



September 12, 2015

Via Electronic Mail

comments-ccwg-accountability-03aug15@icann.org

Re: Google Public Comment on Enhancing ICANN Accountability

Google commends the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG) for preparing a comprehensive set of recommendations to improve ICANN's operations and governance mechanisms. Overall, these proposals will strengthen ICANN's accountability as it prepares for the transition of stewardship of the Internet Assigned Numbers Authority (IANA) functions from the National Telecommunications and Information Administration (NTIA) to the global multistakeholder community. As Google and other members of the multistakeholder community have repeatedly noted, adoption of accountability improvements must go hand-in-hand with the IANA stewardship transition.¹

As noted in Google's prior comments,² the majority of the changes described in the CCWG's proposal strike the right balance: they would provide the community with meaningful ways to hold ICANN accountable, without compromising the latter's administrative efficiency. In particular, we support the following:

- Incorporating the Affirmation of Commitments into ICANN's bylaws;
- Providing greater guidance to the ICANN Board in circumstances where commitments or core values suggest conflicting outcomes, without adopting potentially rigid or unhelpful tests;
- Creating a process for meaningful review of ICANN Board or staff actions through a standing, independent group of experts; and
- Creating a process to recall individual ICANN Board members in exceptional circumstances.

Google also particularly appreciates that the CCWG proposal underscores that ICANN's remit is and will remain limited, and recommends bylaws changes to ensure that "ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide."³ Explicitly recognizing that ICANN

¹ Google Comments on Cross Community Working Group on Accountability Initial Draft Proposal, June 3, 2015 (Google Comments), at 1, *available at* <http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfZwwXu3f3tN.pdf>.

² *Id.* at 2.

³ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, Aug. 3, 2015 (Proposal), at 29, *available at* <https://community.icann.org/pages/viewpage.action?pageId=53783460&preview=/53783460/54887691/CWG-2ndDraft-FINAL-3August.pdf>

lacks authority to regulate content helps ensure that the IANA stewardship “maintain[s] the openness of the Internet.”⁴ This proposed change also reinforces ICANN’s commitment to fundamental human rights, including freedom of expression and access to information.

However, in order to strike a better balance between accountability and efficiency, we recommend the CCWG make the following specific changes:

Change the Independent Review Process procedures to allow meaningful review while encouraging parties to participate in existing community processes.

Google remains concerned that the policies proposed for independent review of ICANN actions will leave some parties without a remedy against arbitrary ICANN action while enabling other parties to re-litigate reasonable implementation choices. First, the CCWG’s proposal allows review of ICANN actions only to the extent that they “exceed[] the scope of ICANN’s Mission and/or violate[] ICANN’s Articles and Bylaws.”⁵ This limited scope of review leaves parties without a remedy if ICANN acts within the scope of its Mission, Articles, and Bylaws, but makes a fundamentally irrational decision. Second, individual parties seeking review should be required to participate in any ICANN public comment process directly related to the subject being brought for Independent Review. Third, panels should review ICANN action under an abuse of discretion standard, rather than the *de novo* standard currently contemplated by the Proposal.⁶ In this model, failure to follow processes would qualify *per se* as an abuse of discretion. Taken together, these three changes would encourage participation in community processes. By contrast, if parties believe that they can challenge ICANN policies as contrary to the bylaws or mission on a *de novo* basis before an IRP, they may decide it is strategically beneficial to refrain from participation in community processes and merely file a challenge to the contested action later. Of course, the requirement to participate in community processes would not apply to challenges that address ICANN actions where no community consultation has taken place. It is critical for the stability and efficiency of the Internet ecosystem for ICANN decisions, properly taken and subject to a transparent and accountable review process, to have a degree of finality and predictability.

Retain the requirement to participate in community processes before seeking reconsideration.

As with other aspects of ICANN’s operations, Google believes that any changes to the Request for Reconsideration process should enhance accountability while at the same time promoting efficiency. For this reason, we believe that prior participation in a public comment process directly related to the subject of reconsideration should continue to be required, just as it should be required to seek independent review of ICANN actions. Eliminating this

⁴ Proposal at 24; Press Release, National Telecommunications and Information Administration, NTIA Announces Intent to Transition Key Internet Domain Name Functions (Mar. 14, 2014), *available at* <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

⁵ Proposal at 40.

