

October 15, 2015

Comparison of Enforcement Mechanisms¹

The chart below compares how each the community powers set forth in the CCWG-Accountability 2nd Draft Proposal could be enforced (a) under the current bylaws model, (b) using the Multistakeholder Enforcement Mechanism proposed by the ICANN Board (MEM), (c) by a Sole Designator and (d) by a Sole Member. The columns comparing the three models (MEM, Sole Designator, and Sole Member) are shaded as follows to indicate similarities and differences between the three models: green where there is general agreement/consistency, yellow where there is relatively close alignment but with some differences and purple where there are material differences. “Direct enforcement” means the ability to go directly to court to enforce and “indirect enforcement” means the ability to enforce through the power to remove directors/recall the board.

| Community Powers | Current Bylaws Model | Means of Enforcement with Board’s MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|---|--|---|--|---|
| 1. Reconsider / Reject ICANN Budget or Strategy / Operating Plans | <ul style="list-style-type: none"> Board has fiduciary responsibilities for operating and strategic plans and budget, and those items are fundamentally committed to their business judgment. <p>Budget:</p> <ul style="list-style-type: none"> Bylaws require President (with the assistance of the CFO) to prepare and submit to the Board a proposed budget. The Board shall adopt the budget and publish on the website. <p>Strategic/Operating Plan:</p> <ul style="list-style-type: none"> Bylaws require Board to conduct a periodic independent review at least every five years. Results of reviews posted to | <ul style="list-style-type: none"> Board has fiduciary responsibilities for operating and strategic plans and budget, and those items are fundamentally committed to their business judgment. <ul style="list-style-type: none"> Bylaws would require Board to consult with community and reconsider budget, strategy, and operating plans. | <ul style="list-style-type: none"> Board has fiduciary responsibilities for operating and strategic plans and budget, and those items are fundamentally committed to their business judgment. <ul style="list-style-type: none"> Designator given right to trigger Board consultation up to specified number of times. | <ul style="list-style-type: none"> Powers regarding operating and strategic plans and budget would be reserved to the Sole Member so that Board fiduciary responsibilities do not preclude effective review. |

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|------------------------------|--|--|--|--|
| | <p>website for public review and comment, and considered by the Board no later than second scheduled meeting after such results have been posted for 30 days.</p> <ul style="list-style-type: none"> Board may adopt changes to strategic or operating plan upon two-thirds vote. | <p>Budget:</p> <ul style="list-style-type: none"> If community mechanism rejects, budget could proceed with restrictions if implemented over community objection. If implemented over community objection, budget may not represent an increase of more than 10% over previous year's budget. <p>Strategic/Operating Plans:</p> <ul style="list-style-type: none"> If community mechanism rejects, strategic or operating plan could proceed with restrictions if implemented over community objection. <ul style="list-style-type: none"> Community, through SOs/ACs, can reject Board's budget/plan up to two times. | <ul style="list-style-type: none"> Restrictions on budget and strategic/operating plans adopted by Board over Sole Designator objection. Subject to override if required by Board fiduciary duties. <ul style="list-style-type: none"> Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. | <ul style="list-style-type: none"> Sole Member given reserved power to reject Board budget up to two times, with Bylaw requiring ICANN to operate on the previous year's budget for the new fiscal year if the budget is rejected twice. <ul style="list-style-type: none"> Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. |
| <i>Enforcement mechanism</i> | <ul style="list-style-type: none"> Any person materially affected by a Board decision that is asserted to be inconsistent with the Articles of Incorporation or Bylaws may submit a request for IRP. | <p><i>* Enforcement via MEM *</i></p> <ul style="list-style-type: none"> If Board ignores Fundamental Bylaws requirements, SO/ACs, through MEM Issue Group, could invoke MEM process. MEM Issue Group (composed of | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Sole Designator has standing to enforce consultation right; direct enforceability by Sole Designator. <p><i>* Enforcement via IRP *</i></p> | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Sole Member has standing to enforce Bylaw restrictions on budget; direct enforceability by Sole Member. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|--|--|--|--|--|
