GNSO Registries Stakeholder Group (RySG) Comments on the
Enhancing ICANN Accountability CCWG Work Stream1 Draft Proposal

The GNSO Registries Stakeholder Group (RySG) is pleased to submit the following comments and feedback to the Enhancing ICANN Accountability CCWG concerning its Work Stream 1 Draft Proposal. We note our appreciation for the significant amount of time, energy and resources dedicated to this effort and the constructive and collegial manner in which the CCWG has conducted its work. The RySG generally supports the draft work product to date, and we look forward to further engagement as the interim proposal is refined following the receipt of public comments. As contracted parties to ICANN, the gTLD registries welcome this unique opportunity to improve ICANN's accountability to the entire community. We strongly support the new and necessary checks and balances recommended in the CCWG's draft proposal.

Several RySG members have noted concern with the relatively short time available for consideration of the draft CCWG proposal and development of feedback. As such, RySG support is conditional on further development of the details. Accordingly, we reserve the right to amend our position.

The RySG believes the set of Work Stream 1 proposals contained in the interim report, if implemented, would likely provide sufficient enhancements to ICANN's accountability framework to enable a timely and responsible transition of IANA functions stewardship (in conjunction with the ongoing work of the IANA Stewardship Transition CWG). The RySG believes that ensuring that ICANN adheres to its mission, commitments, and core values are fundamental to ensuring ICANN accountability. As such, we strongly support that the Draft Proposal provides a clear statement of ICANN's Mission, as well as ICANN's commitments to the community and its Core Values that govern the manner in which ICANN carries out its Mission. Equally key is the ability of the global multi-stakeholder community to challenge decisions or actions of the ICANN Board and management, where the Board itself is no longer the ultimate authority in review of its own decisions. Appropriate checks and balances on power are the critical requirement. As such, the RySG strongly supports the recommended enhanced community powers enabling:

(1) challenge of ICANN Board decisions through a <u>binding</u> Independent Review Process;
(2) removal or recall of ICANN Board members – individually or entirely;
(3) veto or approval of changes to the ICANN Bylaws, Mission, Commitments and Core Values; and
(4) rejection of Board decisions on Strategic Plan and budget, where the Board has failed to appropriately reflect community input in these documents.

The RySG is concerned, however, that these proposed and necessary community powers would be unenforceable under ICANN's current organizational and corporate structure. Thanks to the significant contribution and expertise of the CCWG's independent legal advisors, it has become clear that an evolution of ICANN is required to ensure the community powers are enforceable – otherwise the community remains in an advisory capacity only and the ICANN Board retains its ultimate authority. The RySG believes this is unacceptable and supports an approach to ensure necessary checks and balances on the Board while securing the required enforceable community powers. If the proposed community powers are not enforceable, there is no real accountability.

The following are the RySG responses to the specific questions posed by the CCWG Accountability. Please see the end of this document for a list of other comments and questions raised by RySG members.

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. If implemented, the RySG believes the recommended changes to ICANN's mission, commitments and core values would help to enhance ICANN's accountability to the global multi-stakeholder community. In the Draft Proposal, ICANN's mission, core values, and commitments are more clearly and strongly articulated than in the existing bylaws. We believe that these changes will help to ensure ICANN accountability. Including the proposed community power to approve any future Board-proposed changes would further strengthen and secure these proposed changes. Without such a community power, the proposed changes would be subject to change without concurrence from the global multi-stakeholder community. We are especially supportive of the recommended clarification that ICANN's powers are enumerated, as this will help to ensure that ICANN's work remains within its limited mission as agreed by the community.

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

Yes. The RySG supports the list of requirements included in the recommendation, provided that the community has the ability to approve or reject any future changes initiated or advanced by the ICANN Board.

Fundamental Bylaws

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

> Yes. The RySG agrees that the introduction of Fundamental Bylaws would help to enhance ICANN's accountability to the global multi-stakeholder community. Establishing an approval threshold of 75% would serve to ensure a substantial percentage of the affected community agrees with proposed changes.

