

# **CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations**

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18 February 2016



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# Summary

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Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is being distributed for the consideration and approval of the working group's 6 Chartering Organizations.

This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.

The main elements of the proposal are outlined below, supported by additional annexes and appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.

- **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.
- An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.
- New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
  - Reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans.
  - Reject changes to ICANN's Standard Bylaws.
  - Approve changes to new Fundamental Bylaws, Articles of Incorporation and ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - Remove an individual ICANN Board Director.
  - Recall the entire ICANN Board.
  - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
  - Reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of Post-Transition IANA separation.
  - The rights of inspection and investigation
- A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.

All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.

The accountability elements outlined above will be supported through:

- Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.
- Core elements of ICANN's governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

In addition, further proposed changes include:

- Recognition of **ICANN's respect for Human Rights** into the Bylaws.
- Incorporation of ICANN's commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.
- Improved accountability and diversity standards for ICANN's **Supporting Organizations and Advisory Committees**.
- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016 that do not need to be in place or committed to prior to the IANA Stewardship Transition. These include:
  - Considering improvements to ICANN's standards for diversity at all levels.
  - Further enhancements to the accountability of ICANN's Supporting Organizations and Advisory Committees, as well as ICANN staff.
  - Improving ICANN's transparency relating to ICANN's Documentary Information Disclosure Policy (DIDP), interactions with governments, whistleblower policy and Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment in the Bylaws.
  - Addressing questions focused on jurisdiction of contracts and dispute settlements.
  - Considering enhancements to the role and function of the ICANN Ombudsman.

To develop these recommendations to improve ICANN's accountability, the working group:

- Relied on suggestions and proposals generated inside the working group and by the broader Internet multistakeholder community.
- Conducted three public comment periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.
- Rigorously "stress tested" ICANN's current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.
- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.
- Made the minimum enhancements to ICANN's accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.
- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.

- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

Each of the twelve recommendations has a corresponding annex with additional details including a summary, CCWG-Accountability<sup>1</sup> Recommendations, Detailed Explanation of Recommendations, Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations,' Stress Tests Related to this Recommendation, how the recommendation meets the CWG-Stewardship<sup>2</sup> Requirements, and how the recommendation addresses NTIA Criteria.

**Note:** Minority statements can be found in Appendix A – Documenting Consensus (Including Minority Views)

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<sup>1</sup> Cross Community Working Group on Enhancing ICANN Accountability

<sup>2</sup> Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

# Background

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On 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the [Internet Assigned Numbers Authority \(IANA\) Functions](#) to the global multistakeholder community. NTIA asked ICANN to convene an inclusive, global discussion to determine a process for transitioning the stewardship of these functions to the Internet community.

During initial discussions on how to proceed with the transition process, the ICANN multistakeholder community, recognizing the safety net that the NTIA provides as part of its stewardship role of the IANA Functions, raised concerns about the impact of the transition on ICANN's accountability.

To address these concerns, the ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process. As a result, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened. The CCWG-Accountability's work consists of two tracks:

**Work Stream 1:** Focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

**Work Stream 2:** Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

Any other consensus items that are not required to be in place within the IANA Stewardship Transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN Management or others.

The work documented in this Draft Proposal focuses on Work Stream 1, with some references to related activities that are part of Work Stream 2's remit.



# Requirements

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This section provides an overview of the requirements the CCWG-Accountability has to fulfill in developing its recommendations

## NTIA Requirements

NTIA [has requested](#) that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. Government stewardship role” with regard to the IANA Functions and related Root Zone management. In making its announcement, the NTIA specified that the transition Proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectations of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a Proposal that replaces its role with a government-led or an intergovernmental organization solution.

Additionally, NTIA also requires that the CCWG-Accountability Proposal clearly document how it worked with the multistakeholder community, which options it considered in developing its Proposal, and how it tested these.

Please Refer to Annex 14 – NTIA Requirements for the details of how the CCWG-Accountability meets these requirements.

## CWG-Stewardship Requirements

In the transmittal letter for the CWG-Stewardship transition plan to the IANA Stewardship Transition Coordination Group (ICG), the CWG-Stewardship noted the following regarding its dependencies on the CCWG-Accountability work in response to an earlier version of this document:

“The CWG-Stewardship is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms proposed by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The co-Chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability Work Stream 1 recommendations, if implemented as expected, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability. If any element of these level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship, this will require revision.”

The CWG-Stewardship requirements of the CCWG-Accountability are detailed on pages 20 – 21 of the CWG-Stewardship Proposal transmitted on 25 June 2015. The Work Stream 1 Proposals from the CCWG-Accountability address all of these conditions.

These requirements are:

1. ICANN Budget
2. ICANN Board and Community Empowerment Mechanisms
3. IANA Function Review and Separation Process
4. Customer Standing Committee
5. Appeals Mechanism
6. Post-Transition IANA (PTI) Governance
7. Fundamental Bylaws

Please refer to Annex 13 – CWG-Stewardship Requirements for details on how the CCWG-Accountability meets these requirements.

# The CCWG-Accountability's Findings and Recommendations

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This section provides an overview of the CCWG-Accountability's findings and recommendations regarding Work Stream 1:

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

**Recommendation #2:** Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

**Recommendation #3:** Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

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

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

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

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

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

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

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

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

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

Note:

- **The language in the Summary, CCWG-Accountability Recommendations, and Changes from the “Third Draft Proposal on Work Stream 1 Recommendations” sections of the Recommendations is copied from the matching Annexes which were approved as consensus positions by the CCWG-Accountability. Only the formatting has been modified to accommodate the structure of the main report.**
- **The language proposed in recommendations for ICANN Bylaw revisions are conceptual at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental and Standard Bylaws).**

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

### Summary

- Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board has the final responsibility for the activities and affairs of ICANN.
- With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.
- The CCWG-Accountability recommends creating a new entity that will act at the direction of the community to exercise and enforce Community Powers. . The entity will take the form of a California unincorporated association and be given the role of sole designator of ICANN's Directors and will have the ability to enforce directly or indirectly the Community Powers. The entity will be referred to as the "Empowered Community."
- As permitted under California law, the Empowered Community will have the power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws may be provided to the Empowered Community.
- The CCWG-Accountability accepts that its statutory power will be limited as described above and that this is sufficient given:
  - The creation of Fundamental Bylaws that can only be modified jointly by the ICANN Board and Empowered Community.
  - All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
  - The right of inspection is granted to Decisional Participants in the Empowered Community.
  - The right of investigation is granted to the Decisional Participants in the Empowered Community.
- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

### CCWG-Accountability Recommendations

- The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:
  - This entity will take the form of a California unincorporated association and be given the role of sole designator of ICANN's Directors and will have the ability to enforce

directly or indirectly the Community Powers. This entity will be referred to as the “Empowered Community.”