| | <ul style="list-style-type: none"> IRP Panel shall determine whether actions Board action is consistent with Article of Incorporation or Bylaws based on standard of review set forth in Bylaws. If feasible, Board will consider IRP Panel declaration at next Board meeting. Board action on IRP Panel declaration is final. Legal recourse for community unclear if the Board determines an IRP declaration or Bylaws requirement is inconsistent with Board's fiduciary duties. | <ul style="list-style-type: none"> SO/ACs) if organized at the outset as a standing body with legal personhood (for example an unincorporated association) could ultimately seek enforcement action in California courts. Legal recourse for community unclear if the Board determines that Bylaws requirements are inconsistent with Board's fiduciary duties. <i>* Indirect enforcement (through Board recall)*</i> Community can recall Board if it fails to make appropriate revisions or follow consultation process. | <ul style="list-style-type: none"> Designator could invoke binding IRP process and ultimately bring court action. <i>* Indirect enforcement (through Board recall)*</i> If Sole Designator objects to Board final decision, can initiate process to remove individual directors or recall the entire Board. | <ul style="list-style-type: none"> <i>* Enforcement via IRP *</i> Sole Member could invoke binding IRP process and ultimately bring court action. <i>* Indirect enforcement (through Board recall)*</i> If Sole Member objects to Board final decision, can to remove individual directors or recall the entire Board. |
| Who Can Challenge? | <ul style="list-style-type: none"> Any person materially affected by a Board decision. | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs) | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) |
| Where To Challenge? | <ul style="list-style-type: none"> IRP process | <ul style="list-style-type: none"> MEM process, California court | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> Each party bears own expenses; cost of IRP provider allocated to non-prevailing party except in extraordinary cases | <ul style="list-style-type: none"> Borne by ICANN | <ul style="list-style-type: none"> Borne by ICANN | <ul style="list-style-type: none"> Borne by ICANN |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> No required delay because the Sole Designator decides when to act IRP process would precede enforcement actions in courts in California and elsewhere. | <ul style="list-style-type: none"> No required delay because the Sole Member decides when to act IRP process would precede enforcement actions in courts in California and elsewhere. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|---|---|--|---|--|
| Estimated Delay of Decision Making | • N/A | • Unknown | • In general, the IRP process may take 12-18 months. ² | • In general, the IRP process may take 12-18 months. |
| Binding Decision? | • No | • Unclear; limited by board's fiduciary duties. | • Yes, but limited by board's fiduciary duties. | • Yes. |
| 2. Approve Changes to ICANN "Fundamental" Bylaws and Articles of Incorporation | <ul style="list-style-type: none"> • No formal process for community participation • Bylaws may only be altered, amended, appealed, or new Bylaws adopted upon action by two-thirds vote of all members of the Board. | <ul style="list-style-type: none"> • Community given right to approve Fundamental Bylaws amendments. • Proposed Fundamental Bylaws changes must be presented to community for approval or veto . • As with Standard Bylaws process, unclear whether Board proposal anticipates giving named SOs/ACs approval rights. | <ul style="list-style-type: none"> • Community given right to approve Fundamental Bylaws amendments. • Sole Designator given right to approve proposed Fundamental Bylaws amendments. • Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. | <ul style="list-style-type: none"> • Community given right to approve Fundamental Bylaws amendments. • Sole Member given right to approve Fundamental Bylaws amendments. No changes progress without Sole Member approval. • Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. |
| <i>Enforcement mechanism</i> | | <p><i>* Indirect enforcement (through Board recall)*</i></p> <ul style="list-style-type: none"> • Community may initiate process to recall Board if Board amends a Fundamental Bylaw without community approval. <p><i>* Enforcement via MEM *</i></p> <ul style="list-style-type: none"> • If Board ignores Fundamental Bylaws requirements, SO/ACs, through MEM Issue Group, could invoke MEM process. • MEM Issue Group (composed of SO/ACs) if organized at the outset as a standing body with legal personhood (for example an | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> • Direct enforceability by Sole Designator (bylaws-as-contract theory). <p><i>* Enforcement via IRP *</i></p> <ul style="list-style-type: none"> • Designator could invoke binding IRP process and ultimately bring court action. | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> • Sole Member has statutory standing under California corporate law to enforce this right; direct enforceability by Sole Member. • Sole Member would have statutory right under California law to initiate or adopt bylaws amendments on its own, but the exercise of this right could be practically curtailed through internal Sole Member mechanisms. |

² See, e.g., *Vistaprint* (01-14-6505) (June 2014 to Oct. 2015).

