<u>**MEMORANDUM**</u>

TO: Legal Sub-team of the Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Legal Assessment: Proposed Accountability Mechanisms
Preliminary Response to Legal Sub-team Templates identified in
Memorandum Ref CCWG/SA/002

DATE: April 10, 2015

Overview

You have asked that we review templates that describe mechanisms and powers under consideration by the CCWG regarding efforts to enhance ICANN's accountability, and advise on the legal viability of those mechanisms and powers under "current conditions," which we understand to mean the current structure of ICANN as a nonprofit public benefit corporation organized under California law (reference: CCWG/SA/002, attached (the "<u>Template Memorandum</u>")).   This memorandum provides an overview of key considerations related to the legal framework. We have included our summary analysis of the viability of the mechanisms and powers posed at the end of each of the templates, attached to this memo, in sections entitled "Legal Analysis and Viability."

Qualifications

Please note that our legal analysis is preliminary in nature and provided on a level in keeping with the general level of the question posed in the Template Memorandum. Our legal analysis is tailored to the question posed by the Legal Sub-team, and is provided for the benefit of the Legal Sub-team, to help facilitate its consideration of the mechanisms described in the templates, and should not be relied upon by any other persons or for any other purpose. These draft responses reflect Sidley's and Adler & Colvin's preliminary reactions regarding the questions and have not been reviewed by any outside third parties.

Unless otherwise stated, the legal analysis contained below is based on California law, and in particular, the laws governing California nonprofit corporations (*California Corporations Code, Title 1, Division 2*). In our effort to prepare these responses for the Legal Sub-team in a very limited time frame, we have not completely and fully explored and researched all of the potential options and nuances posed by each of the templates. Also, please note that where we

were uncertain as to underlying concerns reflected in a particular template, we have made certain assumptions about the template or inserted clarifying questions and comments.

Key Considerations Related to the Legal Framework

A number of recurring themes emerge from our analysis of the mechanisms and powers.

1. <u>Corporate Law and Contract Law</u>: The toolkit for implementation of the mechanisms and powers under consideration include both corporate law and contract law. While California corporate law applicable to public benefit corporations provides flexibility, for some of the mechanisms and powers under consideration, contractual arrangements would be needed to augment enforceability (similar to member agreements in associations and shareholder agreements in certain corporate law structures).

2. <u>Inter-related Issues</u>: The legal viability of mechanisms and powers— and the ease or difficulty of implementation from a legal perspective—will often depend upon *who* is to be given the rights to exercise powers and how they are organized, and the *types of powers* at issue. For example, as will be described in more detail below, giving certain powers to a membership body in a nonprofit public benefit corporation may provide for greater enforceability and ease of implementation than giving those powers to a designator or a group of designators.

3. <u>Legal Personhood</u>: To exercise legally cognizable powers or rights (powers or rights that are enforceable), one must be recognized in law as a "legal person." In order for the ICANN community to exercise powers, the persons, bodies or groups exercising such powers in most cases will have to be organized as legally cognizable persons (individual humans or legally recognized entities). Legally recognized entities may include a range of organizations such as corporations, partnerships and limited liability companies. They may also include unincorporated associations, which have some similarities to the structure of the current ACs and SOs. Mechanisms and powers may be exercised by these legal entities or by individuals who are selected by community organizations. In either instance, consideration will need to be given to legal personhood.

4. <u>Members vs. Designators</u>: The mechanisms and powers described in the templates can be exercised by members under corporate law, in some instances with support from contractual arrangements. Many of the mechanisms and powers can also be exercised by designators, but designator authority is inherently more limited under California law. Member, designator, and third-party approval structures may also be combined, if necessary, to reach a desired result.

Members. In a membership corporation, members are given certain powers and rights that are protected by California corporate law. These include: electing and removing directors; voting on major corporate actions such as amendments to articles and bylaws, mergers, and dissolution; notice of and attendance at membership meetings; and due process in the termination of membership status. In addition to these statutory rights, the law allows members to be given specific reserved powers in the articles or bylaws. These may take various forms: a right to veto or consent to a board action; a right to act on the members' initiative in lieu of board action; or an exclusive member right that precludes board action. (In addition to, or instead of, reserved

rights, the board-within-a-board mechanism discussed in the legal analysis to template WP1-E might also be used to give the community rights to review and overturn board decisions.) To protect their rights, members have standing to sue the corporation, and members may also sue others on behalf of the corporation to enforce the corporation's rights. Members can be divided into classes having different rights.

Membership requires that members have legal personhood. If SOs and ACs will be members, they will need to be organized as separate legal entities, such as nonprofit unincorporated associations. ICANN currently does not have members, so establishing classes of members and rights and the associated protections and procedures can be expected to require significant additions to the current articles and bylaws. Procedural protections of member rights are likely to make handling member interactions more burdensome for ICANN's administrators. Once in place, a membership structure is harder to change, and eliminating members entirely is difficult.

Since members owe no fiduciary duty to the corporation, giving members extensive decision-making authority may result in decisions driven by constituency interest and shorter term considerations.

A director appointed by one membership class may not be removed by other classes of members or by the board. However, contractual agreements could be used to obligate each membership class to remove its director(s) in the event of a community decision to recall the board.

Designation. California law allows a corporation's directors to be identified in the bylaws by position or selected from time to time by a person or persons, called designators. Other than the right to appoint specific directors and remove them, the law is silent on designators' rights, unlike the extensive rights and protections afforded members. California law does allow third parties to be given the right to consent to amendments to the articles or bylaws, and such rights may be given to designators to protect their appointment and removal powers. While there is no mechanism in California corporate law for giving designators the right to revisit board decisions, this could be accomplished either through contractual arrangements, or through the board-within-a-board structure discussed in the legal analysis for template WP1-E. Similarly, corporate law does not give designators standing to either sue the corporation, or to sue on behalf of the corporation, so contractual arrangements would be required to fill this gap.

Normally, designators are legal persons. ICANN's current structure comes closest to a designator arrangement, although the designators are internal organizational units without any clear separate legal existence. If the designator structure is retained, we would advise that efforts are undertaken to clearly establish the units as unincorporated associations, which would strengthen the legal foundations of the designator structure and allow the use of contractual agreements with designators as needed for enforceability. Even with this change, implementing this mechanism would require less extensive changes to ICANN's bylaws than converting to a membership corporation.

Like members, designators owe no fiduciary duties to the corporation, so some caution should be exercised in giving extensive decision-making authority to them.

As with classes of members, a director appointed by one designator may not be removed by other designators or the board without that designator's consent. Accordingly, contractual arrangements would be needed to obligate each designator to remove its director(s) in the event of a community decision to replace the board.

5. <u>ICANN's Purpose</u>: Under nonprofit corporate law, including California law, the purpose for which the non-profit is organized, as set forth in its articles of incorporation (and optionally supplemented in its bylaws), provides the "polestar" that guides the activities of the board and the duties of directors as fiduciaries. Under California law, the purposes stated in a nonprofit public benefit corporation's articles and bylaws impose a charitable trust[1] on all of the assets of the corporation requiring that those assets be spent in furtherance of those charitable purposes. All activities of the board and its individual members are to be directed toward fulfilling that purpose. To the extent there is concern that the ICANN board is focused on activities that are not aligned with the multi-stakeholder community's interests, consideration should be given to reviewing ICANN's stated purposes to ensure that they adequately encompass multi-stakeholder community interests. It may be that the currently stated purpose is adequate in its alignment with interests of the multi-stakeholder community, and that the disconnect in the ICANN board expressed in many of the discussions we have observed to date relates to how the current board understands its fiduciary obligations. If that is the case, the CCWG may wish to consider director education efforts relating to fiduciary duties and the stated purpose of ICANN as among the necessary reforms.

6. <u>Balancing Accountability and Decision-Making Authority</u>: As a general concept of corporate law, including the corporate laws of California, the board of directors is the body with the authority and responsibility for managing and directing the affairs of the corporation in compliance with the corporation's articles of incorporation and bylaws. Directors have fiduciary duties attendant to those responsibilities (including, as noted above, a "duty of obedience" to the purpose expressed in the articles of incorporation, and a duty to use the assets for the expressed charitable purposes). A relatively small decision body of directors—rather than a large decision body of multiple stakeholders—is viewed as a means of providing for the kind of efficient decision-making that is required in an organization that has operational business activities. While in theory the multi-stakeholder community could be organized to serve as the board and make all board level decisions, this is unlikely to be an efficient decision-making structure for the oversight of ICANN's business. Moreover, it would undermine the system of checks and balances that is provided by having the multi-stakeholder community as a separate means to hold the board accountable. In evaluating any accountability mechanism, consideration should be given to the need for balance in decision-making rights to support the board's ability to make efficient business and operational decisions. In this regard, we note generally that providing the community with the broad ability to dictate or override *all* or *substantially all* board decisions— for example, through a broad community veto right—would be inconsistent with the board's fiduciary obligations to protect ICANN's assets and provide objectivity regarding the best interests of ICANN, and would undermine both the efficiency and effectiveness of board decision-making and the system of governance checks and balances.

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[1] This charitable trust should not be confused with operating in trust form as a legal entity. The distinction is discussed further in Adler & Colvin Preliminary Draft Responses to Request #1, at page 10.

7. <u>Board Composition</u>: Given the key role that a board of directors plays under corporate law, the primary mechanisms for corporate accountability are the powers to:

- Select directors who will strive as fiduciaries to fulfill ICANN's stated purpose, who understand the interests of the multi-stakeholder community and who will bring that understanding to bear on key decisions;

- Replace directors when they do not act in an accountable manner; and

- Recall and replace the entire board in extreme circumstances.

The power to select and replace directors and to recall the board is legally viable under both a member and designator approach. In both instances, details will need to be worked out regarding replacement of the entire board to assure that those with rights to remove certain directors will be bound to do so upon the vote of a supermajority of the member or designator group, but we believe these issues can be resolved. In addition, attention will need to be given to how to ensure that there is not a point in time where there is no board, either because the board has been recalled or because all of the directors have resigned due to an impending recall.

8. <u>Article and Bylaw Amendments</u>: Approval of article and bylaw amendments is also a key accountability mechanism to prevent the board from changing the rules by which ICANN is governed in ways that could be disadvantageous to the multi-stakeholder community and component bodies that have been given specific rights, for example, rights to designate directors. Approval of article and bylaw amendments can be implemented in either a member or designator structure.

9. <u>Budgets and Strategic Plans</u>: The more difficult issues relate to the ability of members or designators to reject budgets and strategic plans that have been developed by management and approved by the board. There are mechanisms available to reserve approval rights to a membership body; it is less clear that such approval rights could be reserved to designators. There are also practical considerations regarding implementation that will need to be addressed, for example as relates to the level of detail that must be included in budgets and plans and the degree to which some flexibility to adjust budgets and plans without seeking further approval is prudent to ensure that in unusual circumstances ICANN has the ability to act in a necessary way.

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ACCOUNTABILITY MECHANISMS

Description	Name of Mechanism	**WP-1A: Block changes to ICANN's bylaws**
	Description	Power for community representatives to (approve or) block changes that the ICANN Board intends to make to ICANN's bylaws
	Category (check & balance, review, redress)	Check & balance
	Is the mechanism triggered or non triggered ?	Non triggered (process driven, not incident driven)
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Amendment of decision of ICANN board
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	Last resort: blocking decision of ICANN Board
	Who has standing (directly or indirectly affected party, thresholds…)	Stakeholders, global internet community
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	Existing ICANN bylaws, public interests, stakeholders' interests, applicable (Californian) law
	Which purpose(s) of accountability does the mechanism contribute to ?	Comply with its own rules and processes Ensure decisions are for the public benefit, not just for a particular set of stakeholders
Composition	Required skillset	Skill to understand legal language Skill to assess impact of bylaw change on public interests
	Diversity requirements (geography, stakeholder interests, gender, other…)	Adequate stakeholder representation Remark RM: this is where it becomes obvious that the template was not made for "powers", but for "mechanisms", as distinguished in our doc "Scope, Powers and Mechanisms Working Paper"
	Number of persons (approximate or	Adequate stakeholder representation

	interval)	
	Independence requirements	Adequate stakeholder representation will ensure independence of the group, though –inevitably- their will be dependencies for one or more individual stakeholders
	Election / appointment by whom ?	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms"
	Recall or other accountability mechanism	See above
Decision making	Is the decision mandated or based on personal assessment	Not sure I understand the distinction here. There two options as far as I am concerned: 1. The community representatives have to get back to their constituencies and get their (consensus) approval to block the board's decision (not workable: will take too long with the risk of failing altogether) 2. The community representatives have the mandate from their respective constituencies to take a position based on their personal assessment of the bylaw amendment on the public interests/stakeholders'interests (NOT their personal interests)
	Decision made by consensus or vote ?	Vote. Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to make an amendment to the bylaws, this same stakeholder group can then prevent the community from blocking that amendment
	Majority threshold (if applicable)	Supermajority
Accessibility	Cost requirements	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms". The power has no costs (except possibly the costs of independent legal advice on the proposed bylaw amendment)
	Timeframe requirements	An amendment of ICANN's bylaws is probably not an urgent matter. My personal assessment: process should be given 6 months max, to include at least one ICANN meeting
	Language requirements	As regular
Implementation	Potential means to implement	• An amendment to ICANN's bylaws that gives the (group of) community representatives this power • A mechanism (SO/AC structure, P-CCWG, statutory delegates, statutory members, supervisory board) to delegate this power to
Legal Analysis and Viability		This mechanism is highly viable. [1]

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[1] We have assumed that all requests to evaluate the viability of various alternatives under "current conditions" refers to an evaluation under the law of ICANN's current state of incorporation, California. All comments in this document as to the viability of various options are based on California law.

| | | Members. If ICANN creates voting members representing the community, California law allows these members to be given the power to approve any amendment to the bylaws. The board's power to amend the bylaws could also be restricted or eliminated entirely. The proportion needed to approve the changes could be fairly low to quite high, as desired. If particular member(s) must have approval power, their approval could be required by making each a separate class of members and giving each class specific voting rights. Members may be individual persons or entities; if entities, each entity would internally decide how its vote would be cast.

Third parties. Regardless of whether ICANN has members, the California Nonprofit Corporation Law specifically allows bylaws to state that a specified person(s) can be given the power to approve their amendment. Therefore, the bylaws could give the power to block any changes to the bylaws to certain community representatives, either individuals (such as by office or position) or entities. Note that if desired, the power can be given to multiple persons simultaneously, so that all would have to approve the bylaw amendment for it to take effect.

The key decision on bylaw approval power would be defining who in the community has this power.