- The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the “Decisional Participants” in the Empowered Community.
- The Empowered Community, and the rules by which it is governed, will be constituted in ICANN’s Fundamental Bylaws along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
- The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

Additionally, the CCWG-Accountability recommends:

- Including in the ICANN Bylaws the right for Decisional Participants in the Empowered Community to inspect as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.
- Including in the ICANN Bylaws the right of investigation which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.
- Including in the ICANN Bylaws the following limitation associated with GAC acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community’s exercise of a Community Power to challenge the ICANN Board implementation of GAC consensus advice (referred to as the “GAC carve-out”). In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum, or exercise the Community Power. The GAC carve-out preserves the ICANN Board’s unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus (as defined in Recommendation #11) while protecting the Empowered Community’s power to challenge such Board decisions.

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, stressing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduce additional suggestion by the ICANN Board regarding investigation right (audits), based on 3 Decisional Participants in the Empowered Community threshold.

- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the “GAC carve-out”..

### **Relevant Annexes**

- Annex 01 – Details on Recommendation #1: Establishing an Empowered Community for enforcing Community Powers
- Annex 03 – Details on Recommendation #3: Redefining ICANN’s Bylaws as “Standard Bylaws” and “Fundamental Bylaws”
- Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

## Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, and Enforcement

### Summary

#### Engagement

- Today, the Internet Corporation for Assigned Names and Numbers (ICANN) Board voluntarily consults with the community on a variety of decisions, including the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an “engagement process.”
- The CCWG-Accountability is recommending that engagement processes for specific ICANN Board actions be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
  - Approving ICANN’s Five-Year Strategic Plan
  - Approving ICANN’s Five-Year Operating Plan
  - Approving ICANN’s Annual Operating Plan & Budget
  - Approving the Internet Assigned Numbers Authority (IANA) Functions Budget
  - Approving any modifications to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN’s sale or other disposition of all or substantially all of ICANN’s assets
  - Making ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process
- If it is determined that there is divergence between the ICANN Board and the community after the engagement process, the Empowered Community may decide to use a Community Power after the appropriate “escalation process” has been satisfied.
- The Empowered Community may begin an escalation process to:
  - Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
  - Reject a change to ICANN Standard Bylaws.
  - Approve changes to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN’s sale or other disposition of all or substantially all of ICANN’s assets.
  - Remove an individual ICANN Board Director.
  - Recall the entire ICANN Board.



- Initiate a binding community Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
- Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

### **Escalation**

- The escalation process can differ, sometimes significantly, from one Community Power to another.
- One of the most standardized versions of the escalation process is required for all Community Powers to “reject,” remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.
- This escalation process is comprised of the following steps:
  1. An individual starts a petition in a Supporting Organization (SO) or Advisory Committee (AC) that is a Decisional Participant in the Empowered Community (see Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers).
    - If the petition is approved by that SO or AC, it proceeds to the next step.
    - If the petition is not approved by that SO or AC, the escalation process is terminated.
  2. The SO or AC that approved the petition contacts the other Decisional Participants to ask them to support the petition.
    - At least one additional SO and/or AC must support the petition (for a minimum of two or, for Board recall, three) for a Community Forum to be organized to discuss the issue.
      - If the threshold is not met, the escalation process is terminated.
      - If the threshold is met, a Community Forum is organized to discuss the petition.
  3. An open one- to two-day Community Forum is organized for any interested stakeholder in the community to participate.
    - The petitioning SO and/or AC will:
      - a. Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants.
      - b. Designate a representative(s) to liaise with SOs/ACs to answer questions from the SOs/ACs.
      - c. If desired, request (optional) that ICANN organize a conference call prior to the Community Forum for the community to discuss the issue.

- If the ICANN Board and the Empowered Community can resolve their issues before or in the Community Forum, the escalation process is terminated.
  - Otherwise the Empowered Community must decide if it wishes to use its Community Power.
4. The Empowered Community considers use of a Community Power.
- If the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.
  - If the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and directs it to comply with the decision (as outlined in the Fundamental Bylaws for this Community Power).
5. The Empowered Community advises the ICANN Board.
- If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

### **Enforcement**

- If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.
- The enforcement process can proceed in one of two ways:
  1. The Empowered Community may initiate mediation and community IRP procedures.
  2. The Empowered Community may initiate an escalation process to recall the entire ICANN Board.
- The enforcement process may result in a resolution of the issue. Otherwise, if needed, the result of the enforcement process is enforceable in court.
- If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

### **CCWG-Accountability Recommendations**

- Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that

complies with ICANN rules for public consultations) before taking action on any of the following:

- Approving ICANN's Five-Year Strategic Plan.
  - Approving ICANN's Five-Year Operating Plan.
  - Approving ICANN's Annual Operating Plan & Budget.
  - Approving the IANA Functions Budget.
  - Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.
- Include the engagement, escalation, and enforcement processes in the Fundamental Bylaws. Note: The escalation processes for each Community Power are outlined in Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.

**Table: Required Thresholds for the Various Escalation and Enforcement Processes (Based on a Minimum of Five Decisional Participants in the Empowered Community)**

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
<ul style="list-style-type: none"> <li>● 1. Reject a proposed Operating Plan/Strategic Plan/Budget</li> </ul>	<ul style="list-style-type: none"> <li>● Two SOs/ACs</li> </ul>	<ul style="list-style-type: none"> <li>● Four support rejection, and no more than one objection</li> </ul>
<ul style="list-style-type: none"> <li>● 2. Approve a change to Fundamental Bylaws and Articles of Incorporation, and approve ICANN's sale or other disposition of all or substantially all of ICANN's assets</li> </ul>	<ul style="list-style-type: none"> <li>● N/A</li> </ul>	<ul style="list-style-type: none"> <li>● Three support approval, and no more than one objection</li> </ul>
<ul style="list-style-type: none"> <li>● 3. Reject changes to Standard Bylaws</li> </ul>	<ul style="list-style-type: none"> <li>● Two SOs/ACs, including the SO that led the PDP that requires the Bylaw change (if any)</li> </ul>	<ul style="list-style-type: none"> <li>● Three support rejection, including the SO that led the PDP that requires the Bylaw change (if any), and no more than one objection</li> </ul>

