

# **ICANN Board Comments on the CCWG-Accountability Initial Draft Proposal for Public Comment**

**3 June 2015**

The ICANN Board thanks the CCWG-Accountability for all of its work leading to the first draft proposal of mechanisms to enhance ICANN accountability in light of the changing historical relationship with the US Government. As the CCWG-Accountability prepares its proposal, the Board has some comments, observations and questions for the CCWG to consider. We provide these below, and look forward to continued discussions, including at the upcoming ICANN 53 meeting.

Our comments below are focused on the mechanisms discussed in the proposal falling under Work Stream 1.

As discussed at ICANN52 in Singapore, the Board reiterates that the main areas of proposed enhancements are items that the Board supports. We understand and appreciate how important these changes are to the CCWG-Accountability, and agree that there is a path forward to achieve the community powers and enhancements identified in the CCWG-Accountability's first report. We recognize the importance of affording the ICANN community a voice in assuring that the Strategic Plans of ICANN are within ICANN's mission, that budgets support the mission, and that the Board does not have unilateral ability to change the Bylaws, particularly those parts of the Bylaws that are fundamental to maintaining the Board's accountability to the community. We understand the community's need to have a tool to deter the Board (as a whole or as individuals) from neglecting ICANN's mission, and how a powerful tool may allow for appropriate action to deter such behavior. We agree that the Independent Review Process needs to be refined; with the standard better defined to meet the needs of the community, and that it is important to have binding decisions arising out of that process, as appropriate. As we noted in Singapore, we are far more closely aligned with the CCWG-Accountability than many in the community might realize.

Starting from the baseline that we are supportive of the CCWG-Accountability's main goals, we then have to turn to considerations of implementation – how do we make sure that the goals are implemented in ways that do not pose undue risks to how the ICANN community interacts within the ICANN multistakeholder model?

One of the analyses that we do not see within the report is a something akin to a regulatory impact analysis, where the costs, benefits and alternatives to proposals are weighed to assure that the design of the solution for each issue is the most efficient, least burdensome on the community, and most cost-effective solution. This seems a separate exercise from the stress test work that is reflected in the report. That stress test, or contingency planning, work builds from the identification of stressors or situations that ICANN may face, and then considers how the

proposed solutions assist ICANN in being more accountable when those situations arise, however unlikely. This is valuable work in considering that the CCWG-Accountability is working towards the crucial issues. What seems to be the necessary next step, however, is considering whether the mechanisms that are proposed as solutions are themselves capable of withstanding contingencies and stressors. In this regard, the Board presumes there will be an impact analysis. It is currently working on a series of questions to assist in performing that impact analysis.

The membership model that is described within the CCWG-Accountability report is one of those main areas for which impact testing seems to be needed. One of the foundations of the CCWG-Accountability report is that a move to a membership model is a means to achieving the enhancements identified. The membership model is noted as providing a “viable” solution, with viable meaning “enforceable through a judicial process.” (Annex A to 23 April 2015 Counsel memo.) Recognizing that there is continued debate surrounding this enforceability issue on the CCWG-Accountability mailing list, the concept of membership and enforceability seems to raise some questions that should be considered prior to accepting a specific model, including analysis of what risks and liabilities are being introduced into the system as a whole. For example, while clearer community paths for impacting Board decisions may result in few situations where the community agrees that it is necessary to go to a California court to enforce a right against ICANN, there seems to be other questions about enforceability and impacts have not yet been considered. Such as:

- What opportunities and rights of action are we opening up under law for individual members to bring against ICANN that cannot be constrained by the Bylaws?
- What rights under law do members have to bring actions against other members, and what impact could that have on the multistakeholder model? Does this create opportunities for capture of ICANN or ICANN processes that are not an issue today?
- Are all parts of the ICANN community comfortable with the role that California courts will assume in enforceability of accountability reforms through the membership model?
- If any SO/AC does not want to be a “member,” how does this affect the proposed SO/AC Membership Model? Would it minimize that SO/AC’s participation in the ICANN process if other SOs/ACs have the proposed powers and rights that the “missing” SO/AC does not?

