

# **EMPOWERED SO/AC MEMBERSHIP & DESIGNATOR MODELS FOR COMMUNITY EMPOWERMENT**

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**Description, Comparison and Legal Analysis**

# Overview

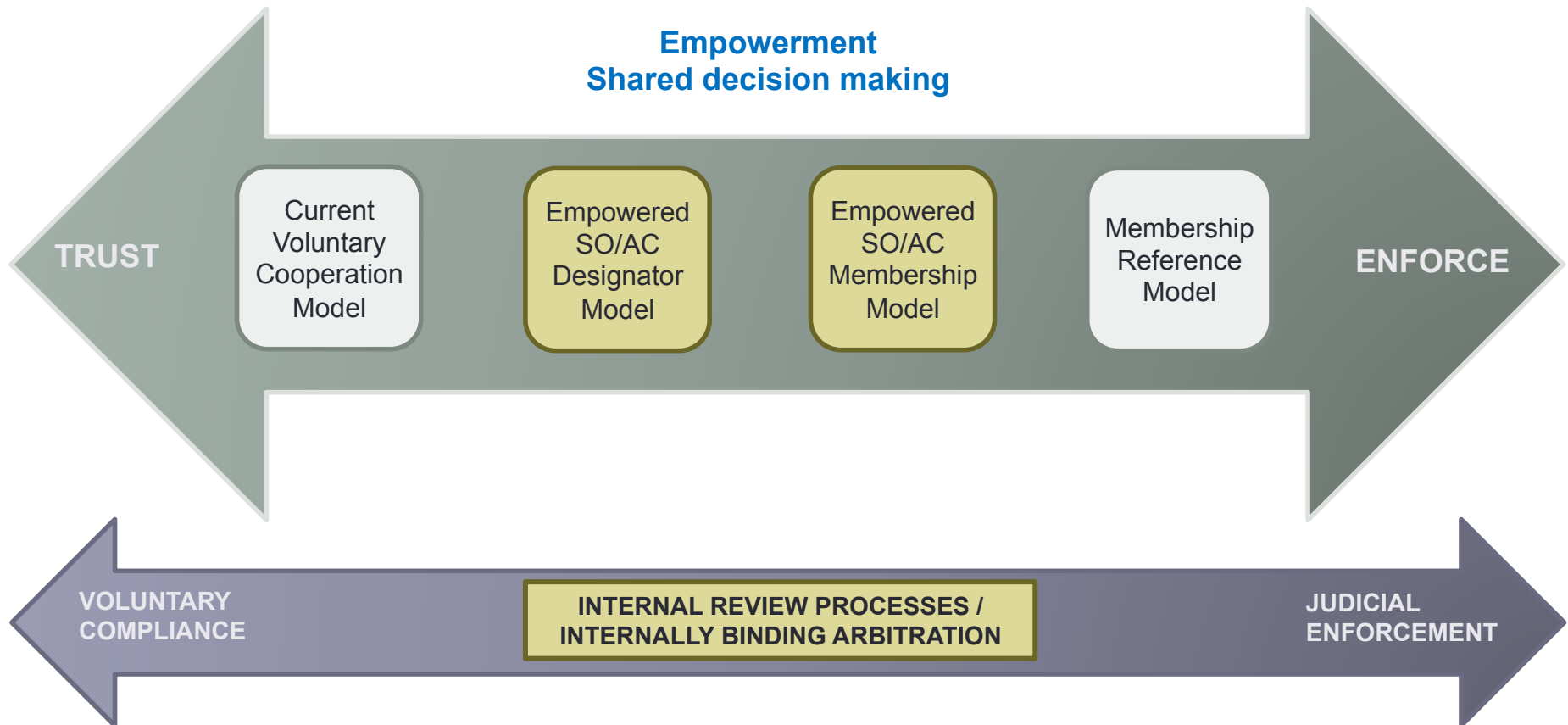
- To facilitate discussion, this presentation describes and compares the two models that were proposed in Buenos Aires for further consideration by the CCWG.
- The two new models seek to address concerns expressed by members of the multi-stakeholder community on the Community Empowerment Mechanism described in Section 5 of CCWG's Accountability Initial Draft Proposal for Public Comment (4 May 2015) ("Initial Proposal")
  - The **"Empowered SO/AC Membership Model"** would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood and would allow opt-in re legal status
  - The **"Empowered SO/AC Designator Model"** would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood and would allow opt-in re legal status
- This presentation also reviews legal issues associated with each model and attempts to more fully describe how the models might be implemented within the legal framework of California nonprofit law.