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
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| | | <ul style="list-style-type: none"> unincorporated association) could ultimately seek enforcement action in California courts. Legal recourse for community unclear if the Board determines that community failure to approve Fundamental Bylaws amendment is inconsistent with Board's fiduciary duties. | | |
| Who Can Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs) | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) |
| Where To Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> MEM process, California court | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> No delay because the Sole Designator decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. | <ul style="list-style-type: none"> No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. |
| Estimated Delay of Decision Making | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unknown | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. |
| Binding Decision? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Yes. | <ul style="list-style-type: none"> Yes. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|---|---|--|---|--|
| <p>3. Reconsider / Reject Changes to ICANN "Standard Bylaws"</p> | <ul style="list-style-type: none"> No formal process for community participation <p>Bylaws may only be altered, amended, appealed, or new Bylaws adopted upon action by two-thirds vote of all members of the Board.</p> | <ul style="list-style-type: none"> Board proposal contemplates process to be refined for SOs and ACs to demonstrate objection without conferring veto power on any or all SOs/ACs. Each SO and AC determines whether to voice an objection; if threshold met, Bylaws preclude Board changes to Standard Bylaws. Community threshold to demonstrate an objection to be agreed upon. While corporate law would permit named SOs/ACs to be given right in Bylaws to veto Standard Bylaws amendments approved by Board, unclear if that is what Board contemplates, and if so, to whom the veto power would be given. If named SO/ACs are given veto, need mechanism to prevent single SO or AC from vetoing in spite of community support. | <ul style="list-style-type: none"> Sole Designator given right to veto proposed Standard Bylaws amendments. Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. | <ul style="list-style-type: none"> Sole Member given right to veto proposed Standard Bylaws amendments. Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. |
| <p><i>Enforcement mechanism</i></p> | | <p><i>* Indirect enforcement (through Board Recall) *</i></p> <ul style="list-style-type: none"> Possible to initiate process to recall Board if Board ignores community rejection of Board amendment. <p><i>* Enforcement via MEM *</i></p> <ul style="list-style-type: none"> If Board ignores Fundamental Bylaws requirements, SO/ACs, through MEM Issue Group, could invoke MEM process. MEM Issue Group (composed of SO/ACs) if organized at the outset as a standing body with legal personhood (for example an unincorporated association) could | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Direct enforceability by Sole Designator (bylaws-as-contract theory). <p><i>* Enforcement via IRP *</i></p> <ul style="list-style-type: none"> Designator could invoke binding IRP process and ultimately bring court action. | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Sole Member has statutory standing under California corporate law to enforce this right; direct enforceability by Sole Member. Sole Member would have statutory right under California law to initiate or adopt bylaws amendments on its own, but the exercise of this right could be practically curtailed through internal Sole Member |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|--|---|---|---|---|
| | | <ul style="list-style-type: none"> ultimately seek enforcement action in California courts. Legal recourse for community unclear if the Board determines that community failure to approve Standard Bylaws amendment is inconsistent with Board's fiduciary duties. | | <p>mechanisms.</p> <p><i>* Enforcement via IRP *</i></p> <ul style="list-style-type: none"> Sole Member could invoke binding IRP process and ultimately bring court action. |
| Who Can Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs) | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) |
| Where To Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> MEM process, California court | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> No delay because the Sole Designator decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. | <ul style="list-style-type: none"> No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. |
| Estimated Delay of Decision Making | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unknown | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. |
| Binding Decision? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Yes. | <ul style="list-style-type: none"> Yes. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