Note that members and third parties with such amendment blocking powers have no fiduciary duties and can be expected to act in their own best interests. |
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ACCOUNTABILITY MECHANISMS

	Name of Mechanism	**WP-1B: Board or management action in conflict with ICANN's bylaws or Articles of Incorporation**
Description	Description	Power for community representatives to challenge and ultimately block actions of the ICANN Board or management that are in conflict with ICANN's bylaws or AoI
	Category (check & balance, review, redress)	Check & balance
	Is the mechanism triggered or non triggered ?	Non triggered (process driven, not incident driven) (Remark RM: questionable, one could argue it is triggered, incident driven)
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Independent review, possibly followed by: Amendment of decision of ICANN board/management
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	1st step: independent review Last resort: blocking decision of ICANN Board/management
	Who has standing (directly or indirectly affected party, thresholds…)	Stakeholders, global internet community
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	ICANN bylaws, ICANN Articles of Incorporation
	Which purpose(s) of accountability does the mechanism contribute to ?	Comply with its own rules and processes
Composition	Required skillset	Skill to understand legal language Skill to assess actions against bylaws and articles of incorporation
	Diversity requirements (geography, stakeholder interests, gender, other…)	Adequate stakeholder representation Remark RM: this is where it becomes obvious that the template was not made for "powers", but for "mechanisms", as distinguished in our doc "Scope, Powers and Mechanisms Working Paper"

	Number of persons (approximate or interval)	Adequate stakeholder representation
	Independence requirements	Adequate stakeholder representation will ensure independence of the group, though –possibly- their will be dependencies for one or more individual stakeholders
	Election / appointment by whom ?	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms"
	Recall or other accountability mechanism	See above
Decision making	Is the decision mandated or based on personal assessment	Not sure I understand the distinction here. There two options as far as I am concerned: 1. The community representatives have to get back to their constituencies and get their (consensus) approval to block the board's decision (not workable: will take too long with the risk of failing altogether) 2. The community representatives have the mandate from their respective constituencies to take a position based on their personal assessment of the action/decision against the bylaws and articles of incorporation
	Decision made by consensus or vote ?	Vote. Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to take a certain action against the bylaws/AoI, this same stakeholder group can then prevent the community from blocking that action/decision
	Majority threshold (if applicable)	Supermajority
Accessibility	Cost requirements	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms". The power has little or no costs (except possibly the costs of independent review and legal advice)
	Timeframe requirements	Depending on the activity that violates the bylaws/AoI, this could be an urgent matter and (almost immediate stop necessary. My personal assessment: process should be given 2 weeks max for urgent matters, non---urgent 3 months max
	Language requirements	As regular
Implementation	Potential means to implement	• An amendment to ICANN's bylaws that gives the (group of) community representatives this power • A mechanism (SO/AC structure, P---CCWG, statutory delegates, statutory members, supervisory board) to delegate this power to

Legal Analysis and Viability		This mechanism has high viability with statutory members, but low viability with designators or other non-member parties.

Under the California law, only certain persons would have standing to bring suit for an injunction, a correction, or damages against the ICANN Board for violating a provision of the articles or bylaws (because such a violation would frequently involve violating the charitable trust under which the corporation holds its assets): (i) the corporation itself; (ii) a statutory member acting in the name of the corporation; (iii) an officer; (iv) a director; (v) a person with a reversionary, contractual, or property interest in the assets subject to the charitable trust; and (vi) the California Attorney General, or a person granted relator status by the Attorney General. Statutory membership represents the most direct strategy for giving community representatives the power to bring suit against the ICANN Board under these circumstances. This remedy could be buttressed with contractual obligations binding the directors to act in a manner consistent with the governing documents (e.g., providing liquidated damages if the directors were found to act otherwise, in violation of the contract). The right to sue under corporate law can be a powerful deterrent to board malfeasance, and it can be made even more effective if, for example, ICANN were to establish a reserve to fund such lawsuits on behalf of the corporation.

Non-member outside parties such as designators would not have standing to bring suit against the ICANN Board under California corporate law. They would either need to convince a person with standing under corporate law to bring suit, or their ability to sue the ICANN Board for violating the ICANN governing documents would need to be established through a contract granting them an interest in ICANN's charitable assets, under (v) above.

In any event, it should be noted that a suit to challenge the ICANN Board action in violation of the articles or bylaws typically cannot reverse any rights that an innocent third party has acquired, such as rights obtained under a contract that the ICANN Board approved even in violation of their corporate authority. Consequently, a questionable ICANN Board action can be reversed in full only until third party rights are created.

(In addition, please refer to the March 27 Adler & Colvin preliminary response to Question 7, concerning the unlikely possibility of an intervention by the California Attorney General in an internal governance matter that did not involve the misuse of substantial charitable assets.) |

	Name of Mechanism	**WP-1C: Block adoption by ICANN Board of strategic plan or budget**
Description	Description	Power for community representatives to block adoption by the ICANN Board of the strategic plan or budget
	Category (check & balance, review, redress)	Check & balance
	Is the mechanism triggered or non triggered ?	Non triggered (process driven, not incident driven)
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Amendment of decision of ICANN board/management possibly preceded by independent review
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	(possible 1st step: independent review) Last resort: blocking decision of ICANN Board/management
	Who has standing (directly or indirectly affected party, thresholds…)	Stakeholders
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	ICANN bylaws, ICANN Articles of Incorporation, public interests, stakeholders' interests, financial stability of ICANN, impact of budget
	Which purpose(s) of accountability does the mechanism contribute to ?	Comply with its own rules Achieve certain levels of performance as well as security Ensure decisions are for the public benefit, not just for a particular set of stakeholders
Composition	Required skillset	Skill to understand strategic plans and budgets, financial management Skill to assess budget and strategic plan vs: ICANN bylaws, ICANN's Articles of Incorporation, public interests, stakeholders' interests, financial stability of ICANN
	Diversity requirements (geography, stakeholder interests, gender, other…)	Adequate stakeholder representation Remark RM: this is where it becomes obvious that the template was not made for "powers", but for "mechanisms", as distinguished in our doc "Scope, Powers and Mechanisms Working Paper"
	Number of persons (approximate or	Adequate stakeholder representation

	interval)	
	Independence requirements	Adequate stakeholder representation will ensure independence of the group, though –possibly--- their will be dependencies for one or more individual stakeholders
	Election / appointment by whom ?	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms"
	Recall or other accountability mechanism	See above
Decision making	Is the decision mandated or based on personal assessment	Not sure I understand the distinction here. There two options as far as I am concerned: 1. The community representatives have to get back to their constituencies and get their (consensus) approval to block the board's approval of the strategic plan and/or budget (not workable for budget: will take too long with the risk of failing altogether. Might work for strategic plan) 2. The community representatives have the mandate from their respective constituencies to take a position based on their personal assessment of the strategic plan and/or budget
	Decision made by consensus or vote ?	Vote. Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to adopt a particular part of the strategic plan or budget, this same stakeholder group can then prevent the community from blocking the adoption of the plan
	Majority threshold (if applicable)	Supermajority
Accessibility	Cost requirements	Remark RM: again, this is where it becomes obvious that the template was not made for "powers", but for "mechanisms". The power has little or no costs (except possibly the costs of independent review and financial advice)
	Timeframe requirements	• For the strategic plan: considering we now have a five year "rolling" strategic plan, adoption of any revision of that plan is not an urgent matter. My personal assessment: process should be given 6 months max, covering 1 ICANN meeting • For the budget: if the group of representatives approves a temporary budget containing the unchallenged part of the proposed budget, I would say 3 months max. If not, ICANN should not get stuck by lack of an approved budget, the existing process for getting an approved budget is already squeezed for time; max 1 month.
	Language requirements	As regular
Implementation	Potential means	• An amendment to ICANN's bylaws that gives

	to implement		the (group of) community representatives this power • A mechanism (SO/AC structure, P-CCWG, statutory delegates, statutory members, supervisory board) to delegate this power to
Legal Analysis and Viability			This mechanism is highly viable if ICANN creates statutory members. Under California law, voting members may be given powers to approve most corporate actions. The proportion needed to approve the changes could be fairly low to quite high, as desired. If particular member(s) must have approval power, their approval could be required by making each a separate class of members. Members may be individuals or entities; if entities, each entity would internally decide how its vote would be cast. The key decision on strategic plan or budget approval power would be defining who in the community has this power. Note that members have no fiduciary duties and can be expected to act in their own best interests. This mechanism is most viable when it is implemented in a way that respects the board's fiduciary duties. Without members, this option has limited legal viability.

WP1-2A: Proposals for incorporating additional elements of the AoC into the ICANN bylaws

Version 1.3
20 March 2015

Listed by AoC article with comments, questions and/or proposed actions:

NOTES:

The proposed red text changes below incorporate feedback from our discussion when the initial proposals were presented and include comments and text edits, etc., from WP1 calls and from Steve DelBianco (SDB) and Robin Gross (RG).

The following are intended to be additions to the bylaws. The purpose of this exercise was not to rewrite the bylaws themselves but rather to find a home for certain important elements of the AoC.

Further discussions also indicated that caution needs to be exercised in determining where these AoC elements are inserted, either in intent (new wording) or in the existing language. It was also noted that the core values in the bylaws may not be ideal place to insert these commitments, and that the proposed Community Compact may be the place to incorporate these ideas.

3. This document affirms key commitments by DOC and ICANN, including commitments to:

(a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent;

> Interestingly ICANN core values only refer to public interest in the context of promoting competition in domain name registration (core value 6) and not ICANN's broader actions.
>
> Suggestion: Insert the above (a) (or similar language) as a new core value in the bylaws.
>
> Possible new core value (or other) in bylaws, incorporating edit by RG (in italics) NOTING that the wording may need to be reviewed to ensure that the GPI does not trump accountable, transparent and bottom-up processes:
>
> > ensure that decisions made related to the global technical coordination of the DNS are made in the global public interest and are accountable, transparent and bottom-up in their formulation
> >
> > *Legal Counsel Question: What does "bottom up in their formulation" mean? Does it require that all decisions be arrived at through some consensus building exercise before a review can be undertaken by the ICANN Board?*

(b) preserve the security, stability and resiliency of the DNS;

> Already accounted for in core value (1)

(c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and

> The notion of competition is only addressed in core values (5) and (6) but do not address the important notions of consumer trust and choice in the broader DNS marketplace.

> Suggestion: the following wording could be added to at the end of core value (5): competitive environment that enhances consumer trust and choice.

> Proposed edit (in bold) to existing core value 5:

>> Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment **that enhances consumer trust and choice**

(d) facilitate international participation in DNS technical coordination.

> Not specifically reflected in the core values or elsewhere in the bylaws but may already be addressed in spirit or intent. Note: RG proposed rephrasing (d) as "Participate in international DNS coordination" although there was no discussion as to whether or not this part of the AoC should be incorporated into the bylaws.

> *Legal Counsel Question: This phrasing would appear to create an obligation for ICANN to participate directly in the efforts at coordinating international DNS. Is that the intent? Is this a change from current practice?*

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users.

> The above are DOC commitments.

ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

> The above addresses a key global accountability issue that of performing "impact assessments" of its decision-making – are these requirements reflected in the bylaws anywhere? If not they should be.

> Proposed new section in Article III Transparency:

> New Section 1.3 (Section 1 Purpose to be renumbered to 1.1, see below for new 1.2) including edit from RG:

>> ICANN will perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or *non-commercial* impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

Legal Counsel Question: Should there be a threshold with regard to whether ICANN will perform and publish analysis on the effects of its decisions on the public? We are concerned that someone may argue that this is a condition attached to every ICANN board decision, without qualification.

AoC articles 5 and 6 are not relevant to WP1 as they are related to DOC commitments.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans.

> If the above is not already accounted for in the bylaws it could be incorporated into section 1 of the bylaw Article on Transparency.

In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

> Similarly, the above, if not already addressed/accounted for, could be brought into section 1 of the bylaw article on Accountability.

> Proposed insertion of new para 1.2 in Article III Transparency (this is AoC para 7 in its entirety including text suggestion by RG):

>> ICANN commits to adhere to transparent and accountable budgeting processes, *providing [adequate] advance notice to facilitate stakeholder engagement in policy decision-making*, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. [In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied].

>> *Legal Counsel Comment: we suggest "reasonable" in the place of "adequate."*

>> *Legal Counsel Question: Should there be a threshold with regard to whether ICANN will provide a thorough and reasoned explanation of decisions taken? We are concerned that someone may argue that this is a condition attached to every ICANN board decision, without qualification.*

8. ICANN affirms its commitments to:

(a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet;

> (A note on this – much of the phrasing in the AoC and the bylaws assumes that ICANN is the coordinator of the DNS (through the IANA contract). However were the contract for the IANA functions to be undertaken by another entity ICANN would, arguably, no longer have that role.)

(b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and

Interestingly the bylaws do not specify that ICANN shall remain a not for profit corporation – does this or some language variant thereof need to made explicit in the mission or core values of the bylaws?

ICANN should remain headquartered in the United States. The issue of jurisdiction remains controversial – WP1 or the broader CCWG should probably discuss.

Note: SDB has suggested that this be brought into the bylaws - noting the commitment by CEO Chehadé at the recent Senate Hearing - and although we did not conclude on this item in the call. It was suggested that this was a discussions item for the CCWG as a whole.

(c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

Suggestion: This phrasing and in particular the operating as a MS organization for the benefit of the public is not explicit in the core values or mission and should be integrated into one or the other sections of the bylaws.

Proposed inserting (c) in full as a new core value in the bylaws (including edit from RG):

Operating as a multi-stakeholder, *bottom-up* private sector led organization with input from the public, for whose benefit ICANN shall in all events act

ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

AoC 9 and **10** have already been addressed already by the group.

Legal Analysis and Viability		The discussed mechanism is legally viable. Aspects of the AOC may be incorporated in ICANN's articles or bylaws via amendment. Under California law, if a nonprofit corporation includes a specific purpose section in its articles or bylaws the board must ensure that corporate activities are consistent with that stated purpose. Where the board fails to do so, certain parties with standing (such as directors, officers, or members acting in a derivative capacity on behalf of the corporation) may be able to successfully sue for an injunction against the board to compel compliance with the articles or bylaws as a matter of charitable trust. The state Attorney General may also bring an action, although in practice this is unlikely absent claims or allegations of significant misuse of funds and breach of charitable trust. For greater analysis of what powers may be granted please see the Sidley Preliminary Draft Responses to CCWG Legal Sub-team (Pgs. 5-6) and Adler & Colvin Preliminary Responses to

		CCWG Legal Sub-team (Pgs. 15-16).
		Please also see above in the body of the Template for specific "Legal Questions" directed to proposed amendment language.

**WP1-2A,B,C,D,E: Non-Triggered Accountability Mechanisms with regard to the
Affirmation of Commitments and related reviews**

Introduction:

The paper seeks to highlight the key issues within the Affirmation of Commitments that impact Accountability within ICANN. It also looks at the reviews within the Affirmation of Commitments and very narrowly focuses on the Accountability mechanisms that are in place as a result of the AoC reviews.

Objectives:

The objectives are to assess:

1. What power(s) is ICANN enabled to exercise within the AoC
2. Who has what Standing and under what conditions?
3. What is the standard of AoC reviews?
4. What is the Composition of the review teams?
   a. Numbers
   b. Election or appointment process
   c. Independence conditions
   d. Recall mechanisms
5. How does the it come to a decision?
   a. consensus, vote...
   b. Is the decision bound by mandates of electors?
6. What are the potential means to implement the AoC and the related reviews?
7. How accessible are the review reports?
   – What are the related costs?
   – What are the delays associated with getting the reviews started or recommendations implemented?

Scope of Analysis

In view of previous input to the CCWG the scope of the Affirmation of Commitments and related reviews has been defined as mainly building on AoC (Affirmation of Commitments) Reviews. This is expected to transfer as much of the AoC approach as practically possible into ICANN by undertaking the following:

1. Merge AoC into the ICANN Bylaws (Work Stream 1) : In Bylaws or Articles, incorporate commitments and review teams currently required in the AoC
2. Ability to sunset review teams and launch new ones: In Bylaws or Articles, empower community representatives (Members, CCWG, etc.) to sunset required reviews and create new reviews.
3. Community appoints Affirmation review team members: In Bylaws or Articles, require that when formal reviews are initiated, empower community representatives (Members, CCWG, etc.) to designate members of the review teams. This is presently controlled by the ICANN CEO and GAC Chair
4. Enforcement of implementation of recommendations from Affirmation reviews: In Bylaws or Articles, empower the community (members, AC/SOs etc. as per the mechanisms) to require the Board to implement, and amend or accelerate implementation of, a previously approved recommendation from an ATRT.
5. In Bylaws or Articles, give Review Teams access to all ICANN internal documents

Existing Accountability Mechanisms within the Affirmation of Commitments:

Section 9 and 10 of the Affirmation of Commitments detail the various reviews and accountability mechanisms as follows:

From the AoC "9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently

robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review

team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board."

