one that takes special efforts to amend. See Annex 3. [2] The Mission Statement will contain other statements in regard to

other roles that ICANN is to play: "to coordinate the operation and evolution of the DNS root name server system" (Mission is to be provided by RSSAC] and to "coordinate the allocation and assignment at the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers" (Mission is described in the ASO MoU between ICANN and RIRs). [3] The words "of the DNS" were, we believe, inadvertently omitted from the text in the 3rd Draft Report. [4] The two referenced documents state that "Consensus Policies shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including registrars. Consensus Policies shall relate to one or more of the following: Issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, Registrar Services, Registry Services, or the Domain Name System ("DNS"); functional and performance specifications for the provision of Registrar Services; registrar policies reasonably necessary to implement Consensus Policies relating to a gTLD registry; resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or restrictions on cross-ownership of registry operators and registrars or Resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or Reseller are affiliated. They include, without limitation: "principles for allocation of registered names in a TLD (e.g., first-come/first-served, timely renewal, holding period after expiration); prohibitions on warehousing of or speculation in domain names by registries or registrars; reservation of registered names in a TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); maintenance of and access to accurate and up-to-date information concerning Registered Names and name servers; procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the Registered Names sponsored in a TLD by a registrar losing accreditation; and the transfer of registration data upon a change in registrar sponsoring one or more Registered Names." And they cannot: "prescribe or limit the price of Registrar Services; modify the limitations on Temporary Policies (defined below) or Consensus Policies; modify the provisions in the Registrar Accreditation Agreement regarding terms or conditions for the renewal, termination or amendment of the Registrar Accreditation Agreement or fees paid by Registrar to ICANN; or modify ICANN's obligations to not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or

procedures or practices arbitrarily, unjustifiably, or inequitably and to not single out Registrar for disparate treatment unless justified by substantial and reasonable cause, and exercise its responsibilities in an open and transparent manner."

PAGE 8: Recommendation 6

Q9: Is reaffirming ICANN's commitment to respect internationally recognized human rights as it carries out its Mission a solution that is acceptable to you?(Please refer to Annex 06 - Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out Its Mission for more information)

Yes, I support this recommendation.,

Comment
The NCSG supports recommendation 6. A commitment by ICANN to respect human rights within the scope of its mission is a crucial step in the transition of oversight of ICANN from the US government to the global community. The NCSG specifically welcomes the inclusion of the bylaw language reaffirming and clarifying ICANN's obligation to respect human rights. We find the proposal for bylaw language on human rights to be clear and balanced. We appreciate the fact that it limits the commitment to ICANN's mission and operations only and provides a clear distinction between ICANN's adherence to respect human rights and obligation to enforce human rights, placing the latter outside of the scope of the ICANN's mission. We are aware of the discussions on the inclusion of particular human rights related international legal instruments, such as Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), into the bylaw language. We welcome the proposed version of the bylaw language, which does not refer to particular international legal instruments. In our view, there is no need to outline specific international documents in the bylaws since there is no reason in principle why particular instruments (e.g. the UDHR) should be referenced at the expense of other important international treaties. At the same time, we agree that the issues related to the applicability of international instruments in the context of ICANN's commitment to respect human rights must be addressed in Work Stream 2. We strongly support the proposal to include the interim bylaw for the purpose of ensuring that Work Stream 2, which will facilitate the development of the framework for interpretation of the human rights commitment, will take place. We further agree with the issues identified in Annex 6 of the Draft which will be the subject of further work in Workstream 2. We hope that Workstream 2 will be carried out in the same collaborative, inclusive and open manner as the whole work of CCWG up to now and will result in a clear framework for interpretation and implementation of ICANN's commitment to human rights.

PAGE 9: Recommendation 7

Q10: **Is strengthening ICANN's Independent Review Process a solution that is acceptable to you?(Please refer to Annex 07: Recommendation 7: Strengthening ICANN's Independent Review Process for more information)**

