



**Comment on Cross  
Community Working Group  
on Enhancing ICANN  
Accountability (CCWG) 2nd  
Draft Report (Work Stream 1)**

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**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

## Summary Comment

The BC gratefully acknowledges the significant and sustained efforts of the Cross Community Working Group (CCWG) on ICANN accountability.

The BC has been persistent in advocating process improvements and enhancements to ICANN accountability--after the IANA transition, when NTIA would no longer have the IANA contract as leverage over ICANN. In the last year, the BC has have filed 11 documents on ICANN accountability after transition, including a Reconsideration Request:

May-2014: ICANN's Draft Principles & Process to Transition NTIA's Stewardship of IANA<sup>1</sup>

May-2014: Initial Comment on Enhancing ICANN Accountability<sup>2</sup>

Jun-2014: Final comment on Enhancing ICANN Accountability<sup>3</sup>

Aug-2014: BC/Registries/ISPs Joint Letter on ICANN's proposed structure for Accountability WG<sup>4</sup>

Aug-2014 Reconsideration Request: ICANN staff imposing its 'Accountability Plan' without adequate account for community views<sup>5</sup>

Sep-2014: Joint letter/questions about ICANN's proposed process for enhanced accountability<sup>6</sup>

Sep-2014: Joint comment on ICANN's proposed process to enhance accountability<sup>7</sup>

Sep-2014: BC Comment on Enhancing ICANN Accountability Process<sup>8</sup>

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<sup>1</sup> 8-May-2014, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-Comment-on-IANA-Transition-Process.pdf>

<sup>2</sup> 27-May-2014, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-initial-comment-on-Enhancing-ICANN-Accountability.pdf>

<sup>3</sup> 25-Jun-2014, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-reply-comment-on-Enhancing-ICANN-Accountability-FINAL.pdf>

<sup>4</sup> Aug-2014, at <http://www.bizconst.org/wp-content/uploads/2014/08/Joint-Statement-on-ICANN-Staff-Proposal-ICANN-Accountability-Process-FINAL.pdf>

<sup>5</sup> 29-Aug-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/Reconsideration-Request-regarding-ICANN-Accountability-Plan.pdf>

<sup>6</sup> 3-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

<sup>7</sup> 6-Sep-2014, at <http://forum.icann.org/lists/comments-enhancing-accountability-06sep14/pdfggcThDbfOp.pdf>

<sup>8</sup> 27-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf>

Dec-2014: BC comment on the CWG-Stewardship 1<sup>st</sup> draft proposal<sup>9</sup>

May-2015: BC comment on CWG-Stewardship 2<sup>nd</sup> draft proposal<sup>10</sup>

Jun-2015: BC comment on CCWG 1<sup>st</sup> draft proposal for ICANN accountability<sup>11</sup>

This depth of engagement demonstrates the importance of accountability to Business Constituency Members. And we are in full agreement with the CCWG's general statement:

[T]he Enhancing ICANN Accountability process was developed to propose 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. This contractual relationship has been perceived as a backstop with regard to ICANN's organization-wide accountability since 1998. (p.5)

### Specific Comments

Regarding its 2<sup>nd</sup> draft proposal, the CCWG posed three questions for public comment:

1. *Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?*
2. *Are there elements of this proposal that would prevent you from approving it transmission to Chartering Organizations?*
3. *Does this proposal meet the requirements set forward by the CWG-Stewardship?*

These questions are sufficiently broad to accommodate BC comments, so we have organized our comments to address the CCWG questions.

#### **1) Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?**

Yes. The global Internet community needs accountability powers that are significantly more than the "trust" model in place today, where the ICANN community has little recourse to challenge actions and inactions of the ICANN corporation and its board. The BC believes that the community needs to have enforceable powers similar to those that the BC proposed in May-2014:

- To challenge Board decisions via an enhanced independent Review Process
- To reject Board-proposed budgets and strategic plans
- To reject (or in some cases, approve) Board-proposed changes to Bylaws
- To recall ICANN Board Directors, individually or in total as a last-resort measure

These specific and confined powers should be enshrined in ICANN bylaws before the IANA transition is completed. The BC believes that the proposed community powers in Work Stream 1 should be adequate to overcome any resistance from the ICANN Board and management to additional measures the community attempts to implement after the IANA transition is complete.

