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**COMMENTS ON CCWG-ACCOUNTABILITY INITIAL DRAFT PROPOSAL**

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**Summary**

The Cross-Community Working Group – Accountability has released, and requested public comment on, its Initial Draft Proposal containing proposed reforms “that would see ICANN attain a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government.”[[3]](#footnote-3) The CCWG proposes four significant new undertakings to be implemented prior to execution of the IANA transition: (1) Restating ICANN’s Mission, Commitments, and Core Values, and placing those into the ICANN Bylaws; (2) establishing certain bylaws as "Fundamental Bylaws" that cannot be altered by the ICANN Board acting unilaterally, but over which stakeholders have prior approval rights; (3) creating a formal “membership” structure for ICANN, along with provisions designed to give the stakeholder-members greater influence on Board decisions; and (4) enhancing and strengthening ICANN's Independent Review Process (IRP).

We strongly endorse these four critical goals, and examine each of them in our comments below. We believe that the CCWG has made significant and substantial progress in designing a durable accountability structure for a post-transition ICANN. We also believe, however, that there are a number of important omissions and/or clarifications that need to be addressed before we can be confident that these mechanisms will, in practice, accomplish their mission. Specifically, we have recommendations and alternative proposals that we believe can help to:

* strengthen the statement of ICANN's Mission so that it can serve effectively as an *enforceable* limitation on ICANN's powers (and we propose several "Stress Tests" to test the adequacy of our formulation);
* distribute the power to enforce the Bylaws more broadly to representatives of the ICANN community;
* strengthen the Independent Review Process by defining its core mission more precisely, consolidating references to the IRP's powers in one place in the Bylaws, giving the Board an “override” or “veto” power, exercisable only upon supermajority or unanimous vote, over IRP decisions, and adding several features that will help the IRP develop the institutional weight and institutional power it will need to perform its critical task adequately.

**Introduction/Background**

The IANA transition is premised on the notion – one that we strongly endorse – that the DNS can best be managed going forward by a private, non-governmental, global, consensus-based, “multi-stakeholder” institution. No element of the transition plan is more important than the design of effective accountability mechanisms for that institution. The DNS has become a significant and immensely valuable global resource, and whoever controls DNS policy-making and policy-implementation wields considerable power.[[4]](#footnote-4) How can the US government, and the global Internet community, assure itself that that power will not be abused by a post-transition-ICANN (“PT-ICANN”) that is no longer answerable to the US government for its actions?[[5]](#footnote-5) If the USG is not going to be exercising oversight over PT-ICANN’s management of the DNS, who is? How is that oversight to be exercised, and how effective is it likely to be? These “accountability” concerns must be addressed before the transition proceeds.

There are many examples of private global governance institutions whose accountability mechanisms are notoriously ill-developed – FIFA and the International Olympic Committee come immediately to mind – and in whose hands we would hardly be expected to place a resource of the magnitude and importance of the Internet’s DNS. There is also widespread agreement (and acknowledgement by ICANN itself) that as currently configured, ICANN has a substantial accountability deficit. Professors Weber and Gunnarson’s recent summary captures what we believe is a broad consensus among scholars and other observers of the history and practice of DNS policy-making:

“ICANN’s corporate organization vest[s] virtually unconstrained power in its Board of Directors. The Board may be influenced or even pressured by particular stakeholders on particular issues at particular times. But it remains legally free to remove directors and officers; disregard community consensus; reject recommendations by the Board Governance Committee or the IRP regarding challenges to a Board decision; and reject policy recommendations from any source, including the GAC and its nation-state representatives.[[6]](#footnote-6)

The IANA transition represents an opportunity to get these accountability mechanisms right. The ICANN Board has indicated that it accepts, as a pre-condition for implementing the transition, the need to implement fundamental changes in the corporation’s governance structure; but once the transition takes place, that leverage disappears. And the opportunity, once lost, might well not come again, because the transition will be very difficult to undo. As we explained in a recent paper, the IANA transition involves nothing more, at bottom, than the expiration of a government procurement contract; because NTIA isn’t transferring anything *to* ICANN as part of the transition, there’s nothing for it to “take back” if the accountability mechanisms fail to effectively control ICANN’s misbehavior.[[7]](#footnote-7)

In addition, it appears that many other components of the final transition proposal – involving the operational details of the transfer of the IANA functions (names, numbers, protocols) – are themselves expressly conditioned on the development of an adequate accountability structure for ICANN, giving added significance and importance to the Accountability portion of the transition plan.[[8]](#footnote-8)

We are particularly concerned, and focus our comments below upon, the extent to which the Cross Community Working Group (CCWG) proposal protects against two forms of abuse: *Capture* by an entity or an interest (public or private) seeking to use DNS resources for its own self-interested purposes, and *Mission Creep*, leveraging control over the DNS to exercise power over matters outside the confines of the DNS itself. These are not, we acknowledge, the only risks posed by the transition; but they are sufficiently important to warrant special attention, and we believe our comments will be most useful if they are focused on them.

The CCWG correctly identifies the task it is undertaking – to ensure that ICANN’s power is adequately and appropriately constrained – as a “constitutional” one: that the CCWG Draft Proposal, and ICANN’s accountability post-transition, can be understood and analyzed as a constitutional exercise, and that the transition proposal should meet constitutional criteria.[[9]](#footnote-9) Constitutions exist to constrain and to channel and to check otherwise unchecked power – “sovereign” power that is subject to no higher (governmental) power. ICANN is not a true “sovereign,” but it can usefully be viewed as one for the purpose of evaluating the sufficiency of checks on *its* power.