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.*

> The RySG agrees with the list of proposed Fundamental Bylaws, with one recommended addition. We believe that ICANN's current bylaw (Article XVIII, Section 1) establishing ICANN's principle office location, which is consistent with the Affirmation of Commitments Section 8b establishing ICANN's headquarters location, should be made a Fundamental Bylaw. All of the accountability mechanisms and reforms currently proposed by the CCWG assume ICANN's continued operation under California not-for-profit corporate law. If that assumption were to change, all of the current accountability reform efforts would need to be re-assessed and started anew. Due to this assumption, the threshold for change of headquarters and/or principle office location should be deemed fundamental and require significant community agreement. The RySG also strongly supports the recommendation that the CWG-Stewardship's proposed IANA Function Review, including CWG-identified requirements for implementing the outcomes of the IFR, should be added to the ICANN Bylaws, as a Fundamental Bylaw.

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.*

> Yes. Subject to the caveats mentioned below, the RySG agrees that the proposed improvements to the IRP would help to enhance ICANN's accountability. The RySG strongly supports a binding IRP and a membership structure to ensure the enforceability of any decisions. The community must have standing to ensure the ICANN Board abides by and implements any binding IRP decision. A standing panel of experts will help.

Enabling a supermajority of ICANN members to file an IRP without burdensome fees will add an important and effective mechanism for community empowerment. This would have been very useful in challenging the ICANN Board's decision to change the IRP following the .xxx case. We also support further community work on examining the issue of a super-majority of the membership being able to veto certain key Board decisions, so the community could avoid being forced to engage in a lengthy IRP process.

Reconsideration Process Enhancements

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 RySG agrees that the proposed improvements to the reconsideration process would help to enhance ICANN's accountability. We agree with the list of requirements and believe that the proposed timeframes and deadlines are reasonable and will likely meet the substantial majority of the community's needs. We believe the scope of permissible requests is appropriate.

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.*

    The RySG generally supports the proposed membership structure, without which the community powers might be unenforceable. The RySG generally supports the proposed allocation of member votes outlined on Page 44 of the interim proposal, and as follows. This Reference Mechanism seems to be a reasonable approach to vote distribution, but there may have to be distinctions depending on the category of issue. It should distribute votes across the five organizations that are involved in policy development and it also provides the possibility of providing representation across the five ICANN regions or to balance representation across internal groups, such as the Stakeholder Groups in the case of the GNSO.

Community segment	Reference Mechanism "votes"
ASO	5
ccNSO	5
gNSO	5
At Large	5
GAC	5
SSAC	2
RSSAC	2

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, the RySG agrees that enabling the community to reject a budget or strategic plan would help to enhance ICANN's accountability. The ability to control the budget is essential as it would have the most direct impact on Board and management actions and activity. We agree with the list of requirements for this recommendation.

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.*

Yes. The RySG agrees that an enforceable community power to reject a proposed Bylaw change would help to enhance ICANN's accountability to the global multi-stakeholder community. We agree with the list of requirements for this recommendation, including the proposed 2/3 majority for a first member vote and 3/4 majority in any subsequent member votes.

The RySG notes the following recommendation: *"The time required for this power to be exercised would be included in the Bylaws adoption process (probably a two-week window following Board approval)."* We understand the desire to put a time limit, but

two weeks is a terribly short deadline for a multi-stakeholder process, so we would instead suggest at least 30 days.

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 RySG agrees that an enforceable community power to approve any Fundamental Bylaw change would help to enhance ICANN's accountability to the global multi-stakeholder community. We agree with the list of requirements for this recommendation, with the addition of one Fundamental Bylaw as included in our response to Question #4 – that ICANN's existing Bylaw XVIII Section 1 be made Fundamental. See Question #4 for detailed rationale.

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.

Yes. The RySG agrees that an enforceable power to remove individual Board Directors, under special circumstances, would help to enhance ICANN's accountability to the community. The RySG supports the CCWG proposal to enable the respective appointing organization (SO, AC, SG, NomCom or community members) to recall and replace their associated Board member. We also support allowing each appointing group to determine its own voting threshold for recall and replacement of the associated individual Board member.

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. The RySG agrees that an enforceable power to recall the entire ICANN Board would help to enhance ICANN's accountability to the global multi-stakeholder community. We support the 75% member voting threshold for recalling the entire Board.

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.

Yes. The RySG agrees that incorporating key principles and elements of the Affirmation of Commitments (AoC) into the ICANN Bylaws is a critical mechanism for enhancing ICANN's accountability to the global multi-stakeholder community. Doing so would further enshrine key accountability and transparency review commitments and help to eliminate a remaining vestige of the United States government's unique role with regard to ensuring ICANN's accountability. Transitioning key components of the AoC would, in effect, transition that oversight from the USG to the global multi-stakeholder community. The RySG supports the list of requirements for this recommendation.