Proposed Recommmednations:

1. It is important that the general principles of the AoC be captured in the ICANN bylaws so as to ensure continuity post NTIA contract.

    Craft from the AoC the proposed wording for the bylaws

2. The proposed reviews in the AoC are not in a practical cycle, which makes it difficult for them to address the required accountability issues. The AoC reviews which runs on a 3year cycle are not aligned to the other ICANN reviews that run on a 5year to 8year cycle.

    Craft from the AoC the proposed wording for the bylaws

3. Selection of Review teams: The powers are vested in the two people who have to make the final decision.

    Craft from the AoC the proposed wording for the bylaws

4. There is no sunset of review teams or process to guide how the review team engages with the Board and ICANN staff during the implementation of the review process

    Craft from the AoC the proposed wording for the bylaws

In Bylaws Article IV, add a new section:

Section 5. Periodic Review of ICANN Execution of Key Commitments
section 5 would include one subsection for each of the 4 Affirmation Reviews.

1. **Accountability & Transparency Review.** The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.

In this review, particular attention will be paid to:

> (a) assessing and improving ICANN Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;

> (b) assessing the role ~~and effectiveness~~ of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; [note: Kavouss asked that we not review 'effectiveness of the GAC; Jordan asked whether the other structural reviews look at 'effectiveness'. They do not.]

> (c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);

> (d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and

(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.; and

(f) assessing the extent to which the Board and staff have implemented the recommendations arising out of the other periodic reviews required by this section.

The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board. The review team may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to ICANN internal documents, and the output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall ~~take action~~ [consider approval and begin implementation] within six months of receipt of the recommendations.

2. **Preserving security, stability, and resiliency**. The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.

In this review, particular attention will be paid to:

(a)   security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;

(b)   ensuring appropriate contingency planning; and

(c)   maintaining clear processes.

Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission.

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall take action [consider approval and begin implementation] within six months of receipt of the recommendations.

These periodic reviews shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the relevant review team.

3. **Promoting competition, consumer trust, and consumer choice.** ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection. The Board shall cause a review of ICANN's execution of this commitment after any round of new gTLDs have been in operation for one year.

This review will examine the extent to which the expansion of gTLDs has promoted competition, consumer trust, and consumer choice, as well as effectiveness of:

> (a) the gTLD application and evaluation process; and

> (b) safeguards put in place to mitigate issues involved in the expansion.

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall ~~take action~~ [consider approval and begin implementation] within six months of receipt of the recommendations.

[Kavouss proposed adding: Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.]

These periodic reviews shall be conducted no less frequently than every four years, measured from the date the Board received the final report of the relevant review team.

4. **Reviewing effectiveness of WHOIS policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust.** ICANN commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.

The Board shall cause a periodic review to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.

[Robin Gross & Bruce Tonkin suggested adding OECD privacy principles to the criterion of this review]

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts, including representatives of law enforcement and experts on privacy, to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output of the review will be published for public comment. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and recommendations to the Board. The Board shall take action [consider approval and begin implementation] within six months of receipt of the recommendations.

These periodic reviews shall be conducted no less frequently than every three years, measured from the date the Board received the final report of the relevant review team.

Legal Analysis and Viability	This accountability mechanism has high legal viability with statutory members, but low viability with designators and other non-member parties.
	This mechanism essentially calls for the ability to reverse an ICANN Board decision to reject a recommendation of a review panel, or to compel the ICANN Board to follow a recommendation in the face of board inaction.
	We see the following as viable mechanisms to implement this power:
	• If there are *statutory members*, the bylaws could give them the power with a low-threshold vote to override a board decision in this area and return the matter to the board for further consideration.
	• If the ICANN Board still failed to accept the recommendation, the *statutory members* would have the following options for escalating the dispute. First, the members could propose and adopt an amendment to the bylaws that implemented the proposed change, without the consent of the ICANN Board. Then, if the ICANN Board disregarded the new directive in the bylaws, the members would have the right to sue the ICANN Board on a claim that the failure of the ICANN Board to follow the bylaws constituted a misuse of charitable assets. Second, the members could vote to remove the entire ICANN Board (with contractual agreements among member classes that all classes will remove all directors based on such a vote), or specific classes of members who elected the obstructionist directors could remove them.
	• We do not believe there is a corporate law basis for giving *designators and other non-member parties* a reserved power to override an ICANN Board decision, nor can they be given the right proactively to amend the bylaws, only to veto amendments otherwise approved. Therefore, in a non-member structure, such an override power would have to reside in a contract. For example, a contract could make the ICANN Board's rejection or refusal of a review panel recommendation extremely expensive for ICANN (such as through a liquidated damages clause), thus creating a director

	fiduciary duty to adopt the recommendation. Violation of that fiduciary duty would expose individual directors to personal liability to ICANN for the harm caused.
	This mechanism is most viable when it is implemented in a way that respects the board's fiduciary duties.

ACCOUNTABILITY MECHANISMS

WP1 Work Status Chart (link)
Table 1:WP1 Powers
Item: **WP1-3A Community can require implementation of all Accountability WG Work Stream 2 accountability improvements**

Background:
In December, the CCWG gathered consensus around this proposed rationale for designating Work Streams:

Work Stream 1 is designated for accountability enhancement mechanisms that must be in place or committed to, before IANA transition occurs.

WS1 mechanisms are those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance Icann's accountability would be implemented if it had consensus support from the community, even if it were to encounter Icann management resistance or if it were against the interest of Icann as a corporate entity.

All other consensus items could be in Work Stream 2, provided the mechanisms in WS1 are adequate to force implementation of WS2 items despite resistance from ICANN management and board.

Discussion:

In Work Stream 1 the community will acquire review and redress powers, but these may not be sufficient to force implementation of consensus Work Stream 2 accountability

improvements. There may be a need for additional community powers to force implementation, or for a commitment from ICANN to implement a specified list of improvements.

At the time of transition, not all accountability improvements for WS2 will are likely be defined in sufficient detail for ICANN to begin implementation.

For items where implementation detail is sufficient, the CCWG could document these items and secure a commitment from ICANN that it would begin implementation within a specified time period. This commitment would be needed before transition (WS1). The commitment could include a means of enforcing the commitment. Alternative, the community could use its power to remove a board that failed to fulfill its commitment.

For items where implementation details are not known at time transition, we may need a different mechanism. Presumably, those implementation details will be worked-out in a bottom-up consensus process, sometime after the IANA transition.

The community can influence the timing to develop implementation details through its policy development processes and Affirmation Review & Recommendations. After public comment, a PDP or review team recommendation for an accountability improvement is expected to be implemented by ICANN board and management.

Question is, how can the community force ICANN to implement such recommendations? WP1 is already developing a community power to require implementation of AoC Recommendations (WP1-2C). PDP recommendations also carry an obligation for ICANN to implement. But what about recommendations arising outside of the PRP or AoC review processes?

This may indicate a need for a new community power. Should it be strictly confined to the WS2 items about which the CCWG reached consensus, or is this a permanent and more general power?

Legal Analysis and Viability	This accountability mechanism essentially calls for the ability to compel the ICANN Board to adopt and implement future accountability mechanisms in the face of a ICANN Board decision to reject a WS2 improvement, or a failure or refusal by the ICANN Board to consider a WS2 improvement.
	The viability of this mechanism and the ways in which it could be implemented are identical to those described in our analysis of **WP1-2A, B, C, D and E.**
	This mechanism is most viable when it is implemented in a way that respects the board's fiduciary duties.

Draft 1: Jordan Carter. Circulated 1 March 2015 at 0240 UTC.

	Name of Mechanism	**WP1-4A: Specification of consensus threshold for ICANN's "due" consideration of GAC Advice**
Description	Description	ICANN bylaws require ICANN to "duly" take GAC advice into account. If the Board does not follow GAC advice there is a process required to try and come to agreement. Today such GAC advice is decided by consensus, as regulated by GAC's Operating Principles. The GAC could at any time decide to change its Operating Principles to change the way advice is agreed. Such a change would change (increase or decrease) governmental influence in ICANN, because it would change the likelihood of GAC providing advice. This mechanism would involve changing the ICANN bylaws to specify that the current "consensus" threshold would be the threshold at which ICANN must "duly" take GAC advice into account. There would be no impact or constraint on the GAC in determining its Operating Principles or working methods.
	Category (check & balance, review, redress)	Check and balance (?)
	Is the mechanism triggered or non triggered ?	Non-triggered – it would simply form part of the enduring framework for ICANN.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Specifies threshold at which ICANN deals with GAC advice under bylaw Article XI Section 2 clause 1j.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	Not applicable.

	Who has standing (directly or indirectly affected party, thresholds…)	Not applicable.
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	Not applicable.
	Which purpose(s) of accountability does the mechanism contribute to ?	Primarily this purpose: • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders It contributes to this purpose by ensuring the status quo level of influence for GAC advice is maintained and can only be changed by agreement of the whole community through future changes to the bylaws (rather than simply GAC decisions on its operating principles).
Composition	Required skillset	Not applicable.
	Diversity requirements (geography, stakeholder interests, gender, other…)	Not applicable.
	Number of persons (approximate or interval)	Not applicable.
	Independence requirements	Not applicable.
	Election / appointment by whom ?	Not applicable.
	Recall or other accountability mechanism	Not applicable.
Decision making	Is the decision mandated or based on personal assessment	Not applicable.
	Decision made by consensus or	GAC decision-making is defined by GAC in its

	vote ?	Operating Principles.
	Majority threshold (if applicable)	GAC decision-making is defined by GAC in its Operating Principles. This proposal deals with how ICANN is obliged to respond to GAC advice by specifying that the treatment set out in the bylaws should occur only when current consensus thresholds are met.
Accessibility	Cost requirements	Not applicable.
	Timeframe requirements	To be implemented before IANA stewardship transition.
	Language requirements	Not applicable.
Implementation	Potential means to implement	Amendment to ICANN Bylaws, with Article XI Section 2 clause 1j changed as follows. (Changes identified as follows: additions in **bold and underlined**, deletions struck through.) j. ~~The~~ **Consensus** advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies, **where consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection**. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee **consensus** advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
Legal Analysis		The discussed mechanism is legally viable. Under ICANN's current structure, the articles or bylaws may be amended only upon action by a two-thirds (2/3) vote of all members of the ICANN Board. As a substantive matter, we see no problem with the proposed changes to the bylaws to give effect to this mechanism. As proposed the GAC is not endowed with power to compel ICANN Board action, rather ICANN must give any GAC consensus due consideration. Moreover,although the ICANN Board and the GAC are obliged to come together and endeavor to resolve difference of opinion or approach regarding a consensus recommendation, the ICANN Board is not bound to agree with the GAC. This is an important right that must be reserved to the ICANN Board in order for it to fulfill its fiduciary duties, and to maintain independence from and avoid undue influence by governmental stakeholders.

Note: the above language defining "consensus" is a direct copy from Principle 47 of the GAC's Operating Principles, which refers to the United Nations standard. GAC's current Operating Principles as agreed at Dakar in October 2011 are available at https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles

Work Item: **WP1-5B-1: Prevent ICANN Imposing Obligations – Accountability Contract**
Drafter: Keith Drazek (kdrazek@verisign.com)
Version: 1.0
Date: Circulated on 13 March 2015

	Name of Mechanism	**WP1-5B-1: Prevent ICANN Imposing Obligations (using an Accountability Contract)**
Description	Description	This would be a new restriction to prevent ICANN from expanding its mandate through the unilateral addition of new obligations or requirements on registries, registrars and registrants.
	Category (check & balance, review, redress)	**Check and balance**: This restriction will ensure that ICANN cannot use its position to unilaterally impose new requirements on its contracted counter-parties, including domain name registrants. It ensures that ICANN must rely on established processes to develop and implement new or amended policies that are necessary for the secure and stable operation of the DNS. It ensures multi-stakeholder community is responsible for developing consensus policies within predictable and transparent bottom-up processes, and that role cannot be circumvented by ICANN.
	Is the mechanism triggered or non triggered ?	**Non-Triggered** Through a new Accountability Contract with Registries, Registrars and Registrants, this would be a new, non-triggered mechanism. It could be a new, stand-alone agreement or it could be incorporated into existing Registry Agreements, Registrar Accreditation Agreements and Registration Agreements.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	A new Accountability Contract would give the community, powers to constrain an ICANN staff and/or Board that attempted to expand its mandate beyond accepted borders through the addition of new requirements on contracted parties and registrants. Breach of the Accountability Contract by ICANN would constitute grounds for reconsideration and redress.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	The Contracted Parties (Registries, Registrars and Registrants) would have the power to trigger this mechanism if needed. As a non-triggered mechanism, a clear and concise Accountability Contract would ideally act as a deterrent to ICANN unilaterally imposing new obligations on contracted parties.

Decision making	Who decides when the Accountability Contract is breached and what procedures are to be used?	The Accountability Contract would need to clearly establish: • thresholds for breach • notice procedures • opportunities for cure • penalties for breaches not cured
Accessibility	Who relies on this mechanism?	Contracted Parties and registrants are the parties who rely directly on an Accountability Contract to prevent new obligations or requirements. However, the entire multi-stakeholder community benefits from an ICANN that operates within its mandate and follows bottom-up, consensus-based policy making processes. The entire community benefits from knowing new requirements or obligations result only from accepted community processes.
Legal Analysis and Viability		An Accountability Contract (whether a stand-alone agreement or provisions incorporated into standard form contracts) would be legally viable. In order to be binding, ICANN would need to be a party to the contract, as would the relevant constituent(s). The other accountability mechanisms being considered could be used to ensure that ICANN includes the Accountability Contract in its agreements with registries, registrars and (to the extent applicable) registrants, or in related agreements to which registrants are a party. The counterparty to the contract could enforce the contract against ICANN, assuming the counterparty is a legally cognizable entity capable of entering into contracts, and of suing and being sued. Other third parties could not enforce the contract unless the contract made them "third party beneficiaries" of the contract with enforcement rights. Enforcement could be through a court proceeding or through alternative dispute resolution procedures to the extent provided in the contract. It is standard practice and the default position in California that bilateral or multilateral contracts cannot be modified unilaterally by one party; a contract would need to provide specifically for unilateral modification for that to be permitted. In order for the Accountability Contract mechanism to operate effectively, provision would also need to be made to ensure that ICANN cannot implement new requirements on these constituents unilaterally outside of the relevant agreements with the constituents. This could be achieved by providing that certain standard terms or standard form contracts for registries, registrars and registrants initially be subject to community approval (using the other accountability mechanisms discussed), and community approval for ICANN to deviate from these terms or forms.

		However, such an oversight could be administratively burdensome and consideration should be given as to whether this type of approval would hinder the efficiency of existing processes.
		This mechanism is most viable when it is implemented in a way that respects the board's fiduciary duties.

Other considerations if this mechanism was implemented:

- A key question: "How do we ensure Registrants are included and/or represented in the Accountability Contract?"

