

U.S. CHAMBER OF COMMERCE COMMENTS ON ICANN CROSS-COMMUNITY WORKING GROUP
ACCOUNTABILITY DRAFT PROPOSAL

JUNE 3, 2015

Please note that questions from the consultation are **bold** and the Chamber's responses are in regular font.

Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

Do you have any general feedback or suggestion on the interim Work Stream 1 proposals?

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. We greatly appreciate the efforts put forth by the CCWG and ICANN staff to present an initial accountability plan draft which is largely a step in the right direction. In particular we are pleased that a plan for accountability has procedures in place to ensure real accountability through legal enforceability. We look forward to engaging with the CCWG as further drafts are developed to ensure the best possible result.

As a threshold issue we believe that the 30 day comment period is much too limited time to review and provide substantive feedback on such a substantial plan, in particular for our members who may not be seeped in the day-to-day CCWG or ICANN conversations. While we recognize the desire to have a discussion around community comments at the upcoming Buenos Aires ICANN meeting, we think it is imperative that any future major inflection points provide a longer comment period and that no issues (except for those with broad community consensus) be settled following such a short turnaround time.

The Chamber recognizes that there has been discussion in the CCWG around the use of the term "private sector" (see e.g. paragraph 66). For simplicity, we recommend affirming that private sector refers to any non-governmental entity (see paragraph 841), which includes business, academia, civil society, and any other groups that are neither government nor fully government controlled. This affirmation will prevent unnecessary confusion and uphold long standing usage and global interpretation of the phrase "private sector."

Revised Mission, Commitments & Core Values

- 1. Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?**

Yes, the recommended changes do represent a positive move towards enhancing ICANN's accountability. We want to encourage the CCWG to stay the course on creating assurances that accountability mechanisms are binding. However, there are still further enhancements that are needed, as indicated by our comments.

2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

Yes we support the list of requirements included in the recommendation, but this support is contingent on the community having the ability to approve or reject any changes that the ICANN Board seeks to implement in the future.

We do, however, wish to raise concerns with one bylaws change regarding modifying the “balancing” language describing how ICANN will evaluate situations when one commitment must be reconciled with another commitment or core value. This new language, closely tracks language on “strict scrutiny” and “intermediate scrutiny” tests that are a part of U.S. legal jurisprudence. These standards were not developed to be used to weigh multiple competing interests or values. Therefore, the original language covering balance and reconciliation of competing values ought to be retained.

Additionally, the Chamber believes ensuring contractual compliance is a key factor in determining meaningful improvements to ICANN accountability. To this extent we support paragraph 337, which states “ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.” However, in order to avoid confusion and ensure ICANN is able to best serve its core mission, we suggest the language in 337 be added to the bylaws. We further suggest paragraph 60 be amended to indicate that without prejudice to ICANN’s ability to interpret or efforts to ensure compliance with its contracts, ICANN does not enjoy broad regulatory authority and will not engage in or use its power to regulate entities with which it does not have a contractual relationship, and shall not attempt to establish additional requirements on parties beyond those to which the parties agree.

Fundamental Bylaws

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?

Yes, the threshold ensuring that 75% of the impacted community approves of the proposed changes will enhance accountability.

4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

Yes it is useful to elevate certain bylaws, in particular those preventing mission creep would ensure accountability and allow ICANN to focus on its core duties.

However, given this higher voting threshold, the CCWG should consider how to strike a balance between providing an appropriate level of detail and creating the flexibility to add improvements to new processes created by the plan. For example, we agree that the fundamental bylaws should include a requirement for a binding Independent Review Process (IRP) mechanism. However, because the ICANN community to date has no experience with this new IRP process, it may be beneficial for the procedures to evolve in light of experience.

We also suggest an additional fundamental bylaw ensuring the location of ICANN headquarters remains in California. This will ensure long term stability and predictability built upon a large amount of legal precedent. Most importantly, the extensive legal advice used in developing the CCWG accountability plan is built on a foundation of California non-profit law and there must be assurances that all the additional functions and bylaw changes instituted remain in place and functioning as intended for the long term.

