From:
James Bladel, GNSO Chair
Donna Austin and Heather Forrest, GNSO Vice-Chairs

To:
CCWG-Accountability Co-Chairs - Thomas Rickert, Leon Felipe Sanchez and Mathieu Weill,

Date: 22 January 2016

Re: **GNSO Council Response to the CCWG-Accountability Third Draft Proposal**

Dear Thomas, Leon and Mathieu:

Attached, please find the detailed Response from the GNSO Council to each of the CCWG-Accountability's Recommendations that were contained in the Third Draft Proposal published for public comment on 30 November 2015. On behalf of the GNSO Council and the GNSO community, we hope that the attached document will be helpful to the CCWG-Accountability as it reviews all the community comments it has received, including those from each of its Chartering Organizations, and determines its next steps and timeline.

These Responses should be read in the wider context of input that the CCWG-ACCT received from all of the GNSO's various Stakeholder Groups and Constituencies (SGs/Cs) during the short Public Comment period, as well as any late comments submitted after the deadline. Our goal in this communication is to draw the CCWG's attention to the following points, which will further explain the GNSO Council's Response:

- The attachment does not represent the GNSO Council's approval (or lack thereof) for any of the CCWG-Accountability's recommendations; rather, it describes the GNSO Council's comments on – and where applicable, suggested modifications, conditions and qualifications to - those recommendations. We confirm that the attachment has been reviewed and approved by the GNSO Council, along with this letter.

- The GNSO Council's Response was based on a review and analysis of all of the GNSO SG/Cs' feedback provided during the public comment period on the Third Draft Report. Where specific SG/C comments have been included, these should not be read as representing either the entirety of that SG/C view or the endorsement of the GNSO Council of that comment. Instead, these comments were extracted and included in the GNSO Council Response because they were considered to represent or exemplify the specific qualifications, conditions and/or concerns that were expressed by the GNSO community (or parts thereof) in that portion of the Response document.

- The GNSO Council expects that its Response, all of the GNSO SG/C public comments, and the GNSO Council and community's suggested conditions, modifications and concerns will be fully taken into account by the CCWG-Accountability. We expect that the CCWG-Accountability will develop a Supplemental Proposal based on the input from its Chartering Organizations and the public. The GNSO Council also expects that it and other Chartering Organizations, and possibly the larger community, will have an adequate opportunity to review and comment on the Supplemental Proposal in a timely fashion.

- The GNSO Council will continue to discuss the CCWG-Accountability's recommendations from the Third Draft Proposal, with the expectation that the Council will vote on approval (or lack thereof) of the Supplemental Proposal forthcoming from the CCWG-Accountability. If no Supplemental Proposal will be forthcoming from the CCWG-Accountability, kindly let us know at your first opportunity.

On behalf of the GNSO Council and the GNSO community, we thank you and the CCWG-Accountability for all the tireless work and thoughtful effort that went into the development of the Third Draft Proposal. We look forward to working with the CCWG and the rest of the community to finalize a proposal that will meet the requirements and conditions set by the CCWG-Accountability's Chartering Organizations.

Thank you for your kind attention.

Best regards,

Donna Austin, GNSO Vice-Chair
James Bladel, GNSO Chair
Heather Forrest, GNSO Vice-Chair

(with Attachment)

Summary of GNSO Level of Support and Comments for each of the CCWG-Accountability's Recommendations in its Third Draft Proposal

This document contains the GNSO Council's response to the Recommendations presented in the CCWG-Accountability's Third Draft Proposal. Note that where GNSO Stakeholder Group and/or Constituency (SG/C) comments have been included, these were extracted from fuller comments from each SG/C and selected to either illustrate or explain the GNSO Council's response. For further details on the SG/C positions on each recommendation, or for those items noted as GNSO divergence, please review the individual SG/C submissions to the public comment forum or request a consultation with that SG/C.