We believe that there is a broad consensus – reflected in the CCWG Draft – that a “constitution” for a re-formulated ICANN should provide, at a minimum, for:

1. A clear enumeration of the powers that the corporation can exercise, and a clear demarcation of those that it cannot exercise.

2. A division of the institution’s powers, to avoid concentrating all powers in one set of hands, and as a means of providing internal checks on its exercise.

3. Mechanism(s) to enforce the constraints of (1) and (2) in the form of meaningful remedies for violations.

4. Transparency and simplicity. No constitutional checks on an institution’s power, no matter how clearly they may be articulated in its chartering documents, can be effective to the extent that the institution’s actions are shielded from view. And it is particularly important, in the context of a truly *global* multi-stakeholder institution, that its structure, and the chartering documents that implement that structure and that guide its operations, are framed as simply and transparently as possible. ICANN’s Charter and Bylaws should speak to the global Internet community whose interests the corporation seeks to advance. The more complex those chartering documents are, the less likely it is that they will be comprehensible to that community (or even to the subset of English speakers within that community).

**The CCWG Draft Proposal**

The CCWG Draft Proposal seeks to implement these basic principles by means of four significant new undertakings:

A. Restating ICANN’s Mission, Commitments, and Core Values, and placing those into the ICANN Bylaws (as “Fundamental Bylaws” – see (B));

B. Establishing certain bylaws as “Fundamental Bylaws” that cannot be altered by the ICANN Board acting unilaterally, but over which stakeholders have prior approval rights;

C. Creating a formal “membership” structure for ICANN, along with provisions designed to give the stakeholder-members greater influence on Board decisions by empowering them, in specified circumstances, to (a) remove individual Board members, (b) recall the entire Board, (c) veto or approve changes to the ICANN Bylaws, Mission Statement, Commitments, and Core Values; and (d) to veto Board decisions on ICANN’s Strategic Plan and its budget; and

D. Enhancing and strengthening ICANN's Independent Review Process (IRP) by creating a standing IRP Panel empowered to review actions taken by the corporation for compliance both with stated procedures and with the Bylaws, and to issue decisions that are binding upon the ICANN Board.

We examine each in our comments below. While we believe that the CCWG has made significant and substantial progress in designing a durable accountability structure for a post-transition ICANN with which the global Internet community can be comfortable, we also believe that there are a number of important omissions and/or clarifications that need to be addressed before we can be confident that these mechanisms will, in practice, accomplish their mission.

**A. Restating ICANN’s Mission Statement, Commitments, and Core Values**

One central risk of the transition is that a largely unregulated and unconstrained ICANN will leverage its power over the DNS to exercise control over non-DNS-related Internet conduct and content.[[10]](#footnote-10) ICANN has (and has always been conceived of as having) a limited technical mission:[[11]](#footnote-11) in the words of its current Bylaws, that mission is to “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of [those] systems.”[[12]](#footnote-12) It should exercise those powers (but *only* those powers) necessary to carry out that mission effectively. Articulating precisely what that mission is and what and those powers are, and doing so in a manner that will effectively circumscribe the exercise of the corporation’s powers and constrain its ability to exercise other powers, or to stray into policy areas outside of or unrelated to that mission, is a critical and indispensable task of the transition.

The CCWG Draft Proposal recognizes this risk, and we strongly endorse its stated goals:

To clarify

(a) “that ICANN’s Mission is limited to *coordinating and implementing* policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS,”

(b) that its Mission “does *not* include the regulation of services that use the DNS or the regulation of the content these services carry or provide,” and that

(c) “ICANN’s powers are ‘enumerated’ – meaning that anything not articulated in the Bylaws are outside the scope of ICANN’s authority.” (emphases added)

The goals the CCWG is pursuing in this section of the CCWG Draft Proposal, and in the re-stated Mission, are critically important ones. We strongly support the central thrust of the CCWG recommendations, and believe it can be articulated even more directly than in the draft. ICANN’s Bylaws should explicitly recognize that the corporation’s role in DNS policy-making is limited to:

“coordinat[ing] the development [of] and implementation of policies” that are

(a) “developed through a bottom-up, consensus-based multistakeholder process,”

(b) designed to “ensure the stable and secure operation of the DNS,” and for which

(c) “uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.”

This helps to clarify that ICANN’s role (and, therefore, the primary role of its Board of Directors) is *to coordinate a consensus-based policy-development process, and to implement the policies that emerge from that process*.[[13]](#footnote-13)

A constitutional balance for the DNS must preserve and strengthen the separation between DNS policy-*making* and policy-*implementation.* ICANN’s position in the DNS hierarchy gives it the *power* to impose its policies, via the web of contracts with and among registries, registrars, and registrants, on all users of the DNS.[[14]](#footnote-14) One critical constraint on the exercise of that power is that it is *not* free to impose on those third parties whatever policies it chooses – even those it believes in good faith to be in the “best interest” of those Internet users. It is the Internet stakeholder community, acting by consensus, that has the responsibility to formulate DNS policy. ICANN’s job is a critical though narrow one: to *organize and coordinate* the activities of that stakeholder community – which it does through its various Supporting Organizations, Advisory Committees, and Constituencies – and to *implement* the consensus policies that emerge from that process.

Power checks power. Although this separation has gotten muddier over the last 15 years, it has always been an essential component of ICANN’s consensus-based, bottom-up policy development scheme – modeled, as it was, on the consensus-based, bottom-up processes that had proved so effective in managing the development and global deployment of the DNS and related Internet protocols in the period prior to ICANN’s formation. It is a critical safeguard against ICANN’s abuse of its power over the DNS.

Effective implementation of this limitation will go a long way towards assuring the larger Internet community that ICANN will stick to its knitting – implementing policies which relate to the openness, interoperability, resilience, and/or stability of the DNS, arrived at by consensus of the affected communities.

