



## **INTERNET ASSOCIATION COMMENTS ON THE CCWG-ACCOUNTABILITY REVISED PROPOSAL ON WORKSTREAM 1 RECOMMENDATIONS SEPTEMBER 12, 2015**

The Internet Association (IA) is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.<sup>1</sup> The Internet Association is dedicated to advancing public policy solutions to strengthen and protect Internet freedom and foster innovation and economic growth. Included here are public policies that support the open architecture of and free flow of information through the global Internet.

The Internet Association is pleased to comment on the “CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations.” We support the CCWG’s plan for enhancing ICANN’s accountability and believe these changes are necessary given the U.S. Government’s intent to relinquish its historical stewardship role. The proposal could be further strengthened and clarified in certain instances, which we detail below. In certain instances, we have commented on elements of the proposal that we strongly support.

IA also encourages the ICANN Board to work constructively with the CCWG in finalizing and adopting accountability improvements. Recent discussions with the Board suggest that the Board may wish to postpone, temper, or weaken critical accountability improvements. IA emphasizes that key accountability improvements must occur in parallel with the IANA stewardship transition. While we encourage dialogue between the Board and the CCWG, such dialogue must recognize that the CCWG’s work is the product of a community-and consensus-based process entitled to deference. We urge the Board to come together with CCWG to expeditiously resolve any areas of disagreement so that the transition can continue to move forward in a way that strengthens the bottom-up, consensus-based multistakeholder model.

### Principles

With regard to existing Core Value 11, the Internet Association believes the clarification of the meaning of “private sector” is appropriate. However, we disagree with the CCWG’s decision to eliminate language requiring that any decision to defer to input from public authorities must be consistent with ICANN’s Commitments and Core Values (154). It should never be acceptable for the ICANN board to accept advice that is not consistent with these Commitments and Core Values. This change creates significant concern because the CCWG has removed this language in response to governments, thereby suggesting that some public authorities might in the future seek to issue actionable advice to the ICANN board that is inconsistent with ICANN’s Commitments and Core Values. Nor is it sufficient to rely solely on the Independent Review Process (IRP) to correct such violations; instead, ICANN must uphold its Commitments and Core Values without regard to inappropriate government pressure

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<sup>1</sup> The Internet Association’s members include Airbnb, Amazon, auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber, Zenefits and Zynga.



The Internet Association supports the efforts of the CCWG to update and revise the Bylaws pertaining to ICANN’s Mission Statement, Commitments, and Core Values. We agree that it is appropriate to provide an elaboration of ICANN’s commitments to human rights and that such an elaboration would be useful in preserving the right to free expression as ICANN transitions from U.S. Government oversight (149). Noting the important but sensitive nature of this topic, the Internet Association recommends the CCWG take certain steps to ensure this work is consistent with existing human rights norms. First, the CCWG must not suggest that ICANN directly incur human rights obligations; those obligations belong solely to states. Second, the CCWG cannot create new human rights; it must therefore rely on verbatim text from existing instruments, such as the Universal Declaration of Human Rights, or it must refer to those instruments. Third, we believe the CCWG should undertake this work only with the cooperation of established experts in the field of international human rights. Fourth, any text regarding human rights should recognize ICANN’s limited remit: consideration of human rights should not expand the scope of ICANN’s activity or purview.

Finally, the Internet Association strongly supports the clarification that ICANN’s mission does not include the regulation of services that use the DNS or the regulation of the content those services provide (146).

## Fundamental Bylaws

The Internet Association agrees that classifying some Bylaws as “Fundamental Bylaws” will enhance ICANN’s accountability by requiring community approval for any changes to these bylaws. The Internet Association supports the proposed list of requirements and list of Bylaws designated as Fundamental Bylaws.

## Appeals Mechanisms

The Internet Association agrees that the scope of the IRP should include actions or inactions possibly 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. The Internet Association further supports the independence of IRP Panelists from the ICANN Board, staff, Supporting Organizations (SOs), and Advisory Committees (ACs).

