



**Comment on Proposal from
the Cross Community
Working Group on Enhancing
ICANN Accountability
(CCWG-Accountability)**

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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.

The BC has been prolific and 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 ten documents on ICANN accountability after transition, including a Reconsideration Request:

May-2014: ICANN's Draft Principles & Process to Transition NTIA's Stewardship of the IANA Functions¹

May-2014: Initial Comment on Enhancing ICANN Accountability²

Jun-2014: Final comment on Enhancing ICANN Accountability³

Aug-2014: BC / Registries / ISPs Joint Letter on ICANN's proposed structure for Accountability WG⁴

Aug-2014 Reconsideration Request: ICANN staff imposing its 'Accountability Plan' without adequate account for community views⁵

Sep-2014: Joint letter with questions about ICANN's proposed process for enhanced accountability⁶

Sep-2014: Joint comment on ICANN's proposed process to enhance accountability⁷

Sep-2014: BC Comment on Enhancing ICANN Accountability Process⁸

Dec-2014: BC comment on the CWG-Stewardship 1st draft proposal⁹.

May-2015: BC comment on CWG-Stewardship 2nd draft proposal¹⁰

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

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

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

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

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

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

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

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

⁹ 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>

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

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.4)

Below, the BC provides input on selected questions posed in the Public Comment Input Framework.

Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

The BC supports the proposed rationale for what must be in Work Stream 1:

Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance ICANN's accountability would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity. (p. 11)

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. To be clear, we believe that the community needs to have enforceable powers 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

We are gratified to see these powers among the Work Stream 1 measures proposed by CCWG. (p.5)

However, we are concerned that these powers might not be enforceable if we fail to adopt an Supporting Organization/Advisory Committee (SO/AC) Membership Model that takes advantage of powers available under California law. (p.41) The BC therefore encourages the CCWG to explain how Membership status can be created and maintained without undue costs, complexity, or liability.

Do you have any general feedback or suggestion on the interim Work Stream 1 proposals?

The BC supports creating “[m]echanisms giving the ICANN community ultimate authority over the ICANN Corporation.” (p.11)

The BC supports “Mechanisms to restrict actions of the Board and management of the ICANN corporation” (p.11) -- provided that Work Stream 1 powers are enforceable against the corporation. From legal advice provided to CCWG, that may require us to adopt an SO/AC Membership Model to exercise statutory powers under California law. (p.41)

Work Stream 1 measures should be implemented before NTIA relinquishes the IANA contract. Implementation should include, at least, changes to ICANN Bylaws that establish community powers. Some implementation details could be accomplished post-transition, provided that the community has powers to force ICANN to take a decision on recommendations arising from a Review Team required by the *Affirmation of Commitments*. If ICANN decides not to implement Review Team recommendations, the enhanced IRP process give the community standing and a low-cost way to challenge and potentially overturn that decision.

Revised Mission, Commitments & Core Values (p. 14)

1. Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?

In general, the BC supports the changes to ICANN’s Bylaws in the areas of Mission, Commitments, and Core Values. When coupled with legally enforceable community power to block, or in some cases approve, Board-proposed amendments to the Bylaws, these changes would enhance ICANN’s accountability.

The BC looks forward to IETF language on ICANN’s mission with respect to protocol, port, and parameter numbers, which is still a missing element.

2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

The BC generally supports the requirements for this recommendation.

The BC supports the CCWG proposal to limit the scope of ICANN’s mission via the Bylaws: “ICANN shall not undertake any other Mission not specifically authorized in these Bylaws.” (paragraph 60 on p.20)

However, the BC proposes a change to the next sentence in paragraph 60, which now reads:

“...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 strongly support 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. Therefore, paragraph 60 should be clarified and we propose that it should read as follows:

“ICANN shall not engage in or use its powers to attempt to establish contractual obligations on companies with which it is not in privity of contract and shall not attempt to establish contractual obligations on contracted parties that are not agreed by such parties.”

Regarding the balancing test among competing Commitments and Core Values, the BC seeks clarification as to why changes are needed to existing language. Any amendments to the existing language should promote prompt resolution of issues – not the lack of action. The BC strongly urges the CCWG to address this in the next iteration of the proposal.

The BC supports the use of the phrase “private sector led” in the Bylaws. The term has been used since ICANN’s inception to reflect its roots in the business, civil society, and technical communities. It is important to note that in this instance, “private sector” does not mean just “commercial,” but rather the broader group of non-governmental stakeholders that have led ICANN. We believe that ICANN can remain private sector led while still adhering fully to the multistakeholder approach.

