



December 21, 2015

Via Electronic Mail

comments-draft-ccwg-accountability-proposal-30nov15@icann.org

**Re: Google Public Comment on Enhancing ICANN Accountability**

The Cross-Community Working Group on Enhancing ICANN Accountability's (CCWG) recommendations<sup>1</sup> represent an impressive achievement: an inclusive, consensus-driven process has resulted in a series of proposals that will make ICANN more accountable to the global community of Internet users it serves, without undermining the organization's ability to effectively perform its vital technical functions. As Google has long argued, striking this balance between improved accountability and operational efficiency is a necessary foundation for the transition of the Internet Assigned Numbers Authority (IANA) functions stewardship from the National Telecommunications and Information Administration (NTIA) to the global multistakeholder community.<sup>2</sup> Google is pleased that the CCWG proposal has found this balance, and we look forward to the IANA transition being successfully implemented in the coming months.

Notwithstanding our support for the CCWG's proposal, Google believes it is important for the community to consider the long-term implications of three discrete elements of the proposal.

**1. Allowing the community to remove the entire ICANN Board at once has the potential to destabilize the organization as a whole.**

As noted in Google's original comments,<sup>3</sup> the power to remove the ICANN Board as a whole could have destabilizing effects on ICANN and on the Internet more broadly: it could leave an organization at the heart of the Internet ecosystem without a stable and empowered governance body.<sup>4</sup> 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 -- without introducing the potentially destabilizing effects

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<sup>1</sup> CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations, Nov. 30, 2015 (Third Draft Proposal), *available at* <https://www.icann.org/en/system/files/files/draft-ccwg-accountability-proposal-work-stream-1-recs-30nov15-en.pdf>.

<sup>2</sup> 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>.

<sup>3</sup> Google Comments at 6.

<sup>4</sup> Third Draft Proposal at 5, 32-34.

of removing the Board writ large.<sup>5</sup> Google continues to urge that recalls be based on specific, serious concerns with an individual Board member rather than a generalized objection to the Board as a whole. Moreover, because the proposal allows individual members to be recalled, a Board recall provision is simply not necessary as a practical matter: if the multistakeholder community is unhappy with all of its Board members, it will have the ability to unseat them individually. If the community is only unhappy with a subset of members, it does not make sense to remove the directors who are performing well. For these reasons, we continue to believe that the community should only have the power to remove individual Board members.

## **2. Requiring the Board to reject the Governmental Advisory Committee (GAC) by a two-thirds majority disproportionately strengthens the power of governments and disincentivizes governmental representatives from participating in the bottom-up process.**

In transitioning the stewardship of the IANA functions to the global multistakeholder community, NTIA will fulfill a long standing commitment to “allow the private sector to take leadership for DNS management.”<sup>6</sup> Given this context, Google is very concerned that the proposal’s recommendation to amend the bylaws addressing the role of GAC advice will disproportionately empower governments at the expense of other stakeholders. Today, the ICANN Board must inform the GAC if it decides to take an action that is not consistent with the GAC advice.<sup>7</sup> Upon such a determination, the GAC and the Board then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.<sup>8</sup> The proposed amendment would limit the ability of the Board to reject advice by a full GAC consensus, allowing such rejection only when two thirds of Board members agree.<sup>9</sup> While Google understands that this rule may merely codify the ICANN Board’s informal practice, the proposal and the significant negotiations that led to it send the wrong message: they create the perception that governmental stakeholders have the power to override and a potential interest in overriding community-driven decisionmaking. This is problematic for two reasons. First, ICANN should continue to operate as a *private-sector-led*, consensus-driven organization.<sup>10</sup> Second, accountability improvements should provide incentives for governments to get involved earlier in the policy development process, rather than encouraging their representatives to sit apart from the rest of the community and issue advice long after the rest of the community has engaged with one another. If the CCWG retains this proposal, it should ensure that only unambiguous, clearly worded advice, provided in writing with an accompanying explanation, and agreed upon by a full consensus of the GAC without formal objection, would enjoy this deferential treatment. Moreover, any action taken in response to GAC advice must be consistent with ICANN’s mission and bylaws.

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<sup>5</sup> Third Draft Proposal at 5, 31-32.

<sup>6</sup> Press Release, NTIA Announces Intent to Transition Key Internet Domain Name Functions, March 14, 2014 (NTIA Announcement) (quoting Department of Commerce, *Management of Internet Names and Addresses*, Policy Statement, 63 Fed. Reg. 31,741, 31, 744 (1998)).

<sup>7</sup> ICANN Bylaws, art. XI, Sec. 2.

<sup>8</sup> *Id.*

<sup>9</sup> Proposal at 52; Annex 11.

<sup>10</sup> In this context, it is worth noting that a similar change was debated and rejected by the community in 2014.

### 3. The proposal's treatment of ICANN's power to enforce contracts should recognize that power is not unlimited.

Google agrees that ICANN bylaws should include a prohibition limiting ICANN's ability to "regulat[e] services that use the Internet's unique identifiers, or the content that they carry or provide."<sup>11</sup> Explicitly recognizing that ICANN lacks authority to regulate content, among other limitations, helps ensure that the IANA stewardship "maintain[s] the openness of the Internet."<sup>12</sup> This proposed change also reinforces ICANN's commitment to fundamental human rights, including freedom of expression and access to information. At the same time, Google recognizes that ICANN must have the power to enter into contracts with registries and registrars, and we support commonsense language stating that "ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its Mission." However, this language must be understood in the context of ICANN's limited remit: while it recognizes that concluding and enforcing contracts does not *per se* run afoul of ICANN's mission, particular interpretations of the contract or enforcement actions may still be challenged as contrary to ICANN's mission and bylaws. Recent e-mails exchanged on the CCWG-Accountability list reflect this understanding,<sup>13</sup> but it should be memorialized and clarified in the final proposal.

Again, Google appreciates the work of the CCWG in putting together a strong proposal for increasing ICANN's accountability and looks forward to working with all stakeholders to present a final proposal to the ICANN Board and NTIA, and to successfully completing the transition of the IANA functions stewardship to the global multistakeholder community.

Sincerely,



Aparna Sridhar  
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Google Inc.

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<sup>11</sup> Third Draft Proposal at 39; Annex 5.

<sup>12</sup> Proposal at 24; NTIA Announcement.

<sup>13</sup> See E-mail from J. Beckwith Burr, Deputy General Counsel and Chief Privacy Officer, Neustar Inc., to Accountability Community <accountability-cross-community@icann.org>, Dec. 4, 2015 ("I want to circulate what I believe is the agreed upon language regarding grandfathering, just to make sure we are all on the same page. . . . For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered. This means that the parties who entered into existing contracts intended (and intend) to be bound by those agreements. It means that neither a contracting party nor anyone else should be able to bring a case that any provisions of such agreements on their face are *ultra vires*. *It does not, however, modify any contracting party's right to challenge the other party's interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.*") (emphasis added); E-mail from Bradley Silver, TimeWarner Inc., to Accountability Community <accountability-cross-community@icann.org>, Nov. 30, 2015 ("Any and all actions taken under Section 3.18 or the RAA do not suddenly become immunized from scrutiny by acknowledging that the RAA is within ICANN's mission.").