

Memorandum

From: CCWG Legal Sub-team

To: Adler & Colvin

Ref: CCWG/AC/001

The CCWG Legal Sub-team requests your legal advice on the following questions:

1. Which available legal mechanisms would provide the means for achieving the CCWG's above-stated goals and concerns and how would we do it? Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community "veto" process, designators, etc. What additional legal (or legally viable) mechanisms are available to achieve the above-stated goals and concerns?
2. What are the benefits, responsibilities, and risks including but not limited to the legal and financial liability of board directors, statutory members, representative delegates, and community participants (both collectively and individually) for ICANN's actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?
3. What are the costs or barriers to participation in ICANN's bottom-up policy development or decision making processes under the different legal structures and mechanisms under consideration for both existing participants and potential participants? How do the different structures and mechanisms under consideration assess against each other with respect to concerns about "capture" or undue influence, costs, barriers to participation, and required time to transition to a new structure?
4. What are the available legal mechanisms for constraining ICANN's activities and preventing the organization from expanding the scope of its mission in the future? How could a contract, "golden bylaw" / "durable bylaw", or some other enforceable agreement achieve this goal? Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?
5. What does it mean for an ICANN board member to hold a fiduciary duty to the organization? To what extent can a board member meet her/his legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed her/him to the board? How to increase (or even maximize) a director's ability to represent the interests of the community that appointed her/him in the course of board decisions, given legal duties of board members to the corporation? To what extent are ICANN's board members required to approve or reject a community decision regarding the management of ICANN based upon the board's separate and distinct interpretation of "what is in the best interest of ICANN" or "the global public interest"?

6. How could the board be bound to accept decisions made by an Independent Review Panel (or other independent entity) including decisions pertaining to the board's oversight of the management of the organization?
7. How could the California Attorney General (or other public official) intervene in ICANN's operation on behalf of community members? How typical is such an intervention by the California Attorney General in the operation of a nonprofit corporation, what are the grounds for such intervention, and what is a reasonable expectation for a successful remedy in this situation?
8. How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?
9. What is recommended for an interim mechanism/caretaker board arrangements if the entirety of the board of directors are spilled by the community?
10. Would it be possible under California law for the community to limit the direct or other damages of third parties (ex: gtld applicants) in a lawsuit against ICANN and if so, how? Are there ways to create disincentives to filing frivolous legal claims against ICANN? How could such limitations be created so there is little "wiggle room" in contract negotiations for ICANN, for example through boilerplate contract clauses?