Recommendation #1	Establishing An Empowered Community For Enforcing Community Powers
Level of GNSO Support	Limited support, with some opposition
GNSO Council Comments	- Some in the GNSO have identified a clear link with Recommendations #10 & #11 and are of the view that the current balance between SO/ACs needs to be preserved in the Empowered Community, especially with respect to the GAC. - As a condition of support for recommendation #1, this Recommendation must include expanded transparency, including a robust right of inspection and improvements to the Document Information Disclosure Policy (DIDP). Particularly in this regard, the GNSO requires a complete understanding of the differences between the right of inspection proposed in this Recommendation, versus that provided for under the Single Member Model that was initially proposed. - The GNSO believes that if a particular SO has a specific area of focus in relation to the budget, it should have proportional voice in Community decisions that affect it.

Recommendation #2	Empowering The Community Through Consensus: Engage, Escalate, Enforce
Level of GNSO Support	General support
GNSO Council Comments	- Several comments expressed concern in relation to the proposed time frames, which were deemed unworkable in practice as more time and flexibility are likely needed. - Several comments raised questions with regard to potential liability for the Community when removing directors, and suggested that additional protections be proposed. - There is broad support among the GNSO that the ICANN HQ should remain in California and that ICANN should remain organized under California law, based on the understanding that the proposed "sole designator" model is as recognized by California law, which may not be as common or the same under the law of other jurisdictions.

Recommendation #3	Redefining ICANN's Bylaws As 'Standard Bylaws' And 'Fundamental Bylaws'
Level of GNSO Support	General support with some qualifications
GNSO Council Comments	• Strong inspection rights must be included as a fundamental bylaw (as noted in the response to Recommendation #1). • For some SG/Cs, approval is conditioned upon a change to reflect that Member approval be replaced with Designator approval in Articles of Incorporation item 9. It was also pointed out that the proposal fails to discuss the Community's role in approving (or rejecting) changes to the Articles of Incorporation, and whether the Articles would be treated as Fundamental Bylaws or standard Bylaws for such purposes. Some are of the opinion that ICANN's Articles of Incorporation must be given the same treatment as Fundamental Bylaws, since Articles of Incorporation are, by their nature, even more "fundamental" than Bylaws.

Recommendation #4	Ensuring Community Involvement In ICANN Decision-Making: Seven New Community Powers
Level of GNSO Support	General support with some qualifications
GNSO Council Comments	• As noted in the response to Recommendations #1 and #3, the final proposal must include strong inspection rights and enhancements to the DIDP • As noted in the response to Recommendation #2, the final proposal must include provisions that shield Community participants from potential liability resulting from the removal of Board members. • As noted in the response to Recommendation #2, the proposed time frames for Community decision-making are potentially unworkable in practice • Removal of a Director appointed by an SO/AC shall be at the direction of the appointing SO/AC, and should not be subject to any list of defined conditions for removal. • The GNSO supports the provision that DIDP disputes are within the scope of permissible subject matter for an IRP. It should be made clear, however, that access to the IRP for this type of dispute should be allowed for all parties eligible to file a DIDP and not solely reserved for or subject to the approval of the Empowered Community itself. • 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 viewed as needing greater clarification and more certainty in the areas where the community has enforcement requirements, as identified in the CWG process.

Recommendation #5	Changing Aspects Of ICANN's Mission, Commitments And Core Values
Level of GNSO Support	Qualified support with divergent positions and conditions
GNSO Council Comments	The GNSO Council's qualified support for this Recommendation is based on the fact that many SG/Cs required that as a condition of support certain clarifications and modifications to the recommendation must first be made. The GNSO Council recognizes that these conditions may be divergent or even contradictory in certain cases, due to the diverse nature of the GNSO community. An illustrative, non-exhaustive list of suggested clarifications and modifications include: • The GNSO supports proposals that limit ICANN's activity to its Mission and Core Values only. • The GNSO recognizes that the proposed language for Bylaws revisions is still being finalized and reserve judgment on the wording until it is finalized. • ICANN's Articles of Incorporation should clarify that "the global public interest" is to be determined through a multi-stakeholder bottom-up process. • The GNSO Council believes that the words "of the DNS" were inadvertently omitted from the text of the Mission Statement in the 3rd Draft Report and need to be restored. • There is broad support for the principal recommendation for a limited ICANN mission. There is lack of consensus among GNSO stakeholders, however, about whether such a limited Mission should allow ICANN to enforce contract terms proposed by registries when those terms might be outside of ICANN's own mission e.g, in relation to proposed Stress Tests 29 & 30. • The following aspects of the 3rd draft proposal should be retained in the final proposal: p.10 of Annex 5, Core Value 3: "ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of