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<sup>9</sup> 22-Dec-2014, at <http://www.bizconst.org/wp-content/uploads/2015/01/BC-comment-on-CWG-proposal-for-transition-of-naming-related-functions.pdf>

<sup>10</sup> 20-May-2015, at <http://www.bizconst.org/wp-content/uploads/2015/05/BC-on-CWG-2nd-Draft-Proposal.pdf>

<sup>11</sup> 3-Jun-2015, at <http://www.bizconst.org/wp-content/uploads/2015/06/BC-on-CCWG-Proposal.pdf>

Having said that, the BC is also concerned that ‘accountability fatigue’ could sap energy from volunteers needed to develop consensus around Work Stream 2 measures. For that reason, the BC believes that CCWG should avoid pushing critical accountability work to Work Stream 2.

In our Jun-2015 comments on the CCWG’s first draft proposal, the BC encouraged the CCWG to explain how Membership status can be created and maintained without undue costs, complexity, or liability. The BC believes that the CCWG’s 2<sup>nd</sup> draft proposal answers those concerns with the new plan for the Community Mechanism as Sole Member.

Below we describe concerns about the proposal and its implementation.

## **2) Are there elements of this proposal that would prevent you from approving it transmission to Chartering Organizations?**

While the BC is generally supportive of the CCWG’s 2<sup>nd</sup> draft, there are several elements of the proposal that raise concerns that, if left unresolved, could make it difficult for the BC to support the final proposal.

### **2.1) Element of potential concern to the BC: *New bylaws might prevent ICANN from enforcing contracts and Public Interest Commitments with registries and registrars.***

In our Jun-2015 comments on the CCWG’s 1<sup>st</sup> draft, the BC raised a concern with the proposal to limit the scope of ICANN’s mission via the Bylaws, worrying that it would prevent ICANN from taking appropriate steps to enforce certain provisions of its contracts:

“ICANN shall not undertake any other Mission not specifically authorized in these Bylaws. ... 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.”

As we stated in our Jun-2015 comments, the BC believes that ICANN should be able to enforce contracts that are voluntarily entered by registries and registrars, and to enforce contract terms that are voluntarily added by new gTLD registries in the form of Public Interest Commitments:

“The BC supports the proposition that ICANN should not attempt to establish obligations on non-contracted parties. Indeed, ICANN’s entire multi-stakeholder structure is built on a self-regulatory system implemented through contractual obligations. Thus ICANN can only establish contractual obligations on parties with which it has privity through a negotiated and mutually agreeable contract/amendment with such parties.”

CCWG did not adopt the BC’s advice, since rapporteurs with significant legal expertise felt strongly that contract enforcement would not be regarded as regulation of services or of content. Instead, the CCWG retained the text and amended ICANN’s mission limitation:

“ICANN shall have no power to act other than in accordance with, and as reasonably appropriate 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.”

However, public comments from Danielle Kehl and David Post at New America requested stress tests designed to suggest that ICANN's enforcement of contract provisions such as section 3.18 of the 2013 RAA could violate the new limited mission and prohibition on regulation of services and content<sup>12</sup>.

The BC believes that the CCWG's bylaws text is not clear on the tension between contract enforcement and a limited mission for ICANN.

On the one hand, CCWG's text could be read to prevent ICANN from enforcing Public Interest Commitments, or from agreeing to other contract provisions implementing consensus policies. On the other hand, CCWG's text does not effectively limit ICANN from acting outside consensus policy in the implementation of those contracts.

The BC asks CCWG to resolve the ambiguity with more clarity in the final proposal.

In addition, CCWG should adopt the recent suggestion of Greg Shatan to resolve ambiguity about the word "they" in the last sentence by replacing with "such services", and to remove the phrase "attempt", as follows:

"ICANN shall not engage in or use its powers to regulate services that use the Internet's unique identifiers, or the content that such services carry or provide."

## **2.2) Element of potential concern to the BC: *Expanding ICANN's Commitment to Human Rights***

The BC followed with interest the late July debate within CCWG on whether and how to elaborate ICANN's commitment to human rights. We understand that CCWG has formed a new sub-group to elaborate an ICANN commitment on human rights.

