

1 Drafting Notes V0.2BT– changes requested by lawyers

Summary – done BT	“5. Agreed to incorporate PEG Advisor input to strengthen the diversity requirement”
Paragraph 4 – done BT	“To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider implementing the CCWG-Accountability Work Stream 2 recommendations... ”
Paragraph 5 – done BT	“Considering enhancements to the Ombudsman’s role and function” “wcommunity”
Paragraph 9 – done BT – also fixed Maximally participatory as agreed with Matheiu	“The CCWG Accountability acknowledges the specific Advice received ...” “Maximally participatory and transparent deliberations by all affected stakeholders are necessary in order to capture the diversity of views...”
Paragraph 16 – done BT	“As part of the Work Stream 2”
Paragraph 22 – done BT	“ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction.”
Paragraph 24 – done BT	“ccTLDs managers”
Paragraphs 24, 34 – 33 fixed, fixed	Clarify references to “decisions” to also include actions/inaction
Paragraph 28 – done BT	“Recommendation #8: Fortifying Improving ICANN’s Request for Reconsideration Process”
Paragraphs 30, 34 – done BT	“... the Work Stream 1”
Paragraph 31 – done BT	Delete (as this paragraph is blank)
Paragraph 33-done BT	“Also, enshrining the process and conditions within a Bylaw (even if it’s a transitional provision article)...”
Paragraph 38 – done BT – end of June is ICANN 59	“Refinement of Proposals by Subgroups, under supervision of the CCWG-Accountability or other CCWG as appropriate” Clarify whether reference in the last bullet should be to ICANN 59 (instead of ICANN 58)

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3 Drafting notes for V0.3BT:

- Section 1 Summary:
 - Reordered recommendations to match details section

- [Removed "access to documents" given this is now covered in Rec. 1](#)
- [Added "transparency of Board deliberations" to match detailed section](#)
- [Section 2 Recommendations:](#)
 - [Reordered recommendations to match details section](#)
 - [Removed "access to documents" given this is now covered in Rec. 1](#)
 - [Added "transparency of Board deliberations" to match detailed section](#)
- [Section 3 – added BBurr description of reviewing Ombudsman role \(para 30\) and edited the introductory para to match.](#)
- [Section 4](#)
 - [Changed the title from Changes from the "Second Draft Proposal on Work Stream 1 Recommendations" to "third Draft"](#)
 - [Removed original content of this section – no longer valid](#)
 - [Added and edited the list of changes from the Second Reading Conclusions as the content.](#)

Annex 12 – Recommendation #12: Committing to Further Accountability Work in Work Stream 2

1. Summary

⁴⁴ The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

²⁵ As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

- [Considering improvements to ICANN's standards for diversity at all levels.](#)
- [Supporting Organizations and Advisory Committee Accountability](#)
- Improving [ICANN/ICANN's](#) transparency with a focus on:
 - Enhancements to [ICANN/ICANN's](#) existing Documentary Information Disclosure Policy (DIDP).
 - Transparency of [ICANN/ICANN's](#) interactions with governments.
 - Improvements to the existing whistleblower policy.
 - [Transparency of Board deliberations](#)
 - [Access rights to ICANN documents.](#)

- ~~Considering improvements to ICANN's standards for diversity at all levels.~~
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- ~~Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.~~
- Considering enhancements to the Ombudsman's role and function.

³⁶ The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming ICANN's 55th Meeting in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.

⁴⁷ The community raised concerns that, post-transition, there may be a lack of incentive for ICANN to implement the Proposals arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to implementing the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. In a letter dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

2. CCWG-Accountability Recommendations

⁵⁸ The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Supporting Organizations and Advisory Committee Accountability
 - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency review process.
 - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
 - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
 - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
 - Enhancements to ICANN's existing DIDP.
 - Transparency of ICANN's interactions with governments.

