

DRAFT

## Annex 1 - Recommendation #1: Establishing an Empowered Community for enforcing Community Powers

### 1. Summary

- Under ICANN’s current Bylaws, the ICANN Board has the final responsibility for all decisions.
- With removal of NTIA as a perceived enforcement body over ICANN, the CCWG-Accountability requires a mechanism to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.
- To manage the process of enforcement on the community’s behalf, the CCWG-Accountability recommends create a new entity, taking the form of “Sole Designator” model available under California law. The entity created using the Sole Designator model will be referred to as the “Empowered Community.”
- Under California law, the Empowered Community has the legally guaranteed power to appoint and remove Board Directors (whether an individual Director or an aggregate entire Board).
- The CCWG–Accountability accepts that having the above powers as the only legally enforceable powers is sufficient, provided that all of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws. This includes the Independent Review Process, which issues binding decisions and grants the community the power to launch an Independent Review Process challenge if it believes the ICANN Board is in breach of its Bylaws or Fundamental Bylaws (such as not accepting the decision of the Empowered Community to use one of its Community Powers (See Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers))
- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

**Comment [ 1]:** Should note that the Empowered Community does not have unwanted further powers.

**Comment [ 2]:** Suggest “Other Work Stream I accountability mechanisms would be designated as Fundamental Bylaws.”

**Comment [ 3]:** Replace with “Articles or Bylaws”.

### 2. CCWG-Accountability Recommendations

Create an entity that manages the process of enforcement on the community’s behalf:

1. This entity will take the form of the “Sole Designator” model, which has legal standing as a California-based unincorporated association.
2. The members of the unincorporated association would be representatives of ICANN’s Supporting Organizations and Advisory Committees of ICANN.

**Comment [ 4]:** Consider changing to: “The Sole Designator will act as directed by participating SOs and ACs.” Avoid use of terms like “members” and “representatives”.

- 3. This entity will be referred to as the “Empowered Community.”
- 4. The Empowered Community, and the rules by which it is governed, will be constituted in ICANN’s Fundamental Bylaws (see Recommendation #3: Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’).

**Comment [ 5]:** Consider adding: “along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent.”

### 3. Detailed Explanation of Recommendations

#### Background

With removal of NTIA as a perceived enforcement body over ICANN, the CCWG-Accountability requires a mechanism to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.

#### Objectives

In developing a mechanism to ensure the community can effectively enforce its decisions, the CCWG-Accountability agreed to:

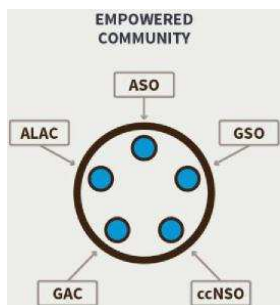
- Minimize the degree of structural or organizational changes required in ICANN to create the mechanism for these powers.
- Organize the mechanism in line and compatible with the current ICANN Supporting Organization and Advisory Committee structures (with flexibility to evolve these structures in the future).
- Address the CWG-Stewardship dependencies.
- To provide the following powers that would be constituted in the Fundamental Bylaws and would also be legally enforceable:
  - The power to reject ICANN’s Budget or Strategic/Operating Plans (CWG-Stewardship dependency)
  - The power to reject changes to ICANN Standard Bylaws
  - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency)
  - The power to remove individual ICANN Board Directors (along with appointment, CWG-Stewardship dependency)
  - The power to recall the entire ICANN Board (CWG-Stewardship dependency)
  - The power to reject ICANN Board decisions relating to reviews of the IANA functions; including the procedure to implement a separation

**Comment [ 6]:** Add “or the IANA Budget”.

process relating to Post-Transition IANA (CWG-Stewardship dependency)

