

December 19, 2015

Comments on Review of CCWG-Accountability Third Draft Proposal

Third Draft Proposal Reference	Suggested Edits	Comments
<b>Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers</b>		
Paragraph 48 Annex 1, Section 1 Annex 1, Paragraph 11	Clarifying changes: “Under California law, the Sole Designator <del>only</del> has the statutory power to appoint and remove individual ICANN Board Directors or the entire Board which is a requirement of the CCWG-Accountability and the CWG-Stewardship. This removes the concerns related to unintended and unanticipated consequences of the additional statutory powers associated with a member. <u>Other powers, such as the power to approve or reject amendments to the Articles and Bylaws may be provided to a Sole Designator.</u> ”	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Paragraph 55 Annex 1, Section 1 Annex 1, Paragraph 18	Clarifying changes: “The CCWG–Accountability accepts that <u>its statutory power will be limited as described above and that this</u> <del>only having the above statutory power</del> is sufficient given:...”	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Paragraph 55 Annex 1, Paragraph 18	Clarifying changes: <ul style="list-style-type: none"> <li>The <del>members of the unincorporated association would be</del> <u>Sole Designator will act as directed by participating representatives of ICANN’s</u> Supporting Organizations and Advisory Committees <del>that wish to participate</del>....</li> </ul> <p><b>3. The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw along with provisions <u>in the Articles of Incorporation and Bylaws</u> to protect it from any changes without its own approval...</b></p>	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Paragraphs 55, 63 Annex 1, Paragraph 18	Clarifying changes: <p><b>4. The Articles will be amended to clarify that the <u>global public interest</u> <del>interests of the corporation</del> will be determined through a bottom-up multistakeholder process.</b></p> <ul style="list-style-type: none"> <li>Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ICANN Board must consider the community’s interpretation of the ‘global public interest’ as ICANN pursues the charitable and public purposes set forth</li> </ul>	Comment provided on November 23, 2015; not fully addressed in Third Draft Proposal

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	in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the <u>global public interest</u> <del>interests of the corporation</del> will be determined through a bottom-up multistakeholder process.	
Annex 1, Paragraph 5	Consider adding the new right of inspection to the bullet list of Objectives	
<b>Recommendation #2: Empowering the Community Through Consensus: Engage, Escalate, Enforce</b>		
<b>Recommendation #4: Ensuring Community Engagement in ICANN Decision-Making: Seven New Community Powers (and see below)</b>		
Paragraph 77 Annex 2, Paragraphs 3, 14 Annex 4, Paragraphs 41, 42, 47, 48, 60	Clarify how resolution occurs when issues are “resolved” between the Empowered Community and (a) the ICANN Board on conference calls or (b) ICANN Board Directors in private meetings (e.g., does this require consensus support of participants? If so, what thresholds apply?)	
Paragraphs 79, 166 Annex 2, Paragraphs 3, 17, 18 Annex 4, Paragraphs 32, 43, 49, 62	Inconsistency between providing that the Community Forum “will not make decisions nor seek consensus” (with the decision whether to advance the petition up to the SOs/ACs to determine after the Forum) and contemplating that the Empowered Community and ICANN Board may “resolve the issue in the Community Forum”  If issues can be resolved between the Empowered Community and ICANN Board in the Community Forum, clarify how resolution occurs (e.g., does this require consensus support of participants? If so, what thresholds apply?)	
Paragraphs 83, 141 Annex 2, Paragraphs 4, 23 Annex 4, Paragraph 5	Clarify that the Empowered Community can seek enforcement by a court of the statutory power to remove directors, and that there is no requirement to use the IRP or recall the entire Board to enforce this power	Consistent with Paragraph 54
Paragraph 83 Annex 2, Paragraphs 4, 23	Clarify that the Empowered Community can submit a Request for Reconsideration, the process that must be followed to submit such a Request (e.g., escalation process) and what decisional thresholds apply	Comment provided on November 23, 2015; not addressed in Third Draft Proposal  Annex 9, Paragraph 22 discusses the ability of the community to invoke a