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its mission." p.39 "For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.

- Support for a revised statement of ICANN's mission is conditioned on the following: (1) The Bylaw clarifies that ICANN has a responsibility to enforce its agreements; (2) Satisfactory drafting of actual Bylaw text, particularly with regard to clarifying the nature of "services" and ensuring that compliance with and enforcement of existing obligations (e.g., PICs and Section 3.18 of RAA) are not weakened; and (3) IRP may be invoked for failure to act (e.g., failure to enforce contracts).

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Recommendation #6	Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as It Carries Out Its Mission
Level of Support	Limited support with some opposition
GNSO Council Comments	The GNSO generally supports the continued evolution of this concept. However, some groups within the GNSO support the proposal as written while others believe that the work should be done in Workstream 2 instead, noting that the proposed version of the Bylaw may be premature given the ongoing work related to human rights and other related open issues, such as (1) which "human rights" will be covered, (2) what is ICANN's role, if any, in enforcement, and (3) which body of law should apply, etc.

Recommendation #7	Strengthening ICANN's Independent Review Process
Level of GNSO Support	General support
GNSO Council Comments	The GNSO supports this recommendation. Comments made by the SG/Cs focused mostly on implementation details and enhancements, including (1)defining who has standing to bring a claim, (2) elements of a claim, including the need to add "failure to act" as a basis, (3) the chilling effects of a "loser pays" model, (4) community involvement in the selection and training of panelists, (5) language of the proceedings to ensure fairness outside a common law jurisdiction, and (6) a warning process by which a Panel could indicate early in the process that a claim is likely to be held frivolous, etc. While many such details remain to be worked out, the GNSO Council does not believe there are any major show-stoppers on this recommendation, provided the CCWG addresses the concerns raised in public comments.

Recommendation #8	Improving ICANN's Request For Reconsideration Process
Level of GNSO Support	General support
GNSO Council Comments	The GNSO Council notes that the following supplementary recommendations were submitted by various SG/Cs: • An independent party, such as the Ombudsman, should review and advise the full ICANN Board on a Request for Reconsideration (RR). • It is especially important that a neutral party (possibly the Ombudsman) reviews the requests first and advises the Board on their merit and worthiness. • A RR must be conducted in a timely fashion (including responses) and all aspects of a RR must be completely transparent and fully communicated to all ICANN stakeholders in a timely manner. This requires the joint design and implementation of the necessary reporting mechanisms by all ICANN stakeholders. • The recommendation should also make clear that (in)actions of the PTI[1] (including timing) are included within the scope of the RR process.

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[1] "PTI" refers to the new non-profit entity that the CWG-Stewardship had proposed be set up following the IANA stewardship transition, to separate the policy and operational aspects of the IANA function from ICANN. For further information, see the June 2015 Final Proposal from the CWG-Stewardship (https://community.icann.org/x/aJ00Aw).

