



June 3, 2015

Via Electronic Mail:
comments-ccwg-accountability-draft-proposal-04may15@icann.org

Re: Cross Community Working Group on Accountability Initial Draft Proposal for Public Comment

Introduction

As a global Internet company, Google depends on the Internet Corporation for Assigned Names and Numbers (ICANN) to perform both the Internet Assigned Number Authority (IANA) functions and its broader policy-making duties related to the global Internet in a way that preserves the underlying security, stability, interoperability, resiliency, and openness of the Internet.¹

Google also supports the National Telecommunications and Information Administration's (NTIA) proposal to transition its stewardship role over the IANA functions to the global multistakeholder community, provided that the conditions enumerated by NTIA in its March 14, 2014 announcement regarding the transition are met. These conditions include: (1) ensuring that the transition supports and enhances the multistakeholder model; (2) ensuring that the transition maintains the security, stability, and resiliency of the DNS; (3) ensuring that the transition meets the expectations of affected parties; (4) ensuring that the transition maintains the openness of the Internet; and (5) ensuring that the IANA functions are not transferred to a governmental or intergovernmental authority.

For the IANA transition to be successful, it is essential that the organization carrying out those functions be accountable to its customers and the multistakeholder community. Among other things, the community must have confidence that the organization makes decisions in a fair, impartial, and transparent fashion; that the organization has a mechanism in place for relevant stakeholders to appeal decisions if necessary; and that the organization remains focused on its core mission and executes that mission efficiently.

¹ The IANA functions include the administration of the IP address identifiers and the Internet protocol parameters and administration of the Domain Name System (DNS).

With these goals in mind, Google appreciates the work of the Cross Community Working Group on Accountability (CCWG-Accountability) to develop an Accountability Initial Draft Proposal (Proposal) to enhance the accountability of ICANN, the organization currently carrying out the IANA functions pursuant to a contract with NTIA. We agree with much of the Proposal; the suggested reforms, if enacted, will be important enablers of a successful and durable IANA transition. Moreover, the Proposal and the reforms contained therein are evidence of the multistakeholder community’s ability to reform itself from within, based on a clear-eyed understanding of areas that need improvement.

We believe that the majority of the changes described in the Proposal strike the right balance: they provide a meaningful check on ICANN without compromising administrative efficiency. In particular, we support the following:

- Incorporating the Affirmation of Commitments into ICANN’s bylaws;
- 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, in exceptional circumstances, individual ICANN Board members, though as noted below we are concerned about the proposed power to remove the Board as a whole given the potentially destabilizing effects of such a move.

We believe that the Proposal could be improved in a few key respects. We detail each of these areas below, but in general, Google believes that some of the proposed measures may unnecessarily create operational inefficiencies and undermine confidence in the finality and predictability of ICANN’s decision-making process -- without necessarily improving accountability along the way.

1. Google does not support the CCWG-Accountability’s proposed revisions to bylaws language addressing balancing and reconciliation of competing core values.

In its Proposal, the CCWG-Accountability proposes modifying the “balancing” language in the bylaws to describe how ICANN will evaluate situations when one commitment must be reconciled with another commitment or core value.² This new language, which among other things requires some reconciliations to be “justified by an important, specific, and articulated public interest goal . . . [and] narrowly tailored using the least restrictive means reasonably available,”³ appears to be taken from so-called “strict scrutiny” tests that U.S. courts use to evaluate First and Fourteenth Amendment challenges. The proposal suggests that in reconciling core values, ICANN should use a version of the U.S. Supreme Court’s intermediate scrutiny tests.⁴

These standards are not appropriate for ICANN. In situations where U.S. courts employ strict or intermediate scrutiny tests, there is usually only one core value to be upheld (e.g.,

² CCWG-Accountability Proposal, pages 17-18; 22-23.

³ CCWG-Accountability Proposal, pages 22-23.

⁴ See CCWG-Accountability Proposal, pages 17, 23.

free speech, equal protection). These tests are not designed to provide guidance when balancing multiple compelling interests that lead to different conclusions. For that reason, the tests often favor governmental inaction. But in the face of competing core values, the Internet ecosystem depends on ICANN continuing to act, albeit in a way as faithful as possible to the many interests at stake. The strict scrutiny test does not provide ICANN with any guidance for how to address this conundrum, nor does it provide any predictability for the community that depends on ICANN's decision.

We recognize, however, that the current test is vague: it, too, provides little guidance to the ICANN board and staff and little predictability to parties affected by ICANN's actions. At its core, the bylaws provision amounts to an exhortation that ICANN bodies to "exercise [their] judgment."⁵ We urge the CCWG-Accountability to develop a proposal that provides meaningful guidance in balancing ICANN's commitments and core values, while avoiding a bias in favor of preserving the status quo, even if the status quo itself does not represent the best effort to balance competing commitments and core values.

2. While we support designating some bylaws as fundamental, fundamental bylaws should not be overly detailed. Fundamental bylaws should be flexible enough to adapt to evolving experience.

We agree with the CCWG-Accountability's proposal to designate certain bylaws as fundamental and the requirement to require support from the community, as well as a $\frac{3}{4}$ vote of the ICANN Board, in order to change any fundamental bylaws.⁶ However, given this higher voting threshold, the CCWG-Accountability should consider whether some fundamental bylaws might be unnecessarily detailed. For example, we agree that the fundamental bylaws should include a requirement for a binding, accessible Independent Review Process (IRP) mechanism that reaches both substantive and procedural complaints.⁷ However, because the ICANN community to date has no experience with this new IRP process, the procedures will likely evolve in light of experience. At this time, the detailed procedures governing how the IRP operates should not be fixed in the language of the fundamental bylaws.