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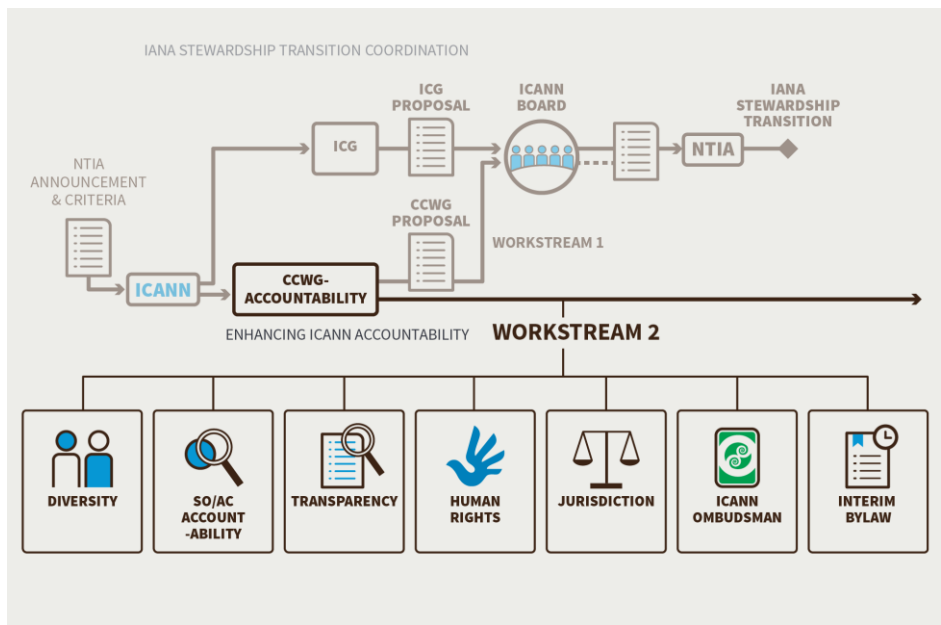
- o Improvements to the existing whistleblower policy.
- o Transparency of Board deliberations
 - Access rights to ICANN documents.
- ~~Considering improvements to ICANN's standards for diversity at all levels.~~
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ~~ICANN~~ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- ~~Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.~~
- Considering enhancements to the Ombudsman's role and function.

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The CCWG-Accountability notes that further enhancements to ~~ICANN~~ICANN Accountability can be accommodated through the accountability review process (see Recommendation #10) or through specific, ad hoc, cross community working group initiatives.

3. Detailed Explanation of Recommendations



69 Commenters made the observation that general accountability requirements, such as diversity and Supporting Organization (SO) and Advisory Committee (AC) accountability, were not fully addressed. Specific criteria were developed for these two key parameters:

710 Diversity

811 Comments received on prior drafts asked that concrete steps to ensure the diversity of the views, origins, and interests of the global Internet community be adequately represented through a multidimensional approach, specifically as the community becomes more empowered. While acknowledging the importance of diversity in the accountability mechanisms, commenters have also expressed the view that any diversity requirement should not prevail over skills or experience requirements.

912 The CCWG Accountability acknowledges the specific Advice received from the Public Expert Group Advisors which stresses the importance of such diversity enhancements. Maximally participatory and transparent deliberations by all affected stakeholders are necessary in order to capture the diversity of views that constitute the (global) public interest in a given instance.

1013 In assessing diversity, the CCWG-Accountability identified that existing mechanisms were in place for entities constituting the ICANN/ICANN ecosystem. Requirements stemming from the following initiatives and governance documents were evaluated:

- [ICANN/ICANN Bylaws.](#)
- [The Affirmation of Commitments.](#)
- [ATRT 1 Recommendations.](#)
- [ATRT 2 Recommendations.](#)
- Documents from each of the ICANN/ICANN SOs and ACs.

1114 Analysis of the above documents determined that improvements are needed. During its discussions, the CCWG-Accountability considered a non-exhaustive list of criteria and sought input on the following suggestions:

- Expanding ATRT reviews into Accountability, Transparency, and Diversity reviews.
- Establishing threshold regarding composition of each body.
- Incorporating the Structural Reviews into Structural Accountability, Transparency, and Diversity Reviews of SOs and ACs, under the Board's supervision.