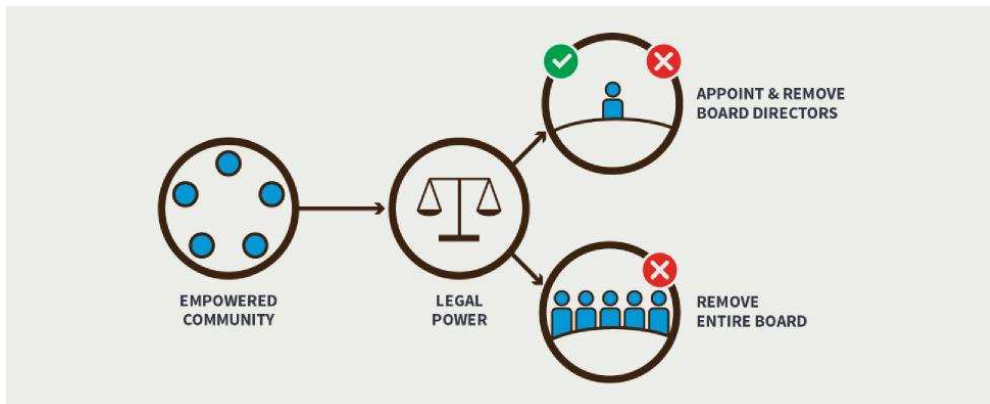
*Effect of Participation Levels in the Empowered Community*

In light of input received from the ICANN Community, implementation of the Empowered Community currently anticipates that all of ICANN’s Supporting Organizations, the At-Large Advisory Committee and Governmental Advisory Committee would participate in the Empowered Community.



The thresholds presented in this document were determined based on this assessment. If fewer than 5 of ICANN’s Supporting Organizations and Advisory Committees agree to participate, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ICANN changes to have more Supporting Organizations or Advisory Committees.

*Legal advice on implementing the Empowered Community*



**Statutory Powers under California Law**

Under California law, the Sole Designator has the power to appoint and remove ICANN Board directors, whether individual or aggregate to the entire Board.

**Comment [ 7 ]:** Delete "aggregate to".

If the ICANN Board refused to comply with those two community accountability decisions, the refusal could be petitioned in a court that has jurisdiction to force the ICANN Board to comply with that decision.

The CCWG–Accountability accepts that having the above powers as the only legally enforceable powers is sufficient, providing:

**1. All of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.**

This includes the Independent Review Process, which issues binding decisions and grants the Empowered Community the power to launch an Independent Review Process challenge if it believes the ICANN Board is in breach of its Bylaws or Fundamental Bylaws.<sup>1</sup>

The ICANN Board would be in breach of following its own Bylaws if it refused to comply with a decision by the Empowered Community with respect to an accountability mechanism defined in the Fundamental Bylaws.

If a community Independent Review Process challenge with respect to such a decision is successful and the Board still refused to comply with the decision, the Sole Designator, on instructions from the community, could petition a court that has jurisdiction to force the ICANN Board to comply with that decision.

Alternatively the Sole Designator on instructions from the community could remove the Board with the expectation that the new Board would respect the decision.

**2. The Empowered Community has legal standing as a California-based unincorporated association.**

The members of the unincorporated association would be representatives of ICANN’s Supporting Organizations and Advisory Committees that wish to participate.

**Comment [ 8]:** Seems to suggest that only statutory powers are enforceable; should make clear that bylaws powers are meant to be enforceable.

**Comment [ 9]:** Add “and protected from any changes without Empowered Community approval.”

**Comment [ 10]:** Replace with “Articles or Bylaws”.

**Comment [ 11]:** Change to “Empowered Community” (see global comment on summary document).

**Comment [ 12]:** See comment above.

<sup>1</sup> 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: five new Community Powers.

**3. The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw.**

*Additional Powers Granted by Inclusion in the ICANN Bylaws*

In addition to the rights granted to a Sole Designator under California law, the CCWG-Accountability recommends including in the ICANN Bylaws the right for the Empowered Community to inspect certain records of the corporation.

**Comment [ 13]:** Add “along with provisions to protect it from any changes without its own approval.”  
**Comment [ 14]:** Add new item 4: “The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.”

