

Comments of the Non-Commercial Stakeholders Group on the 2nd Draft of the CCWG-Accountability Proposal on Work Stream 1 Recommendations

12 September, 2015

The Non-Commercial Stakeholders Group (NCSG) is the vehicle for representation of civil society organizations, nonprofits, and public interest advocates in ICANN's Generic Names Supporting Organization. Our two constituencies and over 159 organizational members and 342 individual members appreciate the opportunity to comment on the CCWG proposal.

NCSG congratulates the CCWG on its bold and comprehensive accountability reform plan. While the overall architecture of the plan is good, there are still areas where revisions need to be made and stress tests or scenarios need to be considered. We begin with short answers to the framework questions and move on to more detailed comments:

- Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?

There are important improvements in accountability mechanisms, but there are also flaws in the proposal that are likely to undercut those improvements. Our full comments (below) explain what we believe the flaws are. Until those concerns are addressed, we could not say for sure whether this proposal enhances ICANN's accountability.

- Are there elements of this proposal that would prevent you from approving its transmission to Chartering Organizations?

Yes. We support 100% the intent of the Sole Member Community Mechanism (SMCM). However, there is overwhelming rough consensus within NCSG that the voting allocations in the SMCM constitute a significant and untested change in the stakeholder balance in ICANN. There are also two possible exceptions to the crucial limitation, expressed in paragraph 187, on ICANN's ability to use the DNS to regulate Internet services and content. One is contained under the heading Freedom to Contract and the other is in Core Value 7. Taken together, these aspects of the proposal reduce our confidence that the proposal will meet the NTIA requirements regarding accountability, the openness of the Internet and the requirement that ICANN not be government-led. Moreover, they would seem likely to attract adverse attention in US Congressional hearings. (For specifics, see our discussion of the voting allocation in Section 2 and the modification of the ICANN commitment regarding policy advice from public authorities in Section 1.)

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

For the most part, yes. The problems noted above may create scenarios in which accountability checks could be bypassed or rendered ineffective, but these affect *policy* accountability concerns more than the IANA stewardship issues.

Detailed Comments:

1. IRP and Mission, Commitments and Core Values

One of the most important accountability enhancements is to narrowly define ICANN's mission and commitments, and to give the Independent Review Process the ability to bind ICANN to those commitments and enforce ICANN's confinement to a well-defined, limited mission. While that goal does command broad consensus, and on the whole the CCWG has done an excellent job of articulating the mission, commitments and core values, there are two areas of concern:

- a) the comment in paragraph 158 on so-called "freedom to contract," and
- b) paragraph 224 related to advice from public authorities.

The ICANN commitment in paragraph 187 says:

"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."

This is a very good, strong limitation on ICANN's mission, and NCSG supports it. We would propose however, that the language could be simplified to read:

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

There are two problems, however.

In the Second Draft Report, paragraph 158 provides commentary on this ICANN commitment that contradicts its intent and purpose. The ICANN commitment in paragraph 187 was inserted to make clear that ICANN could not use its contracting power with Registries and Registrars as a lever to engage in general regulation of Internet content and services. And yet in under the heading "Freedom to Contract," the CCWG wrote:

"Several commenters expressed concerns that by enumerating ICANN's powers specifically, ICANN would not be able to freely negotiate and enforce its contracts with, for example, registries and registrars. The CCWG-Accountability considered this concern, but concluded that the prohibition on regulation of services that use the Internet's unique identifiers or the content that they carry or provide does not act as a restraint on ICANN's contracting authority."

This formulation is poorly stated and must be changed in any final proposal. Since ICANN's regulatory powers are exercised exclusively via contract, the prohibition on regulation of services and content does - and *must* - act as a restraint on ICANN's contracting authority. The whole purpose of paragraph 187 is to prevent ICANN from using its contractual authority over

domain names to engage in general regulation of Internet content and services. The CCWG discussions did not conclude to the contrary. They *did* conclude that the commitment in paragraph 187 would not prevent ICANN from enforcing compliance with a specific TLD registry's own commitments to offer a certain type of service in its application for a delegation. Contractual obligations to ICANN in these types of cases would only apply to a specific TLD operator (e.g., .bank) based on commitments that it made on its own initiative (e.g., to restrict registration to certified financial institutions). In such an instance, ICANN could prevent the TLD operator from unilaterally withdrawing from its contractual commitments.

