



**Comment on  
Enhancing ICANN  
Accountability Process**

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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 welcomes the opportunity to comment on ICANN's current proposal for a process to develop accountability enhancements. Our members were disappointed, along with the broader community, that earlier comments were ignored by ICANN, and that it was only after unified community statements and a reconsideration request that ICANN management addressed some of the process concerns.

To date, ICANN's approach has not resolved our most significant concerns:<sup>1</sup>

### **A 'Coordination Group' instead of a traditional Cross Community Working Group**

The BC recommends that a traditional Cross Community Working Group (CCWG) be formed to develop accountability enhancement proposals. However, ICANN's plan discards the proven CCWG model and instead proposes a wider community group plus a limited participation Coordination Group to develop recommendations. The BC continues to prefer a traditional CCWG with open membership and in control of its own charter, but we will respond to ICANN's proposal for purposes of this comment.

**Composition of the Working Group.** While ICANN's proposal allows open participation in the 'Cross Community Group', decisions about recommendations would be made in a 'Coordination Group' with strictly limited participation. Moreover, ICANN proposes to place 7 outside experts into the Coordination Group, and their views could directly affect consensus recommendations for new accountability mechanisms.

ICANN should clarify the proposed role of these experts in developing, reviewing, and revising accountability proposals. ICANN should also describe the qualifications of experts chosen and how their expertise would materially improve upon expertise available within the ICANN community.

We also ask that participation in the Coordination Group from the community be broadened to at least one representative *per constituency*, rather than one representative per GNSO *stakeholder* group, which is the limit proposed by ICANN management. Individual constituencies have diverse interests so it is unrealistic to expect one stakeholder group representative to fully represent the perspectives of member constituencies. Specifically, the Business Constituency, Intellectual Property Constituency, and Internet Service & Connection Providers Constituency

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<sup>1</sup> ICANN's current proposal is at <https://www.icann.org/resources/pages/process-next-steps-2014-08-14-en>

Also see the BC Reply Comment on Enhancing ICANN Accountability, 30-Jun-2014, <http://www.bizconst.org/wp-content/uploads/2014/07/BC-reply-comment-on-Enhancing-ICANN-Accountability-FINAL.pdf>

should each have a slot on the Coordination Group. By the same token, the two constituencies in the Non-Commercial Stakeholders Group should also have their own slots.

The Business Constituency seeks individual constituency representation, not because it seeks greater relative power for business, but because we consider it essential for the Coordination Group to be informed by three distinct business groups with a vital stake in the continued open, secure and stable Internet.

**Scope of Accountability Mechanisms and Charter of the Accountability WG.** ICANN's latest proposal would have the ICANN Board review and approve the charters for both the Community WG and the Coordination Group. ICANN justifies this Board review in case "the charters exceed the scope of this process."<sup>2</sup> This review would allow the present board alone to determine the scope of the entire accountability process. It would also severely limit the opportunity for the community of Internet users and registrants to impose new accountability mechanisms on ICANN's board and management.

We suggest that the accountability working groups develop their own charters in coordination with each other and in consultation with the broader community. Board comments on the charters would be welcomed, but the final approval of the charters should lie with the working groups. We do not believe the ICANN Board should be empowered to amend or otherwise constrain the charters.

**Board Approval of Accountability Recommendations.** ICANN's recent proposal gives ICANN's board the power to accept or reject some or all of the working group recommendations for enhancing accountability. As the BC noted in its May comments, the Board should be required to explain its rationale for rejecting any recommendations. Moreover, there should be a predefined mechanism for the community to appeal the Board's decision to reject or alter any recommendations.

All Board proceedings regarding the composition, charter, and recommendations on enhancing ICANN accountability should be transparent to community members. That would include publication of any advice provided by ICANN staff or counsel as to legal concerns with accountability mechanisms being proposed.

**Timing and Sequence.** ICANN's proposal seems to reflect management's appreciation that community support and broad participation are essential to the success of this process. While ICANN is describing the IANA and ICANN Accountability tracks as "interrelated and interdependent", the BC has a more specific view on timing and dependency: IANA transition should follow approval of recommendations on Enhancing ICANN Accountability. This sequential dependency should be acknowledged by ICANN board and management – before starting the process of designing new accountability mechanisms.

The points above are based upon previous comments, positions, and statements by the BC on the issue of enhancing ICANN accountability, as described below.

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<sup>2</sup> ICANN's current proposal, footnote 3, at <https://www.icann.org/resources/pages/process-next-steps-2014-08-14-en>

## Joint Questions from entire ICANN Community

On 3-Sep-2014 all advisory committees and stakeholder groups—including the GAC and ALAC—submitted a joint letter with 20 questions about ICANN’s proposed accountability process.<sup>3</sup> On 19-Sep, ICANN answered those questions and raised the general issue of trust. The BC’s reaction to those answers and cover letter are described next.