Yes, I support this recommendation. ,

Comment
The NCSG generally approves of Rec. #7 and the expansion of scope and the overall redesign of and improvements to ICANN's Independent Review Process (IRP). We have concerns and recommendations concerning the following particular aspects of the proposal: 1. Panelist training should be designed jointly by ICANN and the ICANN community. This should offer protection against charges, real or imagined, of indoctrination with bias towards a particular perspective by ICANN itself. 2. Establishment of a system of pro bono representation should be a priority for the community. Such a system, permanent or provisional, should be in place prior to the switch over to the new IRP system. 3. The Community Independent Review Process, including financial benefits thereof, should be made available to all recognized advisory committees, supporting organizations, stakeholder groups and constituencies within ICANN. This should be explicitly stated in the proposal. 4. The NCSG is concerned that making English the sole working language of the IRP would predispose panelists towards norms and standards used exclusively in common law legal traditions. We would encourage the establishment of at least one additional working language, possibility French, used in countries where the civil law legal tradition predominates. 5. We support proposals to review the Cooperative Engagement Process (CEP) in work stream 2. As part of work stream 1 we would ask that, at the plaintiff's request, CEP proceedings be immediately made open and transparent, with recordings and transcripts, with appropriate redactions, if necessary, as agreed by both parties, made available to the public no later than 14 days following any CEP session. 6. We are concerned that the loser pays option, in the event a Panel finds a claim "frivolous or abusive", to have a potentially chilling effect on plaintiffs lacking substantial assets. We would prefer the IRP include a summary judgement mechanism at early stages so that if ICANN considers a filing to be either "frivolous or abusive" early judgement can be made thus reducing costs to a level that would eliminate the need for any loser pay provision at all. If, however, the provision is retained all such judgements should trigger an automatic appeal to the full standing panel before sanctions are applied. 7. 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

these who made the original DIDP request. DIDP
appeals should not be subject to the engagement,
escalation and enforcement staircase nor should they
require support from the Empowered Community at
any threshold.

Q11: Is fortifying ICANN's request for reconsideration process a solution that is acceptable to you?(Please refer to Annex 08 - Recommendation #8: Improving ICANN's Request For Reconsideration Process for more information)

Yes, I support this recommendation.,

Comment
NCSG strongly supports the CCWG's recommendations for improving ICANN's Reconsideration Request process as described in Recommendation #8 of the CCWG 3rd draft report. We agree that the scope of matters reviewed in the process should be broadened and enhanced and that the time for requesters to file should be extended. We support the recommendation for more transparency in the Request for Reconsideration process, including in the board deliberations, and urge that the principle of transparency be further reinforced in the implementation phase of this recommendation. We support the recommendation for more direct board engagement in the investigation and decision making process. It is important that the entire board participate in the process, rather than a single committee, in order for the board to have the level of management oversight appropriate for ICANN at this time. We further support the recommendation to provide the requester with an opportunity to rebut a rejection of their request, before the decision becomes final. Another important improvement will be for ICANN's legal department and lawyers to not be allowed to guide the Reconsideration Request process, given their fiduciary duty is to protect the corporation, rather than provide fair outcomes. ICANN's lawyers have an inherent conflict of interest in evaluating these requests and advising the board on their merits. It is especially important that a neutral party (possibly the Ombudsman) be the first party to review the requests and advise the board on their merit worthiness. This task can no longer be performed by ICANN's lawyers for there to be any improvement in the integrity of Request for Reconsideration process. This principle should be strengthened in the implementation phase. The CCWG Final Report recommendations should also clarify that actions and inactions of the PTI (including timing) will be included within the scope of the Request for Reconsideration process.

Q12: Is incorporation of the Affirmation of Commitments a solution that is acceptable to you?(Please refer to Annex 09 - Recommendation #9: Incorporation of the Affirmation of Commitments for more information)

No, I do not support this recommendation.,

Comment
While there are some good things included in the Affirmation of Commitments (AoC), NCSG does not wholly support Rec. #9. The AoC was a bilateral deal negotiated between ICANN and the U.S. Department of Commerce in 2009, as a substitute for the old Joint Projects Agreement. In many ways the AoC was a laudable attempt to lighten U.S. control and to come to grips with ICANN's accountability shortcomings within the framework of U.S. unilateral oversight. The Accountability and Transparency Review Team in particular was an important advance in ICANN accountability at the time. The AoC also included, however, commitments by ICANN to adhere to substantive policies desired by the U.S. government and some of the interest groups to which it is responsive. For example, the AoC contained a commitment that ICANN would never make a substantial change in its approach to the display of Whois information. NCSG believes that substantive policy for Whois - and all other areas - should come from a bottom-up consensus in ICANN's own policy development process, not from top-down bilateral deals. Therefore we cannot accept certain aspects of the AoC and so it would be inappropriate to support a recommendation that mandates it in this way. While we recognize the value of continuing the reviews of accountability and transparency (ATRT) after the transition, NCSG believes that the CCWG's own accountability reforms are the most important changes to be made. So we support continuation of the ATRT, but we do not support continuance of the other AoC reviews, which lack a bottom-up and consensus based constitution. The ATRT reviews have done some good work over the years, but implementation of the ATRT recommendations has been mixed at best. It is much easier for the Board to agree to the recommendations than it is to get them implemented by the ICANN Staff. A special emphasis must be placed on the recommendation related to access to internal documentation defined in paragraphs 60-67 of the draft report. Improving transparency at ICANN will be critical post IANA transition and those reforms cannot be postponed any longer. Specific Issue: the description of the fundamental Bylaw on separability in paragraph 126, discusses IFR & SIFR does not include any discussion of the Cross Community Working Group on Separation (SCWG) though it does mention the separation process. For completeness sake, it should discuss the SCWG.