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| <p>4. Appoint and Remove Individual ICANN Directors</p> | <ul style="list-style-type: none"> If SO/ACs, and the NomCom, are designators (as a matter of law), they will have a statutory right to remove. If sitting director refuses to vacate, new director could enforce. | <ul style="list-style-type: none"> Individual SO/ACs are not given right to remove directors they appointed, but can initiate removal consideration by the community. Directors sign pre-service letters resulting in removal only for defined causes and only by the community, represented by the SO/ACs. | <ul style="list-style-type: none"> Sole Designator appoints and removes individual directors based on direction from applicable SO/AC/NomCom. | <ul style="list-style-type: none"> Sole Member appoints and removes individual directors based on direction from applicable SO/AC/NomCom. |
| <p><i>Enforcement mechanism</i></p> | <ul style="list-style-type: none"> If SO/ACs and the NomCom are designators: <ul style="list-style-type: none"> SO/ACs could seek enforcement of statutory right to remove in California court. New director could seek enforcement of statutory right to remove in California court. Other directors have statutory right to enforce removal in California court. | <ul style="list-style-type: none"> <i>* Enforcement via pre-service letters*</i> If an SO/AC is a legal person, should be able to enforce pre-service letters in California court. <ul style="list-style-type: none"> <i>* Enforcement via MEM *</i> If director refuses to vacate in violation of pre-service letter (as set forth in Fundamental Bylaws), SO/ACs, through MEM Issue Group, may invoke MEM process. MEM Issue Group (composed of SO/ACs) if organized at the outset as a standing body with legal personhood (for example an unincorporated association) could ultimately seek enforcement action in California courts. <i>* Direct enforcement *</i> If SO/ACs, and the NomCom, are designators (as a matter of law), they will have a statutory right to remove, irrespective of other provisions of the Board proposal. <ul style="list-style-type: none"> <i>* Enforcement by new director *</i> If sitting directors refuse to vacate, new director could enforce. | <ul style="list-style-type: none"> <i>* Direct enforcement *</i> Sole Designator has standing to enforce this right; direct enforceability by Sole Designator. <i>* Enforcement via IRP *</i> Designator could invoke binding IRP process and ultimately bring court action. <i>* Enforcement by new director *</i> If a sitting director refused to vacate, new director could enforce. | <ul style="list-style-type: none"> <i>* Direct enforcement *</i> Sole Member has standing to enforce this right; direct enforceability by Sole Member. <i>* Enforcement via IRP *</i> Sole Member could invoke binding IRP process and ultimately bring court action. <i>* Indirect enforcement (through Board recall) *</i> <i>* Enforcement by new director *</i> If a sitting director refused to vacate, new director could enforce. |
| <p>Who Can Challenge?</p> | <ul style="list-style-type: none"> SO/ACs and NomCom as designators New director (enforcing | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group SO/ACs and NomCom as designator (only if legal persons) | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs) New director | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) New director |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|--|--|--|---|--|
| | <ul style="list-style-type: none"> statutory designator right of their designating SO/AC or NomCom) Other directors | <ul style="list-style-type: none"> New director Other directors | <ul style="list-style-type: none"> Other directors | <ul style="list-style-type: none"> Other directors |
| Where To Challenge? | <ul style="list-style-type: none"> SO/ACs, NomCom, and New Director: Bylaws do not specifically explain designator right to removal or internal process; accordingly, challenges would have to be brought in California courts Other directors: California court | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group: MEM process, California court SO/ACs and NomCom as designator: California court (only if legal persons) New director: California court Other directors: California court | <ul style="list-style-type: none"> Sole Designator: IRP process, courts in California and elsewhere New director: courts in California and elsewhere Other directors: courts in California and elsewhere | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere New director: courts in California and elsewhere Other directors: courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> Unknown. | <ul style="list-style-type: none"> Borne by ICANN | <ul style="list-style-type: none"> Borne by ICANN | <ul style="list-style-type: none"> Borne by ICANN |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> Challenge could be initiated upon refusal of director to vacate upon request of designator. | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> Sole Designator: No delay because the Sole Designator decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. | <ul style="list-style-type: none"> Sole Member: No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. |
