

ICANN IMPACT ANALYSIS / QUESTIONS

Community Working Group (CCWG) Accountability Initial Draft Report

The following questions are intended to help the CCWG fully explore the implications of the proposed recommendations on how the ICANN community will operate in future.

Questions are provided for each of the major areas of the CCWG-Accountability Recommendations. The questions are divided into: 1. issues that seem to be essential to understand how the proposals meet the NTIA criteria; 2. areas where additional information would be helpful, and 3. questions that address more minute details that may be more appropriate for implementation as opposed to the recommendation design.

CCWG Proposal: SO/AC Membership Model

(Objective – Enhance ICANN accountability through empowerment of the Community by making SOs/ACs statutory members of ICANN)

Meeting the NTIA Criteria:

1. Does the proposed membership model create barriers to entry to new participants in the ICANN system? Will the proposal result in more accountability to the members, or to the broader ICANN community? How do stakeholders meaningfully participate in the "community empowerment" mechanisms if they are not part of one of the members or active in an AC/SO?
2. How is the global multistakeholder model supported and enhanced by a membership model that provide California courts as the mechanisms for members to enforce their membership rights? Does the SO/AC Membership Model's further reliance on California law risk chilling global participation in the ICANN community given the hesitancy of some in the multistakeholder community to fully participate due to concerns that ICANN is too US-centric? Is this reliance on California law and courts consistent with the goal of expanding ICANN's global reach? Is the reliance on litigation as the final resort means to resolve disputes and disagreements contrary to the multistakeholder model?
3. Are there risks of capture presented by the proposed membership model? This examination could include issues of rights given by law to individual members, what rights members have against each other, etc.
4. Does the development of a membership level over the community-appointed Board simply move the accountability issue to another level? Is there the potential for How is the CCWG-Accountability addressing issues of conflicts of interest or possibility of capture when exercising the community decision-making processes? What unintended consequences may arise from empowering (e.g., approval rights, etc.) entities/individuals who are not required to act in the best interest of ICANN (and who may have their own business, financial or personal interests), other members or the community as a whole and have stress tests been conducted for each of these consequences?
5. How is the multistakeholder model impacted if one of the current SOs or ACs is not able to become a member? What protections are built into the system?
6. A key component in maintaining the security, stability and resiliency of the Internet DNS is maintaining the stability of ICANN as an

organization. The membership model identified represents a change to the ICANN governance structure to a structure that is untested and that neither ICANN nor the community have experience in managing. What considerations have been taken in assessing how this change will support the stability of ICANN?

7. How is the impact of security, stability and resiliency incorporated into actions taken through the community empowerment models?

Areas where additional information is needed:

8. One of the uniquely valuable attributes of ICANN's multistakeholder community is the broad and divergent views and interests of its stakeholders. Are there any precedent organizations where the proposed SO/AC Membership Model (or similar model) has been implemented? Do any of those precedent organizations consolidate groups/persons with broad and divergent interests into a single membership structure? If so, have those organizations been studied to determine if there are specific issues that such organizations encounter and how to address them?
9. What are the full scope of the rights afforded members under California law, as members have rights exceeding the rights set forth in the CCWG's proposal? Are there any potential adverse consequences to the community through member statutory rights that are not contained in the bylaws?
10. What are the implications of individual members exercising their statutory rights individually rather than collectively by the community through agreement of the members?
11. What are the risks associated with empowering members to bring lawsuits against ICANN, each other and other parties and have stress tests been conducted for reach of these situations? Should litigation against ICANN be a community decision or an individual member's decision?
12. Could the ability to litigate (as a member) create the ability of influential parties (i.e. persons or entities that participate in SOs and ACs) with the opportunity to "capture" ICANN through pressing a member to litigate against ICANN when the entity would not otherwise be able to do so?
13. Could the proposed SO/AC Membership Structure and related director removal mechanisms create an environment within which ICANN directors effectively become "representatives" of their constituencies and their constituencies' interests rather than collectively acting in the global public interest and in accordance with ICANN's mission?
14. The CCWG's advisor, Jan Scholte, has recommended that the CCWG consider accountability of the community (i.e. the members) in the proposed model. What mechanisms will be introduced to ensure that the members act in the best interests of the ICANN community? Will the members be held accountable to the community in a manner similar to the ICANN board? Who ensures the members act in accordance with the bylaws, etc., and how is compliance enforced?
15. How will disputes among members be resolved? Could the lack of a member dispute resolution procedure create risk of capture by a member?