Work Item: **WP1-5B-2: Prevent ICANN Imposing Obligations – Golden Bylaw**
Drafter: Keith Drazek (kdrazek@verisign.com)
Version: 1.0
Date: Circulated on 13 March 2015

<table>
<tr>
<td rowspan="5">Description</td>
<td>Name of Mechanism</td>
<td>WP1-5B-2: Prevent ICANN Imposing Obligations
(through introduction of a Golden Bylaw)</td>
</tr>
<tr>
<td>Description</td>
<td>This would be a new restriction to prevent ICANN from expanding its mandate through the unilateral addition of new obligations or requirements on registries, registrars and registrants.</td>
</tr>
<tr>
<td>Category (check & balance, review, redress)</td>
<td>Check and balance: This restriction will ensure that ICANN cannot use its position to unilaterally impose new requirements on its contracted counter-parties, including domain name registrants. It ensures that ICANN must rely on established processes to develop and implement new or amended policies that are necessary for the secure and stable operation of the DNS. It ensures the multi-stakeholder community is responsible for developing consensus policies within predictable and transparent bottom-up processes, and ensures that role cannot be circumvented by ICANN.</td>
</tr>
<tr>
<td>Is the mechanism triggered or non triggered ?</td>
<td>Non-Triggered
Through the introduction of a new Golden Bylaw, this would be a new, non-triggered mechanism that prevents ICANN from creating new and unilateral obligations on registries, registrars and registrants outside of accepted consensus processes.</td>
</tr>
<tr>
<td>Possible outcomes (approval, re-do, amendment of decision, etc.)</td>
<td>A new Golden Bylaw would give the community powers to constrain an ICANN staff and/or Board that attempted to expand its mandate beyond accepted borders through the addition of new requirements on contracted parties and registrants. Breach of the Golden Bylaw by ICANN would constitute grounds for reconsideration and redress. Disputes could go to an independent arbitration panel that could issue binding decisions.</td>
</tr>
<tr>
<td>Standing</td>
<td>Conditions of standing (ie « last resort », type of decision being challenged, …)</td>
<td>The Contracted Parties (Registries, Registrars and Registrants) would have the power to trigger this mechanism if needed. As a non-triggered mechanism, a clear and concise Bylaw clause would ideally act as a deterrent to ICANN unilaterally imposing new obligations on contracted parties.</td>
</tr>
</table>

Decision making	Who decides when the Accountability Contract is breached and what procedures are to be used?	The Golden Bylaw would need to clearly establish: • thresholds for breach • notice procedures • opportunities for cure • penalties for breaches not cured
Accessibility	Who relies on this mechanism?	Contracted Parties and registrants are the parties who rely directly on a bylaw amendment that would prevent ICANN unilaterally creating new obligations or requirements outside established community processes. However, the entire multi-stakeholder community benefits from an ICANN that operates predictably, within its mandate, and follows bottom-up, consensus-based policy making processes. The entire community benefits from knowing new requirements or obligations result only from accepted community processes.
Legal Analysis and Viability		This mechanism has high viability with statutory members, medium viability with designators or other non-member parties. Where there are statutory members, California law generally requires their approval, in addition to the board's, for any amendment of the articles, as well as for any amendment of the bylaws that materially and adversely affects their rights as to voting or transfer. The articles or bylaws may also remove the power to amend the bylaws from the board entirely, leaving only the membership with the power to amend the bylaws, although this would mean that even uncontroversial minor changes would require a membership vote. The articles and bylaws may specify other circumstances under which member approval is required for amendments, and they may require a measure of member or board approval higher than the statutory default of a majority vote. The articles and the bylaws may also require the consent of other persons (beyond the board and statutory members) for amendments to either document. Accordingly, it would be straightforward to incorporate golden provisions into either or both the articles and bylaws regardless of whether ICANN has statutory members, or designators. With respect to enforcement, only statutory members would have standing to bring suit against the ICANN Board under California law if the ICANN Board attempted to disregard member rights in adopting a bylaw amendment. (See the response to WP-1B.) If other non-member groups are given the right to consent to a bylaw amendment, they would need to have a separate contract that, for example, provided liquidated damages if the ICANN Board did not obtain their consent to an amendment, in order to give them standing to enforce it. (It should be noted, however, that in order to take effect, amendments to articles need to be filed with the

| | | California Secretary of State under certification by officers that all requisite approvals havebeen obtained. Consequently, ICANN officers would need to commit perjury in order to successfully file an articles amendment without obtaining these approvals. The same protection would not exist for the bylaws, however, which are an internal governance document and do not need to be filed with regulators for amendments to become effective.) |

Other considerations if this mechanism was implemented:

A key question: "Through what mechanism or process are registrants able to cite breach of the golden bylaw?"

	Work Item:	**WP1-7A: Removing the ICANN Board of Directors**
	Drafter:	(Version 2.0) Jordan Carter (jordan@internetnz.net.nz)
		(Version 3.0) Malcolm Hutty (malcolm@linx.net)
		(Version 3.1) Malcolm Hutty (malcolm@linx.net)
	Version:	3.1
	Date:	Circulated on 19 March 2015

Introduction

This paper sets out three alternative strawman proposals for a mechanism to remove the ICANN Board of Directors.

The three alternatives distinguished

	Strawman 1	Strawman 2	Strawman 3
Standing: who can *petition* for Board spill?	• Any 2 SOs; or • Any 2 ACs; or • 1 SO + 1AC	• 3 constituencies within gNSO; or • 3 regions within ccNSO; or • ASO	Per rules of each SO
Decision: who *decides* to spill Board ?	Community Council[2]	Community Council[3]	Consensus vote by any SO
Basis for decision	Loss of confidence	Loss of confidence	Loss of confidence
Intended effect	**Last resort mechanism** to remove Board if there is a very high level of consensus to do so within the community	Make Board more responsive by giving mechanism for **substantial components of the community** to press their case for spilling the Board before rest of the community	Board would have to **command the confidence of each SO** on an ongoing basis.
Likelihood of petition occurring	Least likely / highest bar	More likely / intermediate bar	Most likely / lowest bar
Likelihood of petition resulting in spill	Most likely (cross-community support already established by petition)	Least likely (cross-community support not yet established by petition)	Less likely than (1) (Cross-constituency/region support not established by petition)

WP1-7A Strawman 1 establishes a Community Council as a permanent body, and this Council would exclusively have the power to discharge the Board. Members of the Community Council would be appointed by constitute elements of ICANN (SOs and ACs); in order to ensure independence from the Board individuals who hold other leadership positions within ICANN would not be eligible for appointment to the Community Council. Crucially to this strawman proposal, the Community Council

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[2] The original paper proposed a Community Council, and this was envisaged to have multiple powers, not just spilling the Board. If it is decided instead to have some other structure (e.g. statutory members, permanent CCWG) then this power could be given to that body instead.

[3] As above.

would only be able to exercise this power after having been petitioned to do so by two SOs, two ACs, or one SO and one AC.

WP1-7A Strawman 2 follows the same format as Strawman 1, but grants a broader set of entities the right to petition the Community Council to discharge the Board.

WP1-7A Strawman 3 simply empowers each of the three SOs to discharge the Board, provided that a full consensus is found within the SO so to do.

Rationales for, and criticism of, each alternative proposal

Strawman 1 recognises that discharging the Board is a major step, that itself introduces risk to the organisation, and prioritises guarding against excessive use of that power by setting a high bar to exercising it.

In Strawman 1, discharging the Board is a two-step procedure: first there has to be a petition from two SOs or ACs, and second there has to be decision by the Community Council. In practice, the power to petition for discharge the Board is only ever likely to be exercised by gNSO, ccNSO or GAC[4]. Thus the Community Council would only be engaged once the Board had already lost the confidence of either the entire names community other than governments, or the entire stakeholder base for either generic or country code domains. This raises the question of what purpose the Community Council would then fulfil: why would it ever choose not to act upon such a petition? The view of an entire community would be clear by virtue of the petition; if the Community Council failed to act upon it, it would be presumed that this was because the Council believed the community had erred[5].

The existence of the Community Council would give the Board the opportunity to engage more directly with a small number of individuals to justify themselves and win the support and sympathy of the Council members. This could then result in a Board being retained that had lost the support of the broader community, simply by virtue of having persuaded a small group of individual representatives that the broader community is misguided. Whether one supports this model is therefore likely to depend substantially on whether one has greater faith in having sensitive decisions taken on as broad as base as possible (in order to prioritise community accountability) or by representatives who are able to engage deeply and apply special expertise.

Strawman 2 also recognises that actually discharging the Board is a major step, but distinguishes itself from Strawman 1 by suggesting that a considerably lower bar be set for raising the suggestion that the Board be discharged than for deciding to do so. Strawman 2 requires the same process for taking the decision to discharge the Board as Strawman 1, with the same high threshold within the

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[4] SSAC and RSSAC see themselves as purely advisory bodies, whereas discharging the Board is a "command function"; they are therefore unlikely to feel it is appropriate for themselves to exercise a power to petition, even if they are themselves concerned by the action or inaction of the Board. ASO is unlikely to feel it is appropriate to exercise the power to petition unless the numbers community (which is itself relatively unlikely, given the different relationship and limited responsibility ICANN has in that area); in the event that ASO felt it was sufficiently impacted to justify initiating such a procedure, ASO would be more likely to look for a remedy to the MoU between ICANN and the RIRs, and other provisions of the CRISP proposal for post-transition IANA improvements for numbering, than to have recourse to this mechanism.
[5] The other possibility was that there was substantial objection to the petition from one of the other communities not party to the petition. However, this should not be presumed likely: there is big difference between a community not themselves feeling a requirement to spill the Board and actively opposing it. For example, ASO might not choose to join in a petition motivated by a failure to follow DNS PDP, as it doesn't affect the numbering community; that doesn't mean ASO would actively oppose discharging the Board for such a reason.

Community Council. However the right to petition the Community Council to exercise this power is extended more broadly: to any three constituencies within gNSO or regions within ccNSO, as well as ASO.

This difference in Strawman 2 would make the Community Council a more deliberative body. In Strawman 1 the position of an entire community is clear; in Strawman 2, only the concern of a subset of the community is established, and the Community Council becomes the venue for hearing their grievance and establishing whether the community as a whole upholds it and wishes to discharge the Board on its account. This would itself act as a check and balance to the Board, as it would be the only ICANN structure representing the whole community, other than the Board, and the only venue for addressing the community, other than Open Mic sessions.

Strawman 3 is much simpler. It avoids the additional complexity of creating yet another new structure, the Community Council. Strawman 3 stands for the proposition that any ICANN Board must command the confidence of each of the three main communities it serves, the three SOs. If there is a critical loss of confidence by any of the three SOs, a new Board should be selected that can command their confidence.

It might be challenged that it is unjust that one SO alone could unseat a Board that is supported by the other two. Strawman 3's answer to this is that any Board should be able to command the confidence of all three, and that this is an achievable goal. Moreover, if it is felt too difficult to achieve, that does not justify imposing a Board on an unwilling community, but would instead indicate a need to divide ICANN.

This proposal prioritises ensuring that the Board is responsive to and answerable to the community. It is more likely that the Board will in fact be spilled under this model than the other two alternatives. Accordingly, it would be especially important if this proposal is accepted to ensure appropriate mechanisms are in place to accommodate that, such as an "Emergency Caretaker Director" and a mechanism to appoint new directors rapidly.

Strawman 3 does not grant the power discharge the Board to Advisory Committees. The reason for this is simple: Advisory Committees are *advisory*, not responsible executive functions. By contrast, the SOs are the embodiment of the community the Board is intended to serve (and therefore the closest available analogue to membership); as such giving the SOs the ultimate oversight over the Board implements the bottom-up multistakeholder model, whereas giving it to ACs would not.

Template for WP1-7A Strawman 1

<table>
<tr><td rowspan="5">Description</td><td>Name of Mechanism</td><td>WP1-7A Strawman 1:
Removing the ICANN Board of Directors</td></tr>
<tr><td>Description</td><td>This would be a new power for the community to bring about the removal of the ICANN Board of Directors ("the Board"). All directors would be removed and processes would be commenced to replace appointment directors.</td></tr>
<tr><td>Category (check & balance, review, redress)</td><td>Check and balance: it provides the community with an ultimate recourse, to remove the Board from office, ensuring that, in the final analysis, the community retains ultimate control of the organisation.

Redress: the community could ultimately redress a grievance about ICANN's behaviour by causing the election/appointment of a new Board of Directors.</td></tr>
<tr><td>Is the mechanism triggered or non triggered ?</td><td>Triggered.
In the normal course of events Board members serve the term they are appointed for. The community would need significant reason to remove the Board.</td></tr>
<tr><td>Possible outcomes (approval, re-do, amendment of decision, etc.)</td><td>Process to remove the Board succeeds or fails.
• If <u>succeeds</u>, new election/appointment of the Board begins.
• If <u>fails</u>, nothing happens.</td></tr>
<tr><td rowspan="2">Standing</td><td>Conditions of standing (ie « last resort », type of decision being challenged, …)</td><td>The <<Community Council>> would have the power to trigger this mechanism – it would be the sole body able to implement it.</td></tr>
<tr><td>Who has standing (directly or indirectly affected party, thresholds…)</td><td>Triggering this mechanism would require a petition to the <<Community Council>> from any of the following:
• Two SOs
• Two ACs
• One SO and one AC

The petitioning SOs/ACs would have to demonstrate that they had followed their usual internal processes to arrive at the decision to formally trigger this mechanism.</td></tr>
</table>

Standard of review	Which standards is the decision examined against (process, principles, other standards…)	It is proposed that there is a subjective standard to be assessed and demonstrated for this mechanism to be available to the <<Community Council>>: *The actions of ICANN, through action or inaction by the Board, were inconsistent with the obligations set out in the Community Compact.* Aside from this, the standard is the community's opinion. There cannot be an objective test for this mechanism.
	Which purpose(s) of accountability does the mechanism contribute to ?	It contributes to all four purposes of accountability as defined by the CCWG: Ensuring that ICANN will – • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as security • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders) It contributes to these purposes by giving the Board knowledge that if they do not collectively live up to the community's expectations in respect of being accountable, they can be removed.
Composition	Required skillset	The <<Community Council>> will be a standing body in ICANN, established under the Articles / Bylaws with the general purpose of being the way the Community exercises its reserve powers over ICANN. One of these reserve powers is "Removing the ICANN Board of Directors" as specified in this Template. Appointees to the <<Community Council>> should be members of the ICANN Community in good standing and able to make decisions that relate to the various powers granted to the <<Community Council>>. In particular for this power, they will need: • advanced knowledge of ICANN's Compact; • understanding of expectations of the ICANN community; and • understanding of ICANN's environment and context

	Diversity requirements (geography, stakeholder interests, gender, other…)	**Option 1** The <<Community Council>> will achieve diversity of stakeholder and gender representation, due to the requirements set out in the next box. **Option 2** The <<Community Council>> will achieve diversity of stakeholder, gender and regional representation, due to the requirements set out in the next box.

	Number of persons (approximate or interval)	**Option 1:**
		The <<Community Council>> will consist of **twelve** members, comprised as follows:
		• Two representatives of each of the following community bodies:
		    ○ ccNSO
		    ○ GNSO
		    ○ ASO
		    ○ ALAC
		    ○ GAC
		• One representative of each of the following bodies:
		    ○ SSAC
		    ○ RSSAC
		In selecting their representatives, the community bodies electing two representatives must elect two people of different genders.
		
		Option 2:
		The <<Community Council>> will consist of **twenty nine members**, comprised as follows:
		• Five representatives of each of the following community bodies:
		    ○ ccNSO
		    ○ GNSO
		    ○ ASO
		    ○ ALAC
		    ○ GAC
		• Two representatives of each of the following bodies:
		    ○ SSAC
		    ○ RSSAC
		
		In selecting their representatives, the community bodies electing five representatives must:
		• ensure equitable representation across the five ICANN regions; and
		• elect at least two men and at least two women.
		