We support ICANN’s commitment stated in paragraph 336 (p.59), arising from the *Affirmation of Commitments* required review of gTLD expansions:

“ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”

While paragraph 337 indicates this language will be added to the Bylaws core values section, it is only partially reflected in paragraph 107 (p.26), which adds the phrase “enhances consumer trust and choice”. The BC therefore urges the CCWG to implement the entire commitment from the *Affirmation of Commitments*, including “*malicious abuse issues, sovereignty concerns, and rights protection*”

Fundamental Bylaws (p. 27)

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?

The BC supports the concept of designating certain Bylaws as Fundamental Bylaws that would require majority approval by community Members. Also, the BC supports the CCWG’s proposal that 75% of community Members must vote in favor of any proposed change to Fundamental Bylaws.

However, we suggest that the CCWG explore a way to ensure that the need for binding Independent Review is enshrined in a Fundamental Bylaw without fixing every aspect of Independent Review Panel procedure in the Fundamental Bylaw itself. The specific IRP procedures proposed are new, and the community and Board may wish to modify them based on gained experience without having to meet the very high bar established by enshrining these specific details in a Fundamental Bylaw. We need to ensure the process remains sufficiently flexible to address the needs of the community as the Internet continues to evolve.

4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

The BC suggests designating another existing ICANN Bylaw as a Fundamental Bylaw. Article XVIII Section 1 states:

“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.”

Moreover, Article XVIII is consistent with *Affirmation of Commitments* paragraph 8b:

“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”

The BC believes that Article 18 should be a Fundamental Bylaw, so that it would require 75% community voting approval for any change. BC Members presently rely upon contract enforcement and legal action based upon the US court system and do not want that to be changed without broad community approval. Moreover, the BC hopes to rely 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.

Independent Review Panel Enhancement (p.30)

5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

In general, the BC supports the proposed improvements to the IRP. A standing committee of independent compensated experts with ICANN experience will lead to better decisions.

The BC agrees that redress should be available when a particular action or inaction “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 reviewed under an abuse-of-discretion, rather than a de novo standard: The panel should ask whether a decision was based on a consideration of the relevant factors and whether ICANN committed a clear error of judgment. Under this standard, ICANN’s failure to follow its own processes would constitute an abuse of discretion.

In addition, we are particularly supportive of allowing the community to have standing to file an IRP and relief from having to pay legal fees (p.32). If a supermajority of ICANN Members votes to initiate an IRP, we must ensure they have standing and access to the mechanism. This would have been useful, for example, in example challenging ICANN’s decision to allow both singular and plural forms of the same string as new gTLDs.

The BC also supports having IRP decisions be precedential and enforceable in US courts.(p.34)

The BC has some concern that the IRP process proposed by the CCWG would allow parties to introduce new arguments 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 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 IRP. The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.

Reconsideration Process Enhancement (p.35)

6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

In general, the BC supports the CCWG proposal to change the standard for Reconsideration Requests to include the amended Mission and Core Values for ICANN. (p.36)

We also support the CCWG proposal to increase transparency by requiring full documentation of the ICANN Board Governance Committee's dismissal of any Reconsideration Request. (p.37)

The BC supports the CCWG proposal to bypass ICANN legal department for the first substantive evaluation of Reconsideration Requests. The BC believes this review by the Ombudsman is appropriate only if the review is conducted free from the involvement or influence of or interference by ICANN's Legal Department or outside counsel. Matters of policy should go directly to the Board Governance Committee. (p.37)

The BC supports requiring the full ICANN Board to vote on final determinations of Reconsideration Requests. (p.37)

However, the BC has concerns with the proposal to allow reconsideration for failure to consider any "relevant" material. In most U.S. jurisdictions, the standard for relevancy is extremely low. Under the California Evidence Code, relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (emphasis added).¹¹ Any decision made by the Board or the staff is likely to overlook *some* relevant evidence. If failure to consider relevant evidence is grounds for reconsideration, nearly every decision is subject to reconsideration. Therefore, the BC recommends retaining the "material information" standard set forth in the current Bylaws.