16. Could the SO/AC Membership Model limit the ICANN community's ability to modify the existing SOs/ACs in the future? For example, what if the community desires to eliminate an existing SO or AC? How would that affect the membership and how would this be put in place? Could the applicable SO or AC that is being eliminated thwart the will of the community by refusing to relinquish its membership rights? Similar considerations need to be given to scenarios where the community desires to split an SO/AC or create a new SO/AC.
17. Does membership by the current SOs/ACs encourage others to form SOs/ACs (or split the current SOs/ACs into multiple SOs/ACs) in an effort to gain "membership", with the enhanced rights that go along with membership? Could this possibly upset the balance of influence within the multistakeholder structure?
18. What is the correlation between the membership/membership classes and the community voting mechanism contemplated in Graphical Supplement to the CCWG's proposal? What "coordination" with members is contemplated? Does the chart reflect the relative voting power of the members?
19. The GAC plays a valuable role in the ICANN community through providing advice to the ICANN board on issues of public policy. How does the proposed voting model reflect this? How does the GAC's advice enter into the equation and where are the GAC's inputs on public policy to be considered? Has the CCWG liaised with the GAC as to whether the GAC would desire to "vote" on ICANN matters through its membership in ICANN? Does the GAC operate in this manner?
20. Has the CCWG analyzed whether the implementation of the SO/AC Membership Model could jeopardize or modify ICANN's tax status?

Questions that provide implementation level details:

21. The CCWG has not discussed the funding requirements of litigation within the membership model. Is it presumed that ICANN would fund the litigation fees/expenses of the members when they bring a legal action against ICANN? Who would fund lawsuits among members?
22. Who is responsible for maintaining fillings/updating fillings/paying for corporate compliance for the unincorporated associations? Who is responsible for insuring the unincorporated associations?

CCWG Proposal: Community Right to Cause Reconsideration of or Reject Board Approved Budgets and Strategic/Operating Plans

(Objective – Enhance ICANN accountability through empowerment of the Community by giving Members the ability to reject ICANN's Budget and Strategic/Operating Plans)

Meeting the NTIA Criteria:

1. What mechanisms could be put in place with respect to the budget and operating plan veto powers that are being given to the community to ensure these powers will not be used in a way to impact the security, stability or resiliency of the DNS?
2. Given that members do not have an obligation to act in the global public interest or in furtherance of ICANN's mission, what is the mechanism to ensure that members will not act in their personal interest or in the interest of the companies they represent? For example, what will stop members from demanding funding for projects that facilitate their personal interest, but not necessarily the interest of the global public interest or ICANN's mission?

Areas where more information is needed:

3. How do mechanisms operate in a situation where the community has conflicting interests and complaints about a proposed plan/budget? For example, if the members reject the budget because the members dislike the amount of funding assigned to a specific project or category (with one or more members believing the funding is too low and the others too high), how would the ICANN board resolve the conflicting views after the initial budget is rejected?
4. In another example of conflicting community positions, if a revised budget increases the funding allocated to a project/category to reflect members' priorities, then resulting in a decrease in funding to another project/category, will the decrease in funding of this project/category give rise to a valid basis upon which the revised budget could then be rejected by members?
5. Is there a possibility that the plan/budget voting percentages could be a source of capture as a plan/budget could be approved by revising the plan/budget in a manner that satisfies only one member (i.e., with one member's approval of the plan/budget, the members opposing the plan/budget would drop below the necessary threshold to continue to oppose the plan/budget)?
6. Who would have standing to seek enforcement of the limitations on the community powers (such as the inability to bring an objection on grounds that were not previously raised) and how would they seek such enforcement? Would the ICANN board have the ability to find that the applicable member vote did not comply with such limitations?
7. Would the ICANN board still have the ability to fund special or out-of-budget requests during the fiscal year?
8. Would the ICANN board continue to have the authority to approve items and expenditures prior to the budget being approved by the board and the community? For example, how would an expenditure that needs to be funded (such as a meeting just after the start of the fiscal year, with contracting and planning required earlier) be handled, if the full budget process with community

approval has not yet concluded?

