

MEMORANDUM

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

FROM: Sidley Austin LLP and Adler & Colvin

RE: Executive Summary to Responses to Samantha Eisner Questions

DATE: June 15, 2015

Overview

This executive summary supplements the memorandum submitted on June 8, 2015, in response to the questions posed by Samantha Eisner (the “Member Rights Memorandum”) ([Link](#)). The “Chart” referred to in this summary is the one included in the Member Rights Memorandum. All definitions and qualifications from the Member Rights Memorandum are incorporated herein.

This summary classifies the rights in the Chart based on whether they are mandatory without variance, mandatory with some variance or alteration permitted, default rights only, or purely permissive “rights” that may be granted in an organization’s governing documents. (However, except as noted in the Chart, member voting requirements may be increased through an express provision in the corporation’s governing documents.)

As noted in the Chart, these rights exist whether the member is an individual or a legal entity, such as an unincorporated association.

Also as noted in the Chart, the legal analysis presented in the Chart and summarized here, is based only on the California corporate laws governing California nonprofit public benefit corporations (*California Corporations Code, Title 1, Division 2*). Neither the Chart nor this summary address possible alterations or constraints to member rights that could be accomplished through other legal mechanisms. For example, while members have a statutory right to “bring suit” under the California Nonprofit Public Benefit Corporation Law, this can be limited through bylaw provisions and member agreements that provide for internal dispute mechanisms to be utilized first and/or provide for binding arbitration, instead of litigating in court.

Please note that our legal analysis is provided on a level in keeping with the general level of the questions that were posed. Our legal analysis is tailored to the questions assigned by the Legal Sub-team, and is provided for the benefit of the Legal Sub-team, to help facilitate its

consideration of the governance models discussed to date, and should not be relied upon by any other persons or for any other purpose. These responses reflect Sidley’s and Adler & Colvin’s preliminary reactions regarding the questions and have not been reviewed by any outside third parties. Please note that the qualifications from our prior memoranda to the Legal Sub-team apply to this memorandum as well.

I. Mandatory Member Rights that Cannot Be Altered or Constrained

The following statutory member rights are mandatory and may not be altered or constrained under the California Nonprofit Public Benefit Corporation Law. These rights are granted to members regardless of what the governing documents say.

Chart

#	Mandatory Rights that Cannot Be Altered or Constrained
2	Set/change board size stated in the bylaws (whether specified as a number, formula or range)
3	Remove directors “without cause”
5	Approve amendments to bylaws that materially and adversely affect the rights of Members as to voting or transfer
6	Approve any amendments to bylaws that extend or increase the length of directors’ terms
7	Adopt, amend, or repeal bylaw provisions other than those provided in Rights 2, 5, and 6
8	Approve amendments to articles of incorporation
10	Approve indemnification of a corporate agent
11.a.	Bring suit to remove any director for specified acts (fraud, dishonesty, gross abuse of authority, and breach of fiduciary duties)
11.b.	Bring suit to appoint a provisional director if an even number of directors are deadlocked, thereby preventing proper conduct of corporate affairs or risking impairment/loss of corporate business or property
11.c.	Bring suit to appoint provisional directors or request equitable relief if Members are deadlocked in a vote to elect directors
11.d.	Bring suit against a third party in the corporation’s name (a “derivative suit”), including an action to remedy a breach of charitable trust or against a director for self-dealing
12	Approve sale or disposition of all or substantially all assets
13	Approve merger
14	Petition for court-ordered involuntary dissolution of the corporation
15	Elect to voluntarily dissolve the corporation
16	Receive certain reports
17	Inspection rights
18	Member resignation
20	Be protected from liability for the corporation’s debts, liabilities or obligations
21	Attend regular meetings of Members
22	Call special meetings of Members
23	Receive notice of meetings of Members
26	Take action by unanimous written consent of Members, in lieu of acting at Member meeting

Chart**# Mandatory Rights that Cannot Be Altered or Constrained (continued)**

- 27 Request inspectors of election
- 28 Require use of secret ballots for election of directors at a meeting
- 29 Avoid liability for member dues, assessments, or fees levied pursuant to governing documents

II. Member Rights that Can Be Altered Through Bylaws Provisions

Certain member rights are presumed under the California Nonprofit Public Benefit Corporation Law, but may be altered through provisions in the governing documents. Some of these rights, though mandatory, may be varied within statutory limits. Other rights are granted to members by the statute, but only by default and can be removed or otherwise altered in the governing documents. All these conditions are described in greater detail in the Member Rights Memorandum.

Chart**# Mandatory Rights that Can Be Altered**

- 4.a. Fill board vacancies as a result of director being removed
- 4.b. Fill board vacancies caused by reasons other than removal (e.g., resignation, death, incapacity, etc.)
- 9 Amend governing documents to terminate all memberships or any class of Members
- 19 Receive due process in Member expulsion, suspension, and termination

Chart**# Default Rights that Can Be Altered**

- 1 Elect directors
- 24.a. Vote by written ballot without a Member meeting
- 24.b. Vote via electronic transmission
- 24.c. Revoke written ballot
- 24.d. Use of written ballots only instead of voting at a meeting, to elect directors
- 25 Vote by proxy
- 32 Have rights equal to those of all other Members

III. Additional Permitted Member Rights

Some of the rights that can be given to members are neither mandated nor granted to members by default, but are permitted under the California Nonprofit Public Benefit Law if provided for in the corporation's governing documents.

Chart**# Additional Permitted Rights**

- 30 Approve mortgage or pledge of corporation's assets
- 31 Cumulative voting for directors

In addition, the governing documents may grant to members limited rights to overrule the board on specific issues or in specific areas (such as the budget or the strategic plan), so long as these rights do not negate the ability of the board to govern the corporation, or the directors to fulfill their fiduciary duties.