

MEMORANDUM

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

FROM: Sidley Austin LLP and Adler & Colvin

RE: Comments to the 1XPL CCWG Illustrated Concepts

DATE: May 1, 2015

Overview

This memorandum captures Sidley Austin LLP's and Adler & Colvin's comments to the 1XPL CCWG Illustrated Concepts. Please note that we retain all qualifications from our prior memoranda to the Legal Sub-team.

General Comment

Although the report itself talks in general terms of community action, there are fundamentally two ways in which the community will take action in the membership model:

- **“Group A”** – a group of voting statutory members, which will comprise the SOs, ALAC, and in some manner the Nominating Committee, but no other voting groups, since all other participants would be non-voting observers; and
- **“Group B”** – a larger assembly of community participants (e.g., all the SOs and ACs, in voting ratios currently under discussion, as the 29-seat group shown in the slides). Group B has none of the explicit “Community Powers” described in the lower left box of slide 1, but can take prescribed collective action in at least one accountability mechanism (i.e., a “no-confidence action” that would trigger a full board recall by the Group A voting members). This larger community more generally plays an advisory role to the voting statutory members, who then take the requisite legal action pursuant to their rights under the bylaws and California law.

To reiterate: Group A, the statutory voting members, have the direct legal role in the governance of ICANN. They have rights under the bylaws as well as under California law, and they have an extensive legal basis to enforce these rights.

Group B, the larger community, can include Group A voting members, but it also includes participants who do not have statutory voting rights in ICANN, such as the other ACs. That said,

Group B very definitely has an important seat at the table in advising and prompting action by the statutory members.

In our view, the slides blur the roles of these two groups, and our recommendations generally address ways to separate the concepts out.

Slide 1 – The Empowered Community

- Generally, this slide should be reorganized to illustrate Group A and Group B. We suggest different diagrams for each group, or a clear delineation of the non-member ACs that do not have the voting powers noted in the bottom left box.
- This slide does not mention the alternative designator structure. Consider adding a slide that would highlight the differences?
- *What is it? Box:*
 - The description at the upper left-hand box is incorrect. Only those SOs and ACs that are going to be statutory voting members need to become unincorporated associations (for more information regarding Soss and ACs forming unincorporated associations see the Sidley – Adler Response to Questions Re: Unincorporated Associations [[Link](#)]). If an AC is part of the larger community Group B, it does NOT need to be an unincorporated association or other form of legal person.
- *How does it work? Box*
 - Since the process differs for each community power described after this slide, this generic illustration may create confusion. We suggest omitting the diagram in the upper right-hand box.
- *Who gets to vote? Box*
 - Not all the SOs and ACs noted will have voting rights with respect to the core powers; if they did, they would have to be statutory members.
- *Which powers can it exercise? Box*
 - The powers at the lower left-hand side pertain only to Group A, the voting members. (We may wish to note that these are *some* of the legal powers the members will have, but not necessarily an exclusive list.)

Slide 2 -- Community Power 1 (reconsider/reject budget or strategy operating plan):

- Only the statutory members (Group A) have the power to actually reject or block the implementation of a budget or strategic plan that has been approved by the Board.
- The larger community Group B can trigger a Board reconsideration process, but only the Group A members can actually block Board action. This overlay could be reflected as follows, as a suggestion:
 - Board approves budget; community (whether SOs, ACs, or others) object to budget; statutory members of Group A consider the objection; if threshold within Group A is met, the budget is rejected and the board is forced to reconsider the action.

- In this slide and in the others, we think that the Quorum diagram may add a level of unnecessary detail. Consider whether it is necessary for these materials.

Slides 3 & 4 -- Community Powers 2-3 (reconsider/reject changes to ICANN Bylaws, approve changes to Fundamental Bylaws):

- Same observation here, as for prior slide. Only the Group A voting members will have the power under the bylaws to veto changes to the non-fundamental bylaws or to approve changes to fundamental bylaws.
- *How does it work? Box*
 - This is not really a “reconsideration” by the Board. The Board cannot override the member veto, so it will have to either amend the bylaw to make it acceptable, or drop the proposal.
- *Note that Group A will also have the power under California law, by virtue of being voting statutory members, to originate and approve any amendment to the bylaws **without board consent**. This has been described in our prior memos and our chart. The bylaws can set a very high threshold for this action, but California law does not permit us to eliminate this member right altogether.*

Slide 5 -- Community Power 4 (“removing” individual directors):

- Again, as we understand the current proposal, Group B does not have a voting role here (and neither, for that matter, does Group A acting collectively.)
- *Description* -- The “Description” at the upper left is generally correct: Each electing member, and no other member or non-member, has the power to remove the director(s) it has elected. Further nuances will apply for the Nominating Committee directors, but that is not for these slides..
- *Who can initiate a petition* – This requirement is not accurate. Any single SO or AC can remove its own member.
- *Things required to initiate / Decision Threshold* -- The reference to a 75% threshold is confusing. It should not imply that the broad community, or collective voting members, are the ones voting to remove a particular member. That decision is taken up within the organization that selected the member. Uniform governance mechanisms that are implemented by each of the organizations could be created to ensure consistency consistent.

Slide 6 -- Community Power 5 (recalling the entire ICANN Board):

- This power does involve Group B action, with the idea being that Group B would take some sort of collective action, such as a vote of no confidence, which would then trigger automatic resignations by the entire board.
- *On what grounds can they initiate?* – Change “remove” to “recall” in the penultimate line.

IRP slides 7-10

Slide 7 – IRP What is New?

- Suggest changing “allows for a review of the merits” to “allows for review for both substantive and procedural compliance”

Slide 8 - “The New IRP Panel”:

- Add “independent of ICANN, including ICANN SOs and ACs”
- Suggest changing “Limited to a fixed term on the Panel” to “Fixed Term” and “Term Limited”
- Suggest changing “The Board selects panelists and proposes appointees.” to “The Board selects possible panelists and proposes confirmation.” What’s the difference between a panelist and an appointee?
- Suggest changing to “The community mechanism voting statutory members (Group A) would confirm appointments”

Slide 9 - “Filing an IRP”:

- Suggest changing “An IRP can be initiated by any community person\group\entity who can demonstrate:” to
- “Anyone can initiate an IRP if they are materially affected by ICANN actions or inactions in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values, and ICANN Policies”
- Suggest changing “Independent, group, or entity harmed” into “anyone materially harmed”
- On step ‘5’ in the IRP process, there is misspelling
- On step ‘6,’ consider having 1 or 3 people on panel, per the next slide.

Slide 10 - “IRP Decisions”:

- Suggest changing “Possible decisions” to “Possible decisions are that an action (or inaction) was in violation of ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values”
- Drop second paragraph under Possible Decisions. This is not accurate.