CCWG Legal Scoping Document

CCWG's Role and Responsibilities:

The ICANN community's Cross Community Working Group (CCWG) on Accountability is responsible for developing improvements to ICANN's accountability processes. The initial tranche of work tasked to the CCWG is identifying those accountability enhancements that must be in place or committed to before the IANA stewardship role transition can occur. The CCWG's work includes making recommendations to improve ICANN's existing mechanisms that are intended to insure that the bottom-up organization is, in operation, accountable to its community. The CCWG is also undertaking consideration of new mechanisms such as new legal structures or agreements that could improve the organization's accountability.

In this context, "community" means the collective individual participants in ICANN's various Supporting Organizations (SO), Advisory Committees (AC), GNSO Stakeholder Groups, and other relevant sub-grouped interests that together comprise ICANN. As a bottom-up organization, ICANN must remain ultimately accountable to the various constituent participants in the community that the corporation was established to serve, as well as demonstrating accountability and openness to the more global community involved in the Internet domain name system. The CCWG aims to provide initial recommendations to ICANN's board of directors for approval before the IANA stewardship transition window opens in late 2015.

Several questions have arisen in the course of the CCWG's work that require input from independent legal experts to aid the CCWG in the further evaluation of proposals and recommendations. The CCWG[1] seeks to retain these independent legal advisors to assist it in creating mechanisms that provide the means for the community to hold the organization accountable to it for the organization's actions and decisions.

Three specific accountability goals and the concerns are provided below, followed by specific questions intended to obtain needed information for the CCWG to proceed in its evaluation of possible mechanisms. The three specific accountability goals identified by the CCWG and explained below that require independent legal advice on how to best achieve these goals are:

1. Recalling members of the ICANN board of directors.
2. Community empowerment over ICANN's management.
3. Limiting the scope of ICANN's activity.

The initial work of the CCWG is expected to result in recommendations that will be forwarded to the NTIA in consideration with an IANA stewardship transition proposal.

[1] The CCWG is the "client" in the attorney-client relationship established through this retention of independent legal expertise, and all reports and communications are to be made directly between independent legal counsel and the CCWG.

To that end, the NTIA's principles should be considered as part of any review of proposed accountability mechanisms. NTIA's principles provide that the solutions should:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectation of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

The specific proposals listed below under consideration by the CCWG are non-mutually exclusive to the extent permitted, and should not be seen as the only possibilities on the table for consideration to achieve the goals. Other options for available mechanisms and legal structures that would achieve the CCWG's stated goals are welcome and encouraged for exploration. Follow-up questions and clarifications from the CCWG are anticipated in response to the initial answers from independent legal counsel.

Goal 1: Recalling Members of the ICANN Board of Directors

ICANN board members are individually appointed by different sub-groups within the ICANN community for a fixed term. The relevant individual community sub-groups seek a mechanism to recall under-performing board members before the board member's term expires.

Concerns:

Board member recall is to be considered as a "last resort" option that is not often used.

Board member(s) may be recalled at the sole discretion of the appointing Supporting Organization / Advisory Committee according to rules established by that Supporting Organization / Advisory Committee, although possibly requiring a high voting threshold.

Generally, it would be expected that each relevant individual ICANN sub-group would have the power to recall its own board appointees, but not the board appointees from other relevant sub-groups. However, the community as a whole would need the power to remove board members that are appointed by the Nominating Committee (as the Nominating Committee is comprised of delegates from across the community as a whole).

And the community would also like to consider the ability to call for a "vote of no confidence" on the entire board of directors with the effect of recalling the entire board at once, in rare and exceptional situations.

Proposals Under Consideration:

i) Amend Bylaws to Create Power to Spill the Board

Amend ICANN's corporate bylaws (and/or Articles of Incorporation) to provide for the ability of the ICANN community to recall all or some board members in exceptional circumstances. Spilling the entire board at once would register a clear "vote of no confidence". Individual board member recall would be determined based on which part of the community appointed the board member being recalled.

ii) Amend Bylaws to Create "Community Council"

Amend ICANN's bylaws to create a special "Community Council" empowered with recalling the entirety of ICANN's board of directors with a vote of no confidence. The Community Council could be comprised of leaders or appointees of ICANN's various SO/AC's and would have a very high threshold to meet to recall the board. Once recalled, all board directors would be removed with processes in place to appoint replacement directors.

Goal 2: Community Empowerment Over ICANN's Management

ICANN community members seek the means to hold ICANN to ultimately account to it on a narrow set of "high-impact" issues and key decisions. The community requires an ability to challenge and block (to the extent legally permissible) the ICANN board on these key decisions. The types of high-impact issues, where board and management decisions would be subject to community review and challenge include key decisions such as the approval of the organization's budget, bylaws changes, strategic plan adoption, etc. The community further calls for a mechanism that empowers it to design, initiate, launch, and sunset organizational review teams, and to appoint their own members and/or representatives to them.