First, this discussion is not about whether the community ‘trusts’ the current ICANN board. It’s about trusting future boards — after we no longer have the leverage/influence of the US Government to rely upon. This IANA transition is the community’s chance to establish mechanisms to rein-in a future board that would put ICANN’s corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging that the board is obliged to protect the corporation’s interests first, as required by ICANN bylaws:

Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

Should there be any confusion about whether the bylaws refer to ‘ICANN’ as the corporation or the community, we cite ICANN’s own *Management Operating Principles* (2008, p. 5):

"The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."<sup>4</sup>

ICANN doesn’t have shareholders in the traditional sense, so we seek to give voice and voting power to the community. That’s why the BC [proposed](#) a permanent cross-community working group empowered with 6 ways it could act as a check on the ICANN board:

1. Name members of Review Teams created per the *Affirmation of Commitments* (after making the *Affirmation* part of ICANN Bylaws)
2. Appoint members of Independent Review Panel (IRP)
3. Invoke IRP to review decisions by ICANN management or board
4. Review & approve ICANN budgets
5. Review & approve changes to ICANN Bylaws
6. As an extraordinary measure, ‘Spill’ the ICANN board and trigger selection of new directors

Second, there may actually be an issue of trust, but not in the way suggested in the Chegade-Crocker response to our joint questions. With the appearance of top-down control being imposed by ICANN board and management over the accountability process, it’s clear that ICANN the corporation does not trust the community to know what’s in our own best interests. That feeling has been building over the last year, with the top-down imposition of outside expert strategy panels; the lack of action to prevent both singular and plural forms of the same TLD; and the way in which staff selectively summarizes public comments (see our [Reconsideration Request](#)).

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<sup>3</sup> Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

<sup>4</sup> ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf>

## BC Positions on 6-May Public Comment Period on Enhancing ICANN Accountability

On 6-May-2014, ICANN opened a public comment period on Enhancing ICANN Accountability, to examine “how ICANN remains accountable in the absence of its historical contractual relationship to the U.S. Government and the perceived backstop with regard to ICANN's organization-wide accountability provided by that role.”<sup>5</sup>

The BC welcomed this discussion, signaling that ICANN management acknowledges the need for new accountability mechanisms and structures after the U.S Government ends its IANA contract relationship.

In initial comments filed on 27-May, the BC raised the following five concerns about the proposed process and structure for this new ICANN Accountability Working Group<sup>6</sup>.

**1. Composition of the Working Group (WG).** ICANN is inviting community members “to have their names put forward” for participation on the WG.<sup>7</sup> We note that ICANN suggests, “sub-working groups on specialized subject areas will be useful and open to all including experts.” But our concern is with the potentially restricted composition of the main WG that would be tasked with developing written recommendations for enhancing ICANN Accountability.

Several BC members are interested in participating, so we are concerned that ICANN might be proposing to limit the size of the WG. Moreover, we would object if there were to be an equal allocation of limited slots among Advisory Committees and Stakeholder Organizations.

We have experience with ICANN Affirmation Review teams where members are appointed and apportioned to AC/SO groups. And we have experience with cross-community working groups where participation was not constrained. We are asking which of those models is being proposed for Enhancing ICANN Accountability, and we express our strong preference for the open participation model used in most cross-community working groups. It would benefit all community members if ICANN were to clarify these questions before the end of the public comment period, so that reply comments could be more relevant and responsive.

**2. Scope of Accountability Mechanisms.** ICANN listed an inventory of accountability mechanisms that includes existing documents such as the Affirmation of Commitments and ICANN Bylaws. We assume that this inventory is suggestive and not restrictive of the available accountability mechanisms. We also assume that the WG could recommend significant changes to ICANN Bylaws, such as incorporating the Affirmation Reviews into the Bylaws themselves. If our assumptions do not fit with ICANN board and management expectations, then we ask ICANN to clarify any scope limitations before the end of the public comment period.

**3. Charter of the Accountability WG.** On the web page for *Enhancing ICANN Accountability*, there is no mention of creating a charter for this WG. The BC assumes that the WG could create its own charter after it convenes, drawing upon ICANN's proposed questions and inventory of accountability mechanisms. We ask ICANN to affirm our assumption or clarify its expectations

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<sup>5</sup> <https://www.icann.org/public-comments/enhancing-accountability-2014-05-06-en>

<sup>6</sup> BC Initial comments, <http://www.bizconst.org/wp-content/uploads/2014/07/BC-initial-comment-on-Enhancing-ICANN-Accountability.pdf>

<sup>7</sup> <https://www.icann.org/resources/pages/enhancing-accountability-2014-05-06-en>

regarding a charter for this WG. We note that the GNSO Council recently submitted a draft charter for IANA Transition, which could be amended for use by the ICANN Accountability WG<sup>8</sup>.

**4. Criteria for Board Approval of Recommendations.** ICANN proposes that a draft WG report would be posted for public comment, and the final report would go to the ICANN Board to, “**consider whether to adopt all or parts of it**, and direct the CEO to implement those parts it has accepted once that decision is made.”