⁶ *Id.* at 40.

requirement could encourage parties to sit out substantive discussions within the community and later seek reconsideration of Board implementation of community decisions.

In order to preserve operational flexibility, limit the community’s open-ended veto power over ICANN’s strategic plan and budget.

Google applauds the CCWG’s efforts to identify potential accountability measures to protect ICANN’s key operations in a crisis. To that end, Google supports the CCWG proposal to separate the IANA budget from the rest of ICANN’s budget and to ensure that “[t]he IANA Functions budget [is] managed carefully and not decreased (without public input) regardless of the status of the other portions of the budget.”⁷

However, we continue to believe that the ability of the community to veto ICANN’s strategic plan and budget⁸ should be limited. Put simply, we do not believe that the community mechanism should be able to veto the strategic plan and budget over multiple iterations. An infinite number of vetoes can render an organization unable to carry out its mission, and the global multistakeholder community cannot afford such organizational paralysis. The community should be able to submit an initial veto, but if the ICANN Board chooses to override that veto, it should be able to do so provided it submits a detailed report that summarizes its reasons for doing so. If the community remained unsatisfied with the Board’s explanation, it could invoke the independent review process or seek to recall individual Board members to change ICANN’s direction.

We also believe that similar ends could be achieved if, as part of Work Stream 2, the CCWG put in place mechanisms to enhance transparency and community involvement in the process of developing the ICANN budget before it is approved by the ICANN Board. We note significant improvements to the FY 2016 budget process in publishing portfolio and project-level budget information as part of the community comment process. If institutionalized, these and further improvements in how the budget is developed could improve ICANN’s fiscal accountability and minimize the need for the community to rely upon mechanisms of last resort such as a budget veto.

Increased participation in budget drafting, recourse to Independent Review, or recalling Board members—rather than repeated vetoes—would allow the community to more effectively align the direction of the organization with community priorities.

Ensure that any Board recall is contingent on widespread community agreement.

As noted in Google’s original comments,⁹ we are concerned that the power to remove the ICANN Board as a whole could have a potentially destabilizing effect on the Internet ecosystem.¹⁰ The proposal’s suggestion that the community have the power, in exceptional circumstances, to remove individual Board members is a prudent way to enhance the organization’s overall accountability. However, we believe that recalls should be based on

⁷ *Id.* at 56.

⁸ *Id.* at 55-57.

⁹ Google Comments at 6.

¹⁰ Proposal at 60-63.

specific, serious concerns with an individual Board member, and not a generalized objection to the Board as a whole. For this reason, we continue to believe that the community should only have the power to remove individual Board members.

However, if the CCWG moves forward with a proposal to include a community power to recall the entire Board, any recall should have widespread community agreement. In particular, the CCWG should reject the minority view suggesting that “each of the three SOs should be able to exercise the power to recall the entire Board individually.”¹¹ Allowing any single Supporting Organization to recall the entire ICANN Board would be profoundly and needlessly destabilizing, and Google could not support such a proposal.

Clarify voting processes in the “sole member model” to avoid confusion, gridlock, or unpredictability in the exercise of community powers.

We commend the CCWG for including additional details about the voting processes necessary to initiate particular community powers. However, the proposal still lacks sufficiently clear guidance regarding two aspects of voting: how voting thresholds will be determined and on what basis Supporting Organizations and Advisory Committees will be allowed to split votes. The community should not wait until it seeks to exercise these powers to clarify the thresholds for voting and procedures around vote-splitting, especially because we expect that the powers will be invoked only when there is disagreement or confusion in the community regarding broader substantive issues. We urge the CCWG to clarify these matters as soon as practicable.

Again, Google appreciates the work of the CCWG in putting together a strong proposal for increasing ICANN’s accountability. With some changes, we believe this proposal will build stakeholder confidence in the transition of IANA stewardship from NTIA to the global multistakeholder community and can ensure that ICANN conducts its important work in an accountable, competent, and efficient way.

Sincerely,



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¹¹ *Id.* at 63.