We do have a concern that the extent of the governance changes that could be required through the CCWG-Accountability creates the possibility for too much change to be introduced into the ICANN system at once. As one of the participants in the recent Board workshop panel on the IANA Stewardship Transition cautioned, sound engineering practices are based in incremental change and following with additional reforms as needed, as opposed to changing everything at once. When you

change too much at once, and there is later an issue, it's very hard to figure out what part of the change caused the issue. A shift to a membership model, which may introduce a large number of changes into the whole governance model, is indeed an area where there is potential for unintended consequences. We believe that it's important to keep this principle in mind as impact analysis is performed.

We also support one of the advisors to the CCWG-Accountability, Jan Aart Scholte, in his continued reminder to make sure that the solutions and governance changes that are being introduced today include considerations of how the different parts of the ICANN community remain accountable to each other, and allow for those who are not affiliated with any of the current structures to have meaningful participation options in the future. We recommend that this be part of any impact analysis as well.

Aside from these high-level issues that we wish to bring to the forefront, we also have some specific questions on parts of the proposals:

- How will the principles proposed to enhance and improve the Mission and Core Values of ICANN be tested against the bylaws in their entirety? Given that modifying the Mission and Core Values was not part of the community discussion at the Singapore meeting, what is the CCWG-Accountability doing to highlight this change as part of the suite of recommendations? In asking this question, we are supportive of the idea that the mission statement and core values should be refined.
- Under the current governance model, advisory committees are responsible for the provision of advice to the ICANN community and Board on certain areas (GAC for public policy issues; SSAC on security and stability concerns; RSSAC on root server stability; and ALAC on the interests of individual internet users.) For the areas of the proposal that rely upon a community "vote" to determine whether action should be taken, how are those pieces of advice proposed to be taken into account? How does the CCWG intend to deal with a Board action based on advice received from an AC that does not choose to become a member? What are the processes that the community would use to reject a Board action based on advice from the GAC, if it elected to do so?
  - What is the basis for proposing to distribute two votes each to the SSAC and RSSAC (collectively less than any other single group in the voting model) when the Bylaws do not reflect any weighting of import across ACs? How does the CCWG contemplate ensuring that the security, stability and resiliency of the DNS be considered and maintained if the vote of the RSSAC and SSAC play such a limited role?
- With regards to the inclusion of the Affirmation of Commitments reviews into the bylaws:

- Are there sufficient mechanisms in place to assure diversity of the review teams (geographic, gender, etc.)?
  - What are the mechanisms to adjust the review processes as needed by the community?
  - What are the mechanisms for ensuring costing and subsequent prioritization of recommendations, and determination if recommendations are feasible?
  - What limitations on review team access to documents will be identified to address issues such as restricting access to employee records, trade secrets provided to ICANN by others, and assuring that competitors do not gain access to others' sensitive documentation that ICANN has within its files?
- To the extent that ICANN decisions are subject to review or approval through the ICANN “empowered community” model via members, how is that group of members subject to considerations of conflict of interest identification in its decision making?
    - How will the impact of a community mechanism decision be assessed with regards to the broad global public to which ICANN is responsible? And will stakeholders not directly involved in ICANN have a voice?
    - With regards to removing an individual board director, what is the threshold that triggers this? How will the process not be capturable? What will be the basis for removing a board member? Is it worth considering a threshold that requires more than one SO or AC to support the removal of a board member – thus ensuring that individual Board members are accountable to the whole community for their performance as a director, not just the SO or AC that originally selected them.
    - With regards to removal of the entire board, what actions trigger this? What mechanisms will be in place to ensure continued stability and security of ICANN’s mission and responsibilities, while a new Board is appointed?
  - We recommend that language that is incorporated into the Bylaws on WHOIS be updated to reflect the potential for future modification and overhaul of the registration directory system, and not hardcode the legacy “WHOIS” requirements into the Bylaws.
  - The proposed enhancements to the Independent Review Process (IRP) still appear to require further detail, including issues such as standing and remedies, as well as definitional work. What steps are in place to avoid overloading the seven-person IRP panel with frivolous or vexatious complaints? We anticipate further questions after more details are provided.

As we strive to look at the timeframes, clearly some of the proposals can be achieved more rapidly than others, building on existing mechanisms. New proposals, in

particular those changing the governance structure of the organization, require additional time for implementation and testing. Once the proposals become more concrete it would be useful for the CCWG to work with staff on a draft project plan for implementation.