# Accountability, Trust and Enforceability

- “The Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN attain a level of accountability to the global multi-stakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government.”
  - *From Paragraphs 2 & 24 of the Initial Proposal*
- Comments on the Initial Proposal and discussion in Buenos Aires (and earlier) highlight that the current reliance on trust and a voluntary cooperation model is highly valued but that accountability under that model is viewed as insufficient for a future in which IANA stewardship has been transitioned.
- In addition, comments and discussion to date indicate that consensus has not yet developed on the relationship of accountability to trust and enforceability.
- **CCWG’s challenge is to reconcile these points of view.**

# The Trust - Enforceability Continuum

On the trust - enforceability continuum, the Empowered SO/AC Membership and Designator Models lie somewhere between the current Voluntary Cooperation Model and the Membership Reference Model set forth in the Initial Proposal



## Common Goals

- Both of the new models enhance accountability of the ICANN Board to the ICANN multi-stakeholder community -- while encouraging and supporting continued reliance on a highly valued commitment to trust, cooperation and consensus-building -- through:
  - Enhanced community decision rights (powers)
  - Backed by internal enforcement mechanisms with binding force supported in law
- Both models rely on the current SO/AC structure:
  - No changes in SO/AC structures and procedures are required
  - Each SO/AC determines whether and if so when and how to pursue legal personhood
- Both models respond to concerns raised about:
  - Lack of enforceability of current voluntary/cooperative model
  - “Avatar” concept of the reference model described in the Initial Proposal
- Both models provide flexibility for the future

## Common Elements

- Under both models, SOs/ACs operate much as they do now, relying on one another and the ICANN Board, officers and staff to abide by Bylaws
- However, under both models enforceability is enhanced from the current voluntary cooperation model with respect to **all** of the expanded community powers set forth in Section 5 of the Initial Proposal:
  - 5.2 Power: Reconsider/reject budget or strategy/operating plans
  - 5.3 Power: Reconsider/reject changes to ICANN “standard” Bylaws
  - 5.4 Power: Approve changes to “Fundamental” Bylaws
  - 5.5 Power: Appoint and remove individual ICANN Directors
  - 5.6 Power: Recall the entire ICANN Board
  - [5.7\* Power: Reconsider/reject Board decisions relating to reviews of the IANA functions; including ability to trigger a separation of PTI]

**For designators and non-legal persons, a number of these are subject to indirect enforcement:** The Bylaws would provide the community with all of the rights; Board failure to abide by these Bylaw provisions would trigger community consideration of Board recall.

\* Additional power related to CWG Dependencies, not listed in Section 5 of Initial Proposal

# Empowered SO/AC Membership Model

## Proposed in Buenos Aires

- Relies on participation by SOs/ACs for exercise of community powers: Bylaws would provide that ICANN is a membership body **if** one or more SO/AC chooses to become a Member
  - No SO/AC would be required to become a Member; each could choose to “opt in”
  - Becoming a Member requires legal personhood; becoming an actual membership organization requires at least one Member
- Bylaws would provide for all community powers to be exercised by SOs/ACs
- Should conversion to a membership organization be triggered, community powers would be exercised by both Members (i.e., SOs/ ACs who choose to become legal persons and Members) **AND** non-member Participants (i.e., SOs/ ACs who choose *not* to become legal persons or who are legal persons but choose not to become Members)
  - Whether or not an SO/AC becomes a Member or participates as a non-member Participant, its number of votes / power / influence in exercising community powers would not change
- SOs/ACs can exercise the community powers as soon as they are adopted in the Bylaws; there is no formalization requirement to be a Participant
- Door remains open for SOs/ACs who are not legal persons/Members to choose at some future point in time to become legal persons/Members by evidencing intent to exercise authority and acquire legal personhood (or to appoint a legal person as representative) and then electing to become a Member

# Empowered SO/AC Membership Model

## Proposed in Buenos Aires

### LEGAL ISSUES

- *Differential rights*: Will Members have more legal power in ICANN than non-member Participants due to statutory rights of Members? Will legal persons have greater enforcement rights than non-legal persons?
- *Bylaw validity*: Will effort to provide non-member Participants with same rights as Members — including rights that statute says may only be given to Members – give rise to claim that Bylaws are invalid?
- *Capture risk*: If only one or two ACs/SOs become Members with differential statutory rights, how to protect against heightened risk of capture?
- *Revolving membership*: If Members can join and exit at will, are differential rights and capture risk subject to potential for continual change, with associated difficulties in constructing protections and protecting from other unintended /unforeseen consequences?
- *Member statutory rights*: Are there viable options to protect against a Member rights to dissolve corporation and bring derivative suits?