Concerns:

The risks undertaken by board members, the various community members, and other participants, pursuant to the different corporate governance structures available under California nonprofit corporations law (including individual liability for ICANN's actions and decisions).

"Capture", which means when one sub-group of the community is able to "game the system" or obtain disproportionate representation or influence in the overall balance of interests between relevant sub-groups in ICANN's organizational framework. ICANN's existing organizational framework represents a balancing of interests, and these mechanisms should not upset that balance. Concern about possible "capture" apply to all

participants including governments, stakeholders, or other sub-groups within ICANN including its staff.

Complexity of changes and length of time required to alter ICANN's existing corporate governance structure to improve accountability is a concern; and the group seeks mechanisms that achieve the group's goals with the minimal amount of changes or disruption to ICANN's existing organizational framework as reasonably possible.

Proposals Under Consideration:

i) Membership Corporation

Restructuring ICANN's corporate governance structure to become a true "membership" corporation (California Corporations Code §5310). Existing ICANN community participants, including both individuals and companies, would serve as the initial corporate Members with all the rights and responsibilities provided by the statute. The possibility of ICANN as a true membership corporation is contemplated in ICANN's existing bylaws. The proposal should ensure that existing members should not be an obstacle to admitting new members in the future under this model.

ii) Representative Delegates with Decisional Authority

Create "delegates" (California Corporations Code §5152) empowered to represent existing relevant ICANN community sub-group interests in ICANN's decisional processes (at a level as high as the law permits) via bylaws provisions or otherwise, as appropriate.
Delegates would have authority to oversee ICANN's existing board on the management of certain fundamental high-impact issues. Delegates would be selected from ICANN's relevant sub-groups, and together would have the power to overrule ICANN's board and to amend or reject certain board decisions. They would also be empowered to remove one or more board members. Delegates would operate as "last resort" option for correcting board decisions that are widely unsupported by the community. Delegates would have a high voting threshold to execute a power. A "Community Council" could be empaneled as one form of delegation.

iii) Community "Veto" Process to Challenge Board Decisions

Pursuant to California Corporations Code §5210, ICANN's community can be empowered to challenge certain board decisions via a process provided for in the organization's bylaws that is subject to an ultimate decision of the ICANN board. Under this mechanism, ICANN could amend its existing bylaws to empower the community to challenge certain board decisions, while also raising the standard by which the board could reject those community decisions. Thus, the community could challenge an eligible board decision, and the board would then be required to accept the community's overriding decision -- unless the board subsequently voted by a supermajority (or

unanimously) to retain its original decision. This would provide a means for challenging eligible board decisions by community members, while still providing the board with the requisite ultimate decisional authority, since the board could ultimately override the community if a high-level (¾ or unanimous) of agreement among board members could be reached to reject the community "veto". The community "veto" process would only be available to challenge certain key high-impact board decisions such as amending the bylaws or articles, or adopting the organization's budget or strategic plan.

Once the mechanism is triggered, the individual community sub-groups could use their existing decision making processes (ex: elections or consensus) to reach the ultimate or collective decision of the community to reject a board decision. If the board is not able to muster the super-majority of board votes to override a community "veto", then the issue is sent back to the bottom-up processes for further work and development. A successful community "veto" cannot change or amend a board decision, but rather, can only reject and send an widely unpopular high-impact board decision back to the community for further work.

iv) Supervisory Board / 2-Tier Board Construction

Create a second or "supervisory" board of directors, consisting of representatives from ICANN's community sub-groups to oversee ICANN's existing board on the management of certain fundamental high-impact issues. The supervisory board would have the power to overrule ICANN's existing board of directors and to amend or reject certain decisions of ICANN's existing board of directors. It would also be empowered to remove one or more board members. The supervisory board would operate as "last resort" option for correcting decisions of the existing board that are widely unsupported by the community. The supervisory board vote would have to meet a high threshold to execute a power.

v) Permanent Cross-Community Working Group

Establish a Cross-Community Working Group (CCWG), a pre-existing ICANN community consensus development mechanism, to review and coordinate recommendations to ICANN's board of directors for improvements to ICANN's accountability processes on a permanent basis. One option for this would be to amend ICANN's bylaws to provide for the permanent group and set its powers. The CCWG would be comprised of participants from the relevant ICANN sub-groups. To the extent possible, the CCWG would have the authority to:

- Review any board decision. Non-approval by the CCWG would send the board decision back to an ICANN bottom-up policy development process. The board could not revise bottom-up recommendations and would be required to adopt and implement them.
- Refer any board decision to a (possibly binding) independent review panel.
- Approve changes to ICANN bylaws or articles, with supermajority required to approve. The board could not revise CCWG's changes to the bylaws or articles.
- Recall one or all ICANN board members.

