

MEMORANDUM

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

FROM: Adler & Colvin and Sidley Austin LLP

RE: Nominating Committee: Legal Role and Status

DATE: April 29, 2015

Note that the qualifications from our prior memoranda to the Legal Sub-team apply to this memorandum as well.

Overview

CCWG has been discussing with legal counsel the implications of amending ICANN's bylaws so that it would have voting members with strong statutory rights under California law.

We have advised that in order for such members (because they are not individual persons) to enforce such rights, the SOs and ALAC would need to take minimal steps to be unincorporated associations (UAs) under California law. Thus, they would have standing to sue to enforce their rights under the ICANN bylaws and any other ICANN governance contracts they may execute.

Presently, along with the SOs and ALAC that each designate one or two directors to serve on the ICANN board, there is a Nominating Committee (NomCom) comprised of voting and non-voting representatives from many of the same SOs and ALAC (and from other stakeholders), and it actually elects (not just nominates) half of the board. See Article VII of the ICANN Bylaws.

CCWG and counsel have been discussing the legal role and status of the NomCom in the new configuration, and the suggestion has been made that the NomCom could function as a designator rather than a member, but it would still be formed as a UA in order to enforce its rights to elect and remove directors.

The Legal Sub-Team has asked us to answer this question from Avri Doria:

“What qualifies the NomCom as an association? It can't be the people, as there is no continuity, except among the staff and some overlap in chairs as last year's chair, this

year's chair and next year's possible chair, sit together each year. I guess that is a bit of natural person continuity. Is that chair thread significant?

Or is that it is always formed according to same bylaw, even if all of the people are different, that is a qualifying mark? Is being a different instantiation of the same process sufficient to define a UA, even if there is no continuity of natural persons?"

We note at the outset that the "Nominating" Committee title is a misnomer. More correctly, it could be renamed the "Board Selection" Committee. However, since this body is more familiar to CCWG using its current title, we will refer to it as the Nominating Committee or NomCom in this memo.

As we answer Ms. Doria's question, we would like to present you with two options.

Option 1: Nominating Committee as a Legal Entity (UA)

The NomCom could be an unincorporated association itself.

It could be an either (a) an association of the individual participants, who change from time to time by a process prescribed in the ICANN bylaws, or (b) an association of the SOs and ACs themselves, and the individuals who convene to select director candidates are merely appointees.

If the NomCom were understood to be an association of SOs and ALAC (the voting members of ICANN plus the non-voting GAC, SSAC, and RSSAC¹), there would be no concern about the continuity of its participants over time. They would not change unless the ICANN bylaws were amended to add or subtract participants..

If the NomCom were viewed as an association of the appointed individuals, the changing composition of the group of those natural persons over time would not undermine the validity of their association. As Ms. Doria states, this is "a different instantiation of the same process" under the ICANN bylaws.

¹ Presently, the NomCom includes a non-voting Chair, Chair-Elect, and perhaps an Associate Chair. The Internet Engineering Task Force (IETF) is also entitled to appoint someone to the NomCom with the right to vote, although unlike the SOs and ACs, it does not directly elect a director to a seat on the board.

The NomCom presently selects fully 8 of the 16 members on the board. Under Article VII of the ICANN bylaws, all of the voting members on the NomCom (except one) come from the 3 SOs and 1 AC that also have direct power to designate directors. The only other voting member of the NomCom is from the Internet Engineering Task Force (IETF). There are six others who attend NomCom meetings as non-voting liaisons (e.g. GAC). The breakdown of voting members of the NomCom is:

GNSO = 7, from specified constituent groups
ALAC = 5
ccNSO = 1
ASO = 1
IETF = 1

Total = 15

Participants can come and go in an association—and the association still exists.

The NomCom is a body mainly devoted to the identification of good candidates to serve on the board, which proceeds to elect them by the collective decision of its voting participants, with the presence and assistance of non-voting participants. As a statutory member of ICANN, the NomCom could remove one or more of the directors it elected in the same fashion. As Ms. Doria suggests (CCWG-ACCT Draft Report 6.6.5 v.1.1 ([Link](#)), page 40, gray box), the ICANN bylaws could be amended to allow a removal process to be initiated within the NomCom, and decided by appointees from the same SOs, ACs, and other stakeholders. Those appointees conducting the removal process would not need to be the same individuals as those who elected the directors.