# Empowered SO/AC Membership Model

## Proposed in Buenos Aires

- Relies on participation by SOs/ACs that are given specific rights in the Bylaws as third parties (Designators); i.e., does not rely on legal rights of Members
  - Bylaws would give each Designator direct power to appoint and remove certain number of individual directors (5.5)
  - Bylaws would give Designators as a group (voting in Community Mechanism) the powers to reject amendments to standard bylaws upon community petition process (5.3), to review and reject (i.e., “approve”) all amendments to fundamental bylaws (5.4), and to cause recall of entire Board (5.6)
  - Bylaws would give Designators as a group (voting in Community Mechanism) indirect (but still enforceable) powers to reject budget and strategy/operating plans (5.2) and to reject Board decisions relating to reviews of the IANA functions (5.7) by providing that ***a failure of the Board to provide the Community Mechanism opportunity to review, object and direct the Board to reconsider such decisions — and the failure of the Board to so reconsider — would trigger community consideration of Board recall.***  
(This same provision could be a backstop for direct powers as well.)
- SOs/ACs can exercise the proposed community powers as soon as they are adopted in the Bylaws; no formalization requirement
- SOs/ACs can choose at some future point in time to acquire legal personhood. This would enhance their ability to enforce their powers outside of ICANN but is not necessary to use the internally binding IRP process.
  - Whether or not an SO or AC formalizes as a legal person, the number of votes / power / influence it has in exercising community powers should not change

# Empowered SO/AC Membership Model

## Proposed in Buenos Aires

### LEGAL ISSUES

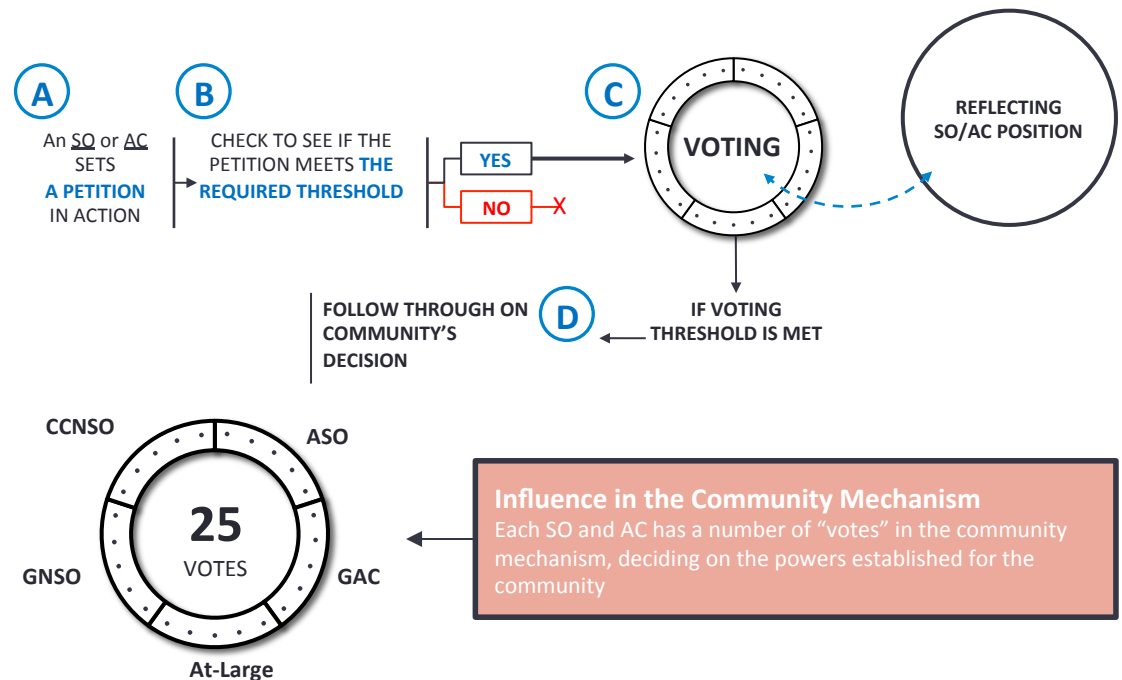
- *Differential rights:* What potential is there for differential rights to arise as between legal and non-legal persons regarding the exercise of “Designator” rights described herein? In addition, will legal persons have greater enforcement rights than non-legal persons? (The statute is silent on whether the right to designate directors must be exercised by legal persons. However, the ability for a third party to be given rights to veto bylaws does require legal personhood.)
- *Enforceability concern:* To what extent can the community rely on the binding IRP mechanism to support its direct and indirect rights – including if SOs and ACs are not legal persons? For example, if a non-legal entity designator were to attempt to remove its director and the director refused, how could the entity enforce its rights?
- *Arbitration impact:* Would the ability of a non-legal entity to use the IRP process undermine it as a binding arbitration mechanism with respect to legal entities?
- *Standing:* Can issues of standing be waived for the binding IRP mechanism?