9. What is the anticipated timing associated with the back and forth between the ICANN board and members regarding the plan/budget? How would the members' timely participation be ensured?
10. Is approval of the plan/budget necessary if members have the ability to remove directors? Given that the draft report already identifies that the community may have to resort to removal of the Board as an ultimate solution if a stalemate occurs in the budget process, is the accountability mechanism the ability to reject the budget/plan or the ability to remove directors from the board?
11. What happens if the plan/budget is never adopted or it takes too long to adopt?
12. If no new budget is approved, what impact could following the previous year's budget have on ICANN and its ability to fulfill its mission? For example, what if a new risk to the security and stability of the DNS arises and the previous year's budget did not provide for funding or the resources necessary to address the new risk?
13. What is contemplated by the 2/3 and 3/4 voting thresholds? For example, is the vote required 2/3 of the votes "cast" by the members (i.e. the members that show up to vote) or 2/3 of the total number of votes that could be cast by the members? Would abstentions be counted as a "no" vote?

CCWG Proposal: Community Right to Reject Changes to "Standard" Bylaws and Approve Changes to "Fundamental" Bylaws

(Objective – Enhance ICANN accountability through empowerment of the Community by granting members with specific rights as it relates to the amending "Standard" and "Fundamental" Bylaws)

Areas where further information is needed:

1. Under California law, members may adopt and amend bylaws without the approval of the board of directors. The process set forth in the CCWG's proposal provides that the ICANN board would introduce fundamental bylaw changes, etc. which would ultimately require the approval of the members. What will cause members to follow the process set forth in the proposal/bylaws and not unilaterally approve amendments to the bylaws pursuant to the members' statutory rights? What concerns are raised as a result of the members not being required to act in the global public interest or in the interest of the ICANN community?
2. What is the anticipated timing requirements associated with the members' exercise of their rejection and approval rights?

CCWG Proposal: Community Right to Remove Individual ICANN Board Members

(Objective – Enhance ICANN accountability through empowerment of the community by granting members the right to remove individual directors)

Areas where further information is needed:

1. Would the CCWG’s proposal (through the method/voting requirements of removal) effectively create two classes of directors, where one class of directors (the NomCom directors) are harder to remove than the other directors (the SO/AC” directors)? If so, what is the impact of a governance structure that makes it easier to remove one class of directors than another class?
2. The ICANN Board members act in the global public interest, and not solely in the best interests of the constituency that appointed them. Is it the intention of the CCWG that the SO/AC directors be accountable to their constituencies instead of the global public interest and ICANN’s mission? If the former, is that consistent with a director’s obligations under California law? If the latter, is the proposed removal right with respect to the SO/AC directors (i.e. no broad community support required or contemplated) inconsistent with that goal?
3. What happens if the NomCom member/designator determines not to consent to the removal of its director(s) despite the community vote to remove the director(s)? The mere vote of the community would not suffice to remove the director under California law absent the member/designator’s consent.
4. Should SOs/ACs adopt objective “standards” by which directors will be judged before such member/designator removes a director? Though “cause” is not required under California law for a member to remove its appointed director(s), standards could serve as guidelines for members/designators when reviewing and determining whether to remove a director from the ICANN board.

CCWG Proposal: Community Right to Remove Entire ICANN Board

(Objective – Enhance ICANN accountability through empowerment of the community by granting members the right to remove the entire ICANN board)

Meeting the NTIA Criteria:

1. What is the long-term institutional stigma/impact associated with removal of (or the initiation of removal of) the entire ICANN board? Could the removal result in the loss of confidence in ICANN of governments, other Internet governance bodies or the world community?
2. What is the potential destabilizing effect of a removal of the entire Board on ICANN as an institution? What considerations have the CCWG-Accountability taken to make sure that ICANN can still effectively operate?
3. Does providing governments the ability to consider the removal of Board members (individual or the entire Board) could create opportunities for governmental capture of ICANN?

