

MEMORANDUM

TO: CCWG Legal Sub-team

CC: Sidley Austin LLP

FROM: Adler & Colvin

DATE: April 14, 2015

RE: Adler & Colvin Comments Regarding Memorandum of March 31, 2015 from Caplin & Drysdale to John Curran and Steve Ryan of the American Registry for Internet Numbers (the “ARIN Memo”)

The ARIN Memo proposes to clarify the status of ICANN’s stakeholders as designators and to make explicit their ability to hold ICANN’s board accountable.

The ARIN memo correctly describes the applicable law regarding designators. It recommends making the stakeholders’ rights as designators explicit in the ICANN governance documents by clearly stating:

1. That those ICANN stakeholders who can currently select directors are designators;
2. That those stakeholders/designators have the right to select directors;
3. That those stakeholders/designators have the right to remove the directors they selected;
4. That those stakeholders/designators have the right to block the removal by the board of those directors they selected;
5. That those stakeholders/designators have the right to fill the vacancy of a director whom they appointed.

The ARIN memo also proposes giving two additional rights to the designators, namely:

6. The right to call a special accountability meeting at which the board could be requested to address certain alleged violations in front of designator representatives; and
7. The need to get consent of a supermajority of the designators to any amendment of the articles of incorporation or bylaws of ICANN.

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We agree that ICANN's current structure comes closest to a designator arrangement (as opposed to a member structure or a self-perpetuating board). As the ARIN Memo indicates, we also agree that if the designator structure is retained, the recommendations set forth in items 1-5 above should be implemented, as well as some variation of item 7 (designators required to approve amendments to articles and bylaws). Together, these changes would give the stakeholder groups important controls over the appointment and removal of individual directors and over any amendments to the articles or bylaws. We would add that to clearly hold these rights, the stakeholder designators should be established as unincorporated associations.

It should be noted that the ARIN Memo does not address two areas that we understand are of high importance to ICANN, possibly because these issues were not posed to Caplin & Drysdale.

First, the ARIN Memo does not contemplate how to give stakeholder designators the ability to approve or veto board actions. It does have a creative suggestion (item 6) to use the tool of special accountability meetings to help designators hold the board accountable. However, while the ARIN Memo proposes that the bylaws would require these meetings, it does not address how to give designators any further rights, or the power to enforce these additional rights, except for the ability to remove the individual directors they appointed.

The ARIN Memo also does not provide for a mechanism to recall the entire board. To do so, another arrangement would need to be added, possibly such as having the designators sign a common contract requiring them to all remove the directors they appointed in certain situations.