		The community bodies electing two representatives must:
		• elect two people from different ICANN regions; and
		• elect two people of different genders.

	Independence requirements	Members of the <<Community Council>> may not be from any of the following categories of people:
		• ICANN Directors or Board Liaisons
		• ICANN Staff
		• ICANN's Nominating Committee
		• Members of any Review or Redress institutions
		• Current office-holder (Chair or Vice Chair) in an SO or AC
		• Staff of entities that are commercially dependent on ICANN
		No more than **two** members of the Community Council may be from any single company or group of related companies, or from one national government or other governmental organisation.
	Election / appointment by whom ?	Members of the <<Community Council>> are appointed by their SOs and ACs according to their usual documented processes.
		Members are appointed for a term of one year, commencing on 1 January.
		If the appointing body has not appointed member/s in time for 1 January, the current member/s continue/s in office until the new one/s is/are appointed (and the term limit does not apply).
		Members are eligible for re-election for a maximum of three consecutive terms, and for five terms in total.
		The <<Community Council>> will elect its own Chair from among its members, who will have a deliberative but not a casting vote.
		(note: this ensures that the Council cannot be sabotaged by appointing bodies failing to appoint members.)

	Recall or other accountability mechanism	The appointing bodies can hold their members to account as per the following rules, which will be set out in the section/s of the Articles / Bylaws constituting this <<Community Council>>:
		• Where an appointing body has concerns about the actions of a member they have appointed, they may by whatever process they choose issue the member with a Formal Warning.
		• Not sooner than thirty days after the issue of a Formal Warning, if the appointing body's concerns have not been resolved, they may appoint a new member to replace the specified member (using the same process they used to appoint that member in the first place). The new member takes over seamlessly from the old member.
		(note: this ensures that the Council cannot be sabotaged by appointing bodies removing their members and failing to appoint new ones.)

Decision making	Is the decision mandated or based on personal assessment	**Option A:** Members of the <<Community Council>> make decisions on personal assessment, but for the use of this power must attend and participate in a meeting of their appointing body's peak body which is solely convened to discuss the use of this mechanism no more than fourteen days and no fewer than seven days before the decision is to be made by the Council. *(note: this option is my proposed compromise position between mandated and individual – individual (because how can SOs or ACs make split decisions?) but requiring attendance at and participation in a discussion.)* **Option B:** Members of the <<Community Council>> make decisions on a mandated basis for the exercise of this power. Appointing bodies may direct their members in any way they see fit that meets the following criteria: • The decision must be made by the peak body of that SO/AC, at a meeting convened for the purpose and not more than 14 and not fewer than 7 days before the date of the Council meeting that will trigger this mechanism; • The meeting of that SO/AC's body should follow its usual processes particularly in respect of the degree of openness it allows to its part of the ICANN community; • The decision must be to direct the votes of all of the SO/AC's members of the Council; • The decision must be agreed supermajority of at least 2/3 of the voting members of the peak body; • The decision must be communicated to the members of the Council representing that SO/AC in writing – and such communication may be public or private. Members of the Council have no discretion but must cast their votes according to the directions they have received.
	Decision made by consensus or vote ?	Decision is by vote of the <<Community Council>> members.
	Majority threshold (if applicable)	**Where membership is Option 1:** Ten members (83.3%) of the <<Community Council>> must vote in favour of the resolution to dismiss the Board. **Where membership is Option 2:** Twenty four members (82.8%) of the <<Community Council>> must vote in favour of the resolution to dismiss the Board. *(note: this is designed to ensure that one single SO or AC cannot block the removal of the Board.)*

Accessibility	Cost requirements	There are costs involved, as follows: - The general costs of the <<Community Council>>'s existence and operation, including whatever staffing or contracted secretariat support it requires. - The costs of a meeting that implements this particular mechanism to remove the Board. - The costs across the ICANN community of conducting the election/appointment process for a fresh Board.
	Timeframe requirements	To be implemented before IANA stewardship transition (i.e. WS1). In terms of implementing this power, I envision that: - Within two working days of the Council receiving an appropriate petition as set out in this template, it must convene a meeting scheduled between fourteen and twenty one days into the future. - SOs and ACs must convene meetings as noted above. - If the Board is removed, various election and appointment processes must be able to appoint a new Board as soon as practicable. Timeframe currently unknown.
	Language requirements	As general in ICANN – translated into the usual language.
Implementation	Potential means to implement	Amendments to Articles and/or Bylaws that create the <<Community Council>> and its powers, including this power. These amendments would need to be created in a way which left them unable to be changed except by community consent (perhaps by approval of the <<Community Council>> itself – to be determined).

Other considerations if this mechanism was implemented:

- The President and CEO is a member of the Board. The CEO's employment arrangements must provide for them continuing in the role of CEO notwithstanding their removal from the Board.
- The issue of "who governs ICANN after the Board is dismissed" should be handled like this:
  - A "Caretaker Mode" convention is developed limiting the authority of the Board and the Chief Executive Officer to only continuing the organisation's existence and making routine low-level decisions.
  - The removed Board formally remains in office but in this "Caretaker Mode" for a defined period of time. At that time all of the previous Directors are deemed to have resigned, and new or reappointed Board members – however many or few are in place – form the Board. This is designed to ensure that no part of the appointment process can be used to hold the organisation hostage.
- Should an SO/AC that is happy to retain its elected Directors be able to trigger a quick reappointment process? Or should full re-elections be required in every instance? Or should

Directors who have been part of a Board that has been discharged thereby become ineligible for reappointment?

Template for WP1-7A Strawman 2

<table>
<tr>
<td rowspan="5">Description</td>
<td>Name of Mechanism</td>
<td colspan="2">WP1-7A Strawman 2:
Removing the ICANN Board of Directors</td>
</tr>
<tr>
<td>Description</td>
<td colspan="2">This would be a new power for the community to bring about the removal of the ICANN Board of Directors ("the Board"). All directors would be removed and processes would be commenced to replace appointment directors.</td>
</tr>
<tr>
<td>Category (check & balance, review, redress)</td>
<td colspan="2">Check and balance:
1) It provides substantial subsets of the community with a venue to address the ICANN community as a whole – a venue that is capable of acting (unlike Open Mic)

2) it provides the community with an ultimate recourse, to remove the Board from office, ensuring that, in the final analysis, the community retains ultimate control of the organisation.
Redress: the community could ultimately redress a grievance about ICANN's behaviour by causing the election/appointment of a new Board of Directors.</td>
</tr>
<tr>
<td>Is the mechanism triggered or non triggered ?</td>
<td colspan="2">Triggered.
In the normal course of events Board members serve the term they are appointed for. The community would need significant reason to remove the Board.</td>
</tr>
<tr>
<td>Possible outcomes (approval, re-do, amendment of decision, etc.)</td>
<td colspan="2">Process to remove the Board succeeds or fails.
If <u>succeeds</u>, new election/appointment of the Board begins.
If <u>fails</u>, nothing happens.</td>
</tr>
<tr>
<td rowspan="2">Standing</td>
<td>Conditions of standing (ie « last resort », type of decision being challenged, …)</td>
<td colspan="2">The <<mark>Community Council</mark>>> would have the power to trigger this mechanism – it would be the sole body able to implement it.</td>
</tr>
<tr>
<td>Who has standing (directly or indirectly affected party, thresholds…)</td>
<td colspan="2">Triggering this mechanism would require a petition to the <<mark>Community Council</mark>>> from any of the following:
Three constituencies within gNSO
Three regions within ccNSO
ASO
The petitioning parties would have to demonstrate that they had followed their usual internal processes to arrive at the decision to formally trigger this mechanism.</td>
</tr>
</table>

Standard of review	Which standards is the decision examined against (process, principles, other standards…)	It is proposed that there is a subjective standard to be assessed and demonstrated for this mechanism to be available to the <<Community Council>>: *The actions of ICANN, through action or inaction by the Board, were inconsistent with the obligations set out in the Community Compact.* Aside from this, the standard is the community's opinion. There cannot be an objective test for this mechanism.
	Which purpose(s) of accountability does the mechanism contribute to ?	It contributes to all four purposes of accountability as defined by the CCWG: Ensuring that ICANN will – • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as security • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders) It contributes to these purposes by giving the Board knowledge that if they do not collectively live up to the community's expectations in respect of being accountable, they can be removed.
Composition	Required skillset	The <<Community Council>> will be a standing body in ICANN, established under the Articles / Bylaws with the general purpose of being the way the Community exercises its reserve powers over ICANN. One of these reserve powers is "Removing the ICANN Board of Directors" as specified in this Template. Appointees to the <<Community Council>> should be members of the ICANN Community in good standing and able to make decisions that relate to the various powers granted to the <<Community Council>>. In particular for this power, they will need: • advanced knowledge of ICANN's Compact; • understanding of expectations of the ICANN community; and • understanding of ICANN's environment and context

	Diversity requirements (geography, stakeholder interests, gender, other…)	**Option 1** The <<Community Council>> will achieve diversity of stakeholder and gender representation, due to the requirements set out in the next box. **Option 2** The <<Community Council>> will achieve diversity of stakeholder, gender and regional representation, due to the requirements set out in the next box.

	Number of persons (approximate or interval)	**Option 1:**
		The <<Community Council>> will consist of **twelve** members, comprised as follows:
		• Two representatives of each of the following community bodies:
		    ○ ccNSO
		    ○ GNSO
		    ○ ASO
		    ○ ALAC
		    ○ GAC
		• One representative of each of the following bodies:
		    ○ SSAC
		    ○ RSSAC
		In selecting their representatives, the community bodies electing two representatives must elect two people of different genders.
		
		Option 2:
		The <<Community Council>> will consist of **twenty nine members**, comprised as follows:
		• Five representatives of each of the following community bodies:
		    ○ ccNSO
		    ○ GNSO
		    ○ ASO
		    ○ ALAC
		    ○ GAC
		• Two representatives of each of the following bodies:
		    ○ SSAC
		    ○ RSSAC
		
		In selecting their representatives, the community bodies electing five representatives must:
		• ensure equitable representation across the five ICANN regions; and
		• elect at least two men and at least two women.
		
		The community bodies electing two representatives must:
		• elect two people from different ICANN regions; and
		• elect two people of different genders.

	Independence requirements	Members of the <<Community Council>> may not be from any of the following categories of people:
		- ICANN Directors or Board Liaisons - ICANN Staff - ICANN's Nominating Committee - Members of any Review or Redress institutions - Current office-holder (Chair or Vice Chair) in an SO or AC - Staff of entities that are commercially dependent on ICANN
		No more than **two** members of the Community Council may be from any single company or group of related companies, or from one national government or other governmental organisation.
	Election / appointment by whom ?	Members of the <<Community Council>> are appointed by their SOs and ACs according to their usual documented processes.
		Members are appointed for a term of one year, commencing on 1 January.
		If the appointing body has not appointed member/s in time for 1 January, the current member/s continue/s in office until the new one/s is/are appointed (and the term limit does not apply).
		Members are eligible for re-election for a maximum of three consecutive terms, and for five terms in total.
		The <<Community Council>> will elect its own Chair from among its members, who will have a deliberative but not a casting vote.
		(note: this ensures that the Council cannot be sabotaged by appointing bodies failing to appoint members.)

	Recall or other accountability mechanism	The appointing bodies can hold their members to account as per the following rules, which will be set out in the section/s of the Articles / Bylaws constituting this <<Community Council>>:
		• Where an appointing body has concerns about the actions of a member they have appointed, they may by whatever process they choose issue the member with a Formal Warning. • Not sooner than thirty days after the issue of a Formal Warning, if the appointing body's concerns have not been resolved, they may appoint a new member to replace the specified member (using the same process they used to appoint that member in the first place). The new member takes over seamlessly from the old member. *(note: this ensures that the Council cannot be sabotaged by appointing bodies removing their members and failing to appoint new ones.)*

Decision making	Is the decision mandated or based on personal assessment	**Option A:** Members of the <<Community Council>> make decisions on personal assessment, but for the use of this power must attend and participate in a meeting of their appointing body's peak body which is solely convened to discuss the use of this mechanism no more than fourteen days and no fewer than seven days before the decision is to be made by the Council. *(note: this option is my proposed compromise position between mandated and individual – individual (because how can SOs or ACs make split decisions?) but requiring attendance at and participation in a discussion.)* **Option B:** Members of the <<Community Council>> make decisions on a mandated basis for the exercise of this power. Appointing bodies may direct their members in any way they see fit that meets the following criteria: • The decision must be made by the peak body of that SO/AC, at a meeting convened for the purpose and not more than 14 and not fewer than 7 days before the date of the Council meeting that will trigger this mechanism; • The meeting of that SO/AC's body should follow its usual processes particularly in respect of the degree of openness it allows to its part of the ICANN community; • The decision must be to direct the votes of all of the SO/AC's members of the Council; • The decision must be agreed supermajority of at least 2/3 of the voting members of the peak body; • The decision must be communicated to the members of the Council representing that SO/AC in writing – and such communication may be public or private. Members of the Council have no discretion but must cast their votes according to the directions they have received.
	Decision made by consensus or vote ?	Decision is by vote of the <<Community Council>> members.
	Majority threshold (if applicable)	**Where membership is Option 1:** Ten members (83.3%) of the <<Community Council>> must vote in favour of the resolution to dismiss the Board. **Where membership is Option 2:** Twenty four members (82.8%) of the <<Community Council>> must vote in favour of the resolution to dismiss the Board. *(note: this is designed to ensure that one single SO or AC cannot block the removal of the Board.)*

Accessibility	Cost requirements	There are costs involved, as follows: • The general costs of the <<Community Council>>'s existence and operation, including whatever staffing or contracted secretariat support it requires. • The costs of a meeting that implements this particular mechanism to remove the Board. • The costs across the ICANN community of conducting the election/appointment process for a fresh Board.
	Timeframe requirements	To be implemented before IANA stewardship transition (i.e. WS1). In terms of implementing this power, I envision that: • Within two working days of the Council receiving an appropriate petition as set out in this template, it must convene a meeting scheduled between fourteen and twenty one days into the future. • SOs and ACs must convene meetings as noted above. • If the Board is removed, various election and appointment processes must be able to appoint a new Board as soon as practicable. Timeframe currently unknown.
	Language requirements	As general in ICANN – translated into the usual language.
Implementation	Potential means to implement	Amendments to Articles and/or Bylaws that create the <<Community Council>> and its powers, including this power. These amendments would need to be created in a way which left them unable to be changed except by community consent (perhaps by approval of the <<Community Council>> itself – to be determined).

Other considerations if this mechanism was implemented:

- The President and CEO is a member of the Board. The CEO's employment arrangements must provide for them continuing in the role of CEO notwithstanding their removal from the Board.
- The issue of "who governs ICANN after the Board is dismissed" should be handled like this:
  - A "Caretaker Mode" convention is developed limiting the authority of the Board and the Chief Executive Officer to only continuing the organisation's existence and making routine low-level decisions.
  - The removed Board formally remains in office but in this "Caretaker Mode" for a defined period of time. At that time all of the previous Directors are deemed to have resigned, and new or reappointed Board members – however many or few are in place – form the Board. This is designed to ensure that no part of the appointment process can be used to hold the organisation hostage.
- Should an SO/AC that is happy to retain its elected Directors be able to trigger a quick reappointment process? Or should full re-elections be required in every instance?