We believe that the implementation of this principle in the CCWG Draft Proposal can be substantially improved and strengthened. To begin with, it is not as clear and it could and should be that the statement of ICANN’s Mission[[15]](#footnote-15) is meant to serve as *an enforceable limitation on* *ICANN’s* *powers* – *i.e.,* thatit is a means of enumerating those powers, and thereby of declaring what the corporation can, and cannot, do. The Proposal’s demarcation between and among ICANN’s Mission, its “Core Values,”[[16]](#footnote-16) and its “Commitments”[[17]](#footnote-17) is overly complex and confusing. It is not clear which are meant to be enforceable enumerations of the corporation’s power – to be included in a Fundamental Bylaw and enforceable by the Independent Review Board - and which are more generally advisory or aspirational, “statements of principle rather than practice” that are “deliberately expressed in very general terms.” By covering so much ground between them, the structure detracts from, rather than enhances, the force of those provisions that *are* designed to serve as actual limits on the corporation’s powers (as opposed to those that are merely aspirational). There are many good reasons to state aspiration and advisory guides to future corporate action, but we suggest that they be more clearly separated from the enumerated powers.[[18]](#footnote-18)

We also suggest that the relevant CCWG-proposed Bylaw provision – that “ICANN shall not undertake any other Mission not specifically authorized in these Bylaws”[[19]](#footnote-19) – may not function effectively to limit ICANN to activities within the narrowly-stated limits of its Mission. Precisely because the Mission, Core Values, and Commitments cover so much overlapping ground, there is a vast range of action that ICANN might take that could be justified with reference to some element or elements appearing on those lists, and thereby deemed to have been “specifically authorized in these Bylaws.” We believe this could detract, importantly, from the effectiveness of the Mission statement as a meaningful limit on what ICANN can and cannot do.

We propose the following alternative as a Fundamental Bylaw, which we suggest would be a clearer and more direct statement of the principle to be implemented and therefore more likely to be adequately enforceable:

“(a) ICANN’s Mission is to coordinate the development and implementation of policies that are developed through a bottom-up, consensus-based multistakeholder process, designed to ensure the stable and secure operation of the DNS, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.

“(b) ICANN shall have no power to act other than in accordance with, and as reasonably necessary to achieve, its Mission. Without in any way limiting the foregoing absolute prohibition, ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.””

We also propose adding the following “Stress Tests” to test the adequacy of this formulation:

Stress Test 1:

At urging of the GAC, the Board directs ICANN’s contract compliance department to take the view that, in order to comply with the mandatory PIC requiring a flow down clause in the registry-registrar contract that contemplates the termination of domain names for “abuse,” the registries must provide assurances that registrars with whom they are doing business are actually enforcing that clause by terminating names whenever they receive any complaint of violation of applicable law. The Board insists that this mandatory flow down provision be included in all new contracts for legacy gTLDs upon renewal.

Current situation: no real recourse.

Proposed situation: Registry could challenge ICANN's actions as outside its Mission (development of consensus policies on issues uniform global resolution of which is necessary to assure stable operation of the DNS) on the grounds that this was not a consensus policy, nor one that was developed stable and secure operation of the DNS, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS. The IRP would likely find that imposition of this obligation, in the absence of consensus, is not within ICANN’s powers.

Stress Test 2:

ICANN terminates registrars on the ground that they do not terminate domain names claimed to have been used to provide access to materials that infringe copyright. ICANN takes the position that, despite the absence of any court orders or due process, and even when the registrar does not host the content in question, it would be “appropriate” to delete the domain name where registrars have received infringement complaints (of a specified kind, in specified numbers) from rightsholders, and that, therefore, the registrar is required by section 3.18 of the Registrar Accreditation Agreement, to delete the accounts or lose its accredited status.

Current situation: No real recourse.

Proposed situation: An aggrieved party could bring an IRP claim arguing that imposition of this requirement, by mandatory contract, is invalid as a violation of ICANN's Mission on the grounds that: (1) Neither the contract clause nor the policy of enforcing it in this manner was developed by consensus, but unilaterally by ICANN staff; (2) The policy being implemented is unrelated to “ensur[ing] the stable and secure operation *of the DNS*” but rather relates to an entirely different set of policy goals; (3) Nor is it a policy “for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability *of the DNS*”; and finally (4) it represents an attempt by ICANN to “use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.” We believe such an action would be likely to succeed.

**B. Establishing certain bylaws as "Fundamental Bylaws"**

The CCWG Draft Proposal introduces a category of “Fundamental Bylaws,” which can only added to, changed, or removed with the approval of (a) a supermajority (75%) of the Board of Directors *and* (b) a supermajority of the corporation’s Members (see part (c) below) (“similar to the level of support needed to recall the entire Board,” currently set at 75%).

The CCWG suggests that only “critical matters” – those that “define the corporation’s scope and Mission, and the core accountability tools the community requires” – should be designated as Fundamental Bylaws; in the first instance, the list of Fundamental Bylaws would be comprised of those Bylaw sections dealing with:

1. The Mission, Commitments, and Core Values;

2. The Independent Review Process (see section D below);

3. The manner in which the Fundamental Bylaws themselves can be amended;

4. The new corporate membership structure and the specific powers granted to the members (see D below); and

5. Mandatory reviews that are part of the CWG-Stewardship’s work – (*e.g.,* the IANA Function Review, and the creation and powers of a Customer Standing Committee).

We strongly endorse the use of Fundamental Bylaws as a means of assuring the broader Internet community that ICANN will continue to live up to the commitments it is making as part of the transition for the foreseeable future, and that these fundamental constraints on the abuse of its power will not themselves be subject to easy manipulation.