We note that there are some conflicting revisions proposed in Sections 3 and Section 6. Generally, we support the more active language used Section 3. We trust that the CCWG-Accountability will reconcile these discrepancies in its final proposal. In the final proposal, we recommend that a single and complete redline of the ICANN Bylaws be included reflecting both the proposed changs to the Mission and Core Values as well as the incorporation of the Affirmation of Commitments into the Bylaws.

We would like to note one point of concern with respect to the following text:

> "ICANN will ensure that as it expands the top-level domain space, will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection."

We agree that the above issues are important topics, but wish to underscore that these topics must be addressed through the multi-stakeholder model and not unilaterally by ICANN as an organization. The latter would create a conflict with ICANN's narrow mission as defined in Section 3. We urge that this be clarified in the final proposal.

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. The RySG agrees that incorporating the Affirmation of Commitments (AoC) reviews into the ICANN Bylaws would help to enhance ICANN's accountability to the global multi-stakeholder community. We believe the Accountability and Transparency Reviews must be incorporated. Other reviews, such as the Whois review, could be sunset. The RySG believes that the community should have the power to designate participants on future reviews (unlike today, where the Chairs of the ICANN Board and GAC have that unique power.)

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.

> The RySG agrees that the so-called "Stress Tests" have been valuable as a tool to weigh the risks and reward of various proposals. As such, we believe the incorporation of the bylaws changes recommended by the CCWG interim proposal would help to enhance ICANN's accountability to the community and NOT doing so would undermine it.

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.

> The RySG supports the proposed work plan for Work Stream 2. In our view, the key requirement of Work Stream 1 has been to secure key community powers so we can trust the subsequent development, approval and implementation of other less critical or urgent reforms.

Other Comments and Questions from the RySG:

We wish to address a number of additional concerns and questions raised by the Draft Proposal. These comments should not be taken to undermine our generally strong support for

the accountability mechanisms proposed. For ease of review, we have sorted these comments by section and provided paragraph numbers wherever possible.

Executive Summary

The Executive Summary refers to "reviews required by the CWG-Stewardship." We support the recommendation that these reviews be incorporated into the Fundamental Bylaws and recommend that the procedures for implementing the outcomes of such reviews that are determined by the CWG-IANA are also included within that fundamental bylaw (¶10).

Section 3) Principles

The Draft Proposal notes a difference of opinion on language pertaining to ICANN "remaining rooted in the public sector." We support the definition of Public Sector proposed in the draft proposal and do not believe that this clarifying language is inconsistent with the multi-stakeholder model. We recommend that this language remain in the final bylaw edits.

With respect to the obligation to avoid capture, it is not clear whether the CCWG-Accountability intends to address this through specific language or through community balancing mechanisms built into the proposed community empowerment structure. We advise that this be achieved through the latter; otherwise defining and identifying instances of capture may be difficult and introduce subjectivities. We believe that the checks and balances described in the draft proposal, which will be reflected in the revised bylaws, help to avoid capture.

Section 4) Appeals Mechanisms

Provide further clarify about how panel determinations would be implemented

The Draft proposal states that *"the panel may not direct the Board or ICANN on how to amend specific decisions, it shall only be able to make decisions that confirm a decision by ICANN, or cancel a decision, totally or in parts."* We believe that it would be useful to further explain how this would work in practice (p.31, Item 4).

Review and refine standing requirements to address the possibility of frivolous complaints

The requirements for standing establish that the IRP may be used by *"any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values or ICANN policies."* While we agree that the IRP should be

more accessible, we have concerns that these requirements could make the IRP vulnerable to frivolous requests that could be time consuming and costly. As an alternative, we recommend that the IRP could be made available to parties *directly* affected by a decision. For parties that are not directly affected parties the Supporting Organizations and Advisory Committees could be the parties given standing to file; this would in effect allow these community groups to provide a screening function in determining whether complaints met the materiality threshold.

Provide further detail about the fee structure for using the IRP

We also believe that the fee structure for filing an IRP requires further development and that, in this process, due consideration should be given to how to prevent against frivolous complaints, while ensuring that the IRP remains available to entities like communities or not-for-profits with legitimate complaints. In such development we also recommend that further information be provided about how mediators would be selected (i.e. whether they would be pulled from a standing list) and how mediation would be funded. We ask that the Final Proposal include of a description of how fees would be collected from complainants to ensure payment if a fee shifting model was implemented.