The commentary in paragraph 158 makes a much broader statement, and this should be corrected. Moreover, it is important to properly define the scope of this narrow exception so that it does not become *de facto* content regulation. The presence of a content-based commitment in a Registry agreement cannot become a wholesale license for ICANN regulate content and services (e.g. by determining what does or does not constitute a properly certified financial institution).

NCSG believes that the heading "Freedom to Contract" is much too broad a title and must be changed to "Compliance with voluntary commitments." The paragraph should be modified to read:

Compliance with Voluntary Commitments ~~Freedom to Contract~~

"Several commenters expressed concerns that by enumerating ICANN's powers specifically, ICANN would not be able to ~~freely negotiate and~~ enforce compliance with ~~its contracts with, for example,~~ voluntary commitments by registries and registrars regarding the nature of their services. The CCWG-Accountability considered this concern, but concluded that the prohibition on regulation of services that use the Internet's unique identifiers or the content that they carry or provide does not ~~act as a restraint on~~ prevent ICANN's ~~contracting authority~~ from using its authority to enforce compliance with registry-registrant commitments to the extent consistent with ICANN's Mission."

NCSG is also concerned about paragraph 224, which also seems to undermine ICANN's commitment to a narrow mission. In this Principle, ICANN commits itself to recognize that "governments and public authorities are responsible for public policy and duly take into account the public policy advice of governments and public authorities." The prior version of this language said that ICANN would take governmental advice into account, but qualified it with the statement that it would react to such advice "in accordance with the bylaws and to the extent consistent with these fundamental commitments and core values." NCSG believes that it was a serious mistake to delete that language. Some members of the GAC objected to this language because they thought that it limited the kind of advice they can offer. In fact, it does not impose any limitation on the GAC. The GAC and anyone else is free to offer any advice they like but ICANN's board should only *act* on advice that is consistent with its mission, fundamental commitments and core values. As originally worded, this commitment clearly prevented ICANN

from acting on advice if it was inconsistent with its mission, commitments and core values. Now that restraint is gone. If “advice from public authorities” constitutes a get-out-of-jail-free card for the ICANN board, then ICANN can do anything, including abuse its powers and break its own bylaws. Note that the current language does not even specify that the advice ICANN will ‘duly take into account’ must be formal consensus advice from the GAC. Apparently, any public policy advice from any public authority or government will do. This is not an enhancement of ICANN accountability but an abdication of it. We therefore urge the CCWG to reinstate the original intent of paragraph 224 by amending it as follows:

While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, and academia, recognizing that governments and public authorities are also responsible for public policy and duly taking into account the consensus public policy advice of the Governmental Advisory Committee ~~governments and public authorities while reacting in accordance with the Bylaws and in a manner consistent with these Fundamental Commitments and Core Values.~~

2. The Community Mechanism and its vote allocations

NCSG strongly supports empowering the bottom up community to create checks and balances on board action. After much deliberation, the CCWG settled on a sole, incorporated “member” representing the various stakeholder bodies as the legal means by which community powers would be enforceable on ICANN. The community powers are what will, in the absence of the NTIA’s ability to pull the IANA contract, hold the ICANN board accountable to the global stakeholder community. This “member” could take action upon a vote facilitated by a proposed Sole Member Community Mechanism (SMCM). The CCWG’s proposal currently allocates 5 votes each to the GNSO, ccNSO, ASO, GAC and ALAC, and 2 votes each to the RSSAC and SSAC. While we support the powers given to the SMCM, the NCSG has several concerns about its resilience, operationalisation and structure. These concerns are serious enough and broadly supported enough to prevent us from supporting a transition based on a voting allocation that destabilizes the carefully constructed balance of interests in ICANN.