**C. Creating a formal “membership” structure for ICANN, along with provisions designed to give the stakeholder-members greater influence on Board decisions**

One of the most serious accountability anomalies in ICANN’s current configuration is that, as a California non-profit corporation without members, any action that it takes in violation of its Bylaws can *only* be remedied in court by means of a lawsuit initiated by the California Attorney General; no other person has legal standing to bring such an action.[[20]](#footnote-20)

This is, in our view, a crucial accountability problem. Enforcement of the ICANN Bylaws – whatever they may ultimately say, with whatever important limitations and representations they may contain as a result of this accountability process – should not be in the hands of a single person, whoever that person may be. To put it plainly, the entire accountability Proposal rests on the notion that the ICANN Bylaws bind the corporation in meaningful ways, and that the Bylaws – including the important new provisions to be added as part of this accountability process itself – will be adhered to. Seeing to it that that occurs is a critical part – perhaps *the* critical part – of any effective accountability scheme. The Bylaws are not self-executing; distributing the power to legally compel compliance with their terms to a broader category of community representatives, while it will not guarantee that the corporation’s future actions are all within the limits set forth in the Bylaws, is a most important part of the overall enforcement arsenal. Like the US government oversight it is designed, in part, to replace, it is a power that may never need to be overtly exercised,[[21]](#footnote-21) but its existence will help to give weight and substance to the Bylaws and to shore them up as a means of insuring proper and appropriate corporate behavior.

We therefore strongly support the creation of a membership structure for ICANN as a means of distributing that enforcement power more broadly to representatives of the ICANN community.[[22]](#footnote-22)

The CCWG Draft Proposal suggests that the membership body would consist of 29 members, chosen in a weighted manner as follows: each of the three Supporting Organizations (the Address Supporting Organization, the Country Code Supporting Organization, and the Generic Names Supporting Organization) would have the right to appoint *five* members; two of the four Advisory Committees (the At Large Advisory Committee and the Government Advisory Committee) would also have the right to appoint *five* members; and the remaining two Advisory Committees (the Root Server System AC and the Security and Stability AC) each would appoint *two* members.

We understand the rationale for weighting the various groups in this manner, and for the discrepancy in treatment accorded to the different Advisory Committees. The goal was to give

“. . . the bulk of influence on an equal basis between the three SOs with which ICANN deals with policy development and the two ACs that are structurally designed to represent stakeholders (Governments and Internet users, respectively) within ICANN . . .

while giving the other ACs a more limited role because they are primarily concerned with specific technical and operational matters and have not been constituted as “representative” of any particular stakeholder community.[[23]](#footnote-23)

We prefer alternative A – in which each of the SOs receives four votes and each AC receives 2 votes – because it is both simpler and, as the Draft notes, “more closely aligned with ICANN’s existing structure,” giving “the bulk of influence to the SOs, while guaranteeing a say for the ACs on an equal basis among them.” A final decision on these alternative voting models should, however, await final decision on the powers that are granted to members in the Bylaws, and the manner in which those powers are to be exercised. In particular, given the requirement (see below) that the powers to be exercised by the members will in all cases require supermajorities, the two alternatives will have different consequences for coalition-formation (depending on what those supermajority provisions entail).[[24]](#footnote-24)

The CCWG Draft Proposal sets forth five specific powers to be exercised by the corporation’s members (in addition to the powers, see note [12] above, they obtain as a matter of law):

(a) to veto the Strategic Plans or annual budgets approved by the Board of Directors; (b) to veto any changes in ICANN's Bylaws approved by the Board, (c) to approve any changes to Fundamental Bylaws; (d) to remove individual members of the Board of Directors; and (e) to recall the entire Board. Each of these actions would require a supermajority vote by the members.

While we support this general plan, we do not fully understand the rationale for requiring a supermajority of members to veto any changes in the ICANN Bylaws (other than Fundamental Bylaws). It would allow the Board to amend the (ordinary) Bylaws not merely in the absence of any consensus among the members that it do so, but even if a majority of the members disapproved of the amendment, and we fail to see a good reason why that should be permitted.

**D. Enhancing and strengthening ICANN's Independent Review Process (IRP)**

Finally, we enthusiastically support the CCWG Draft Proposal’s efforts to overhaul and reform ICANN’s existing Independent Review Process (IRP). Independent review is the final piece of the constitutional puzzle – a third “branch,” independent of the other two (*i.e.,* both the Board *and* the community/members), with neither a policy-making nor a policy-implementation role, which can serve as a neutral arbiter in disputes regarding the exercise of those powers by the other components of the institution.

We agree that the IRP should possess the main structural features set forth in the CCWG Draft Proposal:

(a) IRP consideration should hold ICANN to “a substantive standard of behavior,” rather than just an evaluation of whether or not its actions were taken “in good faith” (as in the current IRP);

(b) the decisions by the IRP Standing Panel should be binding, rather than merely advisory;

(c) the process should be “transparent and accessible (both financially and in terms of ‘standing’ to bring claims”); and

(d) the system should be “precedential,” i.e., the goal is to “produce consistent and coherent results that will serve as a guide for future actions.”

Once again, however, we believe that there are several features of the proposal’s manner of implementing these broad goals that can be substantially improved.

**The Substantive Standard of IRP Review.** Like the Board of Directors, the IRP will function most effectively if its powers are confined narrowly to its core mission, which in the IRP’s case is *to determine whether ICANN is complying with the provisions of the Bylaws* – including, importantly, the provisions regarding ICANN’s Mission and powers.