The BC believes that ICANN's present Articles of Incorporation already include a provision that ensures that ICANN acts consistently with relevant human rights provisions in the performance of its limited mission, since ICANN commits to "carrying out its activities in conformity with ... applicable international conventions". That would seem to make additional elaboration unnecessary. But if the community required further specificity, the BC believes that CCWG should propose amending ICANN's Articles of Incorporation, section 4, with the underlined and bold addition below:

4. The Corporation shall 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 international conventions, **including internationally agreed human rights principles**, and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.<sup>13</sup>

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<sup>12</sup> Stress Tests 29 and 30, in CCWG 2<sup>nd</sup> draft proposal

<sup>13</sup> <https://www.icann.org/resources/pages/governance/articles-en>

The BC believes that the *Universal Declaration of Human Rights* is comprehensive statement of human rights that is appropriate for ICANN<sup>14</sup>. The BC does not support having ICANN selectively commit to certain human rights while excluding others. Nor does the BC support having ICANN commit to the [United Nations Guiding Principles on Business and Human Rights](#), which was proposed by some sub-group members<sup>15</sup>. ICANN is not a business and would be a poor fit with the limited view of human rights originally developed by the UN for businesses in the resource extraction industry.

### **2.3) Element of potential concern to the BC: Board/Legal re-work of WHOIS review**

The BC strongly supports the CCWG proposal to bring the Affirmation of Commitments into ICANN's bylaws. In our Jun-2015 comment on the first CCWG draft, we said:

“The BC suggested in our Jun-2014 comments that parts of the *Affirmation of Commitments* should be become part of ICANN's Bylaws. At the time, we cited the stress test whereby ICANN might terminate the *Affirmation* after it no longer relied upon NTIA to renew its IANA contract.”

We therefore support adopting the *Affirmation* WHOIS review text, with the addition of “Directory Services” in case WHOIS service is replaced:

ICANN commits to enforcing its existing policy relating to WHOIS/Directory Services, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.

The Board shall cause a periodic Review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.<sup>16</sup>

However, ICANN's board chairman recently declared that the Affirmation WHOIS review was “flawed from the beginning” and was accepted under duress. In an email post to CCWG, the chairman promised to “propose language that is consistent with the intent of the existing language. It will make clear that we continue to be committed to a strong system and it will include the possibility of significant improvements that may require structural changes to the entire system.”<sup>17</sup>

On 1-Sep-2015, board member Bruce Tonkin shared ICANN's proposed text for the WHOIS *Affirmation* Review:

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<sup>14</sup> UN universal declaration of human rights, at <http://www.un.org/en/documents/udhr/>

<sup>15</sup> UN Guiding Principles on Business and Human Rights, at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>16</sup> Section 9.3.1 of ICANN Affirmation of Commitments, 2009, at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

<sup>17</sup> CCWG email post from Steve Crocker, 18-Aug-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-August/005008.html>

ICANN commits to enforcing its policy relating to the current WHOIS and any future gTLD Directory Service, subject to applicable laws, and working with the community to explore structural changes to improve accuracy and access to gTLD registration data, as well as consider safeguards for protecting data.

This Review includes a commitment that becomes part of ICANN Bylaws, regarding enforcement of the current WHOIS and any future gTLD Directory Service policy requirements.

The Board shall cause a periodic Review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement, promotes consumer trust, and safeguards data.

The Review Team shall assess the extent to which prior Review recommendations have been completed, and the extent to which implementation has had the intended effect.

This periodic Review shall be convened no less frequently than every five years, measured from the date the Board took action on previous review recommendations.

The BC could support the Board's proposed text, except for the last sentence regarding intervals between reviews. The BC supports the CCWG proposal to start the 5-year window "from the date the previous Review was convened". This text was chosen to ensure that a review would be initiated at least every 5 years. The Board's formulation could result in 6 or seven years between reviews, since the date of Board "action" could be as much as 2 years after a review was convened.

Finally, the CCWG proposes that the next Accountability & Transparency Review Team can change the WHOIS/Directory Services review, pursuant to community-based review and public comment. That would be an appropriate way to adjust the WHOIS/Directory Services review for evolving circumstances and services.

#### **2.4) Element of potential concern to the BC: Erosion of the proposed IRP's binding nature**

The BC strongly supports the adoption of a binding independent review process. However, we are aware of recent legal analysis which suggests that binding IRP decisions could infringe on the Board's statutory obligations and fiduciary responsibilities. The BC, however, notes that the CCWG's outside counsel, Sidley Austin, found that the Board's authority to determine how to correct violations of ICANN Articles or Bylaws avoids the possibility of an IRP ruling infringing on the Board's fiduciary or legal duties. We believe the CCWG should follow this legal advice and preserve the IRP's binding nature in order to ensure the greatest of level of accountability.