### CWG DEPENDENCIES

- Would the indirect enforcement of certain designator rights satisfy the CWG dependencies?

# How do Community Powers Work?

- Under either model, community powers are engaged by any SO/AC via petition and a “weighted vote” approval process (the “community mechanism”)
- Each power has its own threshold for community approval
- ICANN follows through with execution on community’s decision



# How are Community Powers Enforceable?

- Under both models, each SO/AC has ability to remove director(s) selected by that SO/AC
- Under both models, the community — through SOs/ACs — has the ability to use the IRP process and its related internally binding arbitration to enforce community powers:
  - If the ICANN Board were to ignore the provisions of the Bylaws and the outcome of internally binding arbitration, SOs/ACs could:
    - trigger community consideration of full Board recall (accomplished by Designator removal actions and/or springing resignations; note also that replacement directors themselves would have standing to enforce if former directors refused to vacate)
    - seek enforcement of the internally binding IRP decision (as binding arbitration award) in court through
      - an SO or AC that qualified as a legal person or
      - a director (or officer) of ICANN asserting that failure of ICANN to abide by internally binding decision as provided in the Bylaws is a breach of the Bylaws \*

**\* In a dispute between the community and the Board, it is not inconceivable – it may even be even likely – that at least one director appointed by an AC or SO would be willing to stand up for the processes embedded in the Bylaws**

## Implementing the Models

- The discussion that follows includes counsel's ideas on how the two models could be implemented and how some of the concerns that have been identified could be addressed.
- These implementation ideas include greater detail than set forth in the models as proposed and include some modifications to aid in implementation

## Review of Current ICANN Structure: *VOLUNTARY QUASI-DESIGNATOR MODEL*

### ICANN BOARD OF DIRECTORS

- Sole power to amend Articles/Bylaws
- May be able to remove individual directors without input from SOs/ACs (depends on whether court recognizes SOs/ACs/Nom Comm as Designators)
- Can disregard review panel decisions and community input without legal consequence

#### Accountability/Enforceability Issues:

- Board has full control over ICANN, subject to mission stated in Articles of Incorporation and Bylaws, and duty to act in ICANN's best interests
- Bylaws grant SOs/ACs the right to appoint directors, but not power to remove those appointed; corporate law may provide such a right, depending on interpretation of current Bylaws
- Those without legal personhood have no standing to sue in court
- Significant uncertainty exists regarding enforceability of SO/AC rights to appoint or remove directors

#### Quasi-Designators:

- Bylaws provide that GNSO, ccNSO, ASO, ALAC, and Nominating Committee each have rights to appoint directors ("quasi-designator rights")
- May have the right under California law to remove/replace appointed directors (if they are legally recognized as designators)
- No legal power to approve or veto Articles/Bylaws amendments
- Most are not legal persons

### QUASI-DESIGNATORS

GNSO, ccNSO, ASO

ALAC

Nominating Committee

## Implementing the Empowered SO/AC Models: ENHANCED VOLUNTARY COMPLIANCE PHASE: BOTH MODELS

Same basic structure as current governance,  
with *enhanced rights for SOs/ACs*, *stronger IRP*, plus *community mechanism*



