

# Review of CCWG-Acct 3<sup>rd</sup> Proposal and ALAC Issues

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# DISCLAIMER

- The following CCWG Proposal Analysis is my personal take on it.
- The Positions listed as ALAC Positions are my suggestions.
- That being said, we need to transform this into an ALAC position VERY quickly.

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

- Empowered Community
  - Sole Designator
  - GNSO, ccNSO, ASO, GAC, ALAC

**ALAC Position: OK**

## Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce

- Individual (anyone) begins a petition
- Supported by AC/SO (15 days)
- Supported by other AC/SO (6 days)
- Conference Call (7 days)
- Support (2 or 3) to convene Community Forum (7 days)
- Community Forum (7 days)
- Decision to go to Empowered Community (15 days)
- Community Decision (3 or 4 *For*, <2 *Against*)

## **Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce - 2**

- **Enforcement for Non-compliance**
  - Mediation, IRP, Court or Recall if Board does not comply
  - Board Recall

## Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce - 3

Power	Support	Object
Reject a proposed Operating Plan/Strategic Plan/Budget	4 (or 3)*	<2
Approve changes to Fundamental Bylaws and Articles of Incorporation	4 (or 3)*	<2
Reject changes to regular bylaws	3	<2
Remove an individual Board Director appointed by a Supporting Organization or Advisory Committee	1	
Remove an individual Board Director appointed by the Nominating Committee	3	<2
Recall the entire board of directors	4 (or 3)*	<2
Initiate a binding Independent Review Process	3	<2
Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation	4 (or 3)*	<2

\* If 1 AC/SO abstains from a decision, a requirement for 4 supports is reduce to 3.

# Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce - 4

## ALAC Position:

- **General agreement**
- **Reject reduction of 4 supports needed to 3, particularly for Board Recall.**
  - **Change documented under Rec 1 (Para 61) – FAR from where the regular thresholds are found. Likely to be missed!**
  - **Rational is possible difficulty in approving Fundamental Bylaw changes – OK to change that one (ALAC had a concern about difficulty making such changes).**
  - **Change to Budget/Plan/IANA?**
- **Concern over 120 day requirement to name replacement Board member – ALAC procedures would have to change (probably radically).**

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

- Fundamental Bylaws are those associated with the new community, accountability powers, IRP IANA and ICANN's mission, commitments and core values.

**ALAC Position: OK**



## **Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers**

- Reject ICANN's Budget or Strategy/Operating Plans
- Reject Changes to ICANN Standard Bylaws
- Remove Individual ICANN Board Directors
- Recall the Entire ICANN Board
- Approve Changes to Fundamental Bylaws and Articles of Incorporation
- Initiate a binding Independent Review Process
- Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

# Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers - 2

## ALAC Position

- **General agreement**
- **Concern over Liability associate with Board member defamation?**

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

- Many of our objections to the 2<sup>nd</sup> draft proposal focused on this section
- Some of our concerns have been addressed
- Some have not
- A new issue has arisen

# Mission

ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.

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.

- Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to reflect the following considerations:
  1. 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.
  2. 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.
  3. For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.
  4. The CCWG anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

# Registry Specification 1

- 1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System (“DNS”);
- 1.2.2 functional and performance specifications for the provision of Registry Services;
- 1.2.3 Security and Stability of the registry database for the TLD;
- 1.2.4 registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;
- 1.2.5 resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- 1.2.6 restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.
- 1.3. Such categories of issues referred to in Section 1.2 of this Specification shall include, without limitation:
  - 1.3.1 principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
  - 1.3.2 prohibitions on warehousing of or speculation in domain names by registries or registrars;
  - 1.3.3 reservation of registered names in the 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); and
  - 1.3.4 maintenance of and access to accurate and up-to-date information concerning domain name registrations; and 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 for serving registered domain names in a TLD affected by such a suspension or termination.

# Mission - 2

- **ALAC concerns:**

- Many parts of current contracts were not created based on the bottom-up model
- Many parts of current contract are outside of the “picket fence” (that is, not referenced in Specification 1/4). PICs a good example.
- “grandfathering” can protect current contracts but not 100% clear that it will protect renewals and does not protect contracts not yet signed at the time of the Bylaw changes.
  - 35 in auction, 43 on hold, 224 in Pre-delegation test
- The ability to use the IRP to invalidate current contractual terms is not acceptable.

# Core Value

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.

# Core Value - 2

Response: ICANN does not possess the requisite skill or authority to intervene in the competitive market, and its Registry Service Evaluation Process (RSEP) recognizes that (by flagging potential items for review by sovereign competition authorities).

RSEP:

1. After the Registry submission of the RSEP request, and ICANN's completeness check is completed, General Counsel reviews the RSEP request for potential competition issues.  
The main factors evaluated are: [details omitted – see <https://www.icann.org/resources/pages/prelim-competition-issues-2012-02-25-en>]
2. Based on the analysis, General Counsel reaches a preliminary determination on the competition issues (i.e., no significant competition issues or significant competition issues could be raised).
3. If preliminary determination is that no significant competition issues could be raised, the competition review is complete.
4. If preliminary determination is that significant competition issues could be raised by the RSEP request, ICANN, through the General Counsel, will refer the matter to the appropriate competition authority ....

**ALAC Position: ICANN DOES make decisions on competition!**



# Commitments

Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

Preserve and enhance the neutral and judgment free operation of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;

The NTIA has committed to a transition ensuring “The neutral and judgment free administration of the technical DNS and IANA functions”.

Acceptable?

# AoC - Consumer Trust

No explicit reference even though it is in AoC Article 3.

CCWG Response: Article 3 of the affirmation of commitments is a general comment about the purpose of the AOC. It states what the specific commitments made by the parties are intended to promote. All of the specific commitments made by ICANN in the AOC have been transposed into the bylaws through this process.

**Sufficient?**

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

"Bylaw xx will be implemented in accordance with the framework of interpretation to be developed as part of "Work Stream 2" by the CCWG-Accountability or another cross-community working group chartered for such purpose by one or more Supporting Organizations or Advisory Committees. This group must be established promptly, in order to develop an appropriate framework of interpretation as promptly as possible, but in no event later than one year after Bylaw xx is adopted."

(This interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.)

**ALAC Position: Conceptually OK, but one year unrealistic and unclear what the penalty would be for not meeting deadline.**  
**Possible IRP?**

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

- ALAC concern over ability of IRP to accept cases based on conflicting panel decisions, but no apparent allowed outcome.
- CCWG response was that a policy would be needed to explicitly specify the panel decisions subject to such and IRP, and that policy would need to specify the possible outcomes

**ALAC Position: OK, but those details should be explicit.**

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

The ALAC has never had a concern with this and strongly supported it.

**ALAC Response: OK**

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

The only concerns raised by the ALAC have been addressed.

**ALAC Response: OK**

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

Early in the process the ALAC expressed similar concerns and supports the concept.

**ALAC Response: OK**

## **Recommendation #11: Board Obligations with regards to Governmental Advisory Committee Advice (Stress Test 18)**

The ALAC has decided that this is not an issue that it should comment on, other than to note that it has explicitly been stated as an NTIA requirement and that whatever is adopted **MUST** meet the transition requirements.

**ALAC Response: OK**



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

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

**ALAC Response: OK**

# Next Steps

- ALAC must send a preliminary notice to the CCWG of issues that we will be raising.
  - CRUCIAL to alert other Chartering Organizations of the issues that may stop us from ratifying the final CCWG proposal.
- Final comment must be submitted by December 21 (10 days!).
- Outreach?
- Meetings?
- Webinar?

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