Goal 3: Limit Scope of ICANN's Activities

The community seeks a legal (or legally viable) mechanism to prevent ICANN from acting outside from its specifically defined technical mission of managing certain operations of the Internet's domain name system.

Concerns:

To prevent organizational "mission creep" and the future expansion of ICANN's activities beyond its technical mandate and specifically into issues related to the lawful regulation of Internet content or speech. The mechanism should also prevent the community from modifying or expanding ICANN's mission in the future, to the extent possible.

Proposal Under Consideration:

i) "Compact" or "Golden Bylaw" to Limit Scope of ICANN's Activities

ICANN could sign a contract or some other form of legally binding and enforceable agreement in which the organization agrees to limit its own activities (e.g., ICANN agrees to constrain ICANN's activity to the extent permissible, possibly through contract, bylaws provisions, etc.). Stakeholders or some representation of them could possibly be party to this agreement.

Specific Questions Related to the Above Goals and Concerns:

1. Which available legal mechanisms would provide the means for achieving the CCWG's above-stated goals and concerns and how would we do it? Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community "veto" process, designators, etc. What additional legal (or legally viable) mechanisms are available to achieve the above-stated goals and concerns?

2. What are the benefits, responsibilities, and risks including but not limited to the legal and financial liability of board directors, statutory members, representative delegates, and community participants (both collectively and individually) for ICANN's actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?

3. What are the costs or barriers to participation in ICANN's bottom-up policy development or decision making processes under the different legal structures and mechanisms under consideration for both existing participants and potential participants? How do the different structures and mechanisms under consideration assess against each other with respect to concerns about "capture" or undue influence, costs, barriers to participation, and required time to transition to a new structure?

4. What are the available legal mechanisms for constraining ICANN's activities and preventing the organization from expanding the scope of its mission in the future? How could a contract, "golden bylaw", or some other enforceable agreement achieve this goal? Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?

5. Which legal jurisdictions provide for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG's above-stated goals and concerns? Should ICANN consider relocating its headquarters to another legal jurisdiction (outside of California), and if so, where and why? Should ICANN consider being subject to international legislation (which includes, e.g. in the case of an ordinary international organization, abiding by its Constitutive Treaty and other international norms) in order to reduce the influence of the legislation of a single country on ICANN? How would a relocation of ICANN's legal jurisdiction influence the aforementioned proposed accountability mechanisms under consideration by the CCWG?

6. What does it mean for an ICANN board member to hold a fiduciary duty to the organization? To what extent can a board member meet her/his legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed her/him to the board? How to increase (or even maximize) a director's ability to represent the interests of the community that appointed her/him in the course of board decisions, given legal duties of board members to the corporation? To what extent are ICANN's board members required to approve or reject a community decision regarding the management of ICANN based upon the board's separate and distinct interpretation of "what is in the best interest of ICANN" or "the global public interest"?

7. How could the board be bound to accept decisions made by an Independent Review Panel (or other independent entity) including decisions pertaining to the board's oversight of the management of the organization?

8. How could the California Attorney General (or other public official) intervene in ICANN's operation on behalf of community members? How typical is such an intervention by the California Attorney General in the operation of a nonprofit corporation, what are the grounds for such intervention, and what is a reasonable expectation for a successful remedy in this situation?

9. What antitrust legal issues could arise in the context of the CCWG's work and possible recommendations, and how can those issues be most effectively addressed given the CCWG's stated goals and concerns? Particularly in light of the fact that a portion of the ICANN community are contracted parties, what protections can be built in to make sure that the recommendations do not run afoul of antitrust laws and subject ICANN or it's participants to antitrust liability? Do any particular models or mechanisms under discussion give rise to more antitrust related concerns than others?

10. How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?

11. What is recommended for an interim mechanism/caretaker board arrangements if the entirety of the board of directors are spilled by the community?

12. Would it be possible under California law for the community to limit the direct or other damages of third parties (ex: gtld applicants) in a lawsuit against ICANN and if so, how? Are there ways to create disincentives to filing frivolous legal claims against ICANN? How could such limitations be created so there is little "wiggle room" in contract negotiations for ICANN, for example through boilerplate contract clauses?

ICANN Bylaws:
https://www.icann.org/resources/pages/governance/bylaws-en

ICANN Articles of Incorporation:
https://www.icann.org/resources/pages/governance/articles-en