Recommendation #9	Incorporation of the Affirmation of Commitments
Level of GNSO Support	Limited support with some opposition and potentially divergent qualifications

GNSO Council Comments	While there is GNSO support for recommendation #9, some SG/Cs either objected or noted certain qualifications for their support, including:
	• Opposition to some elements was raised by two groups (NCUC and NCSG).
	• Qualified support was indicated by two groups (BC and IPC).
	• The following supplementary recommendations were submitted:
	  - NPOC supports Recommendation #9, but seeks clarification with regard to how actions around the WHOIS and competition, consumer trust and consumer choice would be handled within the context of ICANN's Bylaws.
	  - The BC notes that two of the AoC reviews (Whois and gTLD expansion) relate exclusively to gTLDs, so the BC believes that GNSO stakeholders should be given the opportunity for greater representation on those review teams. The CCWG 3rd draft proposal allows each SO/AC to offer multiple names to review teams, and would enable GNSO representatives to occupy slots that were not requested by other SOACs. At a minimum, this aspect of the Third Draft Proposal should be retained in the final proposal.
	  - The IPC believes that AoC section 8(b) [ICANN to remain a US-based non-profit] should be incorporated into the Fundamental Bylaws, at least if the Articles of Incorporation are not so treated (see above under recommendation #3), and that there should be stronger guarantees of direct constituency participation on review teams that most directly affect a constituency.
	  - The NCUC supports the continuation of the

	ATRT as being compatible with the CCWG's mission and efforts, but does not support the continuation of the other AoC reviews.
	- The NCSG does not wholly support Recommendation #9. The NCSG supports continuation of the ATRT, but does not support continuance of the other AoC reviews, which lack a bottom-up and consensus based constitution.
	- The NCSG believes 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.

Recommendation #10	Enhancing the Accountability of Supporting Organizations and Advisory Committees
Level of GNSO Support	Limited support with some opposition
GNSO Council Comments	The concerns expressed by the SG/Cs include: • There are some concerns within the GNSO with the top down nature of accountability reviews, and the exemption of the GAC from this community requirement. • The unilateral control by the Board of periodic reviews of the SO/ACs would allow the Board to involve itself unfettered in the governance structure of SO/ACs. It was suggested that the review process should be community-led and not controlled by the Board, so that the bottom up nature of ICANN governance is maintained. • It is also troubling that the GAC, further empowered if Recommendations #1 and #11 are adopted, would be exempted from the same periodic reviews as the other SO/ACs. All participants in the Community Mechanism should be subject to equivalent accountability reviews.

Recommendation #11	Board Obligations regarding GAC Advice
Level of GNSO Support	Little support; strong opposition
GNSO Council Comments	There is broad opposition to this recommendation as written. Most SG/Cs do not support the proposal to raise the threshold for a Board vote to reject GAC advice[2]. All expressed serious concerns over the lack of specificity in the recommendation in relation to the requirements for GAC advice (such as the provision of rationale) and the possibility that this recommendation, if adopted, could unduly change the nature of the Board-GAC relationship and/or the position of the GAC vis-à-vis other SO/ACs. Several SG/Cs also believe that any CCWG recommendation on this topic should retain the current flexibility in the Bylaws where the Board is not required to undertake a formal vote in order to reject GAC advice.

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[2] IPC, NCSG and the Registrars SG expressly objected to changing and specifying the threshold for Board action; the Registries SG and ISPCP Constituency did not object expressly but highlighted significant concerns about the implications of such a change. The Registries SG stated it was unlikely to support the 2/3 threshold for Board action unless three additional requirements (provision of a rationale, consistency with ICANN bylaws and within GAC scope, and defined consensus) applied to such GAC Advice. While BC and NPOC supported the change, both nevertheless also noted concerns over the implications, with the BC's support expressly conditioned upon certain qualifications being made to the proposal.

Recommendation #12	Committing to further accountability work in Work Stream 2
Level of GNSO Support	General support
GNSO Council Comments	• The GNSO requires that the proposed interim bylaw require the ICANN Board to formally consider and/or adopt WS2 recommendations, and that these recommendations should be approved by the Board no later than the end of December 2016. • Additionally, the GNSO requires that the WS2 effort continue to be supported by independent counsel, and that WS2 specifically include reviews of the DIDP and Whistleblower Policy.