

**MEMORANDUM**

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Amendments to Articles of Incorporation<sup>1</sup>

DATE: November 23, 2015

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This memo briefly describes measures with respect to ICANN’s Articles of Incorporation (“Articles”) that should be taken to avoid potential circumvention of the community powers proposed to be implemented through the Sole Designator/Empowered Community model (referred to herein as the “Empowered Community”).

The constituent documents of a California nonprofit public benefit corporation such as ICANN are its articles of incorporation and its bylaws. There is a hierarchy between these documents—the articles prevail to the extent that there is any conflict between the articles and the bylaws. This hierarchical relationship holds even if the conflict is between the articles and a “fundamental” bylaw that requires the consent of a third party (in the case of ICANN, the Empowered Community) to be amended.

Under California nonprofit corporation law, if a corporation has no statutory members, amendments to the articles may be adopted by the board. However, the amendment of articles may be made subject to the consent of a third party, just as the amendment of bylaws may be. In the case of ICANN, if the Empowered Community is not provided a right to approve amendments to the Articles, there is a risk that Fundamental Bylaw provisions could be undermined by amendment of the Articles by the ICANN Board, given the hierarchical relationship described above. Thus, we recommend including an approval right with respect to amendments to ICANN’s Articles in favor of the Empowered Community in the same way the Empowered Community has approval rights with respect to Fundamental Bylaws.

This change may be made easily in the Third Draft Proposal by amending the power to approve Fundamental Bylaws to be the power to “Approve Amendments to the Articles of

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<sup>1</sup> Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

Incorporation and Fundamental Bylaws” and to make conforming changes throughout the proposal.

For additional reference on this topic, please see our Memoranda of November 6, 2015 (page 2) ([Link](#)), April 23, 2015 ([Link](#)), April 20, 2015 (Annex B – page 25) ([Link](#)) and April 10, 2015 (page 5) ([Link](#)).