Template for WP1-7A Strawman 3

<table>
<tr>
<td rowspan="5">Description</td>
<td>Name of Mechanism</td>
<td>WP1-7A Strawman 3:
Removing the ICANN Board of Directors</td>
</tr>
<tr>
<td>Description</td>
<td>This would be a new power for the community to bring about the removal of the ICANN Board of Directors ("the Board"). All directors would be removed and processes would be commenced to replace appointment directors.</td>
</tr>
<tr>
<td>Category (check & balance, review, redress)</td>
<td>Check and balance: it increases the focus of the Board on meeting the community's needs, as in the ultimate case it would know it could be removed from office if it failed to do so.

Redress: the community could ultimately redress a grievance about ICANN's behaviour by causing the election/appointment of a new Board of Directors.</td>
</tr>
<tr>
<td>Is the mechanism triggered or non triggered ?</td>
<td>Triggered.
In the normal course of events Board members serve the term they are appointed for. The community would need significant reason to remove the Board.</td>
</tr>
<tr>
<td>Possible outcomes (approval, re-do, amendment of decision, etc.)</td>
<td>Process to remove the Board succeeds or fails.
If <u>succeeds</u>, new election/appointment of the Board begins.
If <u>fails</u>, nothing happens.</td>
</tr>
<tr>
<td rowspan="2">Standing</td>
<td>Conditions of standing (ie « last resort », type of decision being challenged, …)</td>
<td>Any SO could trigger this mechanism.</td>
</tr>
<tr>
<td>Who has standing (directly or indirectly affected party, thresholds…)</td>
<td>A resolution to discharge the Board would have to be carried by any one of:
gNSO Council
ccNSO Council
ASO
This resolution would have to be supported by a full consensus within the relevant Council. This would be a bylaws condition; the SO would not have the power to move to (for example) a majority vote for this resolution.</td>
</tr>
</table>

Standard of review	Which standards is the decision examined against (process, principles, other standards…)	This is a confidence motion: there is no objective standard. Any SO could discharge the Board for any reason, or without formally expressing a collective reason, if they lose confidence in the Board. The check on this power is that there needs to be a full consensus within the SO.
	Which purpose(s) of accountability does the mechanism contribute to ?	Primarily, it contributes to ensuring that ICANN remains a bottom-up multistakeholder organisation in fact as well as name. As a consequence, the community will be able to enforce all the other purposes of accountability through this mechanism, as a last resort. It contributes to all four purposes of accountability as defined by the CCWG: Ensuring that ICANN will – • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as security • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders) It contributes to these purposes by giving the Board knowledge that if they do not collectively live up to the community's expectations in respect of being accountable, they can be removed.
Composition	Required skillset	N/A
	Diversity requirements (geography, stakeholder interests, gender, other…)	SOs are themselves a mechanism for achieving diversity.
	Number of persons (approximate or interval)	
	Independence requirements	

	Election / appointment by whom ?	
	Recall or other accountability mechanism	
Implementation	Potential means to implement	Amendments to Articles and/or Bylaws to grant this power to SOs, and to ensure it can only be exercised by full consensus. Amendments to Articles and/or Bylaws to create a corporate officer, not being a member of the Board, who automatically becomes the sole Emergency Director in the event that this power is exercised, with a specific duty to institute proceedings to appoint a new Board as soon as practicable, and who is automatically removed from office as a Board member upon appointment of a new Board. These amendments would need to be created in a way which left them unable to be changed except by community consent

Other considerations if this mechanism was implemented:

- The President and CEO is a member of the Board. The CEO's employment arrangements must provide for them continuing in the role of CEO notwithstanding their removal from the Board.

Legal Analysis and Viability		This mechanism has high viability, using contractual agreements to allow enforcement of provisions of the bylaws.

Under either designation or membership, the designator(s) and member(s) select directors. Except for very specific circumstances, those same directors may not be removed without the consent of the appointing designator or electing member group.

Therefore, if the entire ICANN Board is to be removed at once, every designator or every member, as applicable, must agree by contract among or by themselves or ICANN or a third party (such as a Community Council) to remove the director it selected if and when the community has voted to recall the board the ICANN Board (however this process is defined and structured by contract).

Under Strawman 1 and 2 every designator or every member could contract with the newly established Community Council to remove the ICANN Board at the Community Council's direction. Alternatively, under Strawman 3, contracts could be made between every designator or every member and each of the three SOs to remove the ICANN Board where full consensus is found within an SO to do so.

While each mechanism is viable, Strawman 3—removal of the entire ICANN Board at the direction of one SO—could be highly disruptive to ICANN's ability to function. Furthermore, the threat of removal of the entire ICANN Board, if the threshold to do so is low, could perhaps cause paralysis on certain issues for the ICANN Board, thereby impeding the Board's ability to manage ICANN.

Irrespective of the option chosen, provision must be made so that ICANN always has a board of directors with fiduciary duties in place, whether via a pre-selected interim board or delayed effectiveness of the removal vote until the next ICANN Board has been selected. |

Work Item: **WP1-7A: Existing SO/AC Processes mechanism**
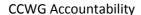**Drafter:** Jordan Carter (jordan@internetnz.net.nz)
Version: 1.0
Date: Circulated on 18 March 2015 @ 19h00 UTC

Description	Name of Mechanism	**WP1-7A: Existing SO/AC Processes (SOAC)**
	Description	Each Power available to the Community as a result of the CCWG's work would be exercised by each SO or AC allocating its "votes" as set out below. These would be determined by each SO or AC individually.
	Category (check & balance, review, redress)	**Not Applicable (N/A)** The categories apply to the powers exercised by the community, not the mechanism itself.
	Is the mechanism triggered or non triggered ?	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
	Who has standing (directly or indirectly affected party, thresholds…)	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
	Which purpose(s) of accountability does the mechanism contribute to ?	**N/A** This applies to the powers exercised by the community, not the mechanism itself.
Composition	Required skillset	Not applicable.
	Diversity requirements (geography,	Not applicable.

	stakeholder interests, gender, other…)	

	Number of persons (approximate or interval)	SOs and ACs would have notional "votes" available under this mechanism, available as follows:
		• Five votes for each of the following community bodies:
		   o ccNSO
		   o GNSO
		   o ASO
		   o ALAC
		   o GAC
		• Two votes for each of the following bodies:
		   o SSAC
		   o RSSAC

	Independence requirements	Not applicable.
	Election / appointment by whom ?	Not applicable.
	Recall or other accountability mechanism	None: this would simply have the same accountability as SOs and ACs generally have.
Decision making	Is the decision mandated or based on personal assessment	**Mandated** by definition, since it is a casting of votes by the SO or AC as an organisation, no individuals being appointed.
	Decision made by consensus or vote ?	**N/A** This would be specified for each of the powers exercised by the community, not as part of this mechanism itself.
	Majority threshold (if applicable)	**N/A** This would be specified for each of the powers exercised by the community, not as part of this mechanism itself.
Accessibility	Cost requirements	The cost of whatever secretariat services required to collate votes.
	Timeframe requirements	To be implemented before IANA stewardship transition (i.e. WS1).
	Language requirements	As general in ICANN — translated into the usual languages.
Implementation	Potential means to implement	To implement this approach, the relevant powers would need to be set out in the bylaws along with voting thresholds etc. A separate section of the bylaws would need to describe the generic process and assign notional "voting weights" as proposed here or as amended, to each SO/AC.
Legal Analysis and Viability		We do not have enough detail to understand whether the proposed "WP1-7A: Existing SO/AC Processes mechanism" is legally viable under current conditions. Certain powers can

be delegated by the ICANN Board to the SO/AC, provided the ICANN Board retains ultimate decision-making authority. Alternatively, certain powers can be reserved to members, but those are limited to reviewing and approving/disapproving board actions that are expressly specified in the articles and bylaws (and those rights statutorily reserved to members). Finally, certain powers also can be reserved to third parties, but they typically revolve around designating board members or having special control of specific bylaws amendments (i.e., the golden bylaws). The exercise of certain rights – e.g., member rights – may also require each SO and AC to be organized as a legally cognizable entity, such as an unincorporated association.

As such, it is important to understand the powers intended to be reserved or delegated to each SO or AC. For example, each SO or AC could be vested with membership rights or afforded certain powers via the articles or bylaws. These rights could be granted to each SO or AC, as opposed to individuals within each organization, so long as each SO or AC was organized in a legally cognizable form. For further analysis of what powers may be granted please see the Sidley Preliminary Draft Responses to CCWG Legal Sub-team (Pgs. 3-5) and Adler & Colvin Preliminary Responses to CCWG Legal Sub-team (Pgs. 2-3).

There is some flexibility in how each SO or AC could exercise its powers. In a membership structure for ICANN, multiple classes of members are permitted, with different voting rights and powers. As a result each SO or AC that is a "member" of ICANN could be granted the desired number of votes for each power. Similarly, in a designator structure, entities with designating authority may be given a different number of votes with regard to decisions made at the designator level. Thus, each SO or AC could also be granted the desired number of votes for each power.

Work Item: **WP1-7B: Permanent Cross-Community Working Group (PCCWG)**
Drafter: Jordan Carter (jordan@internetnz.net.nz)
Version: 1.0
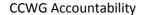**Date:** Circulated on 18 March 2015 @ 19h00 UTC

	Name of Mechanism	WP1-7B: Permanent Cross-Community Working Group (PCCWG)
Description	Description	This would be a standing body, chartered by the SOs and ACs just as our CCWG-ACCT is, representing the ICANN community in exercising specific powers granted to it developed in the course of this CCWG's work (e.g. forcing reconsideration of the Budget, removing the ICANN Board of Directors).
	Category (check & balance, review, redress)	**Not Applicable (N/A)** The categories apply to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Is the mechanism triggered or non triggered ?	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Who has standing (directly or indirectly affected party, thresholds…)	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Which purpose(s) of accountability does the mechanism contribute to ?	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
Composition	Required skillset	Appointees to the PCCWG should be members of the ICANN Community in good standing and able to make decisions that relate to the various powers granted to the PCCWG. In general, they will need: • advanced knowledge of ICANN's Articles and

		Bylaws, including the proposed Compact; • understanding of expectations of the ICANN community; and • understanding of ICANN's environment and context
	Diversity requirements (geography, stakeholder interests, gender, other…)	The PCCWG will achieve diversity of stakeholder, gender and regional representation, due to the requirements set out in the next box.

	Number of persons (approximate or interval)	The PCCWG will consist of **twenty nine members**, comprised as follows:
		• Five representatives of each of the following community bodies:
		  ○ ccNSO
		  ○ GNSO
		  ○ ASO
		  ○ ALAC
		  ○ GAC
		• Two representatives of each of the following bodies:
		  ○ SSAC
		  ○ RSSAC
		
		In selecting their representatives, the community bodies electing five representatives must:
		• ensure equitable representation across the five ICANN regions; and
		• elect at least two men and at least two women.
		The community bodies electing two representatives must:
		• elect two people from different ICANN regions; and
		• elect two people of different genders.
		
		ALTERNATE: Each Chartering Organisation may appoint between two and five members to the PCCWG.
		
		If this alternate approach is taken, it will be more complicated to specify the voting procedures for each Power.

	Independence requirements	Members of the PCCWG may not be from any of the following categories of people: • ICANN Directors or Board Liaisons • ICANN Staff • ICANN's Nominating Committee • Members of any Review or Redress institutions • Current office-holder (Chair or Vice Chair) in an SO or AC • Staff of entities that are commercially dependent

		on ICANN No more than **two** members of the Community Council may be from any single company or group of related companies, or from one national government or other state organisation.
	Election / appointment by whom ?	Members of the PCCWG are appointed, by their SOs and ACs according to their usual documented processes. Appointees must be actively appointed on a yearly basis — either reconfirmed or replaced by a new appointee. Appointing bodies are encouraged to appoint a mix of new and experienced members with reasonable turnover so as to avoid capture of the PCCWG by a set of long-standing members.
	Recall or other accountability mechanism	The appointing bodies can replace members at any time, as with any other CCWG.
Decision making	Is the decision mandated or based on personal assessment	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Decision made by consensus or vote ?	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
	Majority threshold (if applicable)	**N/A** This applies to the powers exercised by the PCCWG mechanism, not the mechanism itself.
Accessibility	Cost requirements	The general costs of the PCCWG's existence and operation, including whatever staffing or contracted secretariat support it requires.
	Timeframe requirements	To be implemented before IANA stewardship transition (i.e. WS1).
	Language requirements	As general in ICANN — translated into the usual languages.
Implementation	Potential means to implement	CCWGs are generally organised by the Chartering Organisations creating a Charter. However to ensure that the PCCWG is indeed Permanent, a different approach may be required — perhaps the inclusion of the Charter as a new section of the ICANN bylaws with appropriate protections to avoid its later removal.
Legal Analysis and Viability		This mechanism is legally viable. However, there are various options for structuring PCCWG, depending upon what choices are made as to what powers PCCWG—as opposed to its component community bodies—has and the manner in which any powers are exercised. If PCCWG is itself to have enforcement powers, PCCWG needs

		to be a legally recognized entity (such as a nonprofit public benefit corporation or an unincorporated association). If, instead, it is simply to be a coordinating body for its component community bodies (which would themselves need to be recognized legal entities of some sort) to reach consensus on actions that should be taken by the community bodies, a contract needs to be in place among the various community bodies to bind the various community bodies to take action to enforce the decision of the PCCWG. If PCCWG is itself constituted as a legal entity, it could serve as the sole "member" of ICANN for purposes of enforcing the various accountability functions that might be desired, such as removing directors, and reviewing and potentially rejecting ICANN Board actions regarding budgets and adoption of Independent Review Process recommendations. It also could serve as a "designator" under California law to fulfill some of the same functions. The roles of "members" and "designators" are discussed in further detail in the legal analysisin WPI-D and WPI-C, respectively. This mechanism is most viable when it is implemented in a way that preserves the board's ability to fulfill its fiduciary duties. If PCCWG is instead a coordinating body which aids the community bodies in exercising what enforcement powers they may have as "members," "designators," or otherwise, it could simply be a committee established under the bylaws. Actual exercise of any powers would be the province of the community bodies represented on the committee; in order for this to take place, the community bodies would need to contract among themselves (as legally cognizable entities) to be bound to take action upon the decision of PCCWG.

Work Item: **WP1-7G: Community Council mechanism**
Drafter: Jordan Carter (jordan@internetnz.net.nz)
Version: 1.0
Date: Circulated on 18 March 2015 @ 19h00 UTC

	Name of Mechanism	**WP1-7G: Community Council**
Description	Description	This would be a standing body, constituted under the bylaws, representing the ICANN community in exercising specific powers granted to it developed in the course of CCWG's work (e.g. forcing reconsideration of the Budget, removing the ICANN Board of Directors).
	Category (check & balance, review, redress)	**Not Applicable (N/A)** The categories apply to the powers exercised under the mechanism, not the mechanism itself.
	Is the mechanism triggered or non triggered ?	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
	Who has standing (directly or indirectly affected party, thresholds…)	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
	Which purpose(s) of accountability does the mechanism contribute to ?	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
Composition	Required skillset	The Community Council will be a standing body in ICANN, established under the Articles / Bylaws with the general purpose of being the way the Community exercises its reserve powers over ICANN.

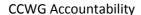Appointees to the Council should be members of the ICANN |

| | | Community in good standing and able to make decisions that relate to the various powers granted to the Council

In general, they will need:
  • advanced knowledge of ICANN's Articles and Bylaws, including the proposed Compact;
  • understanding of expectations of the ICANN community; and
  • understanding of ICANN's environment and context |
|---|---|---|
| | Diversity requirements (geography, stakeholder interests, gender, other…) | **Option 1**
The Council will achieve diversity of stakeholder and gender representation, due to the requirements set out in the next box.