The IRP should *not* become a general-purpose catch-all institution to which anyone who might claim that ICANN has acted badly towards them, or has harmed them in some way, has recourse. Defining the IRP’s mandate too broadly will embroil the institution in any number of ordinary commercial disputes, distracting and deflecting it from its core mission. ICANN, of course, is and will continue to be enmeshed in a complex web of contracts between and among registries, registrars, and registrants, and the disputes that inevitably arise concerning performance under those contracts are already subject to commercial arbitration (see, *e.g.*, § 5.2 of the Base Registry Agreement[[25]](#footnote-25)); we have no reason to believe that that system has been inadequate for that task, or that the IRP is meant to supplant or augment it. The IRP’s powers need to be carefully delineated so that it excludes this class of disputes from the scope of its jurisdiction.

Furthermore, the power that the IRP *does* require to achieve its narrow but critical mission – the power to overturn and invalidate Board action that is inconsistent with the Bylaws – is itself subject to abuse, and the IRP’s exercise of *its* powers, like the corresponding powers of the Board, needs to be kept within narrow constraints. As is the case with the Board’s powers, a careful and precise enumeration of the IRP’s power will help to achieve that goal.

We believe the language in the CCWG Draft Proposal can be tightened up considerably in this regard. At various points in the draft, the IRP’s duties are deemed to include resolving the question of “whether ICANN is staying within its limited technical Mission”; whether it is “abiding by policies adopted by the multistakeholder community”; whether “in carrying out its Mission and applying consensus policies it is acting in accordance with ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values, or ICANN policies”; whether “in carrying out that Mission, [it] acts in a manner that respects community-agreed fundamental rights, freedoms, and values”; whether its actions “violate community-approved standards of behavior, including violations of established ICANN policies”; and whether it has complied with “policies established to hold ICANN accountable to legal requirements applicable to non-profit corporate and charitable organizations.”[[26]](#footnote-26)

We believe these formulations are much broader than necessary for the IRP to serve its “constitutional” function. We would propose consolidating references to the IRP’s powers in one place in the Bylaws, and stating them more directly:

The Independent Review Panel shall have the power to determine whether ICANN has acted (or has failed to act) in violation of these Bylaws. Any person materially harmed by action or inaction by ICANN in violation of these Bylaws may file a claim with the IRP to remedy that violation.

**Binding Decisions**

The CCWG Draft Proposal states that “the intent is that IRP decisions should be binding on ICANN.” The draft is not entirely clear, however, as to how that will be accomplished, and there appears to be some confusion about how that principle will be implemented in the Bylaws and how it will operate in practice.

In particular, there appears to be an open question as to whether, or the extent to which, California law permits the Board to agree, in advance and via a specific provision in the Bylaws, to comply with the decisions of an Independent Review Panel. The Proposal notes that that “the IRP could not address matters that are *so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board*,”[[27]](#footnote-27) without any indication of the matters that might fall into that category (and therefore outside of IRP review/control). The legal memorandum attached to the CCWG Draft Proposal has a discussion of this question, though it does not provide much clarity on this question:

“The enhanced enforceability of such an IRP process – an independent mechanism to utilize arbitration for independent review of disputes – would be limited by the scope and procedural rules for arbitration. Importantly, *the scope of this process and arbitral review would be limited to those areas that are outside of the core powers reserved to the board or members*. This limitation is necessary so that Board continues to exercise its fiduciary responsibilities to manage ICANN and its discretion is not wholly abandoned in favor of the view of another entity.

Section 5210 of the California Corporations Code provides that ‘the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.’ If the IRP had plenary review of any and all board actions, then the board would lose its ability to exercise its fiduciary duties. The board’s ability to delegate power is thus constrained because any and ‘all corporate powers [delegated] shall be exercised under the ultimate direction of the board’ under California corporate law.”[[28]](#footnote-28)

Here as well there is no explanation of what powers are part of the Board’s “core powers” that would not be subject to independent review. It is, potentially, a very troubling restriction on the IRP’s ability to carry out its mission, which is to help ensure that the Board does not exercise *any* of its powers beyond the confines set forth in the Bylaws. An IRP that cannot examine the exercise of the Board’s “core powers” might – depending on the definition of “core powers” – be an ineffective and toothless check on improper Board action. It is very difficult, without a better understanding of this constraint, to evaluate the likely effectiveness of the IRP as an accountability mechanism, and we strongly urge the CCWG to obtain additional clarification from counsel on this question.

We also would propose the following, as a possible means of implementing the principle that IRP decisions bind the corporation without running afoul of the requirement that “all corporate powers shall be exercised by or under the direction of the Board”: In addition to an explicit requirement that that the Board shall comply with IRP decisions, giving the Board the power to refuse to comply – an “override,” or “veto,” power – exercisable *only* upon supermajority (or even unanimous) action by the Board. This has a number of features to recommend it. It could serve as a useful check on the IRP’s powers and the possibility of “rogue decision-making” by the IRP; the combination of a high voting threshold (which could be as high as 100%) and the representation of the various ICANN communities on the Board will help ensure that resisting an IRP directive in any particular matter has broad community support; and it would appear to comply with the requirement that the Board retains direction and control over corporate action, insofar as it retains the ability to “decide for itself” whether or not to comply with IRP directives (though the non-compliance option is one that can only be exercised by a extraordinary Board action).

**Independence, Transparency, and Precedent**

We are concerned that in a number of crucial features, the IRP, as described in the CCWG Draft Proposal, appears to be modeled along the lines of ordinary commercial arbitration. For example,

members of the IRP “Standing Panel” would be nominated by “international arbitral bodies,” in much the way that the International Chamber of Commerce might be asked, under ICANN’s existing arbitration clauses, to propose possible arbitrators for a contract dispute;

IRP panelists are to “receive training on the workings and management of the domain name system,” with “access to skilled technical experts upon request,” as in ordinary commercial arbitration;

in any particular dispute brought before the IRP, “a single or 3-member panel will be drawn from the Standing Panel,” by agreement between ICANN and the complainant (in the case of a single member panel) or with each party selecting one panelist, and those panelists selecting a third (in the case of a 3-member panel) – again, following the procedure commonly used for arbitration of ordinary commercial disputes.