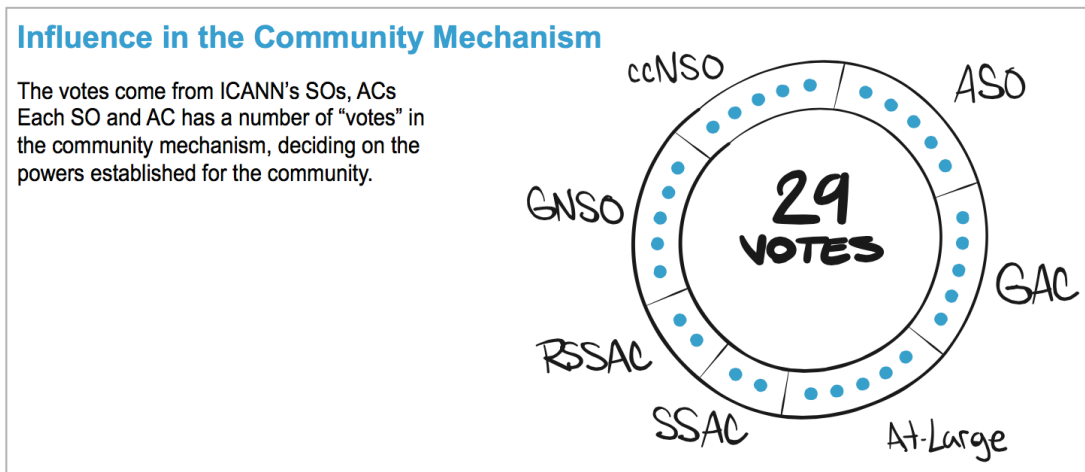
¹¹ Note that this is the standard for admissibility of relevant evidence at trial. Cal. Evid. Code § 210. Discovery requests can be even broader. Cal. Code Civ. Proc. § 2017.010.

The BC also has some concern that the Reconsideration process proposed by the CCWG would allow parties to introduce new arguments without first vetting them through the community's policy development channels. This could eliminate the requirement to participate in applicable public comment processes. We are concerned that the proposed process might 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 Process 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 Reconsideration Process. The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.

Mechanism to empower the Community (p.40)

7. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

The BC supports the proposed allocation of votes among SO/ACs in the ICANN community, as shown in the illustration below:



With 5 distinct votes, the GNSO could adequately reflect the diversity of interests between registries, registrars, commercial stakeholders, and non-commercial stakeholders.

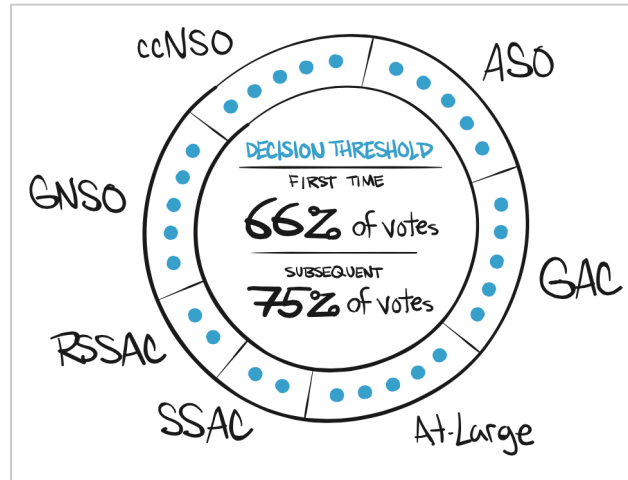
Power: reconsider/reject budget or strategy/operating plans (p.45)

8. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in Jun-2014 that the community be empowered to approve ICANN budgets. The BC supports the proposed community power to reject ICANN's draft budget and strategic plans. It seems appropriate to require 2/3 majority in the first vote and 3/4 majority in subsequent votes.

However, the BC is concerned that a sustained rejection of ICANN budgets and strategic plans could result in the corporation having to operate under prior approved budgets and strategic plans for multiple years – much like the U.S. government often operates under a 'continuing resolution' based on prior budgets. This is not an efficient or effective way to operate an organization like ICANN, and the BC believes CCWG should consider at what point the budget and strategic plan vetoes would be truncated after multiple votes to block the Board's proposal.

The BC notes that enforcing this power may require SO/ACs to adopt Member status under California Law, and encourages the CCWG to explain how Member status can be created and maintained without undue costs, complexity, or liability.



Power: reconsider/reject changes to ICANN "standard" Bylaws (p.46)

9. Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in Jun-2014 that the community be empowered to approve changes to ICANN Bylaws. The BC supports the proposal to allow the community to block a Bylaws change sought by ICANN's Board. It seems appropriate to require 2/3 majority in the first vote and 3/4 majority in subsequent votes.

The BC notes that enforcing this power may require SO/ACs to adopt Member status under California Law, and encourages the CCWG to explain how Member status can be created and maintained without undue costs, complexity, or liability.