### Bylaw Enhancements:

- SOs/ACs/NC continue to appoint directors as “designators” and are given the right to remove them
- SOs/ACs are given the power to veto amendments to Articles of Incorporation and Bylaws
- SOs/ACs/NC maintain current forms (legal person or not)
- SOs and ACs vote through community mechanism to exercise 7 powers (within limits respecting board fiduciary duties)
- Internally binding IRP process supports community exercise of 7 powers
- All disputes relating to internal corporate affairs (alleged Bylaws violations and breaches of fiduciary duty) are expressly made subject to resolution through internally binding IRP process
- IRP process would expressly not require legal personhood although judicial enforcement of an IRP decision would
- Community could also be given rights to inspect certain records
- As a condition to on-boarding, directors would be required to sign a “springing resignation letter” providing in advance for automatic resignation upon specified triggers
- Triggers include community mechanism no-confidence vote for failure to subordinate to 7 powers given to community in Bylaws
- Designators would be required by Bylaws (and perhaps by contract) to recall directors at community mechanism direction (supplements springing resignation letter)
- ? Adjustments to existing NC status and role may be considered

Plus either: **Empowered SO/AC Designator Model:**

- SOs/ACs could opt at any time for legal personhood to enhance their ability to enforce

or **Empowered SO/AC Membership Model:**

- SOs/ACs could opt at any time for legal personhood to enhance their ability to enforce and under specified trigger conditions convert ICANN to membership structure

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## Empowered SO/AC Designator Model:

### What happens:

- Each SO/AC may determine at any time to become a legal person and if so what type of legal entity to become
- Legal personhood gives these SOs/ACs the ability to seek enforcement in court of determination of binding IRP decisions related to claims arising after personhood.
- *NO OTHER CHANGES*

### Problems/Complications:

- SOs and ACs that do not or cannot opt for legal personhood have questionable ability to enforce rights; any directors they attempted to appoint could bring suit if denied recognition by the board.
- SOs and ACs would not have the reserved powers of members to reverse board decisions like approving budget or strategy/operating plan, or implementing IRP recommendations.

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## Empowered SO/AC Membership Model:

### What happens:

- Each SO/AC determines for itself whether to become a legal person and if so when and what type of personhood to pursue (could include selection of an individual (human)?)
- If majority of SOs/ACs become legal persons and determine to become Members of ICANN, Membership conversion is triggered and ICANN becomes a membership organization
- Members may exercise statutory rights and also direct right to reverse board decision on budget or strategic plan and as legal person direct right to veto Bylaw amendments. Statutory rights include standing to bring suit to enforce Bylaws or IRP decision

### Problems/Complications:

- Bylaws must include extensive provisions for possibility of full membership, addressing admission to membership, meeting procedures, termination rights, etc.
- Members will suddenly have much greater power than non-member SOs/ACs—the full array of Member statutory right – and concerns about capture become significant
- Members may be able to bring derivative suits beyond suits anticipated to enforce IRP, *legally untested how to limit*
- Risk that Members capture the organization (dissolve it, remove entire board, amend Bylaws, etc.)—this is a special danger if only one or two SO/AC become Members which is why we propose majority trigger. Precluding the Members from acting unilaterally via contract is *legally untested*.



| Model<br>-----<br>Power  | Enhanced “Voluntary” Phase:<br>Pre-Enforcement   | Enforcement Phase:<br>Empowered Members  | Enforcement Phase:<br>Empowered Legal Person<br>Designators  |
|--|--|--|--|
| 5.2 Reconsider/reject ICANN Budget or Strategy/Operating Plans | <ul style="list-style-type: none"> <li>Bylaws may require Board to reconsider budget/strategy/ operating plan if community mechanism rejects it, within limits respecting board fiduciary duties</li> <li>Board failure to revise may trigger community vote on Board recall (#5.6)</li> </ul>   | <ul style="list-style-type: none"> <li>Members given reserved power under Bylaws to override Board decision directly, regardless of board fiduciary duties</li> </ul>  | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>Designators cannot be given the right to reject the budget/strategic plan themselves, but can recall Board (#5.6) if it fails to make appropriate revisions in response to community vote</li> </ul> |
| 5.3 Reconsider/reject Changes to ICANN “Standard” Bylaws       | <ul style="list-style-type: none"> <li>Named SOs/ACs may be given right to veto amendments approved by Board</li> <li>Only to be exercised when directed by community mechanism</li> <li>Possible to trigger springing resignations or community vote on Board recall (#5.6) if Board ignores community rejection of Board-approved amendment</li> </ul> | <ul style="list-style-type: none"> <li>Bylaws provide that designator role ceases; requirement for member approval of amendments takes effect</li> <li>Members contractually agree to veto amendments only if directed by community mechanism (but contract validity subject to member voting agreement prohibition)</li> <li>Members have standing to enforce this right</li> </ul> | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>Designators contractually agree to veto Articles/Bylaws amendments only if directed by community mechanism</li> <li>As new legal persons, designators can enforce this right</li> </ul>              |
| 5.4 Approve Changes to ICANN “Fundamental” Bylaws              | <ul style="list-style-type: none"> <li>Proposed fundamental Bylaws changes must be presented to community mechanism for approval or veto</li> <li>Board failure to get approval may trigger community vote on Board recall (#5.6)</li> </ul>   | <ul style="list-style-type: none"> <li>Members can be given right to approve any Bylaws amendment; fundamental Bylaws amendments require extraordinary approval threshold</li> <li>Members have standing to enforce this right</li> </ul>  | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>Designators contractually agree to veto or approve Articles/Bylaws amendments as directed by community mechanism</li> <li>As new legal persons, designators can enforce this right</li> </ul>        |
| 5.5 Appoint and Remove Individual ICANN Directors              | <ul style="list-style-type: none"> <li>Designator (legal persons or not) removes director on its own</li> <li>If sitting director refuses to vacate, new director has standing to enforce</li> </ul>   | <ul style="list-style-type: none"> <li>Members step in; Bylaws provide that designator role ceases</li> <li>Each member class has statutory power to remove its directors</li> <li>Members have standing to enforce this right</li> </ul>  | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>As new legal persons, designators could enforce this right (bylaws-as-contract theory)</li> <li>If sitting directors refuse to vacate, new directors also have standing to enforce</li> </ul>        |

