SIDLEY AUSTIN LLP
SIDLEY

ADLER & COLVIN
A Law Corporation

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Sole Designator/Community Enforcement Vehicle Implementation[1]

DATE: November 6, 2015

This memo describes how the Sole Designator Model could be put into operation to enforce the community powers through the creation and organization of a Sole Designator/Community Enforcement Vehicle as a legal entity. The Sole Designator/Community Enforcement Vehicle would be the legal entity for designation of ICANN's directors and for exercise and enforcement of the community rights and powers provided in ICANN's Bylaws.

Note that the term "Sole Designator/Community Enforcement Vehicle" ("SDCEV") is a placeholder reference emphasizing that the enforcement role is distinct from and in addition to the role of designating directors and exercising the other community powers. The CCWG should choose a permanent name for the SDCEV that reflects the separate legal personhood of the SDCEV as a unincorporated association.

1.   How Would the SDCEV Be Established as a Legal Entity?

- The SDCEV would be established in the ICANN Bylaws as an unincorporated association with legal capacity and standing to enforce the community rights provided under the ICANN Bylaws. The Bylaws would specify the key participants (the ACs, SOs, and individuals -- such as chairs of the SOs and ACs -- with a role in the SDCEV's operations).

- In addition to the powers to designate and remove directors, individually and collectively, ICANN Bylaws provisions would give the SDCEV the contemplated community empowerment rights (relating to bylaws amendments,

---

[1] 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) and unincorporated associations (California Corporations Code, Title 3, Part 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.

budget/strategic/operating plans, IRP enforcement, and IANA function review recommendations). The SDCEV should also be given rights in ICANN's Articles of Incorporation to approve some or all amendments to the Articles.

2.   How Would the SDCEV Exercise Community Empowerment Rights?

- The SDCEV will have the ongoing role of formally implementing the appointment of ICANN directors based on input from the various selecting bodies (SOs/ACs/NomCom) and implementing other community decisions regarding the community empowerment rights.

- Each participating SO/AC will need to come to a consensus within the SO/AC on the power to be exercised. It is expected that each SO/AC will use its current procedures to reach a decision and determine consensus. The decision of each individual SO/AC will be its input into the community decision of the SDCEV.

- Each participating SO and AC will need to formally communicate its decision to the SDCEV (and to the rest of the ICANN community). This communication would occur in a manner comparable to the way chartering organizations currently are expected to communicate their respective decisions whether to support the CCWG-Accountability's final proposal (and consistent with the way the chartering organizations *did* communicate their decisions with respect to the CWG-IANA Transition proposal), with the important added element that each of these communications must clearly be made by the SO/AC in its role as a participant in the SDCEV: the chair of each SO and AC would be tasked in the Bylaws with issuing a communiqué in a specific format that indicates that it is an official input to the SDCEV's community decision, stating the SO's or AC's decision as to the exercise of the particular community power. (The process of issuing a communiqué could include an opportunity for the AC or SO on whose behalf it is being issued to review and/or discuss the draft, as part of each SO's and AC's internal procedures.)

- Once issued, these communiqués would be fully and immediately transparent: They would be addressed and delivered to each other SO and AC and the ICANN Board, and they would be posted within 24 hours on a part of the ICANN website that is dedicated to SDCEV actions. Any deviation in a communiqué from an SO's or AC's actual decision would be immediately evident to the participants in that decision. This effectively prevents the SO or AC decision from being captured by an SO or AC chair. (Each SO or AC could also provide for a formal internal objection and override mechanism if deemed necessary.)

- Once all the participating SOs and ACs have issued their communiqués, the resulting collective consensus decision of the SDCEV will be evident to the participating SOs and ACs, the Board, and the community at large.   If the requisite threshold for community decision has been met as evidenced by the communiqués:

o   The ICANN Board could be charged with responsibility for implementing the decision of the community with no further action required on behalf of the SDCEV; or

o   The chairs of the SOs and ACs that have participated in the prevailing decision could be required to take the additional step of signing and delivering a written Statement of SDCEV Action to the ICANN Board, setting forth that the requisite threshold was met, attaching copies of the communiqués that evidence that fact, and directing the ICANN Board to act in accordance with the SDCEV's decision. This Statement of SDCEV Action would also be delivered to each SO and AC and posted on the SDCEV dedicated area of the website.

● The SDCEV will have the authority to take action as necessary to enforce the community empowerment rights as described in Section 3, directly below.

3.   **When Would Enforcement by the SDCEV Be Invoked?**

● The ICANN Board will be required to comply with the Bylaws and implement the SDCEV decisions as set forth in the Bylaws. In the unusual circumstance where the Board resists implementing the decision of the community made in the SDCEV, there are escalation procedures available.

● As a preliminary matter, CCWG must decide *at what point* in the escalation "staircase"[2] the SDCEV is needed: Not every step of every staircase requires that the SDCEV be involved. We suggest the simplest approach generally is that the SDCEV would engage in enforcement activity only after the "Resolution Dialogue" step of the staircase to enforce community rights, as follows:

o