Power: approve changes to "Fundamental" Bylaws (p.47)

10. Do you agree that the power for the community to approve any Fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in Jun-2014 that the community be empowered to approve changes to ICANN Bylaws. The BC supports the approval mechanism for Fundamental Bylaws.

As noted in our response to question 4 above, the BC suggests designating another existing ICANN Bylaw as a Fundamental 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.”

Moreover, Article XVIII is consistent with *Affirmation of Commitments* paragraph 8b:

“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”

The BC believes that Article 18 should be a Fundamental Bylaw, so that it would require 75% community voting approval for any change. BC Members presently rely upon contract enforcement and legal action based upon the US court system and do not want that to be changed without broad community approval.

Moreover, the BC hopes to rely 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 notes that enforcing this power may require SO/ACs to adopt Member status under California Law, and encourages the CCWG to explain how Member status can be created and maintained without undue costs, complexity, or liability.

Power: Recalling individual ICANN Directors (p.48)

11. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in Jun-2014 that the community be empowered to recall the entire ICANN Board of directors. The BC supports the CCWG proposal to allow the appointing organization to vote to recall individual directors. This is far more effective accountability mechanism than simply waiting for the next election cycle.

The BC supports the proposal to allow each SO/AC to determine its own voting threshold for removing its designated director(s) and appointing replacement(s).

Power: Recalling the entire ICANN Board (p.50)

12. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in Jun-2014 that the community be empowered to recall the ICANN Board of directors. The BC supports the CCWG proposal to allow community Members to vote for removing the entire ICANN Board.

Some in the BC support a 75% Member voting threshold to recall the entire Board. Some in the BC support an 80% threshold. (p.50)

The BC notes that enforcing this power may require SO/ACs to adopt Member status under California Law, and encourages the CCWG to explain how Member status can be created and maintained without undue costs, complexity, or liability.

The BC appreciates that CCWG anticipates the need for operational continuity measures in the event the entire ICANN Board is recalled (p.50), and will comment on the details when they are developed.

Incorporating the Affirmation of Commitments into the ICANN Bylaws (p.51)

13. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

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:

Scenario: ICANN unilaterally cancels the Affirmation of Commitments, which it may do with just 120 days notice. And if not outright cancellation, ICANN could refuse to implement recommendations of an Affirmation review. Presently, the discipline imposed by needing to win the IANA contract forces ICANN to adhere to the only external accountability it has today: the Affirmation of Commitments. If the Affirmation is to remain part of the new ICANN accountability framework, it is essential that the leverage formerly conveyed by the IANA contract be replaced with a new mechanism, which may or may not include parties external to ICANN.¹²

The BC supports having key commitments from the Affirmation incorporated in ICANN Bylaws according to CCWG proposal (p.55).

As noted in our response to questions 4 and 10 above, 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:**

¹² 25-Jun-2014, See scenario 1, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-reply-comment-on-Enhancing-ICANN-Accountability-FINAL.pdf>

“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 75% community voting approval for any change. BC Members presently rely upon contract enforcement and legal action based upon the US court system and do not want that to be changed without broad community approval.

Moreover, the BC hopes to rely 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.

14. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? (p.52) Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The BC suggested in our Jun-2014 comments that reviews required in the *Affirmation of Commitments* should be become part of ICANN's Bylaws. At the time, we also suggested 3 ways to improve accountability while bringing the *Affirmation* reviews in the Bylaws:

1. The Accountability & Transparency Review Team (ATRT) should be given authority to sunset obsolete reviews and create new reviews as it sees fit. For example, the Affirmation review of the new gTLD program (paragraph 9.3) could be concluded and possibly replaced with similar reviews of future rounds of TLD expansion. By the same token, the Affirmation Review of Whois (paragraph 9.3.1) could be ended and possibly replaced with a review of successor mechanisms to the present Whois system.

2. The ICANN community should be empowered to designate its representatives on Review Teams—without being subject to approval of the chairs of GAC or ICANN, as in the present Affirmation: “Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC Members) and the Chair of the Board of ICANN.”

3. Recommendations arising from Review Teams should be given higher priority for implementation. A more formal obligation to implement Review Team recommendations may be needed, to avoid repeating the experience of having many ATRT-1 recommendations not implemented when ATRT-2 performed their review.

The BC is pleased that these improvements to the Reviews were embraced by the CCWG and supports the proposal as a way to enhance ICANN accountability. (p.55)

The BC supports the proposed Bylaw changes regarding the new gTLD program, specifically that recommendations from the previous review to be implemented before rounds of new gTLDs can be opened.