Our initial comments to the CCWG asked for further clarity regarding the binding nature of IRP decisions. We agree with the CCWG’s recent update stating that, “to the extent permitted by law, IRP decisions should be binding on ICANN.” IA also previously suggested that the CCWG provide a fallback mechanism for wrongly decided outcomes. We are pleased to see the new provision that clearly erroneous decisions by a three-member standing panel can be appealed to the full Standing Panel. Finally, we agree that IRP panelists should be able to rely on past rulings, but only when those rulings address substantively similar issues.

The Internet Association has some concern that the IRP process, as currently proposed by the CCWG, would allow parties to bring new arguments to the IRP without first vetting them through the community’s policy development channels. We are concerned that the process does not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the IRP after policy development has concluded. Such an approach could create



operational inefficiency and undermine the bottom-up, consensus-based process for developing policy within ICANN. The Internet Association suggests that the CCWG carefully consider whether additional safeguards—such as requiring parties or their trade associations to participate in a public comment process for instances in which there is a challenge to an existing community-developed policy or where ICANN has sought public comment on implementation of an existing policy—could address these concerns while preserving an accessible IRP process. The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.

With respect to the Reconsideration Request, the Internet Association agrees with reforms that would expand the scope of permissible requests and provide additional time for filing. We also strongly support the provision to allow requestors the opportunity to rebut the Board Governance Committee’s (BGC) recommendation before a final decision by the entire board. We agree with the CCWG’s decision to change the allowance for reconsideration where the ICANN Board has failed to consider “material” information from the previously proposed standard of “relevant.”

We agree that ICANN’s Ombudsman should be responsible for initial review and recommendations, but – as we stated in our initial comments – we believe this should only occur if the review is conducted free from the involvement, influence, or interference by ICANN’s legal department or outside counsel. Steps should also be taken to ensure that, when reviewing a previous decision of a subset of the entire ICANN Board, the BGC members reviewing Reconsideration Requests are wholly distinct from the subset that made the decision under review. Without such provisions, the BGC review becomes essentially a rubber stamp process in which Board members validate their own previous decisions.

Finally, as noted in our comments on the CCWG’s first draft of its accountability proposal, the IA also recommends that the CCWG clarify, rather than eliminate, the requirement that parties (or coalitions in which parties are a member) must participate in the applicable public comment process before seeking reconsideration. We are concerned that eliminating such a safeguard would not create the right incentives, as it would invite parties to use the reconsideration process as an end run around policy development by allowing parties to raise concerns only on reconsideration after policy development has concluded. The IA suggests that the CCWG carefully consider whether additional safeguards in the reconsideration process could prevent these eventualities while still preserving an accessible reconsideration process.

### Community Mechanism as Sole Member Model

The Internet Association appreciates the rigor with which the CCWG has explored options for empowering the community. We support the Sole Member Model, believing that it offers the right combination of simplicity and utility -- which was not found in previously considered models. We understand there has been significant deliberation regarding the voting structure for the community mechanism. We find merit in many of the arguments put forward by those supporting minority opinions, but ultimately believe that the voting distribution proposed by the CCWG is both the most fair and the best representation of the multistakeholder approach. We also agree with the vote counting method proposed by the CCWG; a threshold must be achieved by meeting the specified



percentage of “yes” votes based on the entire pool of possible votes. “No” votes, abstentions, and non-participation should be treated the same.

## Community Powers

The Internet Association supports the five community powers prescribed by the CCWG and recommends that the CCWG establish a sixth power. The IANA Transition Coordination Group (ICG) has stated that the initiation of an IANA separation process must be approved by the GNSO, ccNSO, the Board, and “a community mechanism derived from the CCWG-Accountability process.” The CCWG proposal acknowledges this request and agrees to inclusion of bylaws to allow for such community approval, but does not provide further details. IA believes this power should be included as an enumerated and detailed community power.