Define whether restrictions on post-term appointments are term-limited

We support the introduction of term limits and limitations on post-term appointments. We ask that the CCWG-Further clarify the restrictions on post-term appointments (i.e. whether such restrictions would be time limited and what positions what positions they would apply to).

We share the concern cited in the draft proposal about the potential effects of "bad decisions" becoming precedential and advise that these concerns be addressed in the work of the CCWG-Accountability.

Section 5) Community Empowerment

Clarify how bodies that do not elect directors will participate in the Community Empowerment Mechanisms

The draft proposal states, "the ICANN Supporting Organizations and the Advisory Committees who currently have the right to elect directors (as opposed to non-voting observers) to the ICANN Board would each form unincorporated associations." The proposal however is silent on procedures for the Advisory Committees, namely the GAC, that do not elect directors. We ask that that further details be provided about whether these groups will also be expected to (or

allowed to) for an unincorporated association and, if not, how they will participate in the revised community empowerment mechanisms.

Review the role and structure of the NomCom under the revised community structure

The second part of Section 5 says:

> "For the directors appointed by the Nominating Committee, the CCWG-Accountability seeks the community's views about how to allow for removal. Following the principle of "the appointing body is the removing body", it does need to be the NomCom that takes the decision to remove one of these directors. Consistent with the Reference Mechanism outlined above, we expect that the NomCom will need to obtain legal structure to be able to remove directors as well as to appoint directors."

The proposal seems to imply that the NomCom would be included as a member in the ICANN membership structure. We request that further details be provided about whether the NomCom would participate in the Community Empowerment mechanisms as a standalone body. We generally prefer that these mechanisms be deployed by a balance of the other community "members," particularly given imbalances in the existing NomCom composition.

Section 7) Bylaws changes suggested by Stress Tests

Include procedures for handling Supporting Organization Advice that is supported by Consensus

We believe that the Bylaw Clarifications regarding Advisory Committee Advice that is supported by consensus should apply equally to that from ICANN Supporting Organizations, which provide advice in addition to developing Consensus Policy. We believe it is important for the community to be able to force the Board's hand if they are unresponsive to advice from SOs as well as ACs (387).

Section 8) Stress Tests

We understand that every contingency cannot be fully accounted for, and that the stress tests evidence significant improvements to ICANN's overall accountability. However, we are interested in whether and how the CCWG-Accountability intends to handle Stress Tests where the proposed Accountability Mechanisms are identified as "inadequate" or "partially inadequate".

Stress Tests 5, 6, 7, and 8

In the assessment of proposed accountability measures in the case of financial crisis or other loss of revenue, the proposed accountability mechanism states that the community powers could be used to leverage increased fees from registries, registrars, or registrants. We note that the contingencies described would could also serious negative impacts on the revenue streams of ICANN's contracted parties, registries and registrars. We do not believe that simply leveraging increased fees is a viable solution to this Stress Test and recommend that instead the stress test looked at how ICANN's expenditures could be constrained to reflect the decline in revenue, while minimizing the negative impacts on the key services that it provides.

This assessment also raises a more general issue of how the proposed community powers will interact with the contracts between ICANN and its contracted parties. We are concerned about the ability for these agreements to be revised other than through the existing procedures in the Registry Agreement and Registrar Accreditation Agreement. If this is within the intended scope of the community powers, we request that further clarity is provided to permit more substantive comment in the next comment round.

Stress Test 16

Stress Test 16, in which ICANN engages in programs not necessary to achieve its technical mission, is described as being directly related to the IANA Stewardship Transition. We believe that this is a general issue not directly related to the IANA Stewardship Transition. We request that this statement be revised to reflect this general nature or that greater clarity be provided as to why this Stress Test is directly tied to the IANA Stewardship Transition.

Stress Test 20

The first proposed accountability measure for Stress Test #20 is: "*Preventive: During policy development, the community would have standing to challenge ICANN Board decisions about policy and implementation.*" There is a temporal issue in this statement in that the board should not be making policy or implementation decisions before a policy development process was complete, except in limited, emergency circumstances. We suggest that this statement be revised and revised to reflect the processes for Policy Development as defined in the ICANN Bylaws.

Stress Test 26

With respect to Stress Test 26, the assessment of proposed accountability mechanism refers to how this would be handled if the action of concern resulted from the board decision. Additional discussion should be included to consider whether these mechanisms would be sufficient if the issue followed from staff decisions and actions that did not directly follow from a board decision, as overturn of the Board decision would not be the appropriate fix.