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
<ul style="list-style-type: none"> <li>4a. Remove an individual Board Director nominated by an SO or AC (and appointed by the Empowered Community)</li> </ul>	<ul style="list-style-type: none"> <li>Majority within nominating SO/AC</li> </ul>	<ul style="list-style-type: none"> <li>Invite and consider comments from all SOs/ACs. 3/4 majority within the nominating SO/AC to remove their director</li> </ul>
<ul style="list-style-type: none"> <li>4b. Remove an individual Board Director nominated by the Nominating Committee (and appointed by the Empowered Community)</li> </ul>	<ul style="list-style-type: none"> <li>Two SOs/ACs</li> </ul>	<ul style="list-style-type: none"> <li>Three support, and no more than one objection</li> </ul>
<ul style="list-style-type: none"> <li>5. Recall the entire Board of Directors</li> </ul>	<ul style="list-style-type: none"> <li>Three SOs/ACs</li> </ul>	<ul style="list-style-type: none"> <li>Four support, and no more than one objection<sup>3</sup></li> </ul>
<ul style="list-style-type: none"> <li>6. Initiate a binding IRP or a Request for Reconsideration</li> </ul>	<ul style="list-style-type: none"> <li>Two SOs/ACs</li> </ul>	<ul style="list-style-type: none"> <li>Three support, including the SO(s) that approved the policy recommendations from the PDP which result is being challenged through the IRP (if any), and no more than one objection</li> <li>Require mediation before IRP begins</li> </ul>
<ul style="list-style-type: none"> <li>7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process</li> </ul>	<ul style="list-style-type: none"> <li>Two SOs/ACs</li> </ul>	<ul style="list-style-type: none"> <li>Four support, and no more than one objection</li> </ul>

Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the At-Large AC and Governmental Advisory Committee (GAC) (if the GAC chooses to participate) would participate in the Empowered Community (that is, they will be listed in the Bylaws as the five Decisional Participants).

The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects, with the following exception: where the power to be exercised is recalling the entire

<sup>3</sup> A minority of CCWG-Accountability participants prefer to require five SOs and ACs, or allow one objection to block consensus.

Board for implementing GAC advice, the reduced threshold would apply only either (1) after an IRP has found that, in implementing GAC advice, the Board acted inconsistently with the ICANN Bylaws, or (2) if the IRP is not available to challenge the Board action in question. If the Empowered Community has brought such an IRP and does not prevail, the Empowered Community may not exercise its power to recall the entire the Board solely on the basis of the matter decided by the IRP. It may, however, exercise that power based on other grounds.

The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ICANN changes to have more SOs or ACs.

In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would however need to be a conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the change would follow the Fundamental Bylaw change process, which enables such a conscious decision to be undertaken.

## Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Extended time for certain escalation steps in response to comments. Kept overall timeline similar by combining and removing some steps (mandatory conference call).
- Made it mandatory for petitioning party to reach out to SOs/ACs to socialize relevant information before Community Forum.
- Acknowledged comments regarding the thresholds adjustment in case the number of Decisional Participants is lower (paragraph 60 – page 12 of the Third Draft Proposal), by removing this option and replacing it with a lower threshold for approving changes to Fundamental Bylaws. Since the Fundamental Bylaw change process is a requirement for “approval” and not a “rejection” option, this would preserve the requirement for stronger protection of Fundamental Bylaws.
- Determined that the use of the corresponding percentage for thresholds as recommended by the Board can be suggested as a guideline in the event of the creation of new SOs/ACs but there would need to be a conscious decision, depending on the circumstances. If such a new SO/AC were to become a Decisional Participant in the Empowered Community, this change would require a change to the Fundamental Bylaws and would therefore require approval by the Empowered Community.
- Implemented the compromise for Recommendation #11 that the threshold requirements would be modified if the GAC was a Decisional Participant.

## Relevant Annexes

Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

Annex 03 – Details on Recommendation #3: Redefining ICANN's Bylaws as “Standard Bylaws” and “Fundamental Bylaws”

Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers.

## Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

### Summary

- Currently, the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) have a single mechanism for amendment:
  - Any provision of the ICANN Bylaws can be changed by a 2/3 vote of all the Directors on the ICANN Board.
  - The Board is not required to consult the ICANN community or the wider public before amending the Bylaws, but has voluntarily done so up to this point.
- The CCWG-Accountability recommends classifying each of the ICANN Bylaws as either a “Fundamental Bylaw” or a “Standard Bylaw,” with Fundamental Bylaws being more difficult to change.
- Specifically, the CCWG-Accountability recommends that:
  - Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
  - The requirement for public consultations is added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
  - Any changes to Fundamental Bylaws require approval from both the ICANN Board and Empowered Community as outlined in the respective Community Power (see Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers).
  - The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised from 2/3 to 3/4.
  - Approval for changes to the Articles of Incorporation use the same process required for approving changes to Fundamental Bylaws including public consultations.
- Why is the CCWG-Accountability recommending this?

The CCWG-Accountability felt that it was crucial to ensure that ICANN Bylaws that embody the purpose of the organization (Mission, Commitments, and Core Values) and are meant to ensure the accountability of the ICANN Board cannot be changed by the ICANN Board acting alone.

### CCWG-Accountability Recommendations

- The CCWG-Accountability recommends:
  - Classifying each of the ICANN Bylaws as either a Fundamental Bylaw or a Standard Bylaw
  - The following CWG-Stewardship and CCWG-Accountability Recommendations be made Fundamental Bylaws:

- The Empowered Community for enforcing Community Powers, including the role of sole designator of ICANN's Directors, as described in Recommendation #1.
  - The escalation and enforcement mechanisms as described in Recommendation #2.
  - The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets, as described in Recommendation #3.
  - The seven Community Powers as described in Recommendation #4.
  - The Mission, Commitments, and Core Values as described in Recommendation #5.
  - The framework for the Independent Review Process (IRP) as described in Recommendation #7.
  - The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
  - The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
  - The rights of investigation and inspection (as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers)
- Requiring ICANN to conduct public consultations on any proposed changes to Standard Bylaws, Fundamental Bylaws or the Articles of Incorporation.
  - Requiring approval for any changes to Fundamental Bylaws and the Articles of Incorporation from both the ICANN Board and the Empowered Community as outlined in the Community Power (see Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers).
  - Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or the Articles of Incorporation from 2/3 to 3/4 of all the Directors on the ICANN Board.