Areas where more information is needed:

4. Would the ability to remove the entire ICANN board serve as a deterrent to attracting highly qualified candidates?
5. Should an individual AC/SO be forced to remove its directors if that AC/SO believes that its appointed director(s) is doing a good job?
6. If a member were required to remove a director that it did not want to remove, would this be enforceable under California law where the approval of the appointing member is required to remove its appointed director(s)? Could a member block the removal of its director, and how would ICANN deal with such an occurrence?
7. Could an agreement among members to remove directors based on the vote of the community be seen as a “voting agreement” between members, which is prohibited under California law? Similarly, could an agreement among members to remove directors be seen as a “voting agreement” between members?
8. Once removed, could a member simply reappoint its removed director(s)? If not, what limitations are contemplated and how would these be enforced?
9. Do the mechanisms to remove individual directors also apply to the CEO’s seat on the ICANN board?
10. What is a “caretaker” board? Under California law, the members of the board (no matter whom they are and the circumstances surrounding their service) have full authority to act as the board of the organization.
11. With respect to the possibility that the existing board members would remain as “caretaker” board members until their replacements are appointed, how would this work in practice? If a board member is removed, he or she is removed and no longer a board member. Has the CCWG considered the possibility that a person who has received an overwhelming “no confidence” vote of the community might not desire to remain on the board during any process to find his replacement?
12. Could electing “alternative” board members have unintended and unhealthy consequences? For example, what is to stop an “alternate” from actively campaigning for the removal of a director so that the alternate could have a seat on the ICANN board? Is it in line with best governance practices for a sitting board member to be constantly be threatened with replacement by a sitting alternative?
13. Would there be any restrictions on the powers of the interim board and, if so, how would those be enforced?

Questions that provide implementation-level details:

14. How would the selection of a pre-defined subset of the community to function as an interim board occur? Would this be a standing interim board, would it be elected annually, etc.? How would this board function on a day-to-day basis?
15. Could the availability of director compensation create unintended effects in the Board removal and interim selection process?

CCWG Proposal: Independent Review Process Enhancements

(Objective – Enhance ICANN accountability through enhancements to the Independent Review Process)

Meeting the NTIA criteria:

1. What “due process” rights are contemplated by the proposal? Rights of “due process” are not normally available in a corporate setting. Has the CCWG considered whether identifying the protections identified for claimants as “due process rights” implicates a considerable body of law that would not otherwise apply to ICANN, as well as the potential ramifications of assigning “due process rights?”

Additional information needed:

2. The proposal contemplates granting the standing panel the ability to grant affirmative relief (i.e., “cancel a decision by ICANN”). What is the CCWG’s understanding of the areas where this impair the ICANN board’s statutory obligations or fiduciary duties to ICANN? Who has the authority to determine whether the IRP could potentially undermine the ICANN board’s statutory obligations and fiduciary roles, and thus should not be permitted? Is that decision made before an IRP panel is constituted? What procedure would govern the determination of whether an IRP would infringe on the board’s statutory obligations and fiduciary roles?
3. Has the CCWG further developed a proposal concerning the mechanism or process by which “the community” could bring an IRP? Will this include a standing requirements for the community to bring an IRP?
4. Does the CCWG propose that an IRP may be brought to challenge both ICANN board action/inaction and staff action/inaction? If so, has the CCWG considered the potential impact such a broad expansion to the scope of the IRP may have on ICANN’s resources, both in terms of time and legal fees?
5. Has the CCWG considered the proposed expanded definition of standing in the reconsideration process (discussed below) and how that might negate the need to expand the IRP process beyond challenges to ICANN board action?
6. Does the CCWG intend to change the definition of “materially affected” as currently stated in ICANN’s bylaws (i.e., “In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the [Bylaws or the Articles of Incorporation], and not as a result of third parties acting in line with the Board’s action.” Bylaws, Art. IV, § 3.2 (bracketed text subject to proposed changes by CCWG-ACCT)?
7. What appellate mechanism is contemplated? To whom would an appeal be directed? Does the CCWG contemplate an appeal to the full standing panel (similar to an en banc review) or perhaps to a third party dispute resolution provider, such as the ICDR, or something else?
8. Would permitting interim relief before any actual action is taken by ICANN (board or staff) have serious adverse consequences on ICANN’s ability to function? For example, if a person submits a change request for its new gTLD application, is that person, under this proposal, able to file an IRP before the change request is denied? Shouldn’t interim relief be available only where there is a definite, concrete, real and

substantial controversy amenable to specific relief?

