



June 3, 2015

Internet Association's Comments on Cross Community Working Group (CCWG) Accountability Initial Draft Proposal

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. The Internet Association is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.¹ The Internet Association thanks CCWG for the hard work it has put into developing the CCWG Accountability Initial Draft Proposal ("Draft Proposal").

At this initial stage, the Internet Association supports many of the provisions in the Draft Proposal. We believe that it is crucial for ICANN to remain true to its core purpose of developing bottom-up, consensus policies and guidelines in order to help advance the Internet's unique identifier systems, while at the same time becoming more directly accountable to the Internet community. The Internet Association believes the Draft Proposal represents an excellent start to this process. We are mindful that the Draft Proposal is still a working document and will welcome further opportunities for stakeholder participation as the CCWG-Accountability process proceeds.

ICANN's Mission, Commitments, and Core Values

The Internet Association agrees that ICANN's Mission Statement, Commitments, and Core Values are instrumental to ensuring and enforcing ICANN accountability, and supports the concept that they should form ICANN's "constitutional core." ICANN's conduct should be measured against these provisions and ICANN must be accountable for meeting these standards, as well as for not exceeding its scope of responsibilities.

To that end, the Internet Association strongly supports changes to ICANN's Bylaws to impose binding obligations on ICANN to operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law, and international law and conventions through an open and transparent process. Furthermore, the Internet Association would like the scope of ICANN's authority to be specifically enumerated. It further supports the clarification to ICANN's Mission Statement that the scope of its authority does not include the regulation of services that use the DNS or the regulation of content these services carry or provide.

The Internet Association also supports the clarification to the Core Values that any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values. This is important to the goal of accountability; public authorities would have the ability to provide input into ICANN decisions, while ensuring that all ICANN actions are compliant with its Bylaws.

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



The Internet Association suggests the continued use of the phrase “private sector led” in the Bylaws and other documentation. The term has been used since ICANN’s inception to mean “non-governmental,” and not commercial. We believe that ICANN can remain private sector led while still adhering fully to the multistakeholder approach. If any alternative term is used, it must be clear that it is meant that ICANN will remain non-governmental led.

As this process moves forward, however, the Internet Association seeks clarification on the inclusion of new criteria associated with balancing commitments and core values. The new language appears to import concepts from U.S. constitutional law jurisprudence. But under U.S. law, these tests are typically applied when one fundamental value (e.g., equal protection or freedom of speech) is infringed, not when the courts are seeking to balance competing fundamental interests. And the proposed tests, while useful for the context in which they were originally developed, do not provide any guidance as to how ICANN should actually balance competing interests. Unless CCWG can provide more information about how the new text would assist in decision-making, the Internet Association suggests retaining the existing language.

Fundamental Bylaws

The Internet Association agrees that classifying some Bylaws as “Fundamental Bylaws” will enhance ICANN’s accountability by restricting its ability to change certain Bylaws with only a two-thirds majority. The Internet Association supports the proposed list of requirements and list of Bylaws that should become Fundamental Bylaws. However, CCWG may wish to examine whether there is a way to ensure that the need for binding Independent Review panels is enshrined in a Fundamental Bylaw without binding the community to the precise formulation recommended by the CCWG. Although the process set forth by the CCWG seems reasonable, it may be the case that it needs to be modified at the margins once parties have had some experience with it. In addition, the Internet Association believes that a requirement for the ICANN principal office or headquarters to be located in Los Angeles should be included as a Fundamental Bylaw.

Independent Review Panel Enhancement

The Internet Association believes that improvements to the Independent Review Panel will be among the most important tools to enhance ICANN’s accountability. The Internet Association generally agrees with the proposed requirements. In particular, 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, SOs, and ACs.

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 prevent these eventualities while still 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.

Under a strengthened IRP process, the Internet Association agrees that parties should be able to seek review of both substance and procedure. Redress should be available when a particular action or failure to act “violates either (a) substantive limitations on the permissible scope of ICANN’s actions, or (b) decision-making procedures, in each case as set forth in ICANN’s Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies.” However, we believe that ICANN’s decision-making should be accorded deference, and overturned only if a decision is arbitrary or not based on a reasonable interpretation of the relevant documents and factors. Under this standard, ICANN’s failure to follow its own processes would be both arbitrary and unreasonable.

The Internet Association believes that further consideration and clarification is needed regarding what decisions are binding and whom they are binding upon. We suggest that disputes within ICANN should be made binding and thus enforceable in courts of law. Outside parties that are involved in a dispute with ICANN should be able to seek legal recourse outside of ICANN.