Finally, we suggest the inclusion of a new bylaw aimed at the prevention of government capture or undue ICANN influence on public policies unrelated to ICANN's core mission. This would be achieved through additional transparency, requiring that ICANN or any individual acting on ICANN's behalf make periodic public disclosure of their relationship with any government official, as well as activities, receipts and disbursement in support of those activities on behalf of ICANN.

Disclosure of the required information facilitates evaluation by the multi-stakeholder community of the statements and activities of such persons in light of their function as representatives of ICANN. This addition is aimed to obviate concerns that governments might seek to control ICANN decision making processes by providing quid pro quos for actions taken by ICANN or that governments could try to use other intimidations. The additional transparency will remove any appearances of impropriety.

Independent Review Panel Enhancement

- 5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The changes to IRP are a step in the right direction, but many more details regarding due process and standard of review need to be added. Any final accountability plan must feature widely accepted principles on transparency, due process, and fundamental fairness, as well as incorporate well-settled international adjudicatory norms. The decisions of the IRP should be binding and not subject to rejection by the ICANN Board as they currently are. The Chamber wishes to place a marker in this section as one in need of further development and we plan to engage further as the draft plan continues to develop.

Under ICANN's Bylaws, Article IV, Accountability and Review, Section 3, Independent Review of Board Actions, the IRP is envisioned as an "independent third-party review of Board actions allegedly by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." We support that the CCWG seeks to strengthen and expand the use of the IRP – including for review of not only procedural difficulties, but substantive problems as well.

While we agree that review should be available for both substantive and procedural concerns, we believe that actual decisions should be reviewed under an abuse of discretion standard rather than the de novo standard currently contemplated by the Proposal. In this model, failure to follow processes would qualify per se as an abuse of discretion. Pure de novo review would arguably allow individuals to end run around the policy process and undermine decisions made by the community. The Chamber further supports encouraging active participation during the policy development process as the best means to solve stakeholder concerns. Therefore, we suggest changes to the

proposal that ensure parties cannot bring new arguments to the IRP without availing themselves of the community's well-established policy development processes.

Furthermore, while the expansion of the IRP is very welcome, it should not take place without fixing the major problems with the current proceedings. In order to address key concerns regarding unfairness and a lack of due process and transparency, we recommend the following:

- The CCWG should amend Article IV of ICANN's Bylaws expressly to establish a right to equal participation for all materially affected persons/groups/entities "directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation" – both those who suffer harm from the alleged violation and those who might suffer harm should the IRP Panel reverse or change that Board action.
- ICANN's Bylaws should be amended to require that clear and timely notification be given by the party filing the IRP to all parties known to be materially affected by the process or decision being challenged – and further require timely publication to the larger community of the IRP filing so that other interested and materially affected parties can come forward to participate.
- The new definition of Standing (section 4.1.5 of the proposal) should be modified to include the right for all materially affected parties to seek and participate in the IRP proceeding. This will avoid "first to file" races.
- The CCWG should create bylaws that clearly bar ex parte contacts between those who file an IRP, ICANN Counsel and IRP Panelists, particularly when those communications exclude and disadvantage other materially affected parties.
- The CCWG should endorse provisions to ensure a full, fair, independent and objective review of all settlements between ICANN and the party that filed the IRP. It is not clear that the right of review is available in the current plan.

We also suggest adding these basic transparency and due process improvements to other ICANN review processes, such as the pre-IRP Cooperative Engagement Process, requests for reconsideration of staff action, and petitions to the Ombudsman.

These suggestions all fit in closely with ICANN's long standing goals as an organization committed to principles of transparency and fairness to all members of the global community. (See Article III of the ICANN Bylaws - that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness"; and Article II of the ICANN Bylaws which prohibits discriminatory and unequal treatment.)

Reconsideration Process Enhancement

- 6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements. Are the timeframes and deadlines**

proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

Yes, the proposed improvements would help enhance ICANN's Accountability; see also our response to Section 5.