Compared to other models that were considered, e.g., the designator or direct membership models, the accountability provided by the SMCM is very indirect. In the designator or direct membership models, each SO as a member could exercise powers in accordance with California law. But in the case of the sole member Community Mechanism (SMCM), that entity must come to an agreement (i.e., a supermajority vote) with all other SOs and ACs before any powers can be exercised. In this regard, the SMCM actually dilutes accountability to the SOs.

There are still some ambiguities about how the Community Mechanism would work, which creates some risk that the process could be gamed by ICANN or others. For instance, there is not enough information about the Community Forum, where the discussions of the exercise of the community powers would occur. Also, most of the names community SOs and ACs (e.g., GNSO, ALAC, SSAC) are completely dependent on ICANN funding and staff support. Could

ICANN influence a SMCM decision by leveraging these resources? What if ICANN were to simply ignore a SMCM decision? According to the proposal the SMCM will have no assets or staff; thus it is unclear how it would use California law to enforce its rights. We would like to see this clarified.

Most important, the proposed SMCM structure allocates votes in a way inconsistent with ICANN's current balance of stakeholders and its current board selection structure. While we are not 100% unified on this question, there is a very strong rough consensus that the voting allocation is unacceptable.

With the separation of the IANA functions operator and ICANN proposed by the CWG-Stewardship, ICANN is now more focused, as it should be, on policy development for domain names. This means that the two names-oriented Supporting Organizations, the ccNSO and the GNSO, would become the key arenas for domain name policy development after the IANA transition. ICANN's role as the ratifier of global policies for numbers also justifies membership status for the ASO, as the ASO represents an extensive global community for policy development organized around Regional Internet Registries. The Supporting Organizations are the structures with the greatest interest in ensuring that the ICANN board is held accountable for the policies it passes and implements.

On the other hand, it does not make sense to provide votes to most Advisory Committees. The SSAC and RSSAC are sources of expert advice on specific topics for the board and the policy development organizations, not generic policy development structures. Both RSSAC and SSAC members are appointed by the ICANN board, which undercuts their ability to independently hold the board accountable. Furthermore, many members are already well-represented in ASO, GNSO and ccNSO. As for the GAC, it does not select board members and is barred from doing so by the current bylaws. The GAC is not supposed to be a policy development entity, but a provider of advice to the board on the policies developed by the bottom up process. The legal status of a collection of national governments and intergovernmental organizations becoming part of an unincorporated association under the umbrella of ICANN seems extremely odd, and will probably prove to be unacceptable to the GAC itself.

The ALAC is the only advisory committee afforded a bylaws-defined role to hold ICANN accountable and to appoint a board member. But ALAC's influence on the composition of the board is limited and does not match the role of an SO. If one puts the two current ICANN board selection mechanisms (Nomcom and direct election) together into a weighted average, the ALAC selects 3.64 board members out of 16, or 23% the total. The SOs account for the remaining 77% of the board selections. Even if the denominator is decreased to 15 (accounting for ICANN's CEO on the board), the weighted average only increases to 24%, still less than a quarter of the total.

However, in the voting allocation proposed by the CCWG, Advisory Committees would have almost half (48%) of the votes. This is at least double their current share, and puts them near

parity with the Supporting Organizations in terms of influence.¹ In the proposed voting allocation, ALAC and GAC, by themselves and without support from any SO, could:

- block any change in fundamental bylaws
- block an attempt to recall the entire board
- block the removal of a board member appointed by Nomcom
- block the rejection of a budget or operating plan by the rest of the community

The NCSG agrees with the ICANN board's concerns about the changing role and disproportionate influence given to advisory committees in the currently proposed SMCM.² The CCWG's proposed vote allocation would be a substantial departure from ICANN's existing architecture. It would constitute a fundamental shift of power in ICANN toward advisory committees, and an unacceptable revision of ICANN's bottom-up, multistakeholder model.

