

## **Motion on GNSO Joint Position on CCWG-Accountability Third Draft Proposal**

Whereas,

1. The GNSO Council, together with other ICANN Supporting Organizations and Advisory Committees, chartered the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) on 13 November 2014 'to deliver proposals that would enhance ICANN's accountability towards all stakeholders.
2. The CCWG-Accountability published its third draft proposal for public comment on 30 November 2015 (see <https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en>).
3. All GNSO Stakeholder Groups (SGs) and/or Constituencies (Cs) submitted their input on the third draft proposal and its 12 recommendations.
4. A GNSO Council sub-team was formed to review the input submitted by the GNSO SG/Cs and make a recommendation to the GNSO Council concerning a possible joint GNSO position on the third draft proposal .
5. The GNSO Council has reviewed the input provided by the sub-team on the CCWG-Accountability Third Draft Proposal.

Resolved,

1. The GNSO Council views on the recommendations contained in the CCWG-Accountability Third Draft Proposal are as follows:

## Overview of Comments and Council Support Level

For further details on the Comments, or for items noted as GNSO divergence, please review the SG/C submissions to the public comment forum

<b>Recommendation #1</b>	Establishing An Empowered Community For Enforcing Community Powers for more information
<b>GNSO Council Support</b>	Limited Support with some opposition
<b>Comments</b>	<p>Some in the GNSO have identified a clear link with recommendation #11 and are of the view that the current balance between SO/AC needs to be preserved in the empowered community, especially with respect to the GAC.</p> <p>As a condition of support, the GNSO requires expanded transparency, including a right of inspection and improvements to the DIDP</p> <p>The GNSO requires a complete understanding of the differences between this recommendation and the Single Member Model that was initially proposed.</p> <p>If a particular SO has specific area of focus in relation to the budget, it should have proportional voice in Community decisions that affect it.</p>

<b>Recommendation #2</b>	Empowering The Community Through Consensus: Engage, Escalate, Enforce for more information
<b>GNSO Council Support</b>	General Support
<b>Comments</b>	Concerns have been expressed in relation to the proposed time frames, which are deemed unworkable in practice. Furthermore, questions have been raised in relation to liability relating to directors. There is unanimous support among the GNSO on maintaining the location of the ICANN HQ in California.

<b>Recommendation #3</b>	Redefining ICANN's Bylaws As 'Standard Bylaws' And 'Fundamental Bylaws' for more information
<b>GNSO Council Support</b>	General Support with qualifications
<b>Comments</b>	<p>Inspection rights must be included as a fundamental bylaw.</p> <p>Furthermore, some have noted that approval is conditioned upon a change to reflect that Member approval be replaced with Designator approval in Articles of Incorporation item 9. It was also pointed out that the proposal fails to discuss the Community's role in approving (or rejecting) changes to the Articles of Incorporation, and whether the Articles would be treated like Fundamental Bylaws or standard Bylaws for such purposes. Some are of the opinion that ICANN's Articles of Incorporation must be given the same treatment as Fundamental Bylaws, as Articles of Incorporation, by their nature, are even more "fundamental" than Bylaws.</p>

<b>Recommendation #4</b>	Ensuring Community Involvement In ICANN Decision-Making: Seven New Community Powers for more information
<b>GNSO Council Support</b>	General Support with Qualifications
<b>Comments</b>	<p>The GNSO’s support for this Recommendation is conditioned upon the following clarifications and modifications:</p> <ul style="list-style-type: none"> <li>• As noted above, inspection rights and enhancements to DIDP</li> <li>• As noted above, the proposal must include provisions that shield the Community participants from liability resulting from removal of Board members.</li> <li>• As noted above, the proposed time frames for Community decision-making are unworkable in practice</li> <li>• Removal of a Director appointed by an SO/AC shall be at the direction of the appointing SO/AC and should not be subject to any list of defined conditions for removal.</li> <li>• The GNSO supports the provision that DIDP disputes are within the scope of permissible subject matter for an IRP. It should be made clear, however, that access to the IRP for this type of dispute should be allowed for all parties eligible to file a DIDP and not solely reserved for or subject to the approval of the Empowered Community itself.</li> <li>• The recommendations require further clarification as to the ability for the community to enforce a ‘co-decision’ this remains an outstanding issue for many areas of the community with the process needing clarifications and more certainty in the areas of where the community has enforcement requirements as identified in the CWG process.</li> </ul>

