

MEMORANDUM

TO: John Curran
Steve Ryan

FROM: Douglas N. Varley
William M. Klimon

CLIENT: American Registry for Internet Numbers (#11411)

DATE: July 15, 2015

RE: *(EARLY DRAFT)* Proposed Bylaw and Article Amendments for ICANN
Implementing the Empowered-Designators Governance Model

Introduction

We have prepared the attached amendments to the bylaws and articles of incorporation of the Internet Corporation for Assigned Names and Numbers (ICANN) to demonstrate how the empowered-designators governance model can be implemented within the framework of ICANN's current governing documents. The empowered-designators governance model, as developed in principle by ICANN's Cross Community Working Group, granting the following seven powers to ICANN's supporting organizations and advisory committees: (1) to reject ICANN's annual budget, (2) to reject ICANN's strategic or operating plan, (3) to approve changes to ICANN's standard bylaws, (4) to approve changes to ICANN's fundamental bylaws, (5) to appoint and remove individual directors, (6) to remove the entire board, and (7) to reject board decisions or actions relating to reviews of the IANA function. For purposes of the proposed amendments and this memorandum, we have consolidated (a) the powers to reject ICANN's budget and strategic or operating plan, and (b) the approval rights over the two types of bylaws. (With regard to the latter point, we also included approval rights over ICANN's articles of incorporation.)

This memorandum introduces the proposed bylaw and article amendments and discusses the legal authority for the amendments.¹ These proposals rely principally on three provisions of the California Nonprofit Public Benefit Law that can empower third parties who are neither directors nor statutory corporate members. Those provisions permit: third-party "designators" to appoint and remove nonprofit corporate directors;² named persons to have

¹ We think it is important to note that, in addition to amending ICANN's bylaws, its articles of incorporation must also be amended to implement the empowered-designator model. The articles are superior to the bylaws and in the event of any conflict the articles govern. Cal. Corp. Code § 5151(c). Therefore, the articles should not be silent on the designators and the right to approve amendments to the articles should not be left to the directors.

² Cal. Corp. Code §§ 5220(d), 5222(f).

approval rights over changes to a nonprofit corporation's governing documents;³ and third-party nonmembers to have and exercise any or all of the rights of corporate members.⁴ The latter provision is particularly important because it explicitly authorizes the corporation to grant specific members' rights to the designators without making them members.

Accompanying this memo we have included a list of proposed changes to ICANN's governing documents under the headings of the empowered-designator powers, as well as redlined versions of the articles and bylaws, showing our changes in the larger context of the governing documents themselves.

Assumptions

In order to provide working documents that illustrate how to implement the empowered-designators governance model, we have offered some technical modifications of the bylaws that the enhanced model might require. But, first, we have assumed that the supporting organizations and advisory committees that currently appoint directors would continue to do so under the formal rubric of "designators." Consequently, we left almost all of the present provision for appointing directors intact, realizing that some or all of those provisions may need to change in order to more effectively implement the governance model. We also bracketed the list of designators to indicate that the ultimate identity of the designators may be open for discussion. Second, we assume that each designator will be a legal person or would appoint a legal person. Third, we have assumed the "IANA Function Review" would be further defined in ICANN's amended governing documents, so as to give substance to the designators' power to review and reject related board action. But for purposes of the proposals made here, we have omitted any further discussion of the IANA Function Review. Finally, with regard to removal of the entire board, we have included a provision calling for a special accountability meeting. We have not addressed the exact mechanism for removing the entire board that presumably would follow an unsuccessful accountability meeting. Removal of the entire board could be accomplished by means outside of ICANN's governing documents (for example, by agreement of the directors or by post-dated or springing resignations).

Approval Rights Over the ICANN Budget and Strategic and Operating Plans

We have proposed changes to ICANN's bylaw provision on the annual budget (Article XVI, section 4) that require the board to give notice of the proposed budget and strategic or operating plan to the designators and permit the designators to reject the budget and plan by a supermajority of the designators.

³ Cal. Corp. Code §§ 5132(c)(4), 5150(d).

⁴ Cal. Corp. Code § 5056(b).

While the board of a California nonprofit corporation generally has the exclusive power to adopt the annual budget and corporate plans, the statute says that that power can be made subject, by specific provisions in the bylaws, to the right of the members to approve those actions.⁵ In turn, the statute permits that rights that could be held by members may be conferred upon any persons who are not members of the corporation.⁶ (Those persons would have only the rights conferred under the bylaws and would not become members of the corporation as a result of holding those rights.⁷) Therefore, these two statutory provisions permit ICANN's bylaws to grant designators the right to consider and reject ICANN's annual budget and plan.

Right to Approve of Amendments to Bylaws and Articles

We have proposed amendments to ICANN's bylaws (in Article XIX) and to Article 9 of the articles of incorporation requiring the consent of a supermajority of the designators to any amendment to the bylaws or articles.

The Nonprofit Public Benefit Corporation Law permits the bylaws to include a provision requiring the written approval of any amendment to the articles by a "specified person or persons other than the board or members."⁸ The California statute also permits the articles of incorporation to grant an approval right over amendments to the articles to specified persons who are neither directors nor members.⁹

Right to Appoint and Remove Individual Directors

Because ICANN's current bylaws include a system for appointment of directors by designators, as authorized by the statute,¹⁰ changes to those provisions can be minimal. But in order to formalize that status, we have proposed a new Article VI, section 2.4 in the bylaws and a new sentence in Article 4 of the ICANN's articles that indicate that the designators have the power to select the directors and any other rights that belong to designators under the statute.

Under the Nonprofit Public Benefit Corporation Law, each designator has these dual rights with regard to any director it appointed: (a) to remove that director without cause and (b) to block the removal without cause by the Board of that director by withholding consent.¹¹

⁵ Cal. Corp. Code § 5210.

⁶ Cal. Corp. Code § 5056(b).

⁷ See *Advising California Nonprofit Corporations* § 10.2; 3-19 Ballantine & Sterling, *California Corporation Laws* §§ 403.07[13], 407.01 (2015); 5 *California Transactions Forms – Business Entities* § 23:232 (2015); *Marsh's California Corporation Laws* § 32.05[A] (2015).

⁸ Cal. Corp. Code § 5150(d).

⁹ Cal. Corp. Code § 5132(c)(4); see also Cal. Corp. Code § 5812(a).

¹⁰ Cal. Corp. Code § 5220(d).

¹¹ Cal. Corp. Code § 5222(f)(1)-(2).

Accordingly, those rights inhere in ICANN's designators, but they are not explicitly acknowledged in ICANN's current bylaws. To address this, we have proposed a new Article VI, section 11.1 of the bylaws that makes explicit each designator's right to remove any director it appoints. With regard to removal by the board without cause, the current bylaws require notice of removal to a subset of the designators (to the Supporting Organizations and the At-Large Community but not to the Nominating Committee). We also propose a change to current Article VI, section 11.1 (renumbered as section 11.2) of the bylaws to conform to the statute by making consent by the relevant designator a necessary precondition to the removal without cause by the board.¹²

ICANN's current bylaws permit the Nominating Committee and the Supporting Organizations to fill vacancies of directors that they designated. But the same is not true of a vacancy of the director appointed by the At-Large Community, which is filled by the Nominating Committee. We have proposed a simple bylaw amendment (to Article VI, Section 12.1) that would give the right to each designator to fill any vacancy of a director appointed by that designator, which appropriately bolsters the rights of designators under the bylaws.

Right to Remove Entire Board

We have also proposed a new bylaw (Article IV, Section 5) that authorizes: (a) a supermajority of the designators to call a special accountability meeting of the designators requesting the ICANN board to address alleged violations of ICANN's governing documents or board resolutions, (b) representatives of the designators to attend that meeting, and (c) the representatives to put questions to the board. If the board does not respond appropriately to the special accountability meeting, the designators could activate whatever mechanisms have been adopted to remove the entire board.

Generally, under the California statute, the bylaws may include any provision for the management of the activities and for the conduct of the affairs of the corporation that is not contrary to law or the articles.¹³ Since there are no contrary provisions in the law or ICANN's articles, granting the right to the designators to hold a special accountability meeting is well within the discretionary ambit of the bylaws.

In particular, empowering designators to call and invite the directors to attend a special accountability meeting imposes no burden on the board's statutory right to govern the corporation.¹⁴ The board would not be required to take any action at a special accountability meeting. Nor would the holding of that meeting interfere with the board's regular authority to

¹² Cal. Corp. Code § 5222(f)(2).

¹³ Cal. Corp. Code § 5151(c).

¹⁴ Cal. Corp. Code § 5210.

oversee the corporation because the directors could refuse to answer questions and could call their own special meeting for discussion or the taking of any action the board is permitted to take.

Right to Reconsider Board Decisions Relating to Review of the IANA Function

Finally, we have proposed changes to ICANN's bylaw provision on the general powers of the board (Article II, section 1) that permit the designators to reject board actions or decisions relating to "IANA Function Review" recommendations.

Here again, as with the rights over the budget and the strategic or operating plan, we are relying upon the statutory permission for ICANN's bylaws to restrict board action by means of an approval right spelled out in the bylaws, which would ordinarily be exercisable by corporate members but which, in accordance with the statute, can be conferred in the bylaws upon the designators.¹⁵

¹⁵ Cal. Corp. Code §§ 5210, 5056(b).