Option 2
The Council will achieve diversity of stakeholder, gender and regional representation, due to the requirements set out in the next box. |
| | Number of persons (approximate or interval) | **Option 1**
The Community Council will consist of **twelve** members, comprised as follows:
  • Two representatives of each of the following community bodies:
    ○ ccNSO
    ○ GNSO
    ○ ASO
    ○ ALAC
    ○ GAC
  • One representative of each of the following bodies:
    ○ SSAC
    ○ RSSAC
In selecting their representatives, the community bodies electing two representatives must elect two people of different genders.

Option 2
The Community Council will consist of **twenty nine** members, comprised as follows:
  • Five representatives of each of the following community bodies:
    ○ ccNSO
    ○ GNSO
    ○ ASO
    ○ ALAC
    ○ GAC
  • Two representatives of each of the following bodies: |

		o SSAC
		o RSSAC
		In selecting their representatives, the community bodies electing five representatives must: • ensure equitable representation across the five ICANN regions; and • elect at least two men and at least two women. The community bodies electing two representatives must: • elect two people from different ICANN regions; and • elect two people of different genders.
	Independence requirements	Members of the Community Council may not be from any of the following categories of people: • ICANN Directors or Board Liaisons • ICANN Staff • ICANN's Nominating Committee • Members of any Review or Redress institutions • Current office-holder (Chair or Vice Chair) in an SO or AC • Staff of entities that are commercially dependent on ICANN No more than **two** members of the Community Council may be from any single company or group of related companies, or from one national government or other state organisation.
	Election / appointment by whom ?	Members of the Council are appointed, by their SOs and ACs according to their usual documented processes, for a term of one year, commencing on 1 January. If the appointing body has not appointed member/s in time for 1 January, the current member/s continue/s in office until the new one/s is/are appointed (and the term limit does not apply). Members are eligible for re-election for a maximum of three consecutive terms, and for five terms in total. *(note: this ensures that the Council cannot be sabotaged by appointing bodies failing to appoint members.)*
	Recall or other accountability mechanism	The appointing bodies can hold their members to account: • Where an appointing body has concerns about the actions of a member they have appointed, they may by whatever process they choose issue the member with a Formal Warning. • Not sooner than thirty days after the issue of a Formal Warning, if the appointing body's concerns have not been resolved, they may appoint a new member to replace the specified member (using the same process they used to

		appear that member in the first place). The new member takes over seamlessly from the old member. • **For the powers granted to the Council, there should be specification as to whether a member in receipt of a Formal Warning are able to vote related to that power.** (*note: this ensures that the Council cannot be sabotaged by appointing bodies removing their members and failing to appoint new ones.*)
Decision making	Is the decision mandated or based on personal assessment	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
	Decision made by consensus or vote ?	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
	Majority threshold (if applicable)	**N/A** This applies to the powers exercised by the Community Council, not the mechanism itself.
Accessibility	Cost requirements	The general costs of the Council's existence and operation, including whatever staffing or contracted secretariat support it requires.
	Timeframe requirements	To be implemented before IANA stewardship transition (i.e. WS1).
	Language requirements	As general in ICANN — translated into the usual languages.
Implementation	Potential means to implement	Amendments to Articles and/or Bylaws that create the Community Council and its powers, in a way which sees them unable to be changed except by community consent.
Legal Analysis and Viability	Analysis	This mechanism is legally viable. However, there are various options for structuring the Community Council, depending upon what choices are made as to what powers the Community Council —as opposed to its component community bodies—has and the manner in which any powers are exercised. In addition, the gendered and geographic membership requirements may need additional analysis should it be decided to implement them. If the Community Council is itself to have enforcement powers, the Community Council needs to be a legally recognized entity (such as a nonprofit public benefit corporation or an unincorporated association). If, instead, it is simply to be a coordinating body for its component community bodies (which would themselves need to be recognized legal entities of some sort) to reach consensus on actions that should be taken by the community bodies, then a contract needs to be in place among the various community

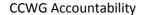| | | bodies to bind the various community bodies to take action to enforce the decision of the Community Council. |
		If the Community Council is itself constituted as a legal entity, it could serve as the sole "member" of ICANN for purposes of enforcing the various accountability functions that might be desired, such as removing directors, and reviewing and potentially rejecting ICANN Board actions regarding budgets and adoption of Independent Review Process recommendations. It also could serve as a "designator" under California law to fulfill some of the same functions. The roles of "members" and "designators" are discussed in further detail in the legal analysis in WPI-D and WPI-C, respectively. This mechanism is most viable when it is implemented in a way that preserves the board's ability to fulfill its fiduciary duties.
		If the Community Council is instead a coordinating body which aids the community bodies in exercising what enforcement powers they may have as "members," "designators," or otherwise, it could simply be a committee established under the bylaws. Actual exercise of any powers would be the province of the community bodies represented on the committee; in order for this to take place, the community bodies would need to contract among themselves (as legally cognizable entities) to be bound to take action upon the decision of the Community Council.
		Either of the above options would be permissible under California law.
		Requiring that members of the Community Council be from a certain geographic region or, in particular, a certain gender, is a bit unusual. Implementation of these requirements would likely require additional research.

	Name of Mechanism	**WP1-C: Statutory Delegates**
Description	Description	The essence of this mechanism is the enhancement of ICANN's accountability to its stakeholders by the creation of a delegates structure internal to ICANN with ultimate authority to control the organization and thus ultimate authority over the ICANN Board. The California Corporation Code (§5152) allows for the designation of delegates which have 'some or all of the powers of members.' Such delegates would not be statutory members of the organization.
	Category (check & balance, review, redress)	Review and redress
	Is the mechanism triggered or non triggered ?	The mechanism itself is a permanent structure. Some of the powers it may execute are predictable and repetitive (e.g. approving ICANN's strategic plan and annual budget) and thus non-triggered, while other may be event driven, thus triggered (e.g. blocking board or management action that is in conflict with the bylaws, blocking changes to the bylaws, recalling the board). Specific powers are to be determined and included in the Bylaws.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Approval, review, redress, redo, recalling the board.
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	For the statutory delegates to overrule ICANN's (executive) board's decision on a matter, should be seen as a last resort option
	Who has standing (directly or indirectly affected party, thresholds…)	Those community representatives that are classified as delegates. Delegates may be natural or legal persons. Different classes of delegates with different powers are permitted. Voting may be by delegate or through other organizational unit (§5153). Through delegates all ICANN's stakeholders have a form of standing.
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	Existing ICANN bylaws, public interests, stakeholders' interests, applicable (California PBC law, Affirmation of Commitments, adopted PDP's, ...
	Which purpose(s) of accountability does the mechanism contribute to ?	All four: • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as

		security
		• Ensure decisions are for benefit of the public, not just for a particular set of stakeholders
Composition	Required skillset	• Vision, strategy, leadership • Analytical, social skills, networking • C-level integral management in an international, multi-stakeholder, multi-cultural environment • Representation, sensitivity
	Diversity requirements (geography, stakeholder interests, gender, other…)	All stakeholders (direct and indirect) should be represented: SO's, AC's etc. This should ensure gender and geographical diversity
	Number of persons (approximate or interval)	See above
	Independence requirements	The delegates involved in making or validating a decision, apart from the obvious interests as a member of the stakeholder group they represent, should not have any other material relationship, transaction or professional aspiration with ICANN itself which may affect their judgment.
	Election / appointment by whom ?	Delegates may be natural or legal persons. If natural, presumably each delegate would be selected by his/her stakeholder group or constituency. The easiest method might be to appoint the (already elected) chairs of the stakeholder groups / constituencies.
	Recall or other accountability mechanism	If a natural person, each delegate could —during his/her term-be recalled (by majority vote) or at the end of his/her term could not be reelected by his/her stakeholder group/constituency. A member cannot be recalled by the other members
Decision making	Is the decision mandated or based on personal assessment	There are two options: 1. The community representatives have to get back to their constituencies and get their (consensus or rough consensus) approval to use the specific power; 2. The community representatives have the mandate from their respective constituencies to take a position based on their personal assessment of the bylaw amendment on the public interests/stakeholders' interests (NOT their personal interests) In most situations, for most powers that the delegates have, option 1 will not be workable: it will take too long with the risk of failing altogether. However, for the decision to recall the (whole) board, option 1 should be the one. For the "nuclear option" (if we are having one), transitioning the IANA function away from

		ICANN, option 1 is an obligation.
	Decision made by consensus or vote ?	Vote. Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to e.g. make an amendment to the bylaws, this same stakeholder group's representative delegate can then prevent the community from blocking that amendment
	Majority threshold (if applicable)	Depending on the decision to take/power to execute: simple majority or supermajority.
Accessibility	Cost requirements	The delegates are volunteers from their respective constituencies. They receive no remuneration, but travel and lodging costs for meeting purposes are covered by ICANN
	Timeframe requirements	To be implemented before IANA stewardship transition
	Language requirements	As general
Implementation	Potential means to implement	• Amendments to ICANN's bylaws that incorporates a delegates structure in ICANN's corporate governance structure and provides it with the required powers; • If natural persons, representatives from stakeholder groups to serve as delegates. If legal persons, formal establishment of same.
Legal Analysis and Viability	Analysis	The discussed mechanism has low viability in light of the goals articulated above. A delegate structure should not be considered as an alternative to a membership structure. Outside the religious context, delegates under California corporate law generally derive their authority from the members they represent -- they are literally the delegates of the members. The California corporate law makes only passing references to the possibility of having delegates as part of a governance structure, without any well-developed framework. Delegate structures, in our experience, are the rarest of governance forms for nonprofits in California. We have seen them used where the number of members is so large as to make member meetings or actions otherwise impractical. The lack of a statutory legal framework, while allowing some creativity for the bylaws drafter, also means that legal enforceability of rights in a delegate structure is highly uncertain. For example, we would advise that delegates must be natural persons rather than entities, although the law on that point is unclear. Similarly, it is not clear that delegates would have standing to sue to enforce the bylaws. While we could draft amendments to the articles or bylaws to establish a membership and authorize the use of delegates to represent those members in governance decisions, it would add significantly to the complexity of the governance structure, and would lack a robust legal foundation. Accordingly, we believe that the use

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of delegates is unlikely to achieve the results desired for ICANN accountability.

The California Corporations Code does anticipate a structure in which persons may hold certain rights typically held by members, without having a full membership structure. This is a designator structure. The key right that can be provided to these persons is the right to select, i.e., "designate", and remove directors. A designator structure, could achieve many of the goals articulated above.

A designator structure internal to ICANN may be created by amending the bylaws to clarify and expand on the rights held by the stakeholders that currently select directors and clearly naming them as designators. Additional designators could be added. Existing and additional designators should be structured as legal entities, such as unincorporated associations, to strengthen their position. These designators would be given the ability to select and remove individual or classes of directors.   The designators could also be given the authority to limit the ability of the board to make unilateral changes to all or certain bylaws (for example, as through a requirement that designators approve any changes to bylaws (or certain fundamental bylaws) and changes to the Articles of Incorporation.

Designators, unlike members, cannot be given reserved powers under corporate law to override or veto the Board in other areas of decision making. In addition, unlike members, designators lack standing to bring suit for breach of charitable trust where the Board decides to disregard limitations placed upon its actions in the bylaws. Contract rights, however, could be created between ICANN and the designators to provide an avenue for legal action in the event ICANN fails to adhere to bylaw procedures.

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	Name of Mechanism	**WP1-D: Statutory Members**
Description	Description	The essence of this mechanism is the enhancement of ICANN's accountability to its stakeholders by the creation of a membership structure internal to ICANN with ultimate authority to control the organization and thus ultimate authority over the ICANN Board. The California Corporation Code expressly authorizes non---profit organizations to have Members with ultimate authority to control the organization. Under Cal. Corp. Code § 5310 "A corporation may admit persons to Membership, as provided in its Articles or Bylaws". Members are given various statutory rights and oversee the Board of Directors.
	Category (check & balance, review, redress)	Review and redress
	Is the mechanism triggered or non triggered ?	The mechanism itself is a permanent structure. Powers can be divided into two categories: statutory and non-statutory. Triggered statutory powers include a Members right to file a derivative lawsuit (§5420/§5710), to adopt, amend and repeal the Bylaws (§5150/5812), and remove any and all members of the Board of directors (§5222). If the Board member is selected by a particular grouping, only that grouping may recall that specific Board member (§5310(1)). Non-triggered statutory powers include a meetings requirement (§5150) and the election of the Board of Directors (§5220 et al). Non-statutory rights may be given to Members. Some of the powers members may be given and execute are predictable and repetitive (e.g. approving ICANN's strategic plan and annual budget) and thus non-triggered, while others event driven, thus triggered (e.g. blocking board or management action that is in conflict with the bylaws)
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Approval, review, redress, redo, recalling the board
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	For the statutory members to overrule ICANN's (executive) board's decision on a matter, should be seen as a last resort option
	Who has standing (directly or indirectly affected party, thresholds…)	Those community representatives that classified as Members. Members may be natural or legal persons. Different classes of Members with different powers are permitted. Through Members all ICANN's stakeholders have a form of standing.
Standard of	Which standards	Existing ICANN bylaws, public interests, stakeholders'

review	is the decision examined against (process, principles, other standards…)	interests, applicable (California PBC law, Affirmation of Commitments, adopted PDP's, ...
	Which purpose(s) of accountability does the mechanism contribute to ?	All four: • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as security • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders
Composition	Required skillset	• Vision, strategy, leadership • Analytical, social skills, networking • C-level integral management in an international, multi-stakeholder, multi-cultural environment • Representation, sensitivity
	Diversity requirements (geography, stakeholder interests, gender, other…)	All stakeholders (direct and indirect) should be represented: SO's, AC's etc. This should ensure gender and geographical diversity
	Number of persons (approximate or interval)	See above
	Independence requirements	The members involved in making or validating a decision, apart from the obvious interests as a member of the stakeholder group they represent, do not have any other material relationship, transaction or professional aspiration with ICANN itself which may affect their judgment.
	Election / appointment by whom ?	Members may be natural or legal persons. If natural, presumably each Member would be selected by his/her stakeholder group / constituency. The easiest method might be to appoint the (already elected) chairs of the stakeholder groups / constituencies
	Recall or other accountability mechanism	If a natural person, each member can –during his/her term--- be recalled (by majority vote) or at the end of his/her term could not be reelected by his/her stakeholder group/constituency. A member cannot be recalled by the other members
Decision making	Is the decision mandated or based on personal assessment	There are two options: 3. The community representatives have to get back to their constituencies and get their (consensus or rough consensus) approval to use the specific power; 4. The community representatives have the mandate from their respective constituencies to take a position

		based on their personal assessment of the bylaw amendment on the public interests/stakeholders' interests (NOT their personal interests) In most situations, for most powers that the delegates have, option 1 will not be workable: it will take too long with the risk of failing altogether. However, for the decision to recall the (whole) board, option 1 should be the one. For the "nuclear option" (if we are having one), transitioning the IANA function away from ICANN, option 1 is an obligation.
	Decision made by consensus or vote ?	Vote. In statutory matters voting is required and certain thresholds are established that can not be changed in the Bylaws (e.g. for removal of Board members). Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to e.g. make an amendment to the bylaws, this same stakeholder group's representative member can then prevent the community from blocking that amendment
	Majority threshold (if applicable)	For statutory powers, specified in the statutes. A simple majority can remove board members, if the number of members is less than 50 (§5033). The same voting threshold applies to bylaws changes (§5150). For non-statutory powers it would depend upon the decision to take/power to execute as we specify in the Bylaws: simple majority or supermajority.
Accessibility	Cost requirements	The members are volunteers from their respective constituencies. They receive no remuneration, but travel and lodging costs for meeting purposes are covered by ICANN. Derivative lawsuits cost. The individual filing may be required to place a bond of up to $50,000. Losing party may be required to pay expenses. Members may incur insurance costs if they wish to protect against potential legal liability (i.e. SLAPP suits).
	Timeframe requirements	To be implemented before IANA stewardship transition
	Language requirements	As general
Implementation	Potential means to implement	• Amendments to ICANN's bylaws that incorporates a delegates structure in ICANN's corporate governance structure and provides it with the required powers; • If natural persons, representatives from stakeholder groups to serve as delegates. If legal persons, formal establishment of same.
Legal Analysis and Viability		The discussed mechanism is a very viable option under current conditions. A membership structure internal to ICANN may be created by amending the articles or bylaws to reserve certain rights to

		members.
		Statutory members may be natural persons or legally recognized entities. Statutory members are not elected. The stakeholder/group (if a legally cognizable entity, such as an unincorporated association) could be the statutory member. Alternatively, the stakeholder/group could identify a natural person to serve as a member (and represent the interests of the stakeholder/group), but then membership would need to be transferred to a new natural person if the stakeholder/group wanted to change the member.