<b>Recommendation #5</b>	Changing Aspects Of ICANN's Mission, Commitments And Core Values for more information)
<b>GNSO Council Support</b>	General Support with (possibly divergent) Conditions
<b>Comments</b>	<p>The GNSO’s support for this Recommendation is conditioned upon the following clarifications and modifications, which the GNSO recognizes may be divergent or even contradictory in certain cases:</p> <ul style="list-style-type: none"> <li>• The GNSO supports Rec #5 provided that these aspects of the 3rd draft proposal are retained in the final proposal: 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.39 “For the avoidance of uncertainty, the language of existing registry agreements and registrar accreditation agreements should be grandfathered.</li> <li>• GNSO conditionally supports the revised statement of ICANN’s mission, subject to the following: (1) The Bylaw clarifies that ICANN has a responsibility to enforce its agreements; (2) Satisfactory drafting of actual bylaws text, particularly with regard to clarifying the nature of “services” and ensuring that compliance with and enforcement of existing obligations (e.g., PICs and Section 3.18 of RAA) are not weakened; and (3) IRP may be invoked for failure to act (e.g., failure to enforce contracts).</li> <li>• GNSO seeks clarity on the Stress Tests 29 and 30, which treat contract enforcement as a threat to ICANN rather than as an essential way in which ICANN fulfills its mission. While revisions have improved these Stress</li> </ul>

	<p>Tests somewhat, they remain misleading and should be removed.</p> <ul style="list-style-type: none"><li>• The GNSO supports proposals that limit ICANN’s activity to its Mission and Core values only.</li><li>• GNSO recognizes that the proposed language for Bylaws revisions is still being finalized and reserve judgment on the wording until it is finalized.</li><li>• ICANN’s Articles of Incorporation should be amended to clarify that “the global public interest” will be determined through a multi-stakeholder bottom-up process. Without such a clarification, ICANN’s board is able to unilaterally substitute its own judgment for that of the community in determining what is in the global public interest as ICANN interprets its mission.</li><li>• The words “of the DNS” were, we believe, inadvertently omitted from the text of the Mission Statement in the 3rd Draft Report and need to be restored.</li></ul>
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<b>Recommendation #6</b>	Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out Its Mission for more information
<b>GNSO Council Support</b>	Limited Support with some opposition
<b>Comments</b>	<p>The GNSO conditionally supports the continued evolution of this concept. While some components of the GNSO support the proposal as written others have proposed that the work is done in Workstream 2 rather than in this context noting that the current version of the by-law may be premature give the other policy work related to Human Rights and the many open issues, such as (1) which "human rights" will be covered, (2) what is ICANN's role, if any, in enforcement, and (3) which body of law should apply, etc. The Council should review a draft of the final version of this Recommendation and attempt to determine the level of support for inclusion of this Recommendation at that time and provide feedback to the CCWG on the viability of such a revised draft prior to the issuance of the CCWG's next Report.</p>

<b>Recommendation #7</b>	Strengthening ICANN's Independent Review Process for more information
<b>GNSO Council Support</b>	General Support
<b>Comments</b>	<p>The GNSO supports this recommendation. Comments made by C's and SG's focus mostly on implementation details including, (1) standing to bring a claim, (2) elements of a claim, including the need to add "failure to act" as a basis, (3) the chilling effects of loser pays model, (4) community involvement in the selection and training of panelists, (5) language of proceedings to ensure fairness outside of common law jurisdiction, and (5) a warning process by which a Panel could indicate early in the process that a claim is likely to be held frivolous, etc. While many such details remain to be worked out, the GNSO Council is not sensing any major show-stoppers on this Recommendation if the CCWG addresses the concerns raised in public comments.</p>

<b>Recommendation #8</b>	Improving ICANN's Request For Reconsideration Process for more information
<b>GNSO Council Support</b>	General Support
<b>Comments</b>	<p>The following supplementary recommendations were submitted:</p> <ul style="list-style-type: none"> <li>• An independent party, such as the Ombudsman, should review and advise the full ICANN Board on an RR.</li> <li>• It is especially important that a neutral party (possibly the Ombudsman) reviews the requests first and advises the board on their merit worthiness accordingly.</li> <li>• All aspects of an RR must be completely transparent and fully communicated to all ICANN stakeholders in a timely manner. This requires the joint design and implementation of the necessary reporting mechanisms by all ICANN stakeholders.</li> <li>• The recommendation should also make clear that (in)actions of the PTI (including timing) are included within the scope of Reconsideration Request Process.</li> </ul>

