



**Comment on CCWG-
Accountability – 3rd Draft
Proposal on Work Stream 1
Recommendations**

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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:

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

BC Comment on CCWG 3rd draft proposal recommendations:

The BC generally supports the CCWG 3rd draft proposal. For each specific recommendation, the BC reserves judgment until the final text and bylaws language have been settled. Below, the BC indicates either support or qualified support for each recommendation.

| CCWG 3 rd Draft Proposal | Support, indicating qualifications and areas of concern for the BC |
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| Rec #1: Establishing an Empowered Community for Enforcing Community Powers | <p>Support, with these qualifications:</p> <p>3rd draft proposal includes reduced legal enforceability of some powers since the community would be a Designator instead of a Member. A Designator has legal power to remove director(s). But this proposal relies upon binding IRP and removal of director(s) in order to enforce community powers over budget and bylaws changes.</p> <p>Therefore, the power to remove director(s) is essential, and requires that the community have access to deliberations and decisions of the board. That requires the Community as Sole Designator to have the same document inspection rights that a Member would have under California law.</p> |
| Rec #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce | <p>Support, with these qualifications:</p> <p>The BC believes that the power to remove director(s) requires that the community have access to deliberations and decisions of the board. That requires the Community as Sole Designator to have the same document inspection rights that a Member would have under California law.</p> <p>Regarding the proposed decision-making steps and thresholds (pages 16-23, Annex 3 and Annex 4), the BC believes that the power to remove ICANN director(s) should be reasonably possible, and therefore supports the CCWG recommendation for a threshold of 4 AC/SOs in support, with no more than 1 AC/SO opposing. The BC agrees that a rationale be given for director(s) removal, but there should be no requirement that removal be based upon pre-specified criteria.</p> |

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| <p>Rec #3: Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’</p> | <p>Support, with these qualifications:</p> <p>ICANN’s Articles of Incorporation state that ICANN “is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.” This could be changed according to the Articles, item 9:</p> <p style="padding-left: 40px;">9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.</p> <p>The CCWG proposal does not give the community the status of a Member, but only that of Designator. BC support for this recommendation is conditioned upon a change to reflect that Member approval be replaced with Designator approval in Articles of Incorporation item 9.</p> |
| <p>Rec #4: Ensuring Community Engagement in ICANN Decision-making: 7 New Community Powers</p> | <p>Support, with these qualifications:</p> <p>The 3rd draft proposal has reduced legal enforceability of some powers since the community would be a <u>Designator</u> instead of a <u>Member</u>. A Designator has legal power to remove director(s). But this proposal relies upon binding IRP and removal of director(s) as the only enforceable community powers.</p> <p>Therefore, the power to remove director(s) is essential, and requires that the community have access to deliberations and decisions of the board. That requires the Community as Sole Designator to have the same document inspection rights that a Member would have under California law.</p> |
| <p>Rec #5: Changing Aspects of ICANN’s Mission, Commitments and Core Values</p> | <p>Support, noting these qualifications, and reserves judgment until the final text has been settled.</p> <p>The BC requires that ICANN be able to enforce contract terms and Public Interest Commitments made by registries and registrars. We support Rec #5 provided that these aspects of the 3rd draft proposal are retained in the final proposal:</p> <p>p.10 of Annex 5, Core Value 3: “ICANN shall have the ability to negotiate, enter into and enforce agreements with contracted parties in service of its mission.”</p> <p>p.39 “For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.</p> <p>The side-by-side comparison in Annex 5.</p> |

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| <p>Rec #6: Reaffirming ICANN’s Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission</p> | <p>Support, while reserving judgment until the final text has been settled.</p> <p>The BC supports the text in 3rd draft proposal, p.41:</p> <p>“Within its mission and in its operations, ICANN will respect internationally recognized human rights. This commitment does not in any way create an obligation for ICANN, or any entity having a relationship with ICANN, to protect or enforce human rights beyond what may be required by applicable law. In particular, this does not create any additional obligation for ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.”</p> <p>The BC is aware that this text is the subject of continued discussion in CCWG.</p> <p>Moreover, the BC is concerned that this text might be used to challenge existing procedures and consensus policies, instead of using the bottom-up policy development process. The BC therefore reserves judgment on this recommendation until the final proposal is presented.</p> |
| <p>Rec #7: Strengthening ICANN’s Independent Review Process</p> | <p>Support, while reserving final judgment until the IRP Implementation Oversight Team makes its recommendations.</p> |
| <p>Rec #8: Improving ICANN’s Request for Reconsideration</p> | <p>Support, while reserving final judgment until the IRP Implementation Oversight Team makes its recommendations.</p> |
| <p>Rec #9: Incorporating the Affirmation of Commitments in ICANN’s Bylaws</p> | <p>Support, with these qualifications:</p> <p>Two of the AoC reviews (Whois and gTLD expansion) relate exclusively to gTLDs, so the BC believes that GNSO stakeholders be given the opportunity for greater representation on those review teams.</p> <p>The CCWG 3rd draft proposal allows each AC/SO to offer multiple names to review teams, and would enable GNSO representatives to occupy slots that were not requested by other AC/SOs. At a minimum, this aspect of the third draft proposal should be retained in the final proposal.</p> |
| <p>Rec #10: Enhancing the Accountability of SOs and ACs</p> | <p>Support.</p> |

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| <p>Rec #11: Board Obligations with regards to GAC Advice (Stress Test 18)</p> | <p>Support, with these qualifications:</p> <p>The BC supports the requirement that ICANN’s board would be obligated to “try to find a mutually acceptable solution” only for GAC advice that is “approved by a full Government Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.” (p.52) That is an improvement on the 2nd draft, which required only that GAC advice was supported by GAC consensus, without defining consensus.</p> <p>GAC advice with this stronger consensus rule would require 2/3 board majority to reject such advice, compared to majority required today. The BC believes the requirement for 2/3 board majority is justified by the stronger requirement for GAC consensus.</p> <p>BC support for recommendation 11 relies upon the interpretation that only GAC advice without a formal objection could trigger a board obligation to try and find a mutually acceptable solution.</p> <p>The BC has also said that GAC advice should include a rationale. However, page 52 suggests only “Insert a mention for all advisory committees: the Advisory Committee will make every effort to ensure that the advice provided is clear and supported by a rationale”. The BC insists that rationale be a requirement for any GAC advice to trigger the board obligations stated in recommendation 11.</p> |
| <p>Rec #12: Committing to Further Accountability Work in Work Stream 2</p> | <p>Support, with these qualifications:</p> <p>The BC agreed with the CCWG’s requirement that “proposed community powers in Work Stream 1 should be adequate to overcome resistance from ICANN Board and management to additional measures the community attempts to implement after the IANA transition is complete”</p> <p>The 3rd draft has fewer legally enforceable powers since it relies upon Designator instead of Member. If the board resisted widely supported measures in Work Stream 2, the community’s only leverage would be removal of ICANN director(s), a very disruptive and difficult process.</p> <p>To address this risk, the BC requires an interim Bylaw that would commit ICANN’s board to formally consider implementing CCWG-Accountability Work Stream 2 recommendations. If the board were to block broadly supported recommendations for work stream 2, the community would have the legally enforceable right to remove director(s).</p> |

This comment was drafted by Steve DelBianco, with edits from Amazon, Disney, Facebook, Google, Microsoft, Verizon, Yahoo, and Marilyn Cade. It was approved in accordance with the BC charter.