**4. Changes from the ‘Second Draft Proposal on Work Stream 1 Recommendations’**

The CCWG-Accountability ‘First Draft Proposal on Work Stream 1 Recommendations’ proposed a “Supporting Organization/Advisory Council Membership Model” as the reference model for the community enforcement mechanism. However, in the Public Comment, 4 May - 3 June 2015, significant concerns were expressed and the CCWG-Accountability initiated work on alternative solutions. A core concern of the Supporting Organization/Advisory Council Membership Model was the ability of the ICANN community to fully participate in the new accountability framework, and was integral to the work in devising a new approach. The CCWG-Accountability ‘Second Draft Proposal on Work Stream 1 Recommendations’ proposed a “Sole Member” model instead of the Supporting Organization/Advisory Council Membership Model.

Since the publication of ‘Second Draft Proposal on Work Stream 1 Recommendations’, the CCWG-Accountability has changed its proposed mechanism for ensuring the community can effectively enforce its decisions. The CCWG-Accountability shifted from a “Sole Member” model to “Sole Designator” model. The reasoning for this change and description of the new model are outlined below.

*Concerns with a “Sole Member” Model*

In the Public Comment on the ‘Second Draft Proposal on Work Stream 1 Recommendations’, concerns were raised that the “Sole Member” model granted members a significant number of powers under California law called “statutory rights.” Commenters expressed concern that these rights, such as the ability to dissolve the corporation, could not be adequately constrained and might have unintended and unanticipated consequences.

**Comment [ 15]:** “Statutory rights” is a description of powers under California law, not an actual legal term. Delete highlighted text and add, after “statutory rights” the phrase “to the Sole Member by operation of California law.”

*The “Sole Designator” Model*

To address these risks described above, the CCWG-Accountability now recommends using a “Sole Designator” model. Under California law, the Sole Designator has the power to appoint and remove ICANN Board directors, whether individual or aggregate to the entire Board. Legal counsel informed the group that adopting a “Sole Designator” model could effectively be implemented while meeting the community’s requirements and having minimal impact on the corporate structure of ICANN.

**Comment [ 16]:** Replace with “an individual director or the entire Board.”

**Comment [ 17]:** Consider adding sentence: “Legal counsel notes that the Articles could be amended to ensure that the community interpretation of the global public interest must be considered by the Board as ICANN pursues the charitable and public purposes set forth in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model.” Note: This was discussed in Dublin but it is unclear the outcome of the CCWG’s deliberation on this issue, as noted in our cover email.

Under the Sole Member model, the right to inspect certain records of the corporation would be granted to the Empowered Community under law. In contrast, under the Sole Designator model, this right can be granted to the Empowered Community under ICANN’s Bylaws.

**5. Stress Tests Related to this Recommendation**

**6. How does this meet the CWG-Stewardship Requirements?**

These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of Community rights regarding the ability to appoint/remove Directors of the ICANN Board, and recall the entire Board.

**7. How does this address NTIA Criteria?**

<p><b>Support and enhance the multistakeholder model</b></p> <ul style="list-style-type: none"> <li>• Decentralizing power within ICANN through an “empowered” community</li> <li>• Providing a legal set of powers to the community while avoiding the risks of making changes to ICANN’s organizational structure</li> </ul>
<p><b>Maintain the security, stability, and resiliency of the Internet DNS</b></p>
<p><b>Meet the needs and expectation of the global customers and partners of the IANA services</b></p>
<p><b>Maintain the openness of the Internet</b></p> <ul style="list-style-type: none"> <li>• Preserving policies of open participation in ICANN’s Supporting Organizations and Advisory Committees</li> <li>• Retaining a decision-making based on consensus rather than voting</li> </ul>
<p><b>NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution</b></p> <ul style="list-style-type: none"> <li>• Retaining a decision-making based on consensus rather than voting</li> <li>• Maintaining the advisory role of governments in the Supporting Organization and Advisory Committee structure</li> </ul>