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

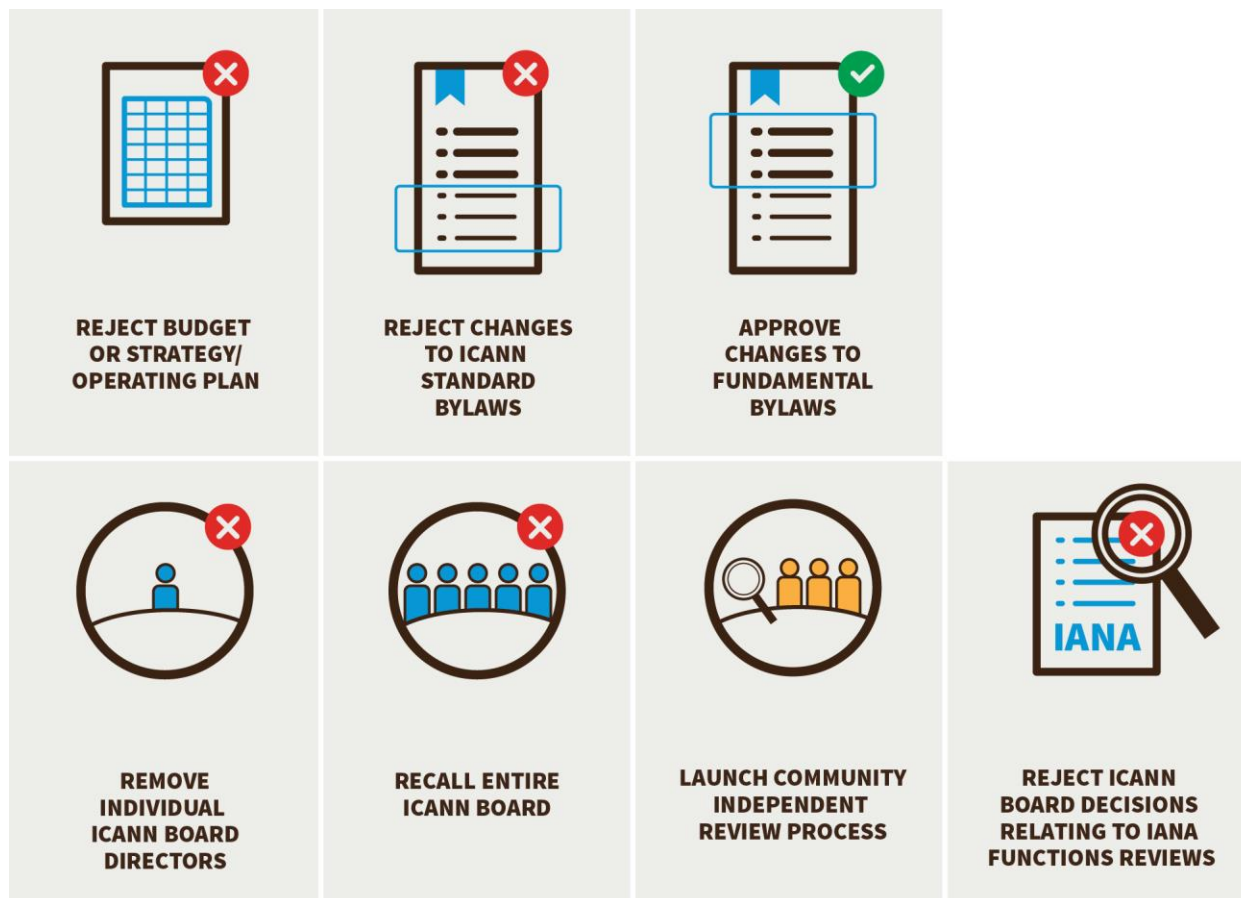
- Clarified that IANA Function Review (IFR) provisions apply only to the IANA naming functions (CWG-Stewardship requirement)
- Clarified the process for changes of Articles of Incorporation to be similar to process for changes to Fundamental Bylaws, as well as the process for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Added a specific recommendation that the current Articles of Incorporation be modified to remove the notion of members and reflect the need for an affirmative vote of at least three quarters of all the Directors on the ICANN Board, as well as approval by the Empowered Community.

### **Relevant Annexes**

Annex 03 – Details on Recommendation #3: Redefining ICANN's Bylaws as “Standard Bylaws” and “Fundamental Bylaws”

Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

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



### Summary

- The CCWG-Accountability has recommended seven Community Powers that should be in place to improve accountability and ensure community engagement. These are:
  - Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
  - Reject a change to ICANN Standard Bylaws.
  - Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - Remove an individual ICANN Board Director.
  - Recall the entire ICANN Board.



- Initiate a binding Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
- Reject an ICANN Board decision relating to reviews of IANA Functions, including the triggering of any Post-Transition IANA (PTI) separation process for the IANA naming functions.
- The powers and associated processes were designed to ensure that no stakeholder can singlehandedly exercise any power and that under no circumstances would any individual section of the community be able to block the use of a power.

### CCWG-Accountability Recommendations

The CCWG-Accountability recommends defining the following community powers as Fundamental Bylaws:

1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
2. Reject a change to ICANN Standard Bylaws.
3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
4. Remove an individual ICANN Board Director.
5. Recall the entire ICANN Board.
6. Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
7. Reject ICANN Board decisions relating to reviews of IANA Functions, including the triggering of any PTI separation process for the IANA naming functions.

The CCWG-Accountability proposes that a Bylaw be added that states that if the entire ICANN Board is removed, an Interim Board will be established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations (SOs), Advisory Committees (ACs), and the Nominating Committee will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

- The ICANN Bylaws will state that, except in circumstances in which urgent decisions are needed to protect the security, stability, and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leadership before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies, or management, including replacement of the serving President and CEO.
- Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2 –Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, Enforcement.

The CCWG-Accountability proposes that there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:

- Fundamental Bylaws would require that the ICANN Board not combine the approval of Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
- Fundamental Bylaws would require the ICANN Board to clearly indicate if a Bylaw change is the result of a Policy Development Process when the Board approves it.

Fundamental Bylaws would require, if the Bylaws change is the result of a Policy Development Process, the SO that led the Policy Development Process to formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the SO that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Budget rejection for PTI significantly updated
- Caretaker budget expanded.
- Indemnification for removal of an ICANN Board Director greatly expanded.
- Escalation steps amended to match process in Recommendation #2.
- Scope of Community IRP modified to match Recommendation #7.
- The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation is now: The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets
- The Power to Initiate a Binding IRP (Where a Panel Decision is Enforceable in any Court Recognizing International Arbitration Results) now includes the possibility for the Empowered Community to file a Request for Reconsideration.