PAGE 12: Recommendation 10

Q13: Is enhancing the accountability of Supporting Organizations and Advisory Committees a solution that

No, I do not support this recommendation.,

Comment

is acceptable to you?(Please refer to Annex 10 - Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees for more information)

Comment:

NCSG does not support Rec. #10. because of the top-down model for determining SO/AC accountability and the exclusion from the Governmental Advisory Committee (GAC) from the standard accountability improvements. Recommendation 10 of the CCWG proposal focuses on the accountability of SO/ACs. The proposal's recommendations regarding the accountability of SO/ACs is not detailed, much is delegated to WS2, however there are important matters that we believe should be addressed. First: As Proposed, Reviews Are too Top-Down and Board Dominated The recommendation suggests independent periodical structural reviews of SO/ACs accountability mechanism. To implement the recommendation the proposal suggests to amend Article IV (section 4) of the bylaws. It does not however note the full text of the Article IV(4)[1]. Noting the full text of Article IV(section 4)[2], it raises major issues with how these reviews will be conducted. The Article IV (section 4) states that the Board "shall cause a periodic review of the performance and operation of each Supporting Organization". We do not agree that the Board should unilaterally be able to initiate such reviews and decide on the strengths of SO/ACs accountability mechanisms, or decide on how the review should take place. This may lead to the Board intervening in the governance structure of SO/ACs. To prevent the Board from unnecessary involvement in the governance structures of SO/ACs, the Board should not be able to unilaterally, or by consultation with certain review working group, decide whether some SO/ACs are accountable to their stakeholder groups and to others, and decide on changing SO/ACs governance structure. Any accountability review should be done at the request of the majority of SO/ACs, and the desirable changes should not take place only at the Board's approval. We therefore disagree with the current suggestion to change the bylaws as the proposal suggests, and recommend that this matter be discussed in WS2. Second: Empowered GAC is Exempted From Accountability Reforms Under Article IV (section "the Governmental Advisory Committee shall provide its own review mechanisms". Hence GAC is exempted from such reviews and must develop its own review mechanisms. The proposal does not mention how it should treat GAC considering the new changes and empowerment of the community which will take place if the accountability proposal is approved. The CCWG proposal dramatically empowers GAC in Recommendation #1 via the Community Mechanism and again in Recommendation #11 by generally requiring the board to accept GAC advice. The lack of any heightened accountability standards for GAC in the CCWG proposal is a major flaw. The creation of an Empowered Community was the rationale provided for holding the community to higher accountability standards in Recommendation #10. Including GAC in the Empowered Community, but exempting GAC from accountability reforms creates an unacceptable hole in ICANN's overall organizational accountability. We

recommend to hold GAC to the same accountability standards of the other SO/ACs. ----------------------------------- [1] The recommendation reads as: "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." [2] 1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. 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. These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group. The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board. 2. The Governmental Advisory Committee shall provide its own review mechanisms.

PAGE 13: Recommendation 11

Q14: Is Board obligations regarding GAC Advice (Stress Test 18) a solution that is acceptable to you?(Please refer to Annex 11 - Recommendation #11: Board obligations regarding GAC Advice)

No, I do not support this recommendation. ,

Comment
NCSG opposes Rec. #11 and its affirmative obligation that ICANN's Board comply with advice from the Governmental Advisory Committee (GAC) unless it can muster a 2/3 vote to oppose governments. We note that nearly the same proposal was unanimously rejected by the ICANN community in 2014 [1] and it only found its way into the CCWG's 3rd draft report due to a "straw poll" of mostly GAC members in a single online meeting. ICANN bylaws currently give special consideration to GAC in 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

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. Under Operating Principle 47, the GAC seeks to adopt advice by consensus.[2] However, as specified in Operating Principle 53, the GAC may revise any operating principle by a majority vote. Stress test 18 considers a scenario where the GAC amends its operating procedures to allow majority voting for advice to the ICANN Board. This possibility raised concerns because: Since the Board must seek a mutually acceptable solution if it rejects GAC advice, the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters. A lower decision threshold could increase government influence over ICANN by forcing Board consideration of controversial GAC advice -- advice that lacks support by all governments or that is broadly opposed by other parts of the community -- and triggering a negotiation to find a mutually acceptable solution. This concern is magnified by the possible inclusion of the GAC as a decisional participant in the Empowered Community, which would be the vehicle for the community to reject objectionable GAC advice approved by the Board. If the GAC participates fully in the Empowered Community, i.e. not only as an advisory body, its vote would count toward activating or blocking those powers of which some require support from 4 of 5 entities. To address these concerns, in the 2nd Draft, the CCWG recommended clarifying the final sentence of Article XI, Section 2 (j) to read "With respect to Governmental Advisory Committee advice that is supported by consensus, 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 following compromise amended text for Article XI, Section 2 (j) that was included in the 3rd draft of the CCWG report: 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 Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable

solution. There is also a second paragraph 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. It is unclear if this paragraph is intended solely to help clarify the intent of the amended bylaw in the 3rd draft report or if it would be included in the bylaws. In sum, this compromise would increase the Board threshold for rejecting to 2/3 as requested in the GAC Dublin communique, but would improve on the 2nd CCWG draft language by limiting special consideration of GAC advice by the Board to consensus advice and defining that advice as general agreement without formal objection. There are several areas of remaining concern: 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."[3] We believe that this change needs to be reversed to honor commitments made to Congress by Mr. Chehade. 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 GAC advice, even if adopted by consensus, should be given special consideration only if it is consistent with ICANN's scope and mission. Paragraph 28 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. Other views forwarded from the GAC should should not require anything other than Board consideration, specifically no formal Board vote, no mandate for a response or obligation to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution." We are also concerned that the second paragraph provides 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. We oppose the suggested change in the Draft Proposal and, instead, recommend the following amended text: The views of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. 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 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. 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. Furthermore, it is important to note that this bylaws revisions would not resolve the additional and related complications arising from GAC membership in the Empowered Community as a decisional participant. -------------------------------------- [1] https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en [2] Operating Principle states, "The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board." Available at https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles. [3]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

February 25, 2015, exchange beginning at the 1:12:25
mark of the video record,
http://www.commerce.senate.gov/public/index.cfm/201
5/2/preserving-the-multistakeholder-model-of-internet-
governance.

Q15: **Is committing to further accountability work in Work Stream 2 a solution that is acceptable to you? (Please refer to Annex 12 - Recommendation #12: Committing to further accountability work in Work Stream 2)**

Yes, I support this recommendation.,

Comment
NCSG broadly endorses the recommendations of the CCWG in Work Stream 2, while stressing the need to adhere to the timeline specified for its completion (i.e., end of 2016 for the draft). It is important that the interim Bylaw to commit ICANN to WS2 clearly specifies this timeline. NCSG endorses the specific inclusion of a review of the Document Information Disclosure Policy (DIDP) and Whistleblower policy as Work Stream 2 objectives, but note with concern the 3rd draft's absence of specific requirements to implement public disclosure of ICANN interactions with government officials, both of the United States and others, 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 in the Final Report. Transparency reforms should play a central role in WS2 as it is the foundational building block to accountability and since the community must rely upon board member recall in a designator corporate governance model. A community that does not know what the board is doing or thinking will be unable to effectively exercise critical recall rights. An uninformed community is a disempowered community. Therefore through WS2, ICANN should create a new culture of transparency in all its operations and at all levels. In particular more transparency is needed over board deliberations. The ICANN board should operate with at least as much transparency as the GNSO Council, which records and transcribes all of its meetings for online publication, and which uses a publicly archived email discussion list for its deliberations and policy discussions. Work Stream 2 should focus on transparency improvements across the entire organization, including at its top, with its board and senior management. DIDP and whistleblower policies must not be the only transparency related issues in Work Stream 2, or CCWG will fail in providing a necessary component for ICANN accountability, transparency. The NCSG also strongly recommends that the CCWG maintain its independent counsel to assist it in it's Work Stream 2 proposals. We welcome the emphasis that the CCWG has attached to diversity as a key WS2 accountability concern. It is equally important to ensure that WS2 recommendations on diversity are geared both towards structural and functional improvements - diversity must be evaluated not just in the context of adequate geographical representation but whether

that representation has contributed effectively to ICANN's multistakeholder model of governance. The terms of reference for the sub-committee that would develop a framework of interpretation for human rights must be clearly laid out in Work Stream 1 itself. Jurisdiction-related aspects addressed by Work Stream 2 must be well-defined. They must be limited to the "layers" identified by the CCWG in Rec #12. Furthermore, the Board's attempt to narrow the scope of Work Stream 2 and weaken requirements that it implement all Work Stream 2 accountability recommendations should rekindle concerns voiced in the CCWG-Accountability that any issues or reforms relegated to Work Stream 2 may 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. [1] ------------------------- [1] ICANN Board of Directors, "ICANN Board Comments on Third CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations," p. 26-27.

PAGE 15: Additional Information

Q16: Please submit comments you have in addition to the information provided above, including on NTIA criteria, CWG-Stewardship requirements and Stress Tests.

Respondent skipped this question