| Estimated Delay of Decision Making | <ul style="list-style-type: none"> ? | <ul style="list-style-type: none"> Unknown. | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. |
| Binding Decision? | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Yes. | <ul style="list-style-type: none"> Yes. |

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| 5. Recall Entire ICANN Board of Directors | <ul style="list-style-type: none"> If SO/ACs, and the NomCom, are designators (as a matter of law), they will have a statutory right to remove. If sitting directors refuse to vacate, new directors could enforce. | <ul style="list-style-type: none"> The Board Proposal does not provide for direct, coordinated action by community to recall entire ICANN Board. Recall possible through simultaneous trigger of pre-service letters that compel resignation of directors upon the occurrence of certain events. | <ul style="list-style-type: none"> Sole Designator given power to recall Board. Sole Designator decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. | <ul style="list-style-type: none"> Sole Member given power to recall Board. Sole Member decides whether to act via community voting mechanism, with specified participation level and voting threshold for action. |
| <i>Enforcement mechanism</i> | <ul style="list-style-type: none"> If SO/ACs and the NomCom are designators: <ul style="list-style-type: none"> SO/ACs could seek enforcement of statutory right to remove in California court. New director could seek enforcement of statutory right to remove in California | <ul style="list-style-type: none"> <i>* Enforcement via MEM *</i> Refusal to vacate may be challenged individually or collectively through MEM. <i>* Coordinated and direct enforcement *</i> If SO/ACs, and the NomCom, are designators (as a matter of law), they will have a statutory right to remove. | <ul style="list-style-type: none"> <i>* Direct enforcement *</i> Sole Designator has standing to enforce this right; direct enforceability by Sole Designator. <i>* Enforcement via IRP *</i> Designator could invoke binding IRP process and ultimately bring court action. <i>* Enforcement by new director *</i> If a sitting director refused to vacate, new director could enforce. | <ul style="list-style-type: none"> <i>* Direct enforcement *</i> Sole Member has standing to enforce this right; direct enforceability by Sole Member. <i>* Enforcement via IRP *</i> Sole Member could invoke binding IRP process and ultimately bring court action. |
| Who Can Challenge? | <ul style="list-style-type: none"> SO/ACs and NomCom as designators New directors (enforcing statutory designator right of their designating SO/AC or NomCom) | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group SO/ACs and NomCom as designator (only if legal persons) New directors | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs) New directors | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) New directors |
| Where To Challenge? | <ul style="list-style-type: none"> Bylaws do not specifically explain designator right to removal or internal process; | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group: MEM process, California court SO/ACs and NomCom as | <ul style="list-style-type: none"> Sole Designator: IRP process, courts in California and elsewhere | <ul style="list-style-type: none"> Sole Member: IRP process, courts in California and elsewhere |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
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| | accordingly, challenges would have to be brought in California courts | designator: California court (only if legal persons) • New directors: California court | • New directors: courts in California and elsewhere | • New directors: courts in California and elsewhere |
| Cost of Challenge Procedure | • Unknown. | • Borne by ICANN | • Borne by ICANN | • Borne by ICANN |
| Estimated Delay to Initiate Challenge | • Challenge could be initiated upon refusal of director to vacate upon request of designator. | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group: Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. <ul style="list-style-type: none"> MEM process would precede enforcement actions in California court. SO/ACs and NomCom as designator: Challenge could be initiated upon refusal of director to vacate upon request of designator. New directors: Challenge could be initiated upon refusal of director to vacate upon request of designator. | <ul style="list-style-type: none"> Sole Designator: No delay because the Sole Designator decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. New directors: Challenge could be initiated upon refusal of director to vacate upon request of designator. | <ul style="list-style-type: none"> Sole Member: No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. New directors: Challenge could be initiated upon refusal of director to vacate upon request of Sole Member. |