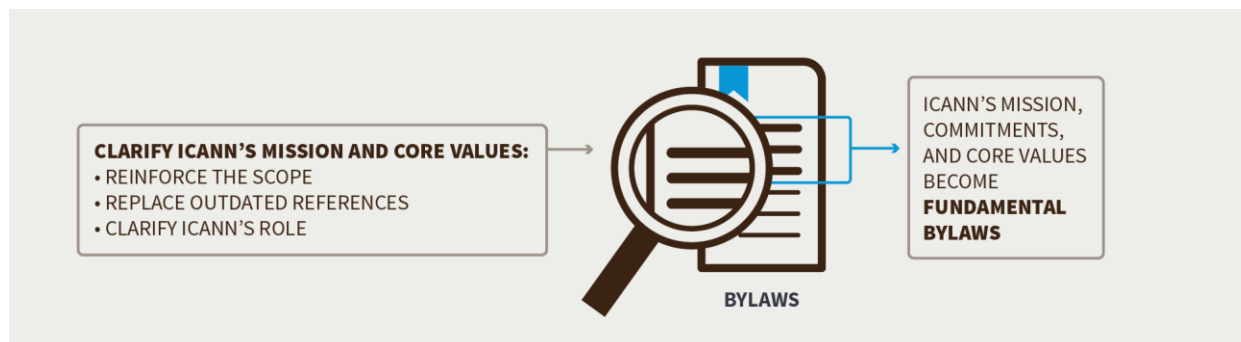
### **Relevant Annexes**

Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement

Annex 03 – Details on Recommendation #3: Redefining ICANN's Bylaws as “Standard Bylaws” and “Fundamental Bylaws”

Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

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



### Summary

The CCWG-Accountability is recommending changes to the ICANN Bylaws to assure that the Bylaws reflect the CCWG-Accountability recommendations.

- Note: The language proposed in this recommendation for ICANN Bylaw revisions is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

### Mission Statement

The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

- Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
- Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN's powers are "enumerated." Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN's authority.
  - Note: This does not mean ICANN's powers can never evolve. However it ensures that any changes will be deliberate and supported by the community.

### Core Values

The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN's existing Core Values provisions into "Commitments" and "Core Values."
  - Incorporate ICANN's obligation to "operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and

international law and conventions through open and transparent processes that enable competition” into the Bylaws.

- Note: These obligations are currently contained in ICANN’s Articles of Incorporation.
- Designate certain Core Values as “Commitments”. ICANN’s Commitments will include the values that are fundamental to ICANN’s operation, and are intended to apply consistently and comprehensively.

Commitments will include ICANN’s obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
  - Limit its activities to those within ICANN’s Mission that require, or significantly benefit from, global coordination;
  - Employ open, transparent, bottom-up, multistakeholder processes; and
  - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
    - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
    - Add an obligation to avoid capture.
    - Although previous CCWG-Accountability draft proposals proposed to modify existing Core Value 5 (“Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment”) to drop the phrase “where feasible and appropriate,” the CCWG-Accountability has reconsidered this recommendation. While acknowledging that ICANN is not an antitrust authority, on balance the CCWG-Accountability elected to retain the introductory language to ensure that ICANN continues to have the authority, for example, to refer competition-related questions regarding new registry services to competent authorities under the RSEP program and to establish bottom-up policies for allocating top-level domains (e.g., community preference).

### **Balancing or Reconciliation Test**

The CCWG-Accountability recommends modification to the “balancing” language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

*These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multistakeholder process.*

## Fundamental Bylaws Provisions

The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. (See Recommendation #3 “Standard Bylaws”, “Fundamental Bylaws and Articles of Incorporation”).

## CCWG-Accountability Recommendations

Modify ICANN's Fundamental Bylaws to implement the following:

### Mission

The Mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope is to coordinate the development and implementation of policies:
  - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability *of the DNS; and*
  - 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.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN provides registration services and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.
4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

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, including Public Interest Commitments (PICs), 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 note the following:

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 included for reference at the end of this Annex.

3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging 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 party's 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 of ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.
4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

## **Section 2. COMMITMENTS & CORE VALUES**

In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.

### **COMMITMENTS**

1. In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:
2. Preserve and enhance its neutral and judgment free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
3. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;
4. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
5. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;

6. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment;
7. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

## **CORE VALUES**

In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies;
2. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
5. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
6. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.
7. Striving to achieve a reasonable balance between the interests of different stakeholders.

These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.

The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.

Note: Specific recommendations on how to implement these modifications can be found at the end of the next section.

## **Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations'**

For space considerations the list of changes is not included here. Please consult Annex 5 for a detailed list of modifications.

### **Relevant Annexes**

Annex 05 – Details on Recommendation #5: Changing Aspects of ICANN's Mission, Commitments, and Core Values



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



### Summary

- The subject of including a commitment to respect Human Rights in the ICANN Bylaws has been extensively discussed by the CCWG-Accountability.
- The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA Functions Contract between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), ICANN's specific Human Rights obligations could be called into question. It was found that, upon termination of the Contract, there would be no significant impact on ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a commitment to respect Human Rights **should be included** in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet.
- This proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its Core Values, and would clarify ICANN's commitment to respect Human Rights.
- Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent Mission expansion or "Mission creep," and under the proposed draft Bylaw, ICANN commits to respect internationally recognized Human Rights "within its Core Values."
- The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.
- The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until a Framework of Interpretation on Human Rights (FOI-HR) is developed and approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).
- Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights.

### CCWG-Accountability Recommendations



- Include a Bylaw with the following intent in Work Stream 1 recommendations:
  - Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”
  - Note: This proposed draft Bylaw will be reviewed by both CCWG-Accountability's lawyers and ICANN's legal department and then submitted to the CCWG-Accountability for approval before its submission to the Board for approval.
- Include the following in Work Stream 2 activities:

The CCWG-Accountability identified several work areas that it recommends should be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights:

  - Develop an FOI-HR for the Human Rights Bylaw.
  - Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
  - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
  - Consistent with ICANN'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 Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
  - Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.

- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

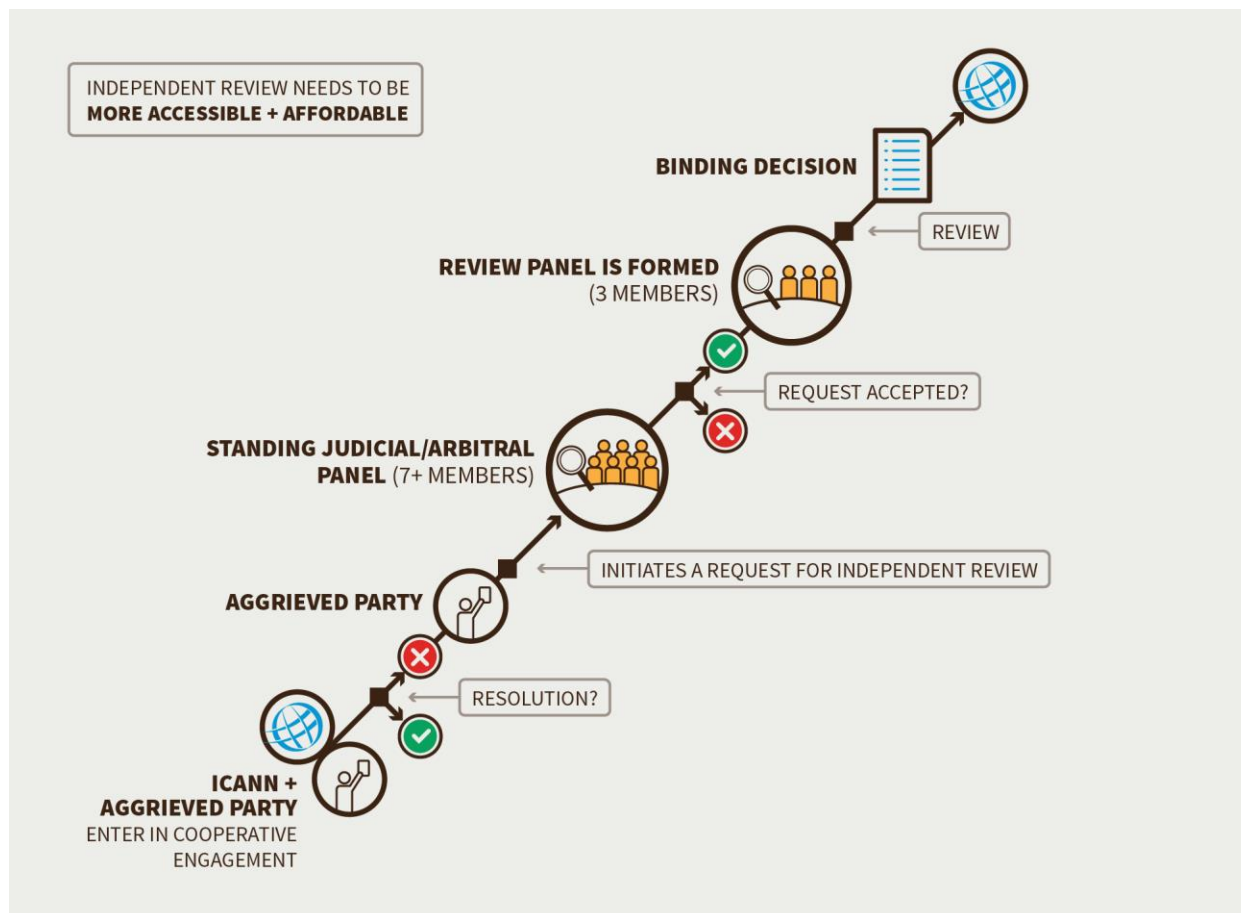
- The CCWG-Accountability considered comments received during the third public comment period which were overall in favor of including Human Rights language with a few exceptions which included the ICANN Board.
- The CCWG-Accountability engaged with the Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- The CCWG-Accountability developed compromise text based on a proposal by its legal advisors which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- The Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which was accepted by the CCWG-Accountability.

### **Relevant Annexes**

Annex 06 – Details on Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

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

The overall purpose of the Independent Review Process is to ensure that any ICANN action or inaction does not exceed the scope of its limited technical mission and complies with both its Articles of Incorporation and Bylaws.



### Summary

The overall purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

The consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.

The CCWG-Accountability therefore proposes several enhancements to the process to ensure that the IRP is:

- Transparent, efficient, and accessible (both financially and from a standing perspective).

- Designed to produce consistent and coherent results that will serve as a guide for future actions.

The CCWG-Accountability also proposes that the IRP:

- Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
- Hear and resolve claims that Post-Transition IANA (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.
- Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community's legal expenses.
- Be subject to certain exclusions relating to the results of an SO's policy development process, country code top-level domain delegations/re-delegations, numbering resources, protocols and parameters.

### **CCWG-Accountability Recommendations**

Modify the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:

- Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
- 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.
- Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws .
- Standing judicial/arbitral panel - The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.

- Composition of Panel and Expertise - Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
- Diversity - English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
- Size of Panel
  - Standing Panel: Minimum of seven panelists.
  - Decisional Panel: Three panelists.
- Independence - Panel members must be independent of ICANN, including ICANN SOs and ACs.
- Recall - Appointments shall be made for a fixed term of five (5) years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the IRP Sub Group.
- Initiation of the Independent Review Process - An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- Standing - Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board's failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- Community Independent Review Process - The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community's legal expenses.
- Standard of Review - The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- Accessibility and Cost - The CCWG-Accountability recommends that ICANN would bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- Implementation - The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by

counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.

- Transparency - The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN's Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