Bylaws changes suggested by Stress Tests (p.61)

15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? (p.55) Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

In prior comments, the BC has supported recommendations from the Affirmation review teams, including ATRT2 recommendation 9.1

9.1. ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice:

The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.

The BC continues to believe this change should be made to ICANN Bylaws in order to enhance ICANN accountability. Moreover, several stress tests indicate this change would be needed to give the community adequate measures to hold ICANN accountable for its decision not to implement formal advice from an Advisory Committee.

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In our Jun-2014 comments, 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 solution¹³. 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."

This stress test is similar to the CCWG's Stress Test 18. The BC therefore supports the proposal for a small 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. (p.64)

On this particular Bylaws provision, the BC suggests that ICANN's obligation to "try and find a mutually acceptable solution" on GAC advice should not result in a decision that conflicts with ICANN Bylaws.

The BC also notes that important questions with respect to the Root Zone Maintainer still need to be resolved (p.77). Insight into the process of transitioning the Root Zone Maintainer would help ensure there is a well-established structure and process for approval of major architectural and operational changes to the Root Zone environment. The BC calls on the CCWG to clarify which entity will have this role and to establish the process that would be used for consultation with the global multi-stakeholder community.

¹³ 25-Jun-2014, See scenario 6, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-reply-comment-on-Enhancing-ICANN-Accountability-FINAL.pdf>

Items for Consideration in Work Stream 2 (p.89)

The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Work Stream 2? If need be, please clarify what amendments would be needed.

As noted above, Work Stream 1 powers must provide the community with confidence that any accountability mechanism that would further enhance ICANN's accountability would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity. (p. 11)

The BC therefore believes that Work Stream 1 measures should be implemented before NTIA relinquishes the IANA contract. Implementation should at least include changes to ICANN Bylaws that establish these essential community powers.

The CCWG proposes 9 measures that are candidates for Work Stream 2. (p.90) The BC supports these measures.

As a general concern about Work Stream 2 improvements, the BC notes that the community must first show consensus support for these changes to Bylaws. This is true whether the recommendations arise from a PDP or from an *Affirmation* Review Team. For recommendations that have community support, the community needs the power to force ICANN to take a decision on the recommendations. (see question 15 above). Then, if ICANN decides not to implement community recommendations, the enhanced IRP process give the community standing and a low-cost way to challenge and potentially overturn that decision.

An additional Work Stream 2 improvement would help to prevent government capture of ICANN and reveal ICANN attempts to influence public policies unrelated to ICANN's core mission.

Governments could seek to control ICANN decision-making processes by providing quid pro quos for actions taken by ICANN or governments could try to use intimidation. This situation could cause ICANN to make policy 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 tremendous resources and clout to interfere with Internet governance public policies that are outside the scope of ICANN's technical obligations.

Therefore, the BC suggests that an additional Bylaw be added 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 on behalf of ICANN. Disclosure of the required information facilitates evaluation by the multi-stakeholder community of the statements and activities of such persons in light of their function as representatives of ICANN.

Three additional questions were noticed on the public comment page on 1-Jun-2015:

1. The CCWG-Accountability welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG-Accountability welcomes feedback on whether the Mission should be subject to even higher thresholds of Board or community assent. (paragraph 126)

The BC believes that revisions or additions to ICANN Bylaws could be developed through a bottom-up consensus process, such as recommendations arising from a periodic review now required under the *Affirmation of Commitments*. These recommendations should be allowed to address Fundamental Bylaws as well as other Bylaws. As with any proposed change to Fundamental Bylaws, the approval of 75% of Community Members should be required.

2. Do you agree that the introduction of a community mechanism to empower the community over certain Board decisions would enhance ICANN's accountability? (paragraph 189)

The BC agrees that a mechanism to empower the community over certain board decisions is essential to maintain ICANN's accountability in the absence of the IANA contract with NTIA. Moreover, this mechanism must be legally enforceable.

3. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies. (paragraph 190)

The BC supports the recommended community mechanism for SO/AC Membership. The legal analysis provided to the CCWG indicated that the Membership option was the best way to give the community legally enforceable powers over the corporation.

The BC notes that the majority of the stress tests analyzed in the proposal relied upon enforceable community powers over decisions and actions of the ICANN corporation. It is not likely that stress testing would find acceptable levels of community accountability if community powers were merely advisory and not legally enforceable.

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This comment was drafted by Steve DelBianco, Aparna Sridhar, Andrew Harris, Chris Wilson, Claudia Selli, and several other members of the BC.

It was approved in accordance with the BC charter.