

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Developing Bylaws Provisions for Inspection Rights

DATE: December 10, 2015

The CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations (30 Nov. 2015) recommends enhancing ICANN transparency.¹ Specifically, CCWG-Accountability recommended—since the Draft Proposal eliminated the use of statutory “members” in favor of a designator and consequently eliminated any attendant “member” statutory rights under California law—that Fundamental Bylaws include Empowered Community (“EC”) inspection rights approximating those guaranteed to statutory “members” under California Corporations Code Section 6333.²

As requested,³ this memorandum explains the statutory provision and outlines how rights of inspection for accounting books and records and minutes of board and board committee proceedings analogous to those provided to “members” by Section 6333 could be incorporated into the Bylaws, as recommended in the CCWG Draft Proposal. Because we are not dealing with statutory “member” inspection rights under the California nonprofit public benefit corporation law, but are rather crafting Bylaws to provide their equivalent, the community has flexibility in creating an inspection rights regime to achieve the desired transparency goals, and could also provide for more or less expansive inspection rights.

We considered but did not include options that would expand the scope of the community’s transparency rights beyond inspection of the information specifically listed in Section 6333. For

¹ CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations (30 Nov. 2015) ([link](#)), at paragraphs 57, 136, and 283.

² **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.**

³ Request certified on October 29, 2015, by co-chair León Sanchez via e-mail to legal counsel.

example, other statutory provisions require that a balance sheet, an accounting of principal changes in assets and liabilities during the year, a statement of revenue and expenses, and a description of certain insider transactions, if any, are required to be provided annually to statutory “members.”⁴ Bylaws could require that ICANN periodically distribute this information. We also did not consider what ICANN corporate information beyond that listed in Section 6333 might be valuable to the community in assessing whether to exercise any of the community powers.

Question 1: What inspection rights are provided by Section 6333?

Section 6333 provides:

The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person’s interest as a member.

If inspection rights under the Bylaws track Section 6333, as proposed, such rights would include the accounting books and records of the corporation and the minutes of proceedings of the board of directors and committees of the board of directors, on the conditions discussed below. Since ICANN will not have statutory “members,” the rights to inspect “member” meeting minutes would not apply.

Question 2: What are “accounting books and records”?

Section 6320(a) requires that a corporation keep, among other documents, “[a]dequate and correct books and records of account.” Although the Corporations Code does not define “books and records of account,” the term is generally understood to refer to the journals and ledgers in which financial transactions are originally entered and recorded, and the statements compiled from them. The term generally does not extend to source documents on which books and records of account are based, such as canceled checks and invoices. Similarly, the term generally encompasses documents relevant to the operation of the corporation as a whole, and not to those relevant to only a small or isolated aspect of the corporation’s operations.

Question 3: What limits are imposed on what may be inspected, and use of the information?

Authority under Section 6333 is sparse, but it is nonetheless clear that a “purpose reasonably related to [a] person’s interests as a member” does not include a member’s commercial or political interests, harassment, or massive and repeated inspection demands probing the minutiae of financial records and details of management and administration. Similar limitations could also be applied to rights of inspection provided by the Bylaws.

⁴ Cal. Corp. Code §§ 6321 and 6322.

Question 4: When must ICANN provide inspection, and in what form?

Section 6333 requires a nonprofit public benefit corporation to allow members to inspect books and records upon written demand “at any reasonable time.” Unless ICANN chooses to provide and transmit the requested materials in electronic format within a shorter timeframe, “any reasonable time” has generally been interpreted to mean ten (10) business days from the date of the request. Within that time period, ICANN would be required to make the records available for inspection at any one of ICANN’s Hub or Engagement Offices. Records subject to inspection would need to be provided in written form at ICANN’s expense. “Written form” also would include electronic records capable of being inspected visually and copied, and the right of inspection would include the right to copy and make extracts of records provided for inspection.

Question 5: What records must be kept confidential and through what mechanism?

Courts have determined in the context of nonprofit corporations that a corporation may, exercising reasonable business judgment as to its best interests, redact documents to protect confidential and trade secret information from inspection. We believe it would be reasonable to require ICANN to provide a rationale for any redaction or other protection of requested accounting books and records. The community should decide whether records such as compensation information should be defined as confidential and excepted from inspection rights.

We understand that the CCWG has agreed upon a confidentiality regime for the Affirmation of Commitments Review Teams; a version of this regime could be applied in the inspection rights context. We have not yet considered the EC’s role in such a regime, but can do so on request.

Question 6: What process is followed to request inspection?

As noted in Question 4, inspection would be initiated by a “written demand” to ICANN. The Bylaws could provide for inspection rights to be initiated by the EC, or instead could permit a broader opportunity to initiate inspections.

Unlike the exercise of the other community powers, which require community engagement and escalation before initiating a request for action by the EC, we suggest that a petition for inspection be brought directly to the EC by a single SO/AC or by multiple SO/ACs. The EC would then make written demand on ICANN for the requested materials. (Alternatively, for simplicity, the Bylaws could permit an AC or SO to make the written demand directly) If the Board refused or ignored the request, the petitioning SO/AC(s) could then initiate an escalating community decision-making process to enforce the demand on the Board, requiring community consensus.

Question 7: Who performs the inspection?

The leadership of each petitioning SO/AC(s) could designate a person, attorney, or other agent to exercise the right of inspection. If more than one SO/AC joined a petition for exercise of inspection rights, each joining SO/AC could designate a person, attorney, or other agent to exercise the right on the EC’s behalf. Those agents would then share copies of the records

inspected with the leadership of all participants in the inspection petition. Subject to any confidentiality requirements, leadership of the respective SO/ACs could then exercise judgment according to their own internal processes and procedures as to the individuals or parties with whom the information should be shared.