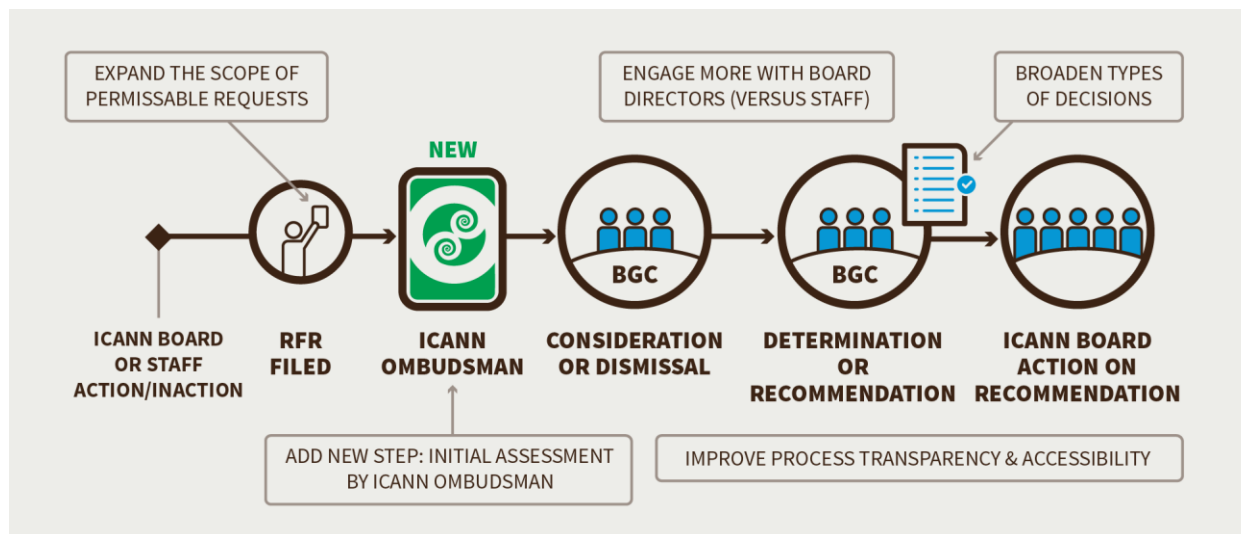
### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Scope of IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- Scope of IRP will include actions and inactions of PTI via the Board being bound in the Bylaws to ensure that PTI complies with its contractual obligations with ICANN. ICANN's failure to enforce material obligations will be appealable via the IRP as a Bylaws violation.
- Scope of IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- Exclusion – the IRP will not be applicable to protocols and parameters.
- Exclusion – An IRP cannot be launched that challenges the result(s) of an SO's policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- Limitation – An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

### **Relevant Annexes**

Annex 07 – Details on Recommendation #7: Strengthening ICANN's Independent Review Process

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



### Summary

Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in [Article IV, Section 2 of ICANN's Bylaws](#).

The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff, including:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
- Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.

The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:

- Recordings/transcripts of Board discussion should be posted at the option of the requestor.
- An opportunity to rebut the Board Governance Committee's (BGC's) final recommendation before a final decision by the ICANN Board should be provided.
- Hard deadlines should be added to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.



ICANN's Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

## **CCWG-Accountability Recommendations**

Modify [Article IV, Section 2 of ICANN's Bylaws](#) to reflect the following changes:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

## **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

## **Relevant Annexes**

Annex 08 – Details on Recommendation #8: Improving ICANN's Request for Reconsideration Process

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



### Summary

Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), in ICANN's Bylaws. This will ensure that community reviews remain a central aspect of ICANN's accountability and transparency framework.

Specifically, the CCWG-Accountability proposes to:

- Add the relevant ICANN Commitments from the Affirmation of Commitments to the ICANN Bylaws.
- Add the four review processes specified in the Affirmation of Commitments to the ICANN Bylaws, including:
  - Ensuring accountability, transparency, and the interests of global Internet users.
  - Enforcing ICANN's existing policy relating to WHOIS, subject to applicable laws.
  - Preserving security, stability, and resiliency of the Domain Name System (DNS).
  - Promoting competition, consumer trust, and consumer choice.

In addition, to support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.

### CCWG-Accountability Recommendations



The CCWG-Accountability evaluated the contingency of ICANN or the U.S. Government unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the section, “Detailed Explanation of Recommendations” section below). To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:

#### **Preserve in the ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments<sup>4</sup>**

- This includes Sections 3, 4, 7, and 8 of the Affirmation of Commitments. Sections 3, 4, 8a, and 8c would be included in the Core Values section of the ICANN Bylaws.
- Part of the content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN’s principal office) is already covered by ICANN Bylaws Article XVIII. Article XVIII is to be classified as a Standard Bylaw and is not to be moved into the Core Values section with material derived from Affirmation of Commitments sections 8a and 8b.
- Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.

#### **Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws**

The following four reviews will be preserved in the reviews section of the Bylaws:

- Ensuring accountability, transparency, and the interests of global Internet users.
- Enforcing ICANN’s existing policy relating to WHOIS, subject to applicable laws.
- Preserving security, stability, and resiliency of the DNS.
- Promoting competition, consumer trust, and consumer choice.

After these elements of the Affirmation of Commitments are adopted in the ICANN Bylaws, the following should take place:

- ICANN and NTIA should mutually agree to terminate the Affirmation of Commitments.

<sup>4</sup> Sections 3, 4, 7, and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.

- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules.
- Through its Work Party IRP Implementation Oversight Team (WP-IRP IOT), the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP).
- To support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff, and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.
- These operational standards should include issues such as: composition of Review Teams, Review Team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to legal counsel.

### **IANA Function Review & Special IANA Function Review**

- A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws and will be classified as Fundamental Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
- All AoC reviews (and the IFR and Special IFR) should be incorporated into the Bylaws.
- The WP- IRP IOT will examine the suggestion to include a mid-term review of the IRP. The ATRT scope will be expanded to suggest a review of the IRP (paragraph 89).
- The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal. (paragraph 54).
- The Board amendment on WHOIS/future registration Directory Services policy (paragraph 127) should be included.
- The ICANN Articles of Incorporation address ICANN's state of incorporation (or corporate domicile), and the ICANN Bylaws (Article XVIII) address the separate issue of the location of ICANN's principal office. Article XVIII of the ICANN Bylaws will be classified as a Standard Bylaw.

- The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that Recommendation #9 would be respected and that this text would address implementation details only.
- CCWG-Accountability lawyers advised clarifying “diversity” in paragraph 54 regarding composition of AoC Review Teams. CCWG-Accountability notes that “diversity” considerations could include geography, skills, gender, etc. and that chairs of participating ACs and SOs should have flexibility in their consideration of factors in selecting Review Team members.
- CCWG-Accountability lawyers suggested “the group of chairs can solicit additional nominees or appoint less than 21 members to avoid potential overrepresentation of particular ACs or SOs if some nominate less than 3 members”. The CCWG-Accountability proposed “up to 21”, so it is not actually proposing a fixed number of Review Team members. “Fixed” has been replaced with “limited” in paragraph 54. CCWG-Accountability purposely allowed AC/SO chairs to select additional Review Team members from ACs/SOs that had offered more than 3 candidates. This is to accommodate ACs/SOs that had greater interest in a review, such as the GNSO, which would be the most concerned with reviews of new gTLDs and WHOIS/Directory Services. Therefore, the representation and number of seats on the Review Team will remain unchanged from the Third Draft Proposal.
- Replaced “participants” with “observers” in paragraph 54.

### Relevant Annexes

Annex 09 – Details on Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN’s Bylaws

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

### Summary

The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:

- **In Work Stream 1:** Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
- **In Work Stream 2:** Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.