#### **2.5) Element of potential concern to the BC: Participation in Community Processes Before Seeking Reconsideration or Independent Review**

The BC continues to be concerned that the Reconsideration and Independent Review process proposed by the CCWG would allow parties to introduce new arguments without first vetting them through the community's policy development channels.

Neither the reconsideration nor the independent review process currently requires parties to participate in public comment processes directly addressing the issue for which reconsideration or review is sought. This process may not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the Reconsideration or Independent Review processes after policy development has concluded. Such an approach could create operational inefficiency and could undermine the bottom-up, consensus-based process for developing policy within ICANN.

The BC 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 review mechanisms. The requirement for prior public comment participation would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.

## **2.6) Element of potential concern to the BC: Effect of repeated budget vetoes**

The BC is pleased that the CCWG has recognized that ongoing budget vetoes can paralyze an organization. However, the BC remains concerned that the CCWG's proposal may not strike the right balance between oversight and efficiency. Under the current proposal, if the community vetoes the budget twice, the prior year's budget is adopted. But over time, such an approach could render ICANN ineffective in accomplishing its core mission. For example, security and stability improvements may require additional resources to implement, and allowing salaries to stagnate for years at a time may impede ICANN's ability to hire and retain key staff members. As such, the CCWG should consider a limit to the total number of consecutive vetoes that the community could adopt before it must resort to other methods of community empowerment, such as recalling board members or seeking independent review of board action.

## **2.7) Element of potential concern to the BC: Make Article XVIII of ICANN bylaws a "Fundamental Bylaw"**

The BC wishes to re-iterate its support for "Fundamental " status for Article XVIII of ICANN's present bylaws. As noted in our comment on the CCWG first draft proposal, the BC believes that *Affirmation of Commitments* paragraph 8b should also become a Fundamental Bylaw:

"ICANN affirms its commitments to: remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community"

*Affirmation* item 8b is largely reflected in an existing ICANN Bylaw, Article XVIII Section 1:

"OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish."

The BC believes that Article XVIII should be designated a Fundamental Bylaw, so that it would require supermajority community voting approval for any change. CCWG's proposal relies upon statutory powers to recall the Board and other actions, as necessary, to ensure that the ICANN



Board and staff remain accountable to the community. The legal analysis indicating that these powers are available to Members of the organization was predicated on the understanding that ICANN would remain a non-profit organization organized under California Law.

The BC acknowledges that ICANN's *Articles of Incorporation* also state that ICANN "is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes." However, this declaration is not the same as an explicit and affirmative commitment to remain headquartered in the USA. The BC therefore continues to advocate that Article XVIII of current bylaws be designated as a *Fundamental* bylaw.

### **2.8) Element of potential concern to the BC: Add a bylaws requirement for transparency in dealing with governments**

An additional Work Stream 2 improvement would limit government influence over ICANN and reveal ICANN attempts to influence public policies unrelated to ICANN's core mission. Governments could influence ICANN board decisions by providing quid pro quos for actions taken by ICANN. This situation could cause ICANN to make policy or implementation decisions that are not based on what is in the best interest of the ICANN community, but what would benefit ICANN as a corporation. In addition, ICANN could use its financial resources and government relationships to interfere with Internet governance public policies that are outside the scope of ICANN's technical obligations.

Therefore, the BC reiterates its call for an additional Bylaw to require ICANN or any individual acting on ICANN's behalf to make periodic public disclosure of their contacts with any government official, as well as activities, receipts, and disbursements in support of those activities. Disclosure of the required information would enable the entire community to evaluate statements and activities of such persons in their roles as representatives of ICANN.

### **2.9) Element of potential concern to the BC: Allowing the Board to act in accord with advice from public authorities that is inconsistent with ICANN's Commitments and Core Values**

With regard to existing Core Value 11, we disagree with the CCWG's decision to eliminate language from its First Draft requiring that any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values (154). This change creates the impression that CCWG removed this language in response to government objections, 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.

It should never be acceptable for ICANN take actions in a manner that *is not* consistent with, or to fail to act in a manner that *is* consistent with, its Commitments and Core Values. We believe requiring advice to be accompanied by legally supported rationale and allowing for IRP claims against any Bylaw violation could help prevent the Board from acting on advice that conflicts with its Commitments and Core Values. Nevertheless, ICANN must uphold its Commitments and Core Values without regard to government pressure, and we believe the CCWG's First Draft language for existing Core Value 11 best accomplished that goal.

