Re: Confirmation that the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations Meets the Requirements of the CWG-Stewardship Final Transition Proposal

Date: February __, 2016

ICANN Cross Community Working Group Accountability (CCWG-Accountability)

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

We write in response to your group's recent publication of the Supplemental Final Proposal on Work Stream 1 Recommendations (the "Final Proposal"). We have prepared this in our capacities as co-chairs of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship).

The CWG-Stewardship final transition proposal submitted for approval to the chartering organizations on 11 June 2015 is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms by the CCWG-Accountability. Specifically, as recognized in the Final Proposal, the CWG-Stewardship final transition proposal sets forth ICANN accountability requirements regarding Community Empowerment Mechanism, IANA Functions Budget, IANA Function Reviews, Customer Standing Committee ("CSC"), Separation Process, Appeals Mechanism, and Post-Transition IANA ("PTI"), as well as Fundamental Bylaws. This document is and should be viewed as an element of the agreed-upon working methods of the CWG-Stewardship and the CCWG-Accountability.

Thank you for resolving each of the issues raised in our comment letter relating to your group's publication of its third draft proposal (the "Third Draft Proposal") and for all your hard work in reaching consensus. As you know, we rely on your work and our trust in the work of your group is vital in permitting us to focus on the essential aspects of our work on the stewardship transition.

We confirm that the Final Proposal meets the requirements of the CWG-Stewardship final transition proposal.

1.   **Community Empowerment Mechanism**

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

        (a) The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;

        (b) The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA Functions) by reviewing and approving: (i) ICANN Board decisions with

respect to recommendations resulting from an IANA Function Review ("IFR") or Special IFR and (ii) the ICANN Budget, including a separate budget for IANA Functions Operations; and

    (c) The ability to approve amendments to ICANN's "Fundamental Bylaws," as described below.

__Applicable CCWG-Accountability Recommendations__ – The Final Proposal contemplates implementing a "Sole Designator" model, pursuant to which a new entity in the form of a California unincorporated association (the "Empowered Community") will be given the role of "Sole Designator" of ICANN Board Directors and will have the ability to directly or indirectly enforce the Community Powers.

The Final Proposal contemplates that the Empowered Community would have the power to: (a) exercise the Community Powers described in the Final Proposal, including the power to: (i) remove (in addition to appoint) individual ICANN Directors, and (ii) recall the entire ICANN Board, and (b) enforce decisions and powers of the Empowered Community through initiating a binding Independent Review Panel ("IRP") process, where a panel decision is enforceable in any court recognizing international arbitration results. In addition, the Final Proposal contemplates that the Empowered Community would be required to follow the engagement and escalation processes described in the proposal before exercising any of the Community Powers. Finally, with respect to actions involving individual Directors, the escalation process to remove a Director could only be used once during a Director's term if the process reaches the step of holding a community forum or above and then fails to remove the Director.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirement relating to the community empowerment mechanism.*

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

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

In the final transition proposal, the CWG-Stewardship also recommends that the IANA Functions Operator's comprehensive costs should be transparent and ICANN's operating plans and budget should include itemization of all IANA operations costs to the project level and below as needed. Under the final transition proposal, an itemization of IANA costs would include: direct costs for the operation of the IANA Functions, direct costs for shared resources and support functions allocation. Furthermore, these costs should be itemized into more specific costs related to each specific function to the project level and below as needed. PTI should also have a yearly budget that is reviewed and approved by the ICANN community on an annual basis. PTI should submit a budget to ICANN at least nine

months in advance of the fiscal year to ensure the stability of the IANA services. It is the view of the CWG-Stewardship that the IANA Functions Budget should be approved by the ICANN Board in a much earlier timeframe than the overall ICANN Budget. The CWG-Stewardship (or a successor implementation group) will need to develop a proposed process for an IANA Functions Operations-specific budget review, which may become a component of the overall budget review. It is anticipated that the IANA Functions Operations Budget review will include a consultation process with relevant and potentially impacted IANA customers.

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

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

The Final Proposal specifies that a decision by the Empowered Community to reject a budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws; the global public interest; the needs of ICANN stakeholders; financial stability, or other matters of concern to the community. The veto could only concern issues that had been raised in the public consultations conducted before the ICANN Board approved the budget or plan.

The Final Proposal specifies that the ICANN Budget and the IANA Functions Operations Budget would be considered separately by the community so that a rejection of the ICANN Budget would not automatically result in a rejection of the IANA Functions Operations Budget, and a rejection of the IANA Functions Operations Budget would not serve as a rejection of the ICANN Budget. The Final Proposal references the CWG-Stewardship requirements that IANA costs as set forth in the IANA Functions Operations Budget be itemized to include "direct costs for the IANA Department", "direct costs for shared resources" and "support functions allocation," and that these costs should be itemized into more specific costs related to each specific function to the project level and below as needed.

The Final Proposal also contemplates that if the Community Power is exercised to reject the ICANN Budget or the IANA Functions Operations Budget, a caretaker budget would be implemented. The Final Proposal describes a caretaker budget as one that provides ongoing funding for crucial ICANN functions, while the issue(s) that caused the Empowered Community's use of the Community Power are resolved, and will be based on current ICANN operations, according to rules developed in the implementation process (which will form a public and transparent

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"defined approach" to the caretaker budget). The Final Proposal notes that the caretaker budget concept should be embedded in the Fundamental Bylaws, including the responsibility of ICANN's Chief Financial Officer to establish the caretaker budget in accordance with the defined approach.