### CCWG-Accountability Recommendations

Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations. The CCWG-Accountability recommends the following:

**Work Stream 1:** Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews that are performed on a regular basis.

- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
- 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.*
- The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:
  - *assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*

**Work Stream 2:** Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process

- Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and, if viable, undertake the necessary actions to implement it.<sup>5</sup>
- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.
- Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

### Changes Made Since the Third Draft Proposal

- Added: The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review: *assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS*
- In Work Stream 2 recommendations, added: *“Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal”.*

### Relevant Annexes

Annex 10 – Details on Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

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<sup>5</sup> CCWG-Accountability Advisor Willie Currie introduced a short description of the mutual accountability roundtable: *The idea of mutual accountability is that multiple actors are accountable to each other. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new Community Powers construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets at each ICANN meeting, perhaps replacing the current Public Forum. The form would be a roundtable of the Board, CEO, and all Supporting Organizations and Advisory Committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year who would be responsible for facilitating each Mutual Accountability Roundtable. Each Roundtable may pick one or two key topics to examine. Each participant could give an account of how his or her constituency addressed the issue, indicating what worked and didn't work. This could be followed by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.*

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

### Summary

Currently, Governmental Advisory Committee (GAC) advice to the ICANN Board has special status as described in the ICANN Bylaws 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 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.*

Stress Test 18 considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters. In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to participate), some stakeholders believe that this could increase government influence over ICANN.

In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice, as described in the following Detailed Recommendations.

### CCWG-Accountability Recommendations

The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws 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 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 60% 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.*

#### Notes:

- This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must “try to find a mutually acceptable solution”, as required in ICANN's current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the



IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.

- The GAC 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 GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- Insert a requirement that all ACs provide a rationale for their advice: A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN Bylaws.
- To address concerns regarding GAC advice that is inconsistent with the Bylaws, add this clarification for legal counsel to consider when drafting Bylaws language:
  - ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.
- The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental/Standard Bylaws).

### **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC “carve out”.

### **Relevant Annexes**

Annex 11 – Details on Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

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

### Summary

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.

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.
- Staff Accountability
- Supporting Organizations and Advisory Committee Accountability
- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP).
  - Transparency of ICANN's interactions with governments.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.
- 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.
- Considering enhancements to the Ombudsman's role and function.

The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN55 Meeting](#) in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.

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 consider 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.

### CCWG-Accountability Recommendations

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.
- Staff Accountability
- 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.
  - Improvements to the existing whistleblower policy.
  - Transparency of Board deliberations.
- 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.
- Considering enhancements to the Ombudsman's role and function.

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

### **Changes from the "Third 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 Organizations, ability for the Board to engage in 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 CCWG-Accountability Advisor input to strengthen the diversity requirement
- Enhancing the Ombudsman role and function is confirmed as a WS2 item
- Re-inserted staff accountability requirement.

### **Relevant Annexes**

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

## Conclusion

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The CCWG-Accountability believes that the set of accountability mechanisms it has proposed, outlined above, empowers the community through the use of the bottom-up, multistakeholder model by relying on of the stakeholders within ICANN's existing and tested community structures. Furthermore, the CCWG-Accountability believes that this community-driven model is appropriate for replacing the accountability inherent in ICANN's historical relationship with the U.S. Government.

### **Community Powers are an Effective Replacement of the Safety Net Provided by the U.S. Government's Current IANA Stewardship Role**

The CCWG-Accountability believes that the Seven Community Powers, as a package, can effectively replace the safety net that the U.S. Government has provided to date as part of its oversight role. It is recommended that these powers need to be enforced by a court of law only as a last resort. The CCWG-Accountability has based its recommendations on existing structures and recommends:

- ⦿ Considering the entire community as ICANN's Empowered Community.
- ⦿ Ensuring no part of the community has more rights than another part, either by having the ability to push through its individual interests or by blocking community consensus. The CCWG-Accountability has ensured that no Community Powers or statutory rights can be exercised singlehandedly.
- ⦿ Ensuring the community can only jointly exercise its powers using a consensus-based model.

### **The CCWG-Accountability Believes that the Recommended Accountability Frameworks Provided in this Proposal Meet the Requirements of the Domain Names Community and the IANA Stewardship Transition Proposal**

The CCWG-Accountability will seek confirmation from the Cross Community Working Group that developed the IANA Stewardship Transition that this Proposal meets its requirements.

The CCWG-Accountability believes that its Proposal also meets the requirements NTIA published for the transition and will present its analysis of this in the full Proposal.

# List of Annexes & Appendices

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- ⊙ Annex 1 – Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers
- ⊙ Annex 2 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement
- ⊙ Annex 3 – Recommendation #3: Redefining ICANN’s Bylaws as “Standard Bylaws” and “Fundamental Bylaws”
- ⊙ Annex 4 – Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers
- ⊙ Annex 5 – Recommendation #5: Changing aspects of ICANN’s Mission, Commitments, and Core Values
- ⊙ Annex 6 – Recommendation #6: Reaffirming ICANN’s Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission
- ⊙ Annex 7 – Recommendation #7: Strengthening ICANN’s Independent Review Process
- ⊙ Annex 8 – Recommendation #8: Improving ICANN’s Request for Reconsideration Process
- ⊙ Annex 9 – Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN’s Bylaws
- ⊙ Annex 10 – Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees
- ⊙ Annex 11 – Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)
- ⊙ Annex 12 – Recommendation #12: Committing to Further Accountability Work in Work Stream 2
- ⊙ Annex 13 – CWG-Stewardship Requirements of the CCWG-Accountability
- ⊙ Annex 14 – Meeting NTIA’s Criteria for the IANA Stewardship Transition
- ⊙ Annex 15 – Stress Testing
- ⊙ Appendix A – Documenting Consensus (Including Minority Views)
- ⊙ Appendix B – Charter
- ⊙ Appendix C – Background & Methodology
- ⊙ Appendix D – Engagement and Participation Summaries (Summary and Documenting Public Consultations)
- ⊙ Appendix E – Initial Work to Determine Focus of the Work Stream 1 Proposal
- ⊙ Appendix F – Legal Counsel
- ⊙ Appendix G – Legal Documents
- ⊙ Appendix H – Bylaws Drafting process & Implementation Timeline
- ⊙ Appendix I – Affirmation of Commitments

- ⦿ Appendix J – Glossary
- ⦿ Appendix K – Co-Chairs’ Special Appreciation of Staff and Rapporteurs Efforts