The IRP’s mission is far removed from ordinary commercial arbitration, and will require a different structure, modeled more closely on the constitutional courts common in civil law countries – institutions whose task, like the IRP’s, is to determine whether the terms and limitations set forth in the relevant foundational documents have been complied with - than on commercial arbitration systems. This is a task that ordinary commercial arbitrators are never called upon to undertake.

There are many reasons why ICANN’s existing IRP process – which has been a feature of ICANN’s structure since its inception – has failed, in the eyes of virtually all observers, to serve as an effective check on ICANN’s powers. The Bylaw modification, adopted in 2012, authorizing the IRP to evaluate only whether a narrow class of Board *procedural* misconduct had occurred[[29]](#footnote-29) – “did the Board act without conflict of interest in taking its decision? did the Board exercise due diligence and care? did the Board members exercise independent judgment in taking the decision?” – rather than applying a *substantive* standard (did the Board act in compliance with all provisions of the Bylaws, including the substantive restrictions on its power?) certainly played a very significant part.

But we would suggest that an additional cause of the failure of the process is that it, too, has been modeled far too closely on ordinary commercial arbitration. The IRP process is, in its current configuration, outsourced to a third party “international dispute resolution provider” chosen by the ICANN Board – currently, the International Center for the Settlement of Investment Disputes (ICSID)), an institution with long-standing experience in providing arbitration and mediation services for complex international commercial disputes. The outside provider has the responsibility for choosing the members of the IRP “standing panel”, designating a “Chair” of the Standing Panel, determining the size (1-person or 3-person) of the IRP panel that will hear any individual dispute, and assigning individual members of the standing panel serve as panelists.

This is a familiar arbitration mechanism that functions quite effectively for ordinary commercial disputes. But it is ill-designed for the fundamental purpose the IRP is meant to serve. It is not reasonable to give a single arbitrator, chosen by a third-party provider, who may have little or no prior contact with or understanding of the complex world of DNS policy-making, who may never again be called upon to examine any aspect of ICANN’s operations or to consider its role in the management of DNS resources, who has no body of prior precedential decisions to use as a guide to decision-making and little or no incentive to add to the stock of well-reasoned and persuasive decisions, the power to decide (with no appeal of the decision permitted) that Board action contravened fundamental principles embodied in the corporation’s foundational documents and was therefore invalid. The Board’s reluctance, over the years, to allow *this* process to exercise *that* power is, in a sense, entirely understandable.

Unlike an ordinary “standing panel” of available arbitrators, the IRP “Standing Panel” needs to be an independent *institution*, with institutional weight, institutional memory, and institutional power, if it is to perform its central task with the requisite degree of seriousness and gravity that is required.

While we believe that much of the CCWG’s Draft Proposal is consistent with this notion, we do not believe that the proposal goes far enough in this direction. We would propose, to begin with, that the CCWG reconsider its decision to have members of the IRP “Standing Panel” nominated by “international arbitral bodies.” We do not believe those institutions, as skilled as they may be in handling commercial disputes, are appropriately tasked with finding persons with the combination of “legal expertise and a strong understanding of the DNS”[[30]](#footnote-30) that will make them successful IRP members. Appointment by the Board of Directors subject to supermajority Community confirmation should be sufficient for that task.

More importantly, we suggest that the IRP should not be structured as a “standing panel” comprising a number of arbitrators who are available for service on individual 1- or 3-person panels for the purpose of resolving individual disputes before being returned to the available “pool.” The IRP should hear and decide cases *as an institution*, with all members participating in all cases. The institution, speaking as an institution with a single institutional voice, needs to develop and stand behind its decisions, which will make them harder to ignore.

It will also make the development of a true precedential system far more likely. By placing the weight of the entire institution, and not merely the views of a small subset of members of a largely anonymous pool of available arbitrators, behind the decisions it makes, it makes it more likely that prior decisions will be respected and that decisions that will serve as prior precedent in the future are explained and justified in a reasonable manner, as required for a precedential system to function effectively.

**Conclusion**

Designing the mechanisms through which a post-transition ICANN can be held accountable for it actions to the global community is both a critical component of the overall IANA transition process and an extraordinarily difficult task. We applaud the efforts that the CCWG-Accountability group has made thus far, and we support the goals it has identified and the general thrust in which the Draft Proposal is pointing. There are, however, a number of elements that must fall into place to ensure that the global multistakeholder community has the means to correct any abuses or misuses of ICANN’s power after U.S. government oversight is removed. We believe that the concerns that we have raised in these comments need to be considered and addressed if ICANN’s power is to be adequately constrained. We look forward to continued engagement on these important matters.