Statutory members do not have fiduciary duties and can be expected to act in their own best interests. This mechanism is most viable when it is implemented in a way that preserves the board's ability to fulfill its fiduciary duties.

Powers granted to members include: i) the election and removal of directors, ii) approval or veto rights over amendments to the articles and bylaws and iii) approval or veto rights over other significant decisions of the corporation (as enumerated in the articles or bylaws , such as the power to force reconsideration of the budget, or other powers being considered). The members may be split into different classes, with each class being given distinct rights (for example, each class can select a certain number of directors). The SOs and ACs could be formed as unincorporated associations and made members, for example, and each stakeholder could be a distinct member class with the right to select a certain number of directors.

The rights provided to members are enforceable through the ability of members to bring an action on behalf of the corporation.

Statutory members can only be terminated with a due process hearing.

For greater analysis of member rights see the Sidley Preliminary Draft Responses to CCWG Legal Sub-team (Pg. 3-4) and Adler & Colvin Preliminary Responses to CCWG Legal Sub-team (Pg. 2 and Pgs. 8-9). |

	Name of Mechanism	**WP1-E: Supervisory Board (two tier board construction)**
Description	Description	The essence of this mechanism is the enhancement of ICANN's accountability to its stakeholders by the creation of a structure internal to ICANN that takes over some of the ultimate powers of the ICANN Board (among which are powers that in fact the NTIA presently –informally, but effectively--- has over the ICANN Board).
	Category (check & balance, review, redress)	Review and redress
	Is the mechanism triggered or non triggered ?	The mechanism itself is a permanent structure. Some of the powers it executes are predictable and repetitive (e.g. approving ICANN's strategic plan and annual budget) and thus non---triggered, while others event driven, thus triggered (e.g. blocking board or management action that is in conflict with the bylaws, blocking changes to the bylaws, recalling the board)
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Approval, review, redress, redo, recalling the board
Standing	Conditions of standing (ie « last resort », type of decision being challenged, …)	For the supervisory board to overrule ICANN's (executive) board's decision on a matter, should be seen as a last resort option
	Who has standing (directly or indirectly affected party, thresholds…)	Those community representatives that are member of the supervisory board. Through them (all) ICANN's stakeholders
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	Existing ICANN bylaws, public interests, stakeholders' interests, applicable (Californian) corporate law, Affirmation of Commitments, adopted PDP's, …
	Which purpose(s) of accountability does the mechanism contribute to ?	All four: • Comply with its own rules and processes ("due process") • Comply with applicable legislation, in jurisdictions where it operates • Achieve certain levels of performance as well as security • Ensure decisions are for benefit of the public, not just for a particular set of stakeholders

Composition	Required skillset	• Vision, strategy, leadership • Analytical, social skills, networking • C-level integral management in an international, multi-stakeholder, multi-cultural environment • Representation, sensitivity
	Diversity requirements (geography, stakeholder interests, gender, other…)	All stakeholders (direct and indirect) should be represented: SO's, AC's, IETF, NRO, ISOC, IAB. This will probably already ensure gender and geographical diversity
	Number of persons (approximate or interval)	See above
	Independence requirements	The persons involved in making or validating a decision of the supervisory board, apart from the obvious interests as a member of the stakeholder group they represent, do not have any other material relationship, transaction or professional aspiration with ICANN itself which may affect their judgment.
	Election / appointment by whom ?	Each member of the supervisory board is appointed (by election) by his/her stakeholder group/constituency. Easiest would be to appoint the (already elected) chairs of those groups/constituencies
	Recall or other accountability mechanism	Each member of the supervisory board can –during his/her term--- be recalled (by majority vote) or at the end of his/her term could not be reelected by his/her stakeholder group/constituency. A member of the supervisory board cannot be recalled by the other members of the supervisory board.
Decision making	Is the decision mandated or based on personal assessment	There are two options: 5. The community representatives have to get back to their constituencies and get their (consensus or rough consensus) approval to use the specific power; 6. The community representatives have the mandate from their respective constituencies to take a position based on their personal assessment of the bylaw amendment on the public interests/stakeholders' interests (NOT their personal interests) In most situations, for most powers that the delegates have, option 1 will not be workable: it will take too long with the risk of failing altogether. However, for the decision to recall the (whole) board, option 1 should be considered. For the "nuclear option" (if we are having one), transitioning the IANA function away from ICANN, option 1 is an obligation.
	Decision made by consensus or vote ?	Vote. Consensus introduces (or reinforces) the risk of capture: if a particular stakeholder group has convinced the ICANN board to e.g. make an amendment to the bylaws, this same

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		stakeholder group's representative in the supervisory board can then prevent the community from blocking that amendment
	Majority threshold (if applicable)	A supermajority vote in favor should be required to execute a power (e.g. block bylaw change, block budget or strategic plan, recall board or part thereof).
Accessibility	Cost requirements	The members of the supervisory board are volunteers from their respective constituencies. They receive no remuneration, but travel and lodging costs for meeting purposes are covered by ICANN
	Timeframe requirements	To be implemented before IANA stewardship transition
	Language requirements	As general
Implementation	Potential means to implement	• Amendments to ICANN's bylaws that incorporate an supervisory board in ICANN's corporate governance structure and provides it with the required powers; • Elected representatives from stakeholder groups to serve on supervisory board
Legal Analysis and Viability	Analysis	A form of "two-tier" board may be acceptable, but in a very different approach from a separate supervisory board as permitted in certain European jurisdictions. In a California nonprofit public benefit corporation, there can be only one board of directors; however, the board can be "tiered" as follows. A board of directors with a large number of members (the "upper tier" or "full" board) could be established to provide overall oversight of the corporation and to approve or reject certain decisions by an executive committee or other committee of the board, which committee could be thought of as the "lower tier" or "small" board. The executive committee/small board (which under California law would have to consist exclusively of individuals who are members of the full board), could exercise most powers ordinarily exercised by a board of directors (powers relating to the governance of the corporation) while the full board may possess powers relating to supervising the small board. Fullboard powers may include the ability to: i) appoint additional committees, ii) remove individuals from the executive committee, iii) amend bylaws and iv) veto or overturn decisions of the executive committee. The members of the full board would need to exercise their fiduciary duties on behalf of the corporation and its mission – not on behalf of the specific constituency that elected them. In that regard, decision making option 1 above where community representatives, as full board members, would make decisions only after polling their constituents would be

		problematic. However, if a community representative, as the full board member, does not align with the interests of the constituency that elected him/her, that constituency can replace that board member. For greater analysis of this concept see the Adler & Colvin Preliminary Responses to CCWG Legal Sub-team (Pgs. 3-4).

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Description	Name of Mechanism	**WP1-F: Community "Veto" Process to Challenge Certain Board Decisions**
	Description	ICANN's bylaws could provide for a mechanism that would allow the ICANN community to challenge certain board decisions with a community "veto" process. When triggered by a challenge of the requisite portion of the overall ICANN community, (for example the chairs of 2 SO's/AC's agree to challenge an eligible board decision), then the individual members of the impacted ICANN community vote through their existing sub-communities (SO's/AC's) on whether to accept or reject the particular board decision in question. Via bylaws provisions, the board could require itself to accept the decision of a community veto unless, the board subsequently voted to retain its original decision by a very high threshold (4/5 or unanimously). This challenge mechanism would only apply to a narrow set of predetermined high impact board decisions such as the adoption of the organization's strategic plan, approval of the budget, approval of bylaws, etc. Those segments of the ICANN community who make decisions via a consensus process could utilize that existing consensus process rather than elections/votes. The ICANN Ombudsman (or other neutral 3rd party) could administer the community veto process.
	Category (check & balance, review, redress)	Redress – it can over-turn a board decision if successful.
	Is the mechanism triggered or non triggered ?	Triggered – by the lodging of a successful "call to question" on a narrow set of high---impact board decisions. Possible example: the chairs of 2 SO's/AC's agree to challenge an eligible board decision by calling it to question with the broader ICANN community. The underlying SO/AC decision to trigger is taken through its internal process. Possible example: SO/AC leadership committees vote to lodge the challenge and call the decision to question to the broader community.
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Encourage the board of directors to be more responsive to the community, at least, out of concern for a veto. At most, the mechanism can over---turn a decision of the board of directors. Re-do. Board decisions would not be "changed" in the process but rather, they would be "rejected" by the community – sent back for further work before adoption by the organization.
Standing	Conditions of standing (ie « last resort », type of	This mechanism would only apply to a narrow set of predetermined high impact board decisions such as the adoption of the organization's strategic plan, approval of the

	decision being challenged, …)	budget, approval of bylaws, etc.

The mechanism would only be available if successfully triggered by a sufficient TBD support level within the community (for example, if 2 AC/SO chairs called an eligible board decision into question). |
| | Who has standing (directly or indirectly affected party, thresholds…) | Directly affected parties –

All ICANN community members impacted by certain board decisions would have the right to cast a vote on a veto question.

SO/AC chairs would be empowered to call an eligible decision into question by the wider community (trigger). The threshold for SO/AC chairs to successfully call a decision into question could be 2 or 3 SO/AC chairs call for the veto question, for example. |
Standard of review	Which standards is the decision examined against (process, principles, other standards…)	A specific and narrow set of pre-determined board decisions of high impact to the entire ICANN community would be the only decisions eligible for examination and challenge by the community. Each community member's own independent judgment of what is in the public interest is the standard decision makers could use to exercise the veto right. (Same standard used by ICANN board of directors to act in public interest).
	Which purpose(s) of accountability does the mechanism contribute to ?	Primarily this purpose: • Ensure ICANN's decisions and activities are in accordance with wishes of the community ICANN serves on fundamental issues. • Enables ICANN to be more "bottom---up" in operation and thus legitimizes ICANN's governance role. It empowers the ICANN community members to directly challenge certain board decisions that are widely unpopular among a number of segments in the ICANN community.
Composition	Required skillset	Not applicable.
	Diversity requirements (geography, stakeholder interests, gender, other…)	Support from several relevant stakeholder interests (AC's/SO's) would be required to challenge an eligible board decision and successfully trigger the community veto process.

Broad support from the widest reach of ICANN stakeholders would be required to decide to veto the board's decision, as all members of the ICANN community would be entitled to a decision making role on these fundamental issues. |
| | Number of persons (approximate or interval) | All members of the various segments in the organizational framework that together comprise ICANN would be participants in this process. That includes all of the individual members of ICANN's ACs, SOs, etc.

The various SO's and AC's etc. would hold a proportionate |

		weight relative to each other to reach the overall decision of the community to reject an eligible board decision. The proportionate or relative weight of the various SO's and AC's would be commensurate with existing balances in ICANN's organizational framework. The existing balance in decision making is intended to be undisturbed by this mechanism.
	Independence requirements	Not applicable.
	Election / appointment by whom ?	Once triggered, the individual ICANN community members themselves would vote in a community-wide election to accept or reject an eligible board decision. However, those segments of the community who make determinations via consensus rather than vote, would utilize its existing consensus process to reach its decision on the question. The individual community members would make their own decision via their own SO/AC processes. No need to select representatives, although it is another, less direct way of reaching the SO/AC decision. Each SO/AC group's decision would be weighted and balanced with the other SO/AC decisions to reach the overall decision of the community to reject a board decision. For example, X number of CCnso's would have direct vote to reject or accept, which would be tallied into a single decision, which is then weighted against the decisions of the GNSO, At-Large, etc. to comprise the overall decision of the community regarding a particular board decision.
	Recall or other accountability mechanism	Not applicable.
Decision making	Is the decision mandated or based on personal assessment	Not applicable.
	Decision made by consensus or vote ?	Once triggered, the ICANN community members could vote in a community--wide election to accept or reject an eligible board decision. However, those segments of the community who make determinations via consensus process rather than elections, could utilize its existing consensus process to reach its decision on the question. SO/AC leaders would utilize their existing internal decision making processes to determine if the question would be called (triggered) in the first place. This mechanism does not attempt to alter the exiting internal decision making processes of the various groups within the ICANN community. On the contrary, it would call ICANN groups' existing internal decision making processes into action.
	Majority threshold (if applicable)	To challenge to an eligible board decision: • Trigger: 2-3 AC/SO support a "call to question"

		from the wider community; • Veto: Super-majority of community members decide to reject board decision; • Unless: Super-super-majority of board members subsequently vote to retain original decision (4/5 or unanimous board).
Accessibility	Cost requirements	Not applicable.
	Timeframe requirements	To be implemented before IANA stewardship transition
	Language requirements	Not applicable.
Implementation	Potential means to implement	Amendment to ICANN Bylaws and/or Articles of Incorporation in accordance with advice from legal council.
Legal Analysis and Viability		This type of community veto power is not legally viable unless it is accomplished through other structures discussed, such as with statutory members or with a full board/small board approach.

ANNEX A

TEMPLATE MEMORANDUM

Memorandum

From: CCWG Legal Sub-team

To: Sidley Austin and Adler & Colvin

Ref: CCWG/SA/002

The CCWG Legal Sub-team requests that you review the different templates on the mechanisms and powers that are so far being discussed by the CCWG.

In the process of designing the mechanisms that will enable enhancing ICANN's accountability, the CCWG has tasked WP1 with building templates that contain the different mechanisms and powers that the CCWG considers need to be put in place to accomplish the goal of enhancing ICANN's accountability with those provisions that need to be put in place before the transition takes place.

In these templates you will find the following structure:

a) Name of the mechanism
b) Description
c) Category (whether it is thought as a check and balance, review or redress)
d) Possible outcomes (approval, re-do, amendment of decision, etc.)
e) Conditions of standing (whether it's a last resort, the type of decision being challenged, etc.)
f) Who has standing
g) Which standards is the decision examined against (process, principles, other standards)
h) Which purpose(s) of accountability does the mechanism contribute to?
i) Required skillset
j) Composition requirements like diversity, number of persons, independence, election/appointment of members and by whom, whether it is a recal or other accountability mechanism.
k) Is the decision mandated or based on personal assessment?
l) Decision made by consensus or vote?
m) Majority threshold (if applicable)
n) Cost requirements
o) Timeframe requirements
p) Language requirements
q) Potential means to implement

Within these elements some may or may not apply to the particular mechanism being proposed.

The purpose of this review is to have your advice on whether the mechanisms being discussed are legally viable under current conditions and if not, what would be needed to make them legally viable?