Finally, the Internet Association supports having IRP panels making precedential decisions with some restrictions. Future panels should be permitted to apply precedent, but only in closely analogous cases. Otherwise, prior decisions should serve only as guideposts. CCWG should consider a fallback mechanism in situations where the panel finds that a prior panel decision appears to be clearly incorrect based on new circumstances or evidence or was wrongly decided.

Reconsideration Process Enhancement

The Internet Association strongly agrees that reform of the reconsideration process is needed. Indeed, the current process never resulted in actual reconsideration. Accordingly, the Internet Association supports the majority of the proposed enhancements and the proposed timelines.

However, the Internet Association does not support allowing reconsideration where the ICANN board has failed to consider “relevant,” rather than “material” information. In most jurisdictions, the standard for relevancy is extremely low. For example, the U.S. Federal Rules of Evidence states that evidence is relevant “if it has *any* tendency to make a fact more or less probable than it would be without the evidence.” As such, all decisions made by the Board or the staff are likely to overlook *some* relevant evidence and, therefore, a relevancy standard is overly broad.

The Internet Association also recommends that 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. Similar to our concern regarding the IRP proposal, 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. Like its



recommendation regarding participation in the IRP context, the Internet Association suggests that the CCWG carefully consider whether additional safeguards in the reconsideration process could prevent these eventualities while still preserving an accessible IRP process.

Finally, the Internet Association agrees that the Board's reliance on its internal legal department is cause for concern, particularly because its primary legal obligation is to protect ICANN. We support an initial review by an Ombudsman, but only if the review is conducted free from the involvement or influence or interference by ICANN's legal department or outside counsel. The Internet Association recommends that the Ombudsman be required to have sufficient staff in place to be able to review requests quickly and not create a bottleneck in the reconsideration process.

SO/AC Membership Model

The SO/AC membership model in the Draft Proposal is still in its preliminary stages. The Internet Association anticipates that this topic will remain subject to future rounds of comments and, thus, reserves the right to submit further comments on this proposal when more details are provided. With that understanding, Internet Association believes that this model is sound. The membership model, coupled with having the SOs/ACs form unincorporated associations, gives the community the most power and enables SOs/ACs to enforce IRP awards against ICANN. It is, thus, the strongest of the proposed models for ICANN accountability. We also believe that the membership model is valid even if some SOs/ACs fail to form unincorporated associations. The Internet Association believes the Designator Model could be a sufficient alternative if the SO/AC Membership model is not accepted by the community.

Powers of the SO/AC Membership

The Internet Association supports the proposed power requirements as described, with two reservations. First, because recalling the entire Board should be considered a measure of last resort, we propose an 80% threshold for this action. Second, allowing the community to veto the budget or the strategic plan raises questions of efficiency and effectiveness. These are key operational documents, and holding them up for multiple cycles of back-and-forth between the Board and the community could be highly detrimental to ICANN's operational effectiveness. The Internet Association suggests a workable solution may be to allow the SO/AC Members to place a one-time veto per cycle for these two powers, which the Board could override by providing an explanatory statement explaining why rejection of the veto was consistent with ICANN's mission and the public interest.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

The Internet Association agrees that incorporating the Affirmation of Commitments in the ICANN Bylaws is a necessary step in the transition, and must be completed prior to the transition. The various review mechanisms provided by the AOC have historically been helpful tools for addressing concerns with ICANN's accountability. The Internet Association also strongly supports the proposed Bylaw changes regarding the new gTLD program, particularly the requirement that that recommendations from the previous review be implemented before rounds of new gTLDs can be opened.



Bylaws Changes Suggested by Stress Tests

The Internet Association supports the proposed Bylaw change recommendations arising from stress tests. In particular, we strongly support the results of stress test 18 regarding the Board's response to GAC advice. ICANN Bylaws should stipulate that GAC advice must be issued by consensus in order to compel the ICANN Board to find a mutually acceptable solution when it does not follow GAC advice. However, the Internet Association disagrees with paragraph 636, which states that the threat posed by stress test 18 *"is not directly related to the transition of IANA stewardship."* We view this issue as directly related to the transition and believe that it is essential that relevant actions be taken to implement this change before the transition is complete.

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The Internet Association looks forward to working with CCWG to finalize the Draft Proposal. The Internet Association suggests that CCWG-Accountability provide in its next draft a document that contains all proposed changes to the Bylaws with changes to the existing Bylaws marked in redline. The Internet Association further encourages CCWG-Accountability to develop a timeline for ICANN to implement the final plan. Once the plan is accepted, ICANN must implement the Bylaw changes in full prior to the USG terminating the IANA contract.