1. Senior Fellow, New America’s Open Technology Institute. David.G.Post@gmail.com. [↑](#footnote-ref-1)
2. Senior Policy Analyst, New America’s Open Technology Institute. Kehl@Newamerica.org. [↑](#footnote-ref-2)
3. See Cross Community Working Group (CCWG) Accountability Initial Draft Proposal for Public Comment (May 4, 2015) (hereinafter “Draft Proposal”), available at <https://www.icann.org/en/system/files/files/cwg-accountability-draft-proposal-with-annexes-04may15-en.pdf>. [↑](#footnote-ref-3)
4. See David G. Post & Danielle Kehl, *Controlling Internet Infrastructure: The IANA Transition and Why It Matters for the Future of the Internet, Part 1*, New America’s Open Technology Institute, April 2015, pp. 19-26, available at <http://www.newamerica.org/oti/controlling-internet-infrastructure/> (hereinafter “Controlling Internet Infrastructure”) (describing source of ICANN’s power and nature of the potential misuse of that power). [↑](#footnote-ref-4)
5. It is not entirely correct to say that ICANN is “no longer answerable” to the US government; assuming (as provided for in the current proposal – see CCWG Draft Proposal, pp. 53-54) that ICANN remains incorporated under California law and headquartered in the US, ICANN will of course be subject to a range of US laws generally applicable to all corporate entities. But as we discuss in our earlier paper, see *Controlling Internet Infrastructure*, *supra* note 3, esp. pp. 16-18, the transition involves termination of the US government’s more direct and substantive oversight role under the IANA Functions Contract. [↑](#footnote-ref-5)
6. Rolf H. Weber & Shawn Gunnarson, *A Constitutional Solution for Internet Governance*, Columbia Science & Technology Review Vol. XIV Fall 2012 at 14, available at <http://stlr.org/download/volumes/volume14/WeberGunnarson.pdf>. [↑](#footnote-ref-6)
7. See *Controlling Internet Infrastructure, Part I* at 19. [↑](#footnote-ref-7)
8. See, e.g., Second Draft Proposal on the IANA Stewardship Transition from the Cross-Community Working Group on Naming-Related Functions, April 22, 2015, available at <https://www.icann.org/en/system/files/files/cwg-stewardship-draft-proposal-with-annexes-22apr15-en.pdf>. (“It is important to note that this proposal is significantly dependent on the results of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) for ICANN level accountability requirements.”) [↑](#footnote-ref-8)
9. Draft Proposal, *supra* note 3, at 18 (requesting comment on the CCWG’s “broad approach” of providing a “constitutional core for ICANN against which the Board and staff can be held to account”) and 115 (describing the “state analogy” that was one of the core building blocks for the Draft Proposal’s recommendations). This approach is thoughtfully and comprehensively described in Weber & Gunnarson, *supra* note 6. [↑](#footnote-ref-9)
10. See *Controlling Internet Infrastructure, supra* note 4,at 19-24. [↑](#footnote-ref-10)
11. See Weber and Gunnarson, *supra* note 6, at 64-5, describing the “consistent” view that ICANN’s mission is a “technical and limited” one, and arguing that “the narrow mission for which ICANN was created marks the outer boundary of its legitimate authority.” [↑](#footnote-ref-11)
12. ICANN’s current Bylaws, in Article I Section 1, define its mission as:

    “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

    1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

    a. Domain names (forming a system referred to as "DNS");

    b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and

    c. Protocol port and parameter numbers.

    2. Coordinates the operation and evolution of the DNS root name server system.

    3. Coordinates policy development reasonably and appropriately related to these technical functions.

    The Bylaws also contain a number of “core values” designed to “guide the decisions and actions of ICANN . . . in performing its mission.” Bylaws, Article I Section 2. These core values are advisory and aspirational only; “statements of principle rather than practice,” and “deliberately expressed in very general terms.” To drive home this point, the Bylaws note that

    “Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

    The specified core values are:

    1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

    2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

    3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

    4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

    5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

    6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

    7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

    8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

    9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

    10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

    11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations. [↑](#footnote-ref-12)
13. While this has been ICANN’s role since its inception, the corporation has on occasion acted in ways – implementing policies that were *not* produced by a consensus-based policy development process – inconsistent with that role. [↑](#footnote-ref-13)
14. See *Controlling Internet Infrastructure, supra* note 4, at 22-6. [↑](#footnote-ref-14)
15. The full revised Mission Statement in the Draft Proposal reads as follows:

    The Mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

    1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers.

    2. Coordinates the operation and evolution of the DNS root name server system.

    3. Coordinates policy development reasonably and appropriately related to these technical functions.

    In this role, with respect to domain names, ICANN’s Mission is to coordinate the development and implementation of policy developed through a bottom-up, consensus-based multistakeholder process that is designed to ensure the stable and secure operation of the Internet’s unique names systems, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.

    In this role, with respect to IP addresses and AS numbers, ICANN’s Mission [is described in the ASO MoU between ICANN and RIRs].

    In this role, with respect to protocol port and parameter numbers, ICANN’s Mission is to [to be provided by the IETF].

    In this role, with respect to the DNS root server system, ICANN’s Mission is to [to be provided by root server operators] . [↑](#footnote-ref-15)
16. The Draft Proposal defines ICANN’s “Core Values” as follows:

    “In performing its Mission, the following core values should also guide the decisions and actions of ICANN:

    Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that decisions are made in the global public interest identified through the bottom-up, multistakeholder policy development process and are accountable, transparent, and respect the bottom-up multistakeholder process;

    To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN’s internal bodies and external expert bodies;

    Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market that enhances consumer trust and choice.

    Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.

    Operate with efficiency and excellence, acting in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.

    While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values.

    [Not advance] [Refrain from advancing] the interests of one or more interest groups at the expense of others. [↑](#footnote-ref-16)
17. The Draft Proposal defines ICANN’s “Core Values” as follows:

    “ICANN must operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable law and international conventions and through open and transparent processes that enable competition and open entry in Internet-related markets, and that reflect the Commitments and Core Values set forth below.