| Estimated Delay of Decision Making | • Unknown. | • Unknown. | • In general, the IRP process may take 12-18 months. | • In general, the IRP process may take 12-18 months. |
| Binding Decision? | • Unclear. | • Unclear. | • Yes. | • Yes. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|---|--|--|---|--|
| <p>6. Mechanism for binding IRP where a panel decision is enforceable in any court recognizing international arbitration results</p> | <ul style="list-style-type: none"> • Nonbinding review of Board's compliance with procedures specified in Bylaws. • Any person materially affected by a Board decision that is asserted to be inconsistent with the Articles of Incorporation or Bylaws may submit a request for IRP. • IRP Panel shall determine whether actions Board action is consistent with Article of Incorporation or Bylaws based on standard of review set forth in Bylaws. | <ul style="list-style-type: none"> • Any SO/AC can petition to invoke process leading to binding arbitration. | <ul style="list-style-type: none"> • Each SO/AC or the sole Designator can invoke binding arbitration. | <ul style="list-style-type: none"> • Each SO/AC or the Sole Member can invoke binding arbitration. |
| | | <ul style="list-style-type: none"> • Upon reaching a certain threshold of SO/AC support, a MEM Issue Group (composed of SO/ACs) with legal personhood and capacity to sue could be established under Bylaws to initiate and enforce binding arbitration. | <ul style="list-style-type: none"> • Each SO/AC with legal personhood and Sole Designator would have legal capacity and standing to enforce results in court. | <ul style="list-style-type: none"> • Each SO/AC with legal personhood and Sole Member would have legal capacity and standing to enforce results in court. |
| | | <ul style="list-style-type: none"> • MEM Issue Group (composed of SO/ACs) if organized at the outset as a standing body with legal personhood (for example an unincorporated association) could ultimately seek enforcement action in California courts. | | |
| | | <ul style="list-style-type: none"> • No single SO/AC has standing to bring derivative suits against fiduciaries. • MEM Issue Group, as separate unincorporated associations, would be part of each MEM, and could act for SO/ACs that are not legal persons. | <ul style="list-style-type: none"> • Neither the Sole Designator nor any individual SO/AC has standing to bring derivative suits against fiduciaries. • Participants in the Sole Designator unincorporated association would enforce their rights, if not legal persons, through the Sole Designator. | <ul style="list-style-type: none"> • No single SO/AC has standing to bring derivative suits against fiduciaries. • Participants in Sole Member unincorporated association would enforce their rights, if not legal persons, through the Sole Member. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|--|--|---|---|---|
| | <ul style="list-style-type: none"> If feasible, Board will consider IRP Panel declaration at next Board meeting. Board action on IRP Panel declaration is final. Legal recourse for community unclear if the Board determines a IRP declaration or Bylaws requirement is inconsistent with Board's fiduciary duties. | <ul style="list-style-type: none"> MEM awards could be recognized in many jurisdictions. Board suggests venue in California only, but provisions could be broadened. ICANN to pay costs of arbitration. MEM panel could be pre-established and pre-funded to ensure availability (unclear in proposal) | <ul style="list-style-type: none"> Sole Designator would have clear rights to enforce results in California courts and other international courts recognizing international arbitration results. ICANN to pay costs of arbitration. Standing panel of arbitrators pre-cleared and established. | <ul style="list-style-type: none"> Sole Member would have clear rights to enforce results in California courts and other international courts recognizing international arbitration results. ICANN to pay costs of arbitration. Standing panel of arbitrators pre-cleared and established. |
| Who Can Challenge? | <ul style="list-style-type: none"> Any person materially affected by a Board decision. | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group | <ul style="list-style-type: none"> Sole Designator (representing SO/ACs or their participants) | <ul style="list-style-type: none"> Sole Member (representing SO/ACs or their participants) |
| Where To Challenge? | <ul style="list-style-type: none"> IRP process (non-binding, internal only). | <ul style="list-style-type: none"> MEM process, California court | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> Each party bears own expenses; cost of IRP provider allocated to non-prevailing party except in extraordinary cases. | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Borne by ICANN. |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> Within 30 days of publishing of Board minutes that are contended to violate Bylaws or Articles of Incorporation. | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> No delay because the Sole Designator decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. | <ul style="list-style-type: none"> No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|--|--|--|--|---|