The Final Proposal acknowledges that the CWG-Stewardship (or a successor implementation group) is required to develop a proposed process for the IANA Functions Operations-specific budget establishment and review. The Final Proposal notes that the CWG-Stewardship may wish to detail the planning process by which the IANA Functions Operations Budget is established as part of its implementation program of work, including the level of detail required to be provided for community input and the timeframes for consultations and approvals, and that the CCWG-Accountability limits its requirements to those set out in Recommendation 4 of the Final Proposal.

As we noted in our comment letter on the Third Draft Proposal, the Final Proposal does not specifically address the timeframe for when budgets should be submitted.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirements relating to the ICANN Budget and IANA Functions Budget.*

3. **IFR**

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

Applicable CCWG-Accountability Recommendations – The Final Proposal contemplates incorporating the review system defined in the Affirmation of Commitments into ICANN's Bylaws. The Final Proposal specifies that the IFR and Special IFR would be incorporated into the ICANN Bylaws based on the requirements detailed by the CWG-Stewardship, and notes that it is anticipated that the ICANN Bylaw drafting process would include the CWG-Stewardship. The Final Proposal also provides that the Empowered Community will have the power to reject ICANN Board decisions relating to reviews of the IANA names function. Prior to making a decision relating to IFRs, the Final Proposal specifies that the ICANN Board must have undertaken a mandatory engagement process pursuant to which the ICANN Board must have consulted with the community.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirement relating to the IFR.*

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

CWG Stewardship Requirements – The CWG-Stewardship final transition proposal requires the creation of a CSC that is empowered to monitor the performance of the

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IANA names function and escalate non-remediated issues to the ccNSO and GNSO. The ccNSO and GNSO should be empowered to address matters escalated by the CSC.

Applicable CCWG-Accountability Recommendations – The Final Proposal contemplates that the CSC will be incorporated into the ICANN Bylaws.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirement relating to the CSC.*

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

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

Applicable CCWG-Accountability Recommendations – The Final Proposal contemplates that governance provisions related to PTI will be incorporated into the ICANN Bylaws as Fundamental Bylaws.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirement relating to PTI.*

6.   **Separation Process**

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

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

The Final Proposal specifies that the Empowered Community will have the power to reject ICANN Board decisions relating to reviews of the IANA names function; including the triggering of PTI separation. Prior to making a decision relating to IFRs, including the triggering of any PTI separation process, the Final Proposal

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specifies that the ICANN Board must have undertaken a mandatory engagement process pursuant to which the ICANN Board must consult with the community.

The Final Proposal specifies that the right to reject ICANN Board decisions relating to reviews of the IANA names function, including ICANN Board decisions relating to Special IFR and SCWG recommendations, can be exercised by the Empowered Community an unlimited number of times.

Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirements relating to the separation process.*

7.   **Appeals Mechanism**

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

Applicable CCWG-Accountability Recommendations *–* The Final Proposal contemplates significant enhancements of ICANN's existing appeals mechanisms, including the IRP. It is contemplates that the IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA naming function (with the exception of ccTLD delegations and redelegations, which appeals mechanisms are to be developed by the ccTLD community post-transition, in coordination with other parties), and that the Empowered Community can use the IRP to challenge an ICANN Board decision if it believes that the ICANN Board is in breach of its Articles of Incorporation or Bylaws (for example, if the ICANN Board determines not to accept the decision of the Empowered Community to use one of its Community Powers or if the ICANN Board determines not to implement a recommendation of the IFR team).

The Final Proposal specifies that the IRP will be available to hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions. The Final Proposal notes that ICANN will enter into a contract with PTI that grants PTI the rights and obligations to serve as the IANA Functions Operator for the IANA naming functions, sets forth the rights and obligations of ICANN and PTI, and includes service level agreements for the IANA naming functions. In addition, the Final Proposal notes that the ICANN Bylaws will require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work, to ensure that PTI complies with its contractual obligations. ICANN's failure to enforce material obligations will constitute an ICANN Bylaws violation and be grounds for an IRP by the Empowered Community. The Final Proposal also notes that the ICANN Bylaws will provide that PTI service complaints of direct customers of the IANA naming functions that are not resolved through mediation may be appealed by way of the IRP.

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Conclusion – *We believe that the Final Proposal adequately satisfies the CWG-Stewardship requirements relating to the appeals mechanism.*

8. **Fundamental Bylaws**

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

Applicable CCWG-Accountability Recommendations – The Final Proposal contemplates that the following, among others, would be made Fundamental Bylaws as part of Work Stream 1:
- Each of the Community Powers (including in relation to ICANN and IANA Functions Operations Budgets, ICANN Director removal/Board recall, and amendments to Fundamental Bylaws);
- The Empowered Community and the rules by which it is governed;
- The framework for the IRP;
- The IFR, Special IFR and the separation process;
- The CSC; and
- PTI governance.

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

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

We appreciate and thank you for your efforts to ensure coordination and collaboration between the co-chairs of our respective groups.

Best regards,

Lise Fuhr and Jonathan Robinson

Co-chairs, CWG-Stewardship

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Summary report: Litéra® Change-Pro TDC 7.5.0.176 Document comparison done on 2/24/2016 11:13:38 PM	
Style name: Sidley Default	
Intelligent Table Comparison: Active	
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Modified DMS: iw://SIDLEYDMS/ACTIVE/213202714/5	
Description: CWG Comment Letter - CCWG Final Proposal - Sidley Draft	
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Delete	7
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Move To	1
Table Insert	0
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Table moves to	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
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