1215 Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN/ICANN's effectiveness in promoting diversity:

- Including diversity as an important element for the creation of any new structure, such as the Independent Review Process (IRP) (for diversity requirements for the panel) and the ICANN/ICANN Community Forum.

- Adding Accountability, Transparency, and Diversity reviews of SOs and ACs to structural reviews as part of Work Stream 2.
- Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every [ICANN/ICANN](#) group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program, and other [ICANN/ICANN](#) outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity.
- Identifying the possible structures that could follow, promote, and support the strengthening of diversity within [ICANN/ICANN](#).
- Carrying out a detailed working plan on enhancing [ICANN/ICANN](#) diversity as part of Work Stream 2.
- Strengthening commitments to outreach and engagement in order to create a more diverse pool of [ICANN/ICANN](#) participants, so that diversity is better reflected in the overall community and thus more naturally reflected in [ICANN/ICANN](#) structures and leadership positions.

[4316](#) **Supporting Organizations and Advisory Committee Accountability**

[4417](#) As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using new Community Powers, i.e., "who watches the watchers."

[4518](#) The CCWG-Accountability reviewed existing accountability mechanisms for SOs and ACs as well as governance documents (see above). Analysis revealed that mechanisms are limited in quantity and scope. Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community.

[4619](#) The CCWG-Accountability recommends the following:

As part of Work Stream 1:

- Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews performed on a regular basis. These reviews should include consideration on the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, and Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the [ICANN/ICANN](#) Bylaws, which currently states: "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/ICANN](#) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness."

As part of the Work Stream 2:

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency review process.
- Evaluate the proposed “Mutual Accountability Roundtable” to assess viability.
- Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
- Assess whether the IRP would also be applicable to SO and AC activities.

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Transparency

⁴⁷²⁰ Transparency is considered quintessential to the viability of community empowerment and its associated legal framework. As such, the CCWG-Accountability recommends reviewing the following to ensure appropriate safeguards are in place:

- Improving **ICANNICANN**'s transparency with a focus on:
 - **Enhancements to **ICANNICANN**'s existing DIDP:** The CCWG-Accountability sets an objective to review and update **ICANNICANN**'s DIDP within two years, with the goal of justifying denials with a specific harm and limiting the scope of non-disclosure.
 - **ICANNICANN's interactions with governments:** The CCWG-Accountability is considering if **ICANNICANN** should be required to compile and publicly post a quarterly report providing: the names of individuals acting on **ICANNICANN**'s behalf who have been in contact with a government official; the names and titles of such government officials; the date, nature, and purpose of those government contacts. In addition, it considers that a line item accounting of the amount **ICANNICANN** spent on government engagement activities should be reported.
 - **Improvements to the existing whistleblower policy.**
 - **Transparency of Board deliberations**

⁴⁸²¹ Human Rights

⁴⁹²² To ensure that adding a draft Human Rights Bylaw into the **ICANNICANN** Bylaws does not lead to an expansion of **ICANNICANN**'s Mission or scope, the CCWG-Accountability will develop a designated Framework of Interpretation as part of Work Stream 2 and will consider the following as it elaborates on the language to be used:

- Consider which specific Human Rights conventions or other instruments, if any, should be used by **ICANNICANN** in interpreting and implementing the Draft Human Rights Bylaw.
- Consider the policies and frameworks, if any, that **ICANNICANN** needs to develop or enhance in order to fulfill its commitment to Human Rights.
- Consistent with **ICANNICANN**'s existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- Consider what effect, if any, this proposed Bylaw would have on **ICANNICANN**'s consideration of advice given by the Governmental Advisory Committee (GAC).

- Consider how, if at all, this Bylaw will affect how [ICANN/ICANN](#)'s operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future [ICANN/ICANN](#) policies and procedures.