| Estimated Delay of Decision Making | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. | <ul style="list-style-type: none"> Unknown | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. | <ul style="list-style-type: none"> In general, the IRP process may take 12-18 months. |
| Binding Decision? | <ul style="list-style-type: none"> No. | <ul style="list-style-type: none"> Yes, where recognized. | <ul style="list-style-type: none"> Yes. | <ul style="list-style-type: none"> Yes. |
| 7. Reconsider / Reject Board Decisions Relating to Reviews of the IANA Functions, Including Ability to Trigger a Separation of PTI (or, IANA Separation Enforceability) | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Bylaws would require Board to implement recommendations, within limits respecting Board fiduciary duties. | <ul style="list-style-type: none"> Sole Designator given right to trigger Board consultation up to specified number of times, with Bylaw restrictions subject to override if required by Board fiduciary duties. | <ul style="list-style-type: none"> Sole Member given reserved power under Bylaws to override Board decision, regardless of Board fiduciary duties. |
| <i>Enforcement mechanism</i> | | <p><i>* Enforcement via MEM *</i></p> <ul style="list-style-type: none"> If Board ignores Fundamental Bylaws requirements SO/ACs, through MEM Issue Group, may invoke MEM process, although PTI may be deemed to be within Board's core fiduciary duties and not subject to binding arbitration. <p><i>* Indirect enforcement (through Board recall) *</i></p> <ul style="list-style-type: none"> Community, through SO/ACs, can initiate process to recall Board if it fails to implement | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Sole Designator has standing to enforce consultation right; direct enforceability by Sole Designator. <p><i>* Indirect enforcement (through Board recall) *</i></p> <ul style="list-style-type: none"> If Sole Designator objects to Board final decision, can initiate process to remove individual | <p><i>* Direct enforcement *</i></p> <ul style="list-style-type: none"> Sole Member has standing to enforce this right; direct enforceability by Sole Member. <p><i>* Indirect enforcement (through Board recall) *</i></p> <ul style="list-style-type: none"> If Sole Designator objects to Board final decision, can initiate process to remove |

| Community Powers | Current Bylaws Model | Means of Enforcement with Board's MEM | Means of Enforcement with Sole Designator | Means of Enforcement with Sole Member |
|---------------------------------------|---|---|--|---|
| | | <ul style="list-style-type: none"> recommendations. Unclear what if any legal recourse community has if Board determines that Fundamental Bylaws requirements are inconsistent with Board's fiduciary duties. | <ul style="list-style-type: none"> directors or recall the entire Board. Unclear whether Sole Designator could invoke binding arbitration on PTI separation. | <ul style="list-style-type: none"> individual directors or recall the entire Board. Sole Member would have greater latitude to invoke binding arbitration over PTI separation |
| Who Can Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> SO/ACs through MEM Issue Group | <ul style="list-style-type: none"> Unclear; potentially Sole Designator (representing SO/ACs) | <ul style="list-style-type: none"> Sole Member (representing SO/ACs) |
| Where To Challenge? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> MEM process, California court | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> IRP process, courts in California and elsewhere |
| Cost of Challenge Procedure | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Borne by ICANN. | <ul style="list-style-type: none"> Unknown. | <ul style="list-style-type: none"> Borne by ICANN. |
| Estimated Delay to Initiate Challenge | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Any single SO or AC, by some measure of consensus, can initiate a petition to commence MEM process, but there is a 15-day discussion phase that begins after providing notice to all other SOs and ACs and a 21-day day period for the other SOs and ACs to consider whether to support the petition. MEM process would precede enforcement actions in California court. | <ul style="list-style-type: none"> No delay because the Sole Designator decides when to act. | <ul style="list-style-type: none"> No delay because the Sole Member decides when to act. IRP process would precede enforcement actions in courts in California and elsewhere. |
| Estimated Delay of Decision Making | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unknown. | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> N/A |
| Binding Decision? | <ul style="list-style-type: none"> N/A | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Unclear. | <ul style="list-style-type: none"> Yes. |