*[Continued on next slide]*

| Power   | Enhanced “Voluntary” Phase: Pre-Enforcement  | Enforcement Phase: Empowered Members   | Enforcement Phase: Empowered Legal Person Designators  |
|---|--|--|--|
| 5.6 Recall Entire ICANN Board of Directors  | <ul style="list-style-type: none"> <li>Community mechanism vote to approve recall triggers springing resignations; and/or</li> <li>Designators (legal persons or not) remove directors at request of community mechanism</li> <li>If sitting directors refuse to vacate, new directors have standing to enforce</li> </ul> | <ul style="list-style-type: none"> <li>Members step in; Bylaws provide that designator role ceases</li> <li>Members contractually agree to remove their respective directors in event of community mechanism vote to recall (but contract validity subject to member voting agreement prohibition)</li> <li>Members have statutory standing to enforce this right</li> </ul> | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>Designators contractually agree to remove their respective directors in event of community mechanism vote to recall</li> <li>As new legal persons, designators could enforce this right (bylaws-as-contract theory)</li> <li>If sitting directors refuse to vacate, new directors also have standing to enforce</li> </ul> |
| 5.7 Reconsider/reject Board Decisions Relating to Reviews of the IANA Functions, Including Ability to Trigger a Separation of PTI | <ul style="list-style-type: none"> <li>Bylaws may require Board to implement recommendations, within limits respecting board fiduciary duties</li> <li>Board failure to implement may trigger community vote on Board recall (#5.6)</li> </ul>   | <ul style="list-style-type: none"> <li>Members given reserved power under Bylaws to override Board decision, regardless of board fiduciary duties</li> </ul>   | <ul style="list-style-type: none"> <li>Same mechanism as voluntary phase</li> <li>Designators cannot be given the right to implement recommendations themselves, but can recall Board (#5.6) if it fails to implement recommendations</li> </ul>   |

## Additional Considerations

According to Paragraph 175 of the Initial Proposal:

*The CCWG-Accountability is largely agreed on the following:*

- 1. To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.*
- 2. To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC/SG structures (without making it impossible to change these in the future).*

# APPENDIX

## Empowered SO/AC MEMBERSHIP

### Model

Reconsider/reject budget and strategy/operating plans

Reconsider/reject changes to “standard” bylaws

Approve changes to “fundamental” bylaws

Appoint and remove individual ICANN directors

Recall the entire ICANN Board

Reconsider/reject Board decisions relating to reviews of the IANA functions (including trigger of PTI separation)

### Concerns

Enforceability

Statutory Rights - Dissolution & Derivative Action

Legal Complexities

Potential for Capture

## Empowered SO/AC DESIGNATOR

### Model

**Empowered SO/AC  
MEMBERSHIP  
Model**

**Factors From BA CCWG-Accountability  
Working Session 1**

**Empowered SO/AC  
DESIGNATOR  
Model**

Pros

Cons

Complexity

Watch the Watchers

Messaging

Perceived Implementation Challenges

Unintended Consequences Flexibility

Openness

Diversity

Participation

CWG Expectation

No Single Point of Failure

Authority

NTIA Criteria