9. With respect to the proposed “injection” of a mediator in CEP, how is the mediator selected? Is the mediation intended to be non-binding? May an IRP be pursued following non-binding mediation? Would the IRP panel have access to the mediation materials?
10. Will permitting a non-binding mediation prior to an IRP serve a useful purpose or unnecessarily present a drain on ICANN’s resources?
11. To what extent will ICANN’s existing bylaws provisions intended to limit IRP costs remain? Namely: “the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.” Bylaws, Art. IV, § 3.12.
12. By giving the Panel the authority to review a claim under a *de novo* standard of review, will it put the Panel in the place of the actual ICANN board directors, meaning that the Panel would be able to substitute its views for the views of directors?
13. Is it reasonable/wise for an IRP panel to make decisions without any deference to the views of ICANN board members?

Questions that provide implementation level details:

14. With respect to the CCWG’s recommendation that if the community brings an IRP, ICANN would be obligated to pay all legal fees, is this a reasonable proposal given the financial burden this would have on ICANN?
15. Should the chair of the standing panel be appointed for a term not to exceed three years?
16. Given the expanded scope of the IRP, coupled with the proposal that a decisional panel may consist of 1 or 3 members, limiting the standing panel to 7 may overburden the members. Would a standing panel of 9 alleviate the burden?
17. What length of the “fixed term” is contemplated?
18. Should panelists serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise?
19. Will the third party international arbitral body propose a large slate of potential candidates, from which the ICANN board may choose a subset, subject to community confirmation? How many candidates will the international arbitral body recommend at once?
20. Would the rules drafted by the standing panel be subject to revision or periodic review? If so, under what mechanism?
21. What enforcement procedures would govern the IRP panel’s decision?
22. If a claimant fails to engage in reasonable settlement efforts, as discussed in the CCWG’s proposal, and the claimant is not successful in the IRP, should the IRP Panel award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal and expert fees?
23. What is the “standard time frame” for decisions by the panel? Should an IRP panel issue its declaration within six months of the filing of an IRP?

CCWG Proposal: Reconsideration Process Enhancements

(Objective – Enhance ICANN accountability through enhancements to the Reconsideration Process)

Areas where additional information is needed:

1. Reconsideration is currently available to challenge staff actions/inactions that contradict ICANN policy(ies) or ICANN board actions/inactions that are taken without consideration of material information or based on false or inaccurate material information. By amending the reconsideration process to include challenges to board or staff actions/inactions that contradict ICANN’s mission and core values and policies, is the CCWG conflating the reconsideration process with the IRP process?
2. What consideration has the CCWG given to the potential overlap proposed between the standing requirements for IRPs versus Reconsideration Requests?
3. By allowing a party to stay silent, but then later seek reconsideration of an action, does the CCWG’s proposal effectively allow parties to object after the fact? Is that efficient or fair to the parties who participated in the process at the appropriate time?
4. The Reconsideration Process proposed enhancements are unique in that they include specific operational direction to how the Board is supposed to get advice and perform its work on the Reconsideration Process. Given that Board members have a duty to make sure that they are considering relevant information in taking actions, shouldn’t the Board be in the position to identify where it will receive the most comprehensive advice?
5. Does it make sense to eliminate lawyers from involvement in the reconsideration process? Reconsideration requests are inherently legal in nature and necessitate the provision of legal advice in their resolution. Isn’t attorney involvement necessary?
6. Given that ICANN has, in recent years, received between 20 and 45 requests for reconsideration, would tasking the Ombudsman with making recommendations to the BGC overwhelm the Ombudsman? Is this within the expertise of the Ombudsman?
7. The CCWG proposes that all final determinations on all reconsideration requests be made by the entire ICANN Board. The Board may – and has – delegated the determinations concerning requests for consideration of staff actions to the BGC. Has the CCWG considered the burden that this requirement could place on the Board, and whether it would impair the Board from performing other work?
8. Are ICANN Board’s decisions on Reconsideration Requests subject to a subsequent IRP?
9. How does the CCWG propose to accomplish its stated goal of improving the DIDP to accommodate the needs of requesters to obtain internal ICANN documents that are relevant to their requests?