In general, we agree that reform of the reconsideration process is needed. However, we urge the CCWG to reconsider changes to the standard used when evaluating the scope of information that the ICANN Board should consider before acting or failing to act in a way that adversely affects a party. The Proposal suggests changing this standard from "material information" to "relevant information," meaning that in order to avoid challenge, the Board would be forced to consider all relevant information before making a decision. This is a significant change to the quantity and breadth of information that the Board would be forced to consider because the threshold for relevancy could be considered quite low. For these reasons, the Chamber urges the drafters of the Proposal to retain the present "material information" standard in the reconsideration provisions of the bylaws.

In addition, we recommend that the CCWG retain the requirement to participate in a public comment process before seeking reconsideration, but modify it as proposed above in the context of seeking independent panel review.

The Chamber strongly supports the membership structure proposal because it gives the community true enforceability. Significant legal work has gone into developing this portion of the proposal and without it, we fear that community powers would be unenforceable and there would be no true accountability. The membership model is the only way to secure these critical accountability reforms and to ensure true accountability of the ICANN Corporation, Board and management to the global multistakeholder community.

The Board's reliance on their internal legal department is cause for concern, particularly because their primary legal obligation is to protect ICANN. We support an initial review by an Ombudsman, but only if the review is conducted free from the involvement or influence of or interference by ICANN's Legal Department or outside counsel. The Ombudsman must be truly independent, including in both staff and monetary resources.

Mechanism to empower the Community

- 7. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.**

We believe the Membership model provides the best opportunity to secure the enforceable community powers required to provide sufficient accountability at ICANN. We further believe that the Designator model could be a sufficient alternative if barriers arise in implementing a Membership model.

Power: reconsider/reject budget or strategy/operating plans

- 8. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

Yes, allowing the community to reject a budget or strategic plan would enhance ICANN's accountability. The list of requirements for this recommendation is satisfactory. However, the CCWG should create a proposal that guards against a situation where the Board and community could go back and forth submitting and rejecting several iterations of a budget. This could result in a stalemate and a resolution mechanism should be developed to ensure ICANN can continue to operate efficiently.

Power: reconsider/reject changes to ICANN "standard" Bylaws

- 9. Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The ability of the community to reject a proposed bylaw change would enhance ICANN's accountability. The list of requirements for this recommendation is satisfactory.

Power: approve changes to "Fundamental" Bylaws

- 10. Do you agree that the power for the community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

Yes, the community approval of any fundamental bylaws would enhance ICANN's accountability and we believe is the list of requirements for this recommendation is sufficient.

Power: Recalling individual ICANN Directors

- 11. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The Chamber supports the proposal to enable the appointing organization to recall and replace their Board member as a means to improve accountability. Each respective organization should be given the power to set their own voting threshold.

Power: Recalling the entire ICANN Board

- 12. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

Yes, but believe there should be a high threshold as this should be an option of last resort. During the development process we have noticed an "us vs. them" mentality from the current board and it

is important to note that our support of this point, as well as other transparency and due process concerns is not necessarily a reflection on the current board itself. We strongly support the CCWG goal of binding accountability, which may only be achieved through legal mechanisms is necessary as merely providing power to spill the board is in itself not enough.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

- 13. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The Affirmation of Commitments (AoC) has served ICANN and the community well. Incorporating keys aspects of the AoC into the bylaws is critical to enhancing ICANN's accountability. Even though ICANN has said is has no plans to terminate the AoC, incorporating key provision into the bylaws makes this and the unique bilateral relationship with the USG a non-issue going forward.

- 14. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

Yes, making the reviews permanent would enhance ICANN's accountability.

Bylaws changes suggested by Stress Tests

- 15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

We support the results of Stress Test 18 and agree with the proposed bylaw amendment. ICANN bylaws should stipulate that GAC advices must be issued by consensus in order to compel the ICANN Board to find a mutually acceptable solution when it does not follow GAC advice.

Items for Consideration in Work Stream 2

The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Accountability Work Stream 2? If need be, please clarify what amendments would be needed.

We would like to see greater development of these points with a clear timeline in place prior to the finalization of any plan as these issues should be prepped for rapid completion at the time of the transition. Finally, we want to emphasize that the CCWG's final proposal be implemented before the transition is completed.