With respect to the power to reject a budget, the CCWG requires that any veto be accompanied by consensus rationale (383). But unless the veto itself was supported by consensus - a threshold that is not required- it seems unlikely that the community would be able to develop a consensus rationale. Instead, the rationale should be agreed upon by a consensus of those voting in support of the veto. Additionally, the CCWG provides the opportunity for the community to issue a second veto with a higher necessary threshold (387), but the proposal does not mention whether subsequent vetoes are allowed. The Internet Association is concerned about the possibility of a cyclical and dysfunctional budget process in which the community repeatedly vetoes Board-approved budgets. We therefore believe that no additional vetoes should be permitted after the second veto. The community would then be free to avail itself of other mechanisms, including reconsideration, Independent Review, and recall of individual Board members in order to ensure that the Board considers the community’s wishes in developing a budget and strategic plan.

As noted in the Internet Association’s original comments, the power to remove the ICANN Board as a whole could have a potentially destabilizing effect on the Internet ecosystem. Therefore, any recall should have widespread community agreement. In particular, the CCWG should reject the report’s minority view suggesting that “each of the three SOs should be able to exercise the power to recall the entire Board individually.” Allowing any single SO to recall the entire ICANN board would be profoundly destabilizing, and the Internet Association could not support such a proposal.

## Meeting the Requirements of the CWG

The ICG report states that the creation of a Separation Cross-Community Working (SCWG) requires approval “by both of the ccNSO and GNSO Councils (each by a supermajority vote, according to their normal procedures for determining supermajority), and will need to be approved by the ICANN Board after a public comment period, as well as a community mechanism derived from the CCWG-Accountability process.” The CCWG report, however, only provides a mechanism, through the IRP, to challenge a decision by the board to not implement a recommendation of the IANA Function Review team. It does not appear to offer a mechanism for community approval of an SCWG. As mentioned above, this power should be clearly detailed as a community power in order to meet the requirements of the CWG.



## Accountability Requirements

The Internet Association agrees with the need for appropriate accountability mechanisms for any entity exercising significant influence within the Internet governance ecosystem. We do have some concerns, however, with suggestions for additional ongoing reviews pertaining to ICANN staff and the SO/ACs. We are not opposed to the practice of accountability reviews, but we worry that the ICANN community is assuming a burdensome level of reviews that may make it difficult for the community to complete substantive work in the face of recurring procedural work. We therefore request that the CCWG carefully consider and seek to properly balance any future recurring obligations of the ICANN community.

## Stress Tests

The Internet Association supports the findings of stress test 18. We agree that the Bylaws should be amended to clarify that, with respect to instances in which the Board does not accept Governmental Advisory Committee (GAC) advice the Board is required to find a mutually acceptable solution only when GAC advice is supported by full consensus. We note that NTIA has stated that such a change is necessary to meet its criteria for the transition, and we believe it is particularly prudent given that the GAC will gain additional rights through community powers of the sole member.

## Work Stream 2

We understand that CCWG plans to use Work Stream 2 to establish rules of procedure for the enhanced IRP (paragraph 1033). But this leads to significant questions regarding the status of the IRP between completion of the two Work Streams. Will the community be required to rely on an IRP without fully developed rules and procedures until Work Stream 2 is completed? Will the existing IRP remain in place until these rules are written? The CCWG should clarify how the community will seek appeal after the transition is complete, but before the rules and procedures of the IRP are completed.

There is also a reference to Work Stream 2 work to assess “enhancements to governments [sic] participation in ICANN,” (1033) but no further context is provided. The CCWG should clarify the intent of this work, carefully detailing how any proposals arising from this effort comply with NTIA’s criterion that its role not be replaced by a governmental solution.

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The Internet Association looks forward to working with CCWG to finalize the Draft Proposal and appreciates the hard work put into the process by all concerned.