**2.10) Element of potential concern to the BC: The Stress Test 18 Bylaws Change must be part of the final proposal.**

As noted in our comments at the beginning of transition planning (Jun-2014), the BC identified a stress test where the GAC might change to majority voting while still requiring ICANN to try and find a mutually acceptable solution. At that time, the BC suggested, “This scenario might indicate the need to amend ICANN Bylaws regarding deference to GAC advice that is not supported by consensus.”

The CCWG ultimately employed a similar test, Stress Test 18. The BC therefore supports the outcome of Stress Test 18 and the proposal for a change to ICANN’s Bylaws, so that ICANN’s obligation to “try and find a mutually acceptable solution” only applies where the GAC advice was supported by consensus. The BC might not support a final CCWG proposal that failed to include this bylaws change, particularly if the proposal also allows the GAC to vote in the Community Mechanism.

**3) Does this proposal meet the requirements set forward by the CWG-Stewardship?**

In general, the BC perceives that the CCWG draft meets the requirements of the CWG-Stewardship final proposal.

Moreover, the BC emphasizes that the acceptability of the ICG’s proposal is fundamentally contingent on ensuring that improvements to ICANN’s framework for accountability are adopted in parallel. The two proposals are interlinked and depend on each other on various important elements such as: ICANN and IANA budget; community empowerment mechanisms; IANA Functions Review; the Customer Standing Committee; the creation of appeal mechanisms relating to the IANA functions, and the clarity concerning when such appeal mechanisms would be available; establishment of fundamental bylaws, etc.

As Assistant Secretary Lawrence Strickling has specifically recognized, the two processes must go hand-in-hand, and the BC agrees.<sup>18</sup>

However, the BC describes two areas below where the CCWG proposal probably needs further detail to specifically address CWG-Stewardship requirements.

**3.1) While the BC Supports the Creation of a Post-Transition IANA (PTI) as a Separate Legal Entity, PTI Should Have a Limited Remit and Should Be Clearly Accountable to the ICANN Board.**

We continue to believe that ensuring a limited remit and ultimate accountability at the ICANN level are fundamental to the success of PTI. While the ICG’s proposal notes that the PTI board should provide “oversight of the operations of PTI in order to ensure that PTI meets, at a

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<sup>18</sup> See Lawrence Strickling, Remarks at The Media Institute, 29-Sep-2014 (as prepared for delivery) (“The two work streams on the IANA transition and enhanced accountability are directly linked and NTIA has repeatedly said that both issues must be addressed before any transition takes place.”), available at <http://www.ntia.doc.gov/speechtestimony/2014/remarks-assistant-secretary-strickling-media-institute>

minimum, applicable statutory requirements under California public benefit corporation laws and, importantly, fulfills its responsibilities under the IANA functions contract with ICANN,”<sup>19</sup> it does not explicitly limit either the PTI board’s functions or PTI’s remit.

We note that the CCWG 2<sup>nd</sup> draft imposes limits on ICANN’s mission in paragraph 168 and in paragraph 187. These limitations on ICANN’s actions will be enforceable via binding Independent Review Process (IRP) proposed by the CCWG. However, BC Members seek clarification that these limitations are also enforceable for actions or inactions of a wholly-owned ICANN subsidiary such as the PTI.

For similar reasons, the BC Members continue to believe that the post-transition IANA board should be drawn from the broader ICANN board, rather than including three employees of ICANN or PTI and two independent directors, as is currently proposed.<sup>20</sup> Employees of PTI would not necessarily provide the requisite level of accountability, and the appointment of independent directors creates confusion as to who is ultimately responsible for carrying out the IANA functions. In sum, the proposed structure raises the risk that each board can attempt to avoid responsibility for any operational shortcomings by seeking to hold the other board responsible. If the ICG insists on this PTI board structure, then that choice only makes it more important to explicitly scope and limit the PTI’s activities.

### **3.2) The Proposed Separation Review Process Needs to be Further Defined.**

While the BC understands the need to plan for potential separation of IANA functions from ICANN, we reiterate our hope that ICANN’s board would remedy problems with IANA operations before separation became necessary. The unprecedented process of separating IANA functions from ICANN could invite intergovernmental organizations to demand “their turn” once ICANN had proved unsatisfactory. Moreover, the BC believes that the strong measures proposed by CCWG-Accountability give the community significant leverage to correct ICANN deficiencies before having to begin a separation process.