Removal of one or more of the NomCom-elected directors could also be triggered by the community mechanism described in 6.6.1 of the Draft Report, if the NomCom (as a UA) had entered into a binding contract with the other statutory members of ICANN to act in accordance with the community vote.

Alternatively, directors elected by the NomCom could sign a “springing” resignation effective upon a no-confidence vote of the community, making removal action by the NomCom unnecessary.

Option 2: As a “Delegate Council,” the NomCom Could be an Election Process (not a UA)

The somewhat puzzling character of the NomCom or Board Selection Committee concept has prompted us to suggest an alternative that may be more suitable for ICANN, with one adjustment to its composition regarding the Internet Engineering Task Force (IETF).

If the NomCom’s voting participants were limited to statutory members of ICANN, the NomCom could be a “Delegate Council”, which would not need to be a UA at all. It could be understood simply as an internal ICANN event, a convening of delegates chosen by members (that are UAs) to elect some of the directors and conduct other membership business.

As it is now configured, the NomCom could not qualify as a Delegate Council for one reason: The IETF appoints a voting participant to the NomCom, but the IETF has not been identified as a possible statutory member of ICANN like the SOs and ALAC. If the IETF’s voting appointee on the NomCom were reduced to non-voting status, or dropped entirely, or if the IETF were elevated to be a voting member of ICANN, then the NomCom could be a Delegate Council.

A Delegate Council could function fully within the ICANN governance structure without itself being a voting member, or a designator, or a UA with enforceable corporate or contract rights.

The use of delegates is recognized by California law as an alternative to members directly electing directors.² The ICANN bylaws in Article VII already come very close to establishing the kind of delegate system described in the California Corporations Code.

California law presents no objection to having two simultaneous routes by which members can elect directors. Half of the board can be filled by direct election, where each of the members elects one or more directors to seats on the board. The other half can be filled by delegates, selected by the same (or some of the same, or other) members, who use a collective process to elect directors to serve on the board. The IETF could be a statutory member of ICANN solely by virtue of its right to a voting delegate on the Delegate Council; it need not also directly elect a director to the board.

With respect to the removal of (some or all of) the directors elected by the Delegate Council, California law is quite flexible. Members in a corporation (like ICANN, with fewer than 50 members) can remove directors with the approval of a majority of all members,³ or by a supermajority if stated in the bylaws. Voting by class on removal would not be required if the directors elected via the Delegate Council had been elected by representatives of all the members, acting collectively. The Delegate Council could remove its directors in the same manner that it had elected them.

Removal of directors elected by the Delegate Council could be accomplished by the delegates acting personally at a meeting or by written ballot. The ICANN bylaws could provide that new delegates, who had not participated in the election of those directors, would decide on the removal.

Actually, the removal of such directors could be done by the required majority of members, voting directly rather than through the Delegate Council. The delegates do not need to be given all the authority of members; perhaps the removal power could be reserved to the members themselves.

Going back to the original question of UA status for the NomCom (or the Delegate Council), we believe that the members' inherent rights to elect and to remove directors via the Delegate Council would be enforceable in court by the members as UAs. The Delegate Council would not need to be a UA, because it is only a vehicle for the legal members of ICANN to exercise certain aspects of the membership's ultimate governing authority.

Finally, we want to reassure you that the Delegate Council would be a legally-effective mechanism even though the delegates may act upon their own independent judgment in choosing directors, without being instructed by each of the members they represent as to which candidates to elect.

² California Corporations Code Section 5152: A corporation may provide in its bylaws for delegates having some or all of the authority of members. Where delegates are provided for, the bylaws shall set forth delegates' terms of office, any reasonable method for delegates' selection and removal, and any reasonable method for calling, noticing and holding meetings of delegates and may set forth the manner in which delegates may act by written ballot similar to Section 5513 for written ballot of members. Delegates may only act personally at a meeting or by written ballot and may not act by proxy. Delegates may be given a name other than "delegates."

³ California Corporations Code Section 5222(a)(1).

Questions for CCWG Regarding the Choice of Option 1 or Option 2

1. Would you prefer that the NomCom become a Delegate Council, so it would not need to be organized as a UA, and would instead simply provide a collective system for members of ICANN to elect some of the directors?

2. If so, regarding the IETF's role on such a Delegate Council:

a. Should its right to an appointee be eliminated?

b. Should its appointee be reduced to non-voting status?

c. Should it be elevated to a statutory member of ICANN, and keep its voting appointee?