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		Reconsideration process
Paragraph 83	Clarify how the Empowered Community decides whether to seek enforcement by a court (e.g., escalation process) and what decisional thresholds apply	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Paragraph 85 Annex 2, Paragraph 25	Clarify how the Empowered Community “accepts the results from the mediation phase” (e.g., does this require consensus support? If so, what thresholds apply?)	
Paragraph 85	Clarify if a Request for Reconsideration is required before using the IRP and, if not, how the processes interrelate given they both relate to violations of Articles or Bylaws	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Paragraph 119 Annex 7, Paragraph 36 Glossary (Cooperative Engagement Process)	Clarify whether mediation and/or Cooperative Engagement is mandatory – Paragraph 119 states that “Require mediation before IRP begins” but Annex 7, Paragraph 36 provides that parties can enter into a Cooperative Engagement Process or mediation; Glossary definition of “Cooperative Engagement Process” provides that prior to initiating an IRP, complainants are “urged” to enter into a period of cooperative engagement with ICANN...”	
<b>Recommendation #3: Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’</b>		
Annex 3	Consider including discussion around requirements to approve changes to Articles of Incorporation as these are separate to Fundamental Bylaws (e.g., under “Detailed Explanation of Recommendations” and “Community Power: Approve Changes to “Fundamental Bylaws””)	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
<b>Recommendation #4: Ensuring Community Engagement in ICANN Decision-Making: Seven New Community Powers</b>		
Paragraph 145 Annex 4, Paragraph 9	Consider discussing what would constitute a “significant issue” that could result in a challenge to a budget or operating/strategic plan (e.g., issues described in the CWG-Stewardship proposal: perceived inconsistency with the purpose, mission and role set forth in ICANN’s Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community)	
Paragraphs 148, 154	Discuss development and timing of the caretaker budget	

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Annex 4, Paragraphs 12, 18		
Paragraph 157	Consider clarifying that the community could not propose its own Standard Bylaw changes	
Paragraphs 172, 173, 175 Annex 4, Paragraph 38	Consider providing examples of what would constitute a “significant issue” or “reason” for an SO/AC or the NomCom to use the engagement and escalation process to determine whether to remove a director; and consider using consistent terminology (e.g., “reason”)	
Paragraph 187 Annex 4, Paragraph 69 Glossary (IRP)	Add clarifying changes as appropriate if the IRP is expanded to cover actions and inactions of PTI	
Paragraph 187	Consider adding footnote: “For example, if the Board were not to accept the decision of the Empowered Community to use one of its Community Powers. Community Powers are documented in Recommendation #4: Ensuring community involvement in ICANN decision- making: Seven New Community Powers.”	
<b>Recommendation #5: Changing Aspects of ICANN’s Mission, Commitments and Core Values</b>		
Annex 5, Paragraph 28	Clarify what the redline in the 3 <sup>rd</sup> Draft Proposal column compares to; it is unclear why the Existing Bylaws column includes red text indicating changes  Consider providing a redline that compares the Existing Bylaws to the Draft Proposal	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Annex 5, Paragraph 28	Consider adding to the main proposal/annex (from “Note to drafters”): “The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.”	
<b>Recommendation #7: Strengthening ICANN’s Independent Review Process</b>		
Paragraphs 228-249 Annex 7	Add clarifying changes as appropriate if the IRP is expanded to cover actions and inactions of PTI  Clarify if a Request for Reconsideration is required before using the IRP and, if not, how the	Comments provided on November 23, 2015; not addressed in Third Draft Proposal

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	processes interrelate given they both relate to violations of Articles or Bylaws	
Paragraph 232 Annex 7, Paragraph 26	Clarify what is meant by “[t]o the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request” (e.g., would such a person be included on the review panel or must they be available for consultation)	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Annex 7, Paragraph 30	Mention that the panel will need a “clerk’s office” separate from ICANN in order to achieve independence	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Annex 7, Paragraph 38	Note that processes must be designed to conform to international arbitration norms	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
Annex 7, Paragraph 43	Note that all proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
<b>Recommendation #8: Improving ICANN’s Request for Reconsideration Process</b>		
Paragraphs 242-247 Annex 8	Add clarifying changes as appropriate if the Reconsideration process will be expanded to cover actions and inactions of PTI (including timing)	
<b>Recommendation #9: Incorporating the Affirmation of Commitments in ICANN’s Bylaws</b>		
Annex 9, Paragraphs 127, 128	Add introductory text to provide context to the table that follows	Comment provided on November 23, 2015; not addressed in Third Draft Proposal
<b>Additional Annexes and Appendices</b>		
Annex 13, Section 1	Add discussion of CWG-Stewardship requirements with respect to Post-Transition IANA governance	
Annex 15	Update stress tests as appropriate to clarify that certain “proposals” discussed in the stress tests are no	

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	longer being proposed	
Appendix F, Paragraph 1	Replace the two bullets with the following: <ul style="list-style-type: none"> <li>• Adler &amp; Colvin is the primary source of advice on California corporate governance and nonprofit corporate law, unincorporated association law, and charitable trust law.</li> <li>• Sidley Austin LLP advises on corporate governance, international law and jurisdiction issues, alternate dispute resolution issues, antitrust, and other topics as deemed appropriate. Sidley Austin serves as the coordinating law firm.</li> </ul>	Comment provided on November 23, 2015 (cover email) ; not addressed in Third Draft Proposal