The BC supports the inclusion of a separation review in the overall transition plan. However, the ICG and CCWG should clarify the escalation processes necessary to invoke separation, and adopt a standard for determining when separation may be considered. The current discussion of escalation merely notes the kinds of processes that will need to be developed to accommodate the separation process, and it does not suggest that following all of these processes is mandatory.<sup>21</sup> The discussion of separation contained in Annex L of the CWG-Stewardship’s does not clearly explain the processes for attempts to cure deficiencies in operation before the separation process is triggered.

Put another way, the current separation process describes steps that the community must take to ensure that there is community agreement on the need to separate, but it doesn’t clearly

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<sup>19</sup> Internet Assigned Numbers Authority Coordination Group, Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community 42 (July 2015) (Proposal).

<sup>20</sup> *Id.* at 42.

<sup>21</sup> *See id.* at 110.

describe the efforts the community must take to fix any issues through discussion with ICANN or PTI before resorting to separation. Because moving the functions to a new operator would be fundamentally destabilizing, a requirement to engage with PTI and/or ICANN before commencing the separation process should be specified.

Similarly, CWG’s Annex L notes only that a separation process can be commenced “if the I[ANA] F[unctions] R[eview] determines that a separation process is necessary,”<sup>22</sup> but provides no guidance as to when such a determination would be appropriate.

We recommend that the CWG-Stewardship establish a substantive standard for separation of the naming functions. For example, the proposal could specify that separation can only take place if the IANA Functions Review team finds that keeping the functions with the current operator raises significant concerns regarding the security, stability, and resiliency of the functions and the security, stability, and resiliency of the domain name system overall. The Separation Cross-Community Working Group would have to make a finding with a higher threshold to invoke separation, and that finding should be specifically endorsed by any community mechanism endorsing separation. Allowing separation for reasons unrelated to security, stability, and resiliency of the IANA functions risks destabilizing the broader domain system in an attempt to solve unrelated problems—an outcome that should be disfavored.

The mechanisms for initiating the SCWG also need additional consideration. The ICG requires supermajority approval by the GNSO and ccNSO, followed by approval by the Board “as well as a community mechanism derived from the CCWG-Accountability process.”<sup>23</sup> The CCWG proposal acknowledges this request and agrees to inclusion of bylaws to allow for such community approval, but it defers the specifications to the CWG-Stewardship. As the ICG report is presently open ended on the specifics of this community approval process, we believe the ICG should work with the CCWG-Accountability to develop the specifications for this community power.

The CCWG’s proposed *Community Mechanism as Sole Member* may not be the right body to launch a Separation Working Group, since the protocol community (IETF) may not be represented. We suggest that the ICG specify that a Separation Working Group, if ever needed, would include the IETF, regardless of whether that group was participating in the Community Mechanism.

#### **Addendum: A preliminary reaction to the ICANN board’s comment on the CCWG proposal**

The BC notes the comments filed by the ICANN board on 11-Sep. Lacking time to fully consider those comments, the BC nonetheless wanted to respond to these two major concerns noted by the board in its summary:

- The proposed community enforceability structure introduces a significant and fundamental structural change from the current multistakeholder governance mechanism that the community has developed in a bottom-up consensus-based process over the past 17 years.

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<sup>22</sup> *Id.* at 108.

<sup>23</sup> *Id.*

- Moving ICANN’s structure away from an open, multistakeholder governance mechanism to the Sole Membership Model makes it more restrictive to a set of members, and potentially more prone to capture if not tested appropriately.

As stated above, these board concerns may reflect some misunderstanding of the Community Mechanism as Sole Member (CMSM) developed by the community over the last 10 months.

By intent and by design, the CMSM is an escalation path that exists to backstop the Advisory Committees and Supporting Organizations and the bottom-up consensus process we’ve evolved over the last 17 years. For each of the community powers proposed by the CCWG, the CMSM can only consider petitions and voting after the community has worked through existing bottom-up processes such as public comment and policy development. Moreover, petitions for the CMSM to vote on exercising a power must be supported by multiple AC/SOs, and the actual voting must be supported by supermajority.

So while the CMSM helps the ICANN community even the balance of power with the ICANN corporation, it does not fundamentally alter the way ICANN will operate its bottom-up processes.

We look forward to further analysis and discussion of the board’s comment and its new proposal for a Multistakeholder Enforcement Mechanism.

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This comment was drafted by Steve DelBianco, Chris Wilson, Aparna Sridhar, Ellen Blackler, and Andrew Harris. It was approved in accordance with our charter.