3. We support the creation of a binding IRP mechanism, but the procedures governing that mechanism should more explicitly encourage clear, informed, and participatory decision-making.

While we agree with the need to create a binding IRP mechanism, we encourage the CCWG-Accountability to modify its proposal in two respects. First, we believe that parties participating in the IRP ought to have previously participated, if applicable,⁸ in the public

⁵ ICANN Bylaws, art. 1, § 2.

⁶ CCWG-Accountability Proposal, pages 28-29.

⁷ CCWG-Accountability Proposal, page 29.

⁸ The requirement to participate in the public comment process would only apply if ICANN squarely presented the issue that is the subject of the IRP in a prior call for comment. If, for example, ICANN sought to implement

comment process by either submitting their own comments or being members of a trade association, stakeholder/constituency group or some other associated group that submitted a comment on its members' behalf. While some may view this as overly restrictive or burdensome, Google believes that this policy is analogous to the requirements imposed by other rulemaking proceedings⁹ and will encourage greater participation by the community – at an earlier stage in ICANN's decision-making process, when many issues can be more proactively identified and resolved. In our view, this requirement would not pose a substantial burden for appellants because participating in ICANN's public comment process does not require specialized expertise or lengthy submissions. The only requirement would be for the appellant to have presented its arguments informally when given an opportunity to do so.

Second, we believe that actual decisions should generally be reviewed under an abuse of discretion standard rather than the *de novo* standard currently contemplated by the Proposal.¹⁰ 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 the finality of decisions made by the community. 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. For similar reasons, we appreciate the Proposal's clarification that delegation and re-delegation (with the exception of the ccTLDs) will be handled through a unitary process.¹¹

However, we recognize that the abuse of discretion standard for review of ICANN staff and board decisions, combined with the limited veto powers we discuss below, may make it unreasonably difficult for ICANN community members to challenge decisions taken by ICANN in the rare instance that they are *overwhelmingly* opposed by the community. While there might be several ways to address this concern, one approach would be to adopt a different standard of review for IRP challenges brought by the community as a whole, as opposed to an individual entity. In such situations, the CCWG-Accountability could consider mandating that panels to review ICANN's decisions *de novo*. We look forward to working with the CCWG-Accountability to ensure that a united ICANN community can provide a meaningful check on major ICANN decisions without unduly impeding operational efficiency.

a new policy without seeking input from community members, then such action could be challenged without first providing public input.

⁹ For example, in order to appeal a final order of the Federal Communications Commission (FCC), any "party aggrieved" by the order may file a petition for a review of that order. 28 U.S.C. § 2344. The courts have consistently interpreted the term "party aggrieved" to require that a petitioner have participated in the agency proceedings. *See, e.g., ACLU v. FCC*, 774 F.2d 24, 25-26 (1st Cir. 1985).

¹⁰ CCWG-Accountability Proposal, page 34.

¹¹ CCWG-Accountability Proposal, page 32.

4. The reconsideration request process should also encourage more efficient decision-making.

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 the relevant public comment process should continue to be a requirement for parties to have standing to ask for a reconsideration request, for the reasons outlined in the above IRP discussion.

Moreover, we urge the CCWG-Accountability 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,"¹² meaning that in order to avoid challenge, the Board would be forced to consider information beyond that which is material to the decision at issue. This is a significant and novel change to the quantity and breadth of information that the Board would be forced to consider, leading the Board to an impossible decision between being overwhelmed with information – making decisions take longer, without necessarily being better – or not taking into account some information that meets the low threshold of "relevance"¹³ and risking a series of requests for reconsideration that degrade the predictability and efficiency of ICANN's operations. For these reasons, Google urges the drafters of the Proposal to retain the present "material information" standard in these provisions of the bylaws.

5. The community's power to recall the ICANN Board and veto ICANN's strategic plan and budget should be reasonably limited.

We applaud the CCWG-Accountability's efforts to identify potential accountability measures to protect ICANN's key operations in a crisis. However, we believe that one proposed accountability measure – the ability of the community to veto ICANN's strategic plan and budget¹⁴ – 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. We have seen this play out in multiple global governing institutions and while it does provide an opportunity for checks and balances it also can render an organization unable to carry out its mission. We need to make sure we are striking the balance between accountability and organization 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

¹² CCWG-Accountability Proposal, page 36.

¹³ The "relevance" standard is very permissive. For example, under the California Evidence Code, relevant evidence admissible at trial is "evidence . . . having *any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Cal. Evid. Code § 210 (emphasis added). The standard for evidence in discovery proceedings is even more permissive. *See* Cal. Code Civ. Proc. § 2017.010.

¹⁴ CCWG-Accountability Proposal, page 69.

seek to recall individual Board members to change ICANN's direction. A process in which the community and Board could go back and forth for months at a time would unnecessarily and significantly degrade ICANN's operational efficiency.

For similar reasons, we are concerned that the power to remove the ICANN Board as a whole could have a potentially destabilizing effect on the Internet ecosystem.¹⁵ While we believe that 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, we believe that the decision to remove the entire Board should still happen on the basis of particular, serious concerns with each individual Board member, not a generalized objection to the Board as a whole. For this reason, we would favor the community only having the power to remove individual Board members.

Conclusion

Google recognizes the importance of enhancing ICANN's accountability to its customers and the broader multistakeholder community. In our view the suggestions outlined in the Proposal represent an important first step in achieving this goal. We look forward to working with the CCWG-Accountability in refining these proposals and ensuring that ICANN conducts its important work in an accountable, competent, and efficient way.

¹⁵ CCWG-Accountability Proposal, page 50.