

(DRAFT) Legal Scoping Document

CCWG's Role and Responsibilities:

ICANN's Cross Community Working Group (CCWG) on Accountability is responsible for developing improvements to ICANN's accountability processes. This includes making recommendations to improve existing mechanisms that are intended to insure the bottom-up organization is accountable to the community. It also includes the creation of new mechanisms including the possibility of new legal structures or agreements that could improve the organization's ability to serve its community.

In this context, "community" means the collective participants in ICANN's various Supporting Organizations, Advisory Committees, Stakeholder Groups, and other sub-grouped interests that together comprise ICANN. As a bottom-up organization, ICANN must remain answerable to the various participants in the community that the corporation was established to serve. The CCWG aims to provide recommendations to ICANN's board of directors for approval in June 2015.

Several issues have arisen in the course of the CCWG's work that require input from independent legal expertise to aid the CCWG in the further evaluation of proposals and recommendations. The CCWG retains this legal advice to assist it in creating mechanisms that can provide the means for the community to hold the organization accountable to it for the organization's actions and decisions. Specific questions are provided below to obtain legal clarifications and information needed by the CCWG to proceed in its evaluation of recommended mechanisms. As such, the CCWG is the "client" in the attorney-client relationship established through this retention of legal expertise, and all reports and communications are to be made directly between independent legal counsel and the CCWG.

Goal 1. Recalling Members of the ICANN Board of Directors

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

Concerns:

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

Board members should only be recalled under a narrow set of prescribed reasons and with high threshold of difficulty to recall the board member.

Generally, it would be expected that each individual ICANN sub-group would have the power to recall its own board appointees, but not the board appointees from other sub-groups.

However, the community would 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.

Proposal Under Consideration:

Amend ICANN’s corporate bylaws (and/or Articles of Incorporation) to provide for the ability to recall all or some board members in exceptional circumstances.

Goal 2. Community Empowerment Over ICANN’s Management

ICANN community members seek the means to hold ICANN to account on certain key issues and to challenge the ICANN board or management on a narrow set of key decisions.

The community requires an ability to block (to the extent legally permitted) the ICANN board or management on a narrow set of key decisions. The community wants the ability to design, sunset, and launch organizational review teams and to appoint their own representatives to them.

Concerns:

The risks undertaken by board members and community members pursuant to the different corporate structures available under California nonprofit corporations law (including liability for ICANN’s actions and decisions).

“Capture” or one sub-group of the community being able to game the system in some way to skew votes or obtain over-representation in the overall balance between sub-groups with respect to the ICANN community’s decisional process.

Complexity of changes (and length of time) required to alter ICANN’s existing corporate structure 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 possible.

The types of high-impact issues, where decisions would be subject to community review and challenge would only be key decisions such as the approval of the organization’s budget, bylaws changes, strategic plan adoption, etc.

Proposals Under Consideration¹:

i) Membership Corporation

Restructuring ICANN's organization to be a true "membership" corporation (California Corporations Code §5310 / §7310) with existing ICANN community participants, including both individuals and companies, serving as corporate Members.

ii) Representative Delegates with Decisional Authority

Create "delegates" (California Corporations Code §5152 / §7152) empowered to represent existing ICANN community sub-group interests in ICANN's decisional process (at a level as high as the law permits) via bylaws provisions or as otherwise appropriate.

iii) Community Veto Process to Challenge Board Decisions

California Corporations Code §5210 provides the means for ICANN's community to challenge board decisions via process provided for in the bylaws that are 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 and raise the standard by which the board could reject community decisions. The community could challenge a board decision and the board would be required to accept the community's decision unless the board subsequently voted by a super-majority (or unanimously) to retain its original decision and reject the community's decision to veto the board's initial decision. This would provide a means for challenging board decisions by community members, while providing the board with an ultimate decisional authority because it could over-ride the community if a high-level of agreement among board members could be reached.

Goal 3. Limit Scope of ICANN's Activities

The community seeks a legal mechanism that could prevent ICANN from acting outside its narrow technical mission of managing the domain name system.

Concern:

To prevent organizational "mission creep" and the future expansion of ICANN's activities beyond its technical mandate and specifically into issues related to content regulation.

¹ The proposals are considered non-mutually exclusive and not the only possibilities on the table for consideration by the CCWG. Other options for available mechanisms and legal structures that would achieve the CCWG's stated goals are welcome and encouraged for exploration.

Proposal Under Consideration:

“Contract” to Limit ICANN’s Scope

ICANN could sign a contract or some other type of legally binding and enforceable agreement in which the organization agrees to limit its activities (i.e. ICANN constrain ICANN’s activity, possibly through contract, bylaws provisions, etc.).

Specific Questions Related to Goals and Concerns:

Which available legal mechanisms would provide the means for achieving the CCWG’s 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, contracts, community “veto”, etc. What additional legal mechanisms are available to achieve the stated goals and concerns?

What are the benefits, responsibilities, and risks (both collectively and individually) including but limited to the legal and financial liability of board members, community members, and representative “delegates” for ICANN’s actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?

What are the costs or barriers to participation at ICANN under the different legal structures and mechanisms under consideration?

What are the available legal mechanisms for constraining ICANN’s activities and prevent the organization from expanding the scope of its mission or activities? Which available mechanisms provide the most benefits to the community and the most effective means of enforcement?

Which legal jurisdiction provides for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG’s stated goals and concerns? Should ICANN consider relocating to another legal jurisdiction (outside of California), and if so, where and why?

To what extent can a board member meet her legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed her to the board? How to maximize a director’s ability to represent the community that appointed her in the course of board decisions, given legal duties of board members?

How could the board agree to be bound to decisions made by an Independent Review Panel (or other independent entity) regarding decisions pertaining to the management of the organization?

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

To what extent are ICANN's board members required to approve or reject a community decision based upon the board's interpretation of "what is in the best interest of ICANN" or "the global public interest"?

What anti-trust legal issues are possible to arise in this context and how can those issues be most effectively addressed given the CCWG's stated goals and concerns?

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?