<b>Recommendation #9</b>	Incorporation of the Affirmation of Commitments for more information
<b>GNSO Council Support</b>	Limited Support with some opposition
<b>Comments</b>	<p>The GNSO supports Recommendation #9, with some qualification:</p> <ul style="list-style-type: none"> <li>• Opposition to some elements was raised by two groups (NCUC and NCSG).</li> <li>• Qualified support was indicated by two groups (BC and IPC).</li> <li>• The following supplementary recommendations were submitted: <ul style="list-style-type: none"> <li>○ NPOC supports Recommendation #9, but seeks clarification with regard to how actions around the WHOIS and competition, consumer trust and consumer choice would be handled within the context of ICANN’s Bylaws.</li> <li>○ The BC notes that two of the AoC reviews (Whois and gTLD expansion) relate exclusively to gTLDs, so the BC believes that GNSO stakeholders should be given the opportunity for greater representation on those review teams. 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.</li> <li>○ The NCUC supports the continuation of the ATRT as being compatible with the CCWG’s mission and efforts, but does not support the continuation of the other AoC reviews.</li> <li>○ The NCSG does not wholly support</li> </ul> </li> </ul>

	<p>Rec. #9. The NCSG supports continuation of the ATRT, but does not support continuance of the other AoC reviews, which lack a bottom-up and consensus based constitution.</p> <ul style="list-style-type: none"><li>○ The NCSG believes a special emphasis must be placed on the recommendation related to access to internal documentation defined in paragraphs 60-67 of the draft report. Improving transparency at ICANN will be critical post IANA transition and those reforms cannot be postponed any longer.</li></ul>
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<b>Recommendation #10</b>	Enhancing the Accountability of Supporting Organizations and Advisory Committees for more information
<b>GNSO Council Support</b>	Limited Support with some opposition
<b>Comments</b>	<p>There is some concern within the GNSO with both the top down nature of accountability reviews and the exemption of the GAC from this community requirement.</p> <p>The unilateral control by the Board of periodic reviews of the SOACs would allow the Board to involve itself unfettered in the governance structure of SOACs. It is suggested that the review process should be controlled and initiated by the community, not the Board, so that the bottom up nature of ICANN governance may be maintained.</p> <p>It is also troubling that the GAC, further empowered if recommendations 1 and 11 are adopted, is exempt from the same periodic reviews as the other SOACs. All participants in the Community Mechanism should be subject to equivalent accountability reviews.</p>

<b>Recommendation #11</b>	Board obligations regarding GAC Advice
<b>GNSO Council Support</b>	No support
<b>Comments</b>	The GNSO does not support this recommendation. For further information, please see the SG/C comments submitted to the public comment forum in response to the CCWG-Accountability Third Draft Proposal public comment forum.

<b>Recommendation #12</b>	Committing to further accountability work in Work Stream 2
<b>GNSO Council Support</b>	General Support
<b>Comments</b>	The GNSO requires that the proposed interim bylaw require the ICANN Board to formally consider and/or adopt WS2 recommendations, and that these recommendations should be approved by the Board no later than the end of December 2016. Additionally, the GNSO requires that the WS2 effort continue to be supported by independent counsel, and that WS2 specifically include reviews of the Document Information Disclosure Policy (DIDP) and Whistleblower policy.

2. The GNSO Council instructs the GNSO Secretariat to share this GNSO Council input on the CCWG-Accountability Third Draft Proposal with the Chairs of the CCWG-Accountability as soon as possible.
3. Although this GNSO input is submitted after the close of the public comment period, the GNSO Council expects the CCWG-Accountability to give this input due consideration as it is the accumulation of the individual GNSO SG/C positions that were submitted within the deadline.
4. The GNSO Council appreciates all the efforts of the CCWG-Accountability to deliver its final proposal to the Chartering Organizations in a timely manner and looks forward to considering the final proposal in due time.