    Specifically, ICANN’s action must:

    Preserve and enhance the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;

    Maintain the capacity and ability to coordinate the internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet;

    Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN’s Mission and require or significantly benefit from global coordination;

    Employ open, transparent and bottom-up, [private sector led multistakeholder] policy development processes that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;

    Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, with integrity and fairness without singling out any particular party for discriminatory treatment;

    Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN’s effectiveness.” [↑](#footnote-ref-17)
18. For instance, key components of the Mission Statement appear in the list of Commitments and Core Values – e.g., that ICANN is “limited to acting on matters within its Mission,” that its role is “ensur[ing] that decisions are made in the global public interest identified through the bottom-up, multistakeholder policy development process,” and that it must “employ open, transparent and bottom-up, policy development processes .” This makes it most unclear as to whether these are to be treated as enforceable limits on ICANN’s power, or merely aspirational guides to its actions. [↑](#footnote-ref-18)
19. The full provision reads:

    “ICANN shall not undertake any other Mission not specifically authorized in these Bylaws. Without in any way limiting the foregoing absolute prohibition it is expressly noted that ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide.” [↑](#footnote-ref-19)
20. See ICANN counsel’s “Initial Responses to the Community Working Group’s California Law Questions (7 February 2015), available at <https://mm.icann.org/pipermail/accountability-cross-community/attachments/20150208/ed62a5b3/AccountabilityQuestionsforCCWG-fromJonesDay-0001.pdf>

    (the “legal mechanism available to the community to seek redress if the community believes that the Board is acting contrary to its purpose or the Bylaws . . . is to contact the California Attorney General, which has jurisdiction over ICANN as a California nonprofit public benefit corporation”); Cal. Corp Code § 5250 (“A corporation is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed or has departed from the purposes for which it is formed. In case of any such failure or departure the Attorney General may institute, in the name of the state, the proceeding necessary to correct the noncompliance or departure.”); “Accountability and Transparency Frameworks,” *Internet Corporation for Assigned Names and Numbers*, available at <https://archive.icann.org/en/accountability/frameworks-principles/legal-corporate.htm> (“The California Attorney General is the legal overseer of California nonpublic benefit corporations such as ICANN... The Attorney General, acting on behalf of the public, may conduct investigations and bring legal actions to ensure that ICANN does not stray from its public charitable purpose. For corporate behavior that has otherwise gone uncured and uncorrected, members of the public are also able to petition the Attorney General to conduct these investigations.“). [↑](#footnote-ref-20)
21. See *Controlling Internet Infrastructure, supra* note 3, at 17, where we noted, in connection with the NTIA’s existing oversight power, that “like the proverbial Sword of Damocles, it can be performing its job very effectively even when it remains motionless.” [↑](#footnote-ref-21)
22. California law gives the members of a non-profit corporation the right to “bring suit (1) individually for a failure by the board to follow the bylaws and statute in refusing to acknowledge removals or appointments; and (2) on behalf of the corporation against the board where the corporation has suffered harm, and/or there has been a breach of charitable trust as a result of board action or inaction.” CCWG Draft Proposal, App. G Annex B-1. [↑](#footnote-ref-22)
23. See CCWG Draft Proposal, *supra* note 3, at 43-45. [↑](#footnote-ref-23)
24. For example, under the “Reference model,” any action requiring a 2/3 vote of the members will require 20 votes, while ¾ vote will require 22; under alternative A, the same requirements are 14 and 15. In the former, therefore, at least *four* of the higher-weighted groups would have to concur in any action requiring a supermajority; the votes of any *two* of the higher-weighted constituencies would be sufficient to block any action requiring a 2/3 or ¾ vote, while in Alternative A, a supermajority could be achieved with the concurrence of only two of the higher-weighted groups. [↑](#footnote-ref-24)
25. ICANN Base Registry Agreement, available at https://www.icann.org/resources/pages/registries/registries-agreements-en. [↑](#footnote-ref-25)
26. CCWG Draft Proposal, *supra* note 3, at 30-31. [↑](#footnote-ref-26)
27. *Id.* at 31. [↑](#footnote-ref-27)
28. CCWG Draft Proposal, App. G Annex B-1. [↑](#footnote-ref-28)
29. ICANN’s current Bylaws (See Article IV, Sec. 3(4)) provide:

    “The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

    (a)did the Board act without conflict of interest in taking its decision?;

    (b) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

    (c) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”

    See *Controlling Internet Infrastructure, supra* note 4, at 14 n. 43, for an explanation of the circumstances leading up to this change in the Bylaws:

    After receiving an adverse Independent Review Panel (“IRP”) decision in 2008 regarding its handling of the application for a new .xxx TLD, ICANN initiated a process leading to a change in the provision in its By-Laws dealing with independent review. The original provision, which charged the IRP with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws,” was change to a substitute provision, adopted in 2012, with a much more limited scope; the IRP would henceforth only consider whether the Board “act[ed] without conflict of interest... exercised due diligence and care, [and] exercise[d] independent judgment” in making any particular decision.

    See also Independent Review Bylaws Revisions, available at https://www.icann.org/en/system/files/ files/proposed-bylaw-revision-irp-26oct12-en.pdf; Weber & Gunnarson, Constitutional Limitations, *supra* note 6, at 69 (the current IRP process is a “paradigm of procedural unfairness”; the fact that “ICANN has no effective appeal mechanism is troubling, given ICANN’s origins and its repeated written agreements with the United States”); Maher, Accountability and Redress, available at http://www.circleid.com/posts/20140829\_accountability\_and\_redress/ (describing ICANN’s “manipulation of its By- Laws” as imposing a “severe limitation” on the IRP’s powers, and suggesting that ICANN “decided that a change in the ground rules was needed in order to avoid further and similar embarrassments” after the .xxx debacle). [↑](#footnote-ref-29)
30. Draft Proposal, at 34. [↑](#footnote-ref-30)