The BC is concerned that widely supported recommendations for accountability enhancements could still be rejected by ICANN’s Board. This is a very real risk in a process where the community could well recommend significant enhancements that affect the autonomy, accountability, and transparency of ICANN Board operation.

Before the end of this public comment period, we request that ICANN inform the community of criteria the Board could use to reject WG recommendations. ICANN should also implement a process for explaining the Board’s decision to reject WG recommendations, along with a mechanism for the community to appeal the Board’s rejection decisions.

Moreover, we also recommend a process to review the subsequent **implementation** of recommendations by ICANN management, perhaps as part of future Accountability & Transparency Reviews required under the present Affirmation of Commitments.

**5. Timing.** ICANN’s proposal to convene the WG before London meeting is ambitious but possible, absent controversy over limits placed on WG composition. However, the BC has a broader concern about timing, regarding the relationship between ICANN Accountability enhancements the transition of IANA functions. As we noted in our comments in IANA Transition, the BC believes that IANA transition should follow approval of recommendations made by the WG on Enhancing ICANN Accountability.

### **Joint Statements regarding the Accountability Process**

In addition to the BC comments described above, the BC also joined a range of community members in making joint statements, filing formal requests, and providing specific questions. At the ICANN London meeting on 26-Jun-2014, the BC joined its GNSO partners in this statement:

The GNSO community took up Fadi’s challenge from the opening ceremony to seek harmony this week in London. Instead of a song or two, the statement we are about to read represents an unprecedented, yes, an unprecedented event. It only took us 50 meetings but I think the rarity of what you’re witnessing this afternoon sends a very strong message about our views.

The GNSO community, with all of our diversity and occasionally competing interests, has come together to unanimously, unanimously as a community, support the following:

The entire GNSO joins together today calling for the Board to support community creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed-upon compact with the community.

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<sup>8</sup> 8-May-2014 email from Jonathan Robinson, at <http://mm.icann.org/pipermail/ianatransition/2014/001013.html>

This deserves the Board's serious consideration. Not only does it reflect an unprecedented level of consensus across the entire GNSO community, it's a necessary and integral element of the IANA stewardship transition.

True accountability does not mean ICANN is only accountable to itself or to some vague definition of the word. It does not mean that governments should have the ultimate say over community policy without regard to the rule of law. Rather, the Board's decision must be open to challenge and the Board cannot be in position of reviewing and certifying its own decisions.

We need an independent accountability structure that holds the ICANN Board, staff, and various stakeholder groups accountable under ICANN's governing documents, serves as an ultimate review of Board staff decisions, and through the creation of precedent, creates prospective guidance for the Board, the staff and the entire community. As part of the IANA stewardship transition, the multistakeholder community has the opportunity and responsibility to propose meaningful accountability structures that go beyond just the IANA-specific accountability issues.

We are committed to coming together and developing those recommendations for creation of these mechanisms. We ask the ICANN Board and staff to fulfill their obligations and support this community driven multistakeholder initiative.

## **Joint Letter from GNSO Stakeholder Groups and Constituencies**

On 26-Aug-2014 the BC signed a Joint letter of the entire GNSO plus the ALAC and GAC, requesting additional time to prepare questions & comments on ICANN's proposal<sup>9</sup>. We note that ICANN management accommodated our joint request by opening the present public comment period.

## **Reconsideration Request**

On 29-Aug-2014 the BC joined the Non-Commercial Stakeholders Group and the Registries in filing a **Reconsideration Request** to challenge ICANN management's decision to ignore express community preferences in making its current proposal.<sup>10</sup> This reconsideration request is still active, and we anticipate a response by the ICANN board by early October.

## **Note**

The BC has met ICANN's request that this round of comments focus on the process proposed, and not on the substance of possible accountability enhancements. Note, however, that the BC has also provided substantive suggestions for increasing ICANN accountability.<sup>11</sup> In that comment, the BC addressed the 6 questions ICANN posed in the public notice, and proposed ten 'stress tests' that could help to design and assess new accountability mechanisms.

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<sup>9</sup> <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-et-al-26aug14-en.pdf>

<sup>10</sup> Reconsideration Request, <https://www.icann.org/en/system/files/request-bc-rysg-ncsg-29aug14-en.pdf>

<sup>11</sup> BC Reply Comment on ICANN Accountability, <http://www.bizconst.org/wp-content/uploads/2014/07/BC-reply-comment-on-Enhancing-ICANN-Accountability-FINAL.pdf>

Substantive enhancements to ICANN accountability will be taken up in the process that is the subject of these comments. For purposes of these comments, we have addressed only the process for enhancing ICANN accountability.

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These comments were drafted by Steve DelBianco, Aparna Sridhar, Angie Graves, and Marilyn Cade. It was approved in accordance with the BC charter.