2023 Jurisdiction

2424 Jurisdiction directly influences the way [ICANN/ICANN](#)'s accountability processes are structured and operationalized. The fact that [ICANN/ICANN](#) today operates under the legislation of the U.S. state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.

2225 The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability. [ICANN/ICANN](#) is a **nonprofit** public benefit corporation incorporated in California and subject to **applicable** California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. [ICANN/ICANN](#) is subject to a provision in paragraph eight¹ of the Affirmation of Commitments, signed in 2009 between [ICANN/ICANN](#) and the U.S. Government.

2326 [ICANN/ICANN](#)'s Bylaws (Article XVIII) also state that its principal offices shall be in California.

2427 The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence.
- Governing law for contracts with registrars and registries and ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action and inaction of staff, and for redress and review of Board Decisions, IRP, and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.
- Meeting NTIA requirements.

2528 At this point in the CCWG-Accountability's work, the main issues that need to be investigated within Work Stream 2 relate to the influence that [ICANN/ICANN](#)'s existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within [ICANN/ICANN](#), involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where [ICANN/ICANN](#) is incorporated:

¹ 8. [ICANN/ICANN](#) affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community**; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit [ICANN/ICANN](#) shall in all events act.

- Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:
 - Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.
 - Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.
 - Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.

[2629](#) A specific Subgroup of the CCWG-Accountability will be formed to undertake this work.

[2730](#) **Considering Enhancements to Ombudsman's Role and Function**

[31](#) Through the enhanced Request for Reconsideration process (see Recommendation #8: [ImprovingFortifying ICANN/ICANN's Request for Reconsideration Process](#)), the CCWG-Accountability has given increased responsibility to the Ombudsman. ~~Perceived as a key component of accountability, the CCWG-Accountability has identified further enhancements to the Ombudsman's role and function as an area to explore in Work Stream 2.~~

[2832](#) The ombudsman can perform a critical role in ensuring that ICANN is transparent and accountable, preventing and resolving disputes, supporting consensus-development, and protecting bottom-up, multistakeholder decision-making at ICANN. ICANN's office of ombudsman must have a clear charter that reflects, supports, and respects the organization's Mission, Commitments and Core Values, and must have sufficient authority and independence to ensure that it can perform these important roles effectively. As part of Work Stream 2, the CCWG will evaluate the current Ombudsman charter and operations against industry best practices and recommend any changes necessary to ensure that the ICANN ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders.

[2933](#) **Interim Bylaw**

[3034](#) The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit [ICANN/ICANN](#) to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. The Bylaw would task the group with creating further enhancements to [ICANN/ICANN's](#) accountability related to the Work Stream 2 list of issues, according to process and procedures similar to those of ~~the W~~ork Stream 1 : openness to all participants, transparency of deliberations, public comment inputs...

[31](#)—

[3235](#) This Interim Bylaw must be incorporated in the [ICANN/ICANN](#) Bylaws as part of Work Stream 1, prior to the IANA Stewardship Transition. This Interim Bylaw has been proposed to address concerns that, post-transition, an absence of incentives may lead to the [ICANN/ICANN](#) Board dismissing the CCWG-Accountability's proposed Work Stream 2 recommendations. However, in a [letter](#) dated 13 November 2015, the [ICANN/ICANN](#) Board confirmed its intent to work with the [ICANN/ICANN](#) community and to provide adequate support for work on these issues.

[3336](#) Enshrining the commitment to Work Stream 2 as an Interim (Transition) Bylaw provides stronger guarantees compared to an approach that would rely on a Board resolution. A Board resolution

could indeed be changed by the Board itself at any time, and the composition of the Board changes over time. Also, enshrining the process and conditions within a Bylaw (even if it is a transitional provision-article) triggers the ability for IRP challenge if the CCWG Accountability or the Board did not comply with the process or conditions described in the Bylaw.

3437 The language of this Interim Bylaw provision should provide that the CCWG Work Stream 2 recommendations, when supported by full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering Organizations, be considered in a similar status to ~~the~~ Work Stream 1 recommendations. The ICANN/ICANN Board's decision, including any action or inaction, would be subject to challenge through enhanced Request for Reconsideration and Independent Review Processes.

3538 The Bylaw would be consistent with the language described in the CCWG-Accountability Charter, and explicitly mention the NTIA criteria as a reference for the recommendations, as well as the requirement that recommendations are based on consensus.

3639 The Bylaw would also describe the process outlined in the ICANN/ICANN Board's resolution of 16 October 2014 (see <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d>), such as :

- The requirement for Work Stream 2 recommendations to be consensus recommendations, endorsed by the Chartering Organizations;
- The requirement to initiate a specific dialogue in case the Board believes it is not in the global public interest to implement a recommendation, as well as the description of the steps of this dialogue
- The requirement of a 2/3 majority of the Board to determine that implementing a recommendation is not in the global public interest.

3740 **Timeline**

3841 The initial plan includes the following key milestones:

- March 2016 (ICANN/ICANN55): Definition of scope of work and organization into Subgroups.
- March 2016 to end of June 2016: Drafting of Proposals by Subgroup, under supervision by CCWG-Accountability.
- June 2016 till early October 2016: 40-day Public Comment Period, including discussions during ICANN/ICANN56 and/or ICANN/ICANN57.
- October – mid-January 2017: Refinement of Proposals by Subgroups, under supervision of the CCWG-Accountability or other CCWG as appropriate.
- Mid-January – March 2017: Second 40-day Public Comment Period, including discussions during ICANN/ICANN58.
- By end of June 2017: Finalize Proposals and deliver to Chartering Organizations.
- Obtain approval and deliver Proposals to ICANN/ICANN Board at ICANN/ICANN59.

4. Changes from the “~~Third~~Second Draft Proposal on Work Stream 1 Recommendations”

- Interim Bylaws clarifications to address Board’s concerns by highlighting that WS2 will be following similar rules as WS1: consensus recommendations, endorsement by Chartering Orgs, ability for the Board to engage special dialogue, 2/3 threshold for such Board decision etc.
- Edits to the documents will include focus on fact that WS2 deliberations will be open to all (similar to WS1)
- List of WS2 items is “limited to” instead of “related to”. A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG.
- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.
- Agreed to incorporate PEG Advisor input to strengthen diversity requirement
- Enhancing Ombudsman role and function is confirmed as a WS2 item

³⁹⁴² Public comments revealed that a review of staff accountability should not be pursued. The development of a designated Framework of Interpretation for the proposed Human Rights Bylaw and expansion of the transparency-related issues are also noteworthy changes. The proposed solution of incorporating a review of diversity into Affirmation of Commitment-mandated Accountability and Transparency reviews was removed.

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5. Stress Tests Related to this Recommendation

- ST1
- ST2
- ST11

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

- N/A

7. How does this address NTIA Criteria?

⁴⁰⁴³ **Support and enhance the multistakeholder model.**

- In-depth review of diversity and SO and AC accountability is planned for Work Stream 2.

- Addition of an Interim Bylaw will secure Work Stream 2 towards enhancing the general accountability framework.
-

4144 Maintain the security, stability, and resiliency of the Internet DNS.

- Accountability of SO and AC structures and their components will help ensure one entity cannot singlehandedly change or block a process.
 - Addressing the question of applicable law for contracts and dispute settlements.
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4245 Meet the needs and expectation of the global customers and partners of the IANA services.

- Analysis of transparency will help contribute to ensuring visibility is given into operations of [iCANN/iCANN](#).
 - Development of a Framework of Interpretation for Human Rights Bylaw will help maintain limited scope of [iCANN/iCANN](#)'s Mission.
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4346 Maintain the openness of the Internet.

- Consolidating, enhancing diversity and SO and AC accountability.
-

4447 NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution

- Transparency of interactions with governments is flagged as a topic to further explore.
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