5A Community Mechanism as a Sole Member Model

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In developing a mechanism to empower the ICANN multistakeholder community, the CCWG-Accountability agreed on the following:

- To enhance ICANN's accountability.
- To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.
- To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC structures (without making it impossible to change these in future).
- To address the CWG-Stewardship dependencies
- To include the following powers which would be legally enforceable
    - Reconsider/reject budget or strategic/operating plans (CWG-Stewardship dependency - Budget)
    - Reconsider/reject changes to ICANN "standard" Bylaws
    - Approve changes to "Fundamental" Bylaws (CWG-Stewardship dependency)
    - Appoint and remove individual ICANN Directors (CWG-Stewardship dependency)
    - Recall the entire ICANN Board (CWG-Stewardship dependency)
    - Reconsider/reject Board decisions relating to reviews of the IANA functions; including the procedure to implement a separation process relating to PTI (CWG-Stewardship dependency)

The first CCWG-Accountability draft proposal presented as a reference model for the community mechanism an SO/AC Membership Model.[1] However, there were significant concerns expressed in the Public Comment from 4 May – 3 June 2015, and in order to respond to the feedback received, the CCWG-Accountability initiated work on alternative solutions. Core

[1] For further detail on the proposed SO/AC Membership Model, please see the first draft proposal (Section 5.1.1). In addition, please refer to Appendix [G] that provides a comparison of the three models.

concerns about the ability of the ICANN community to fully participate in the new accountability framework were integral to the work in devising a new approach.

At the Paris meeting on 17-18 July 2015, the CCWG-Accountability considered 3 distinct models:

- The "**Empowered SO/AC Membership**" Model, which would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood (except for enforceability) and would allow opt-in re legal status.

- The "**Empowered SO/AC Designator**" Model, which would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood (except for enforceability) and would allow opt-in re legal status.

- The "**Community Mechanism as Sole Member** (**CMSM**)" Model, which is an alternative that builds upon the more favorable concepts in the other models and simplifies certain implementation aspects. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the CMSM.

Following discussions, and consultations with external legal counsel, the CCWG-Accountability concluded that it should proceed with the CMSM Model given the understanding that:

- It provides the required legal enforceability that the Empowered SO/AC Designator Model and Empowered SO/AC Membership Model could not.

- It removes the problematic requirement for some SOs/ACs that they become legal persons, whether to participate as a member in the Empowered SO/AC Membership Model or to enforce rights in both the Empowered SO/AC Membership Model and Empowered SO/AC Designator Model.

- It avoids the problem of differential statutory rights between SOs/ACs that become members and SOs/ACs that were not members, associated with the Empowered SO/AC Membership Model.

- By allowing action only upon support of the community through the Community Mechanism, it limits the issues related to the statutory rights of members associated with the Empowered SO/AC Membership Model which would allow members to dissolve ICANN and bring derivative suits.

The subsections below explain the CMSM Model. (As with any model, it is anticipated that there may be a level of detail that must be resolved in the drafting of appropriate Bylaws. Draft Bylaws implementing the model, as refined after this Public Comment process, will be subject to further review and approval by the ICANN community.)

5A.1 The Community Mechanism as Sole Member (CMSM) Model

As the name implies, under the Community Mechanism as Sole Member (CMSM) Model ICANN would remain a California public benefit corporation (also known as a not-for-profit corporation in some jurisdictions), but its internal governance structure would be transformed from a structure having no members, to a structure having a single member. This change will not require any re-incorporation or affect ICANN's status as a nonprofit or tax-exempt organization, and can be simply implemented through Bylaw amendments approved by the ICANN Board.

As required by law, the Sole Member in the CMSM Model would be a legal person created through the ICANN Bylaws as an unincorporated association. The CMSM Model would rely on direct participation by SOs and ACs in this sole member for exercise of community powers but would not require any of them to have legal personhood. The Sole Member would have no officers or directors and no assets.

ICANN's SOs and ACs would participate in this Sole Member. Participating in the Sole Member would allow the participating SOs/ACs, as a group, to provide instructions to the Sole Member to use its member powers to exercise the community powers only as directed by the SOs and ACs (for example, to approve a change to the ICANN Bylaws). Participating SOs and ACs would not meet as the Member, and no representatives would cast votes. The directions for voting would come from the SOs and ACs themselves. No SO or AC, or any individual, has to 'join' ICANN or the Sole Member in order to exercise their rights, and no new legal obligations arise for any ICANN participant.

It is important that before SOs/ACs make decisions regarding how to vote in exercising a community power, they discuss the matter among themselves and with each other. Sub-section 5AX below sets out the CCWG-Accountability's initial thinking on how to implement a simple system to do this, based on experience with the work of the CCWG itself.

The SOs and ACs that wish to participate in the Sole Member would simply indicate they wish to do so at the time of its creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to participate initially could opt in later as set out in the following sub-section. New SOs or ACs that were created at a later date could choose to participate in the Sole Member at any time, but this would require the current participants to approve this and the ICANN Bylaws to be amended to reflect their participation.

The SOs/ACs that participate in the Sole Member would do so according to a set of rules described in the ICANN Bylaws that would be created specifically for this purpose. The SOs/ACs could only instruct the Sole Member to exercise its powers as a group and would do so by using a voting mechanism as defined in the Bylaws (the exception to acting as a group is related to the appointing and removing of individual directors, as explained in the next paragraph). The rules would describe the number of votes each SO/AC would have in this process and the minimum number of votes required to instruct the Sole Member to exercise a power. Each power could have a different minimum number of votes required to instruct the Sole Member (e.g. approving a Bylaw change could require a minimum of 66% support vs. approving a fundamental Bylaw change could require a minimum of 75% support). Each SO/AC would be responsible for defining their processes for voting under these rules. The chair of each SO/AC would be responsible for communicating the votes or decisions of the SO/AC to

the ICANN Board. This pass-through of cumulative votes and decisions would become the act of the Sole Member.

ICANN directors would technically be appointed or removed by the Sole Member but the Sole Member would only be capable of acting at the direction of the entities specified in the Bylaws (SOs/ACs/NomCom) with respect to the appointment and removal of individual directors. In order to maintain the current arrangements for the appointment of directors, which is a requirement pursuant to the ICANN Bylaws, the Member rules expressed in ICANN's Bylaws would require the Sole Member to use its power to appoint or remove a director on the instructions of the specific SO/AC/NomCom responsible for appointing that director as per the current ICANN Bylaws, without requiring a community-wide vote.

Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of participants in the member (however all SOs/ACs can decide to participate, up until the creation of the Member or at a later date). Each of these SOs/ACs would have 5 votes on any proposal to instruct the member which requires a vote (for a total of 20 votes). There is no requirement or expectation than a participating SO/AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against).

Under these arrangements the decisions and powers of the CMSM could be enforced through the internal IRP process with the force of binding arbitration and, if necessary, further backed through judicial proceedings.

As a Member of ICANN, the Community Mechanism would enjoy all the rights that the law prescribes members as having. The general approach of the CCWG-Accountability is that none of these statutory rights should be easily exercised. As such, the recommendation is that to deploy any such statutory rights should require full consensus of the participating SOs/ACs (that is, unanimity). Note the detail of what these rights are, in Appendix XXXX of this report.

5A.2 Influence in the Community Mechanism

Drafting note: WP1 will be completing the details on voting thresholds.

5A.4. Governance models and community powers

Please refer to Appendix G produced by legal counsel.