NCSG also disagrees with the part of the plan that allows ACs or SOs to decide when or whether to join the SMCM. We believe the stability of the governance structure requires that the distribution of votes for specific actions should be known in advance, and that the reforms should only proceed when we know exactly which entities are and are not part of the SMCM. Given the importance of the SMCM in overall accountability, and the possibility that it might be used to disrupt the organization's functioning, leaving participation in the mechanism open is not a good idea.

We note that the CCWG proposal actually admits that there was no real consensus on the proposed voting allocation. It said only that the proposed option "attracted the most support," a standard that falls far short of consensus. The proposal noted that 3 other "alternative configurations" were floated, which reinforces our belief that the current proposal does not represent a solid consensus, and that the implications of the various options have not been fully thought through. As such, the CCWG must revise its proposed SMCM voting allocation, and conduct stress tests on the results.

NCSG would favor a voting allocation based on ICANN's existing balance of stakeholders and board selection structure. We favor a vote allocation that mirrors the current direct selection of board members, i.e., with each SO allocated 2 votes and the ALAC allocated 1 vote. (As long as the proportions remained the same, the number of votes could be increased by any multiple to provide an opportunity for wider representation within the SOs and AC - e.g., each SO could be given 10 votes and ALAC could be given 5 to allow for regional or SG or constituency representation). Neither of the expert ACs nor the GAC should participate in the SMCM.

¹ See the blog post "CCWG Community Mechanism Threatens to Upset ICANN Balance," Internet Governance Project, August 11, 2015 for a complete quantification of the voting allocations. <http://www.internetgovernance.org/2015/08/11/ccwg-community-mechanism-threatens-to-upset-icann-balance/>

² <https://forum.icann.org/lists/comments-ccwg-accountability-03aug15/pdf9yXuAWTTa8.pdf>

3. Human Rights definition and application

The CCWG solicits comments on two different ways of formulating ICANN's commitment to human rights. Option one expressed ICANN's commitment "to respect the fundamental human rights of the exercise of free expression and the free flow of information." Option 2 expressed ICANN's commitment more broadly, "Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights."

With a few exceptions, NCSG tends toward support for the second, more general formulation. The first formulation is too limited because other human rights, such as privacy, are relevant to ICANN policies. We do, however, recognize that a generic reference to human rights might not work as effectively as more specific requirements, and that freedom of expression and privacy are two human rights most directly relevant to ICANN's policy activity. Our preference, therefore, would be to formulate the commitment this way:

"Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights, in particular freedom of expression and privacy."

4. Reconsideration Request

NCSG wishes to express its support for the CCWG's proposal for handling Reconsideration requests. Currently, when a Reconsideration Request comes in, it goes first to the ICANN Legal Department for an analysis. ICANN Legal's report is then provided to the board. As ICANN's lawyers, the legal department has a fiduciary obligation to protect the corporation; it has no incentive to assess the merits of a Request taking ICANN's other responsibilities to the community into consideration. Therefore, the board's understanding of the issues in the RR can be biased and incomplete when it relies on its attorneys for the evaluation. The CCWG proposal changes this, for the better. It gives the Ombudsman (instead of ICANN legal) the initial responsibility for processing the requests and advising the board on their merits.

5. Role of GAC and treatment of advice

One of NCSG's member organizations, the Heritage Foundation, raised a concern that most of us share.³ There is an inconsistency between GAC's status as a body whose advice is privileged in the bylaws with special board attention and its status as a voting member of the proposed Community Mechanism with the same rights as SOs. We agree with Heritage that GAC cannot have it both ways. If it is given any votes in the SMCM, it must give up its status as any entity whose formal advice can oblige the Board to try to find a mutually acceptable solution in the case of disagreement.

NCSG also has serious concerns about the wholesale importation of the Affirmation of Commitments' language to "adequately address issues of competition, consumer protection,

³ <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/pdf3jSALMHMFt.pdf>

security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protection.”Some of those concerns (e.g., consumer protection, sovereignty) could easily take ICANN outside of its narrow mission or be interpreted by the actors involved in an expansive way to advance special interests.. Given ICANN’s status as a global coordinator and policy maker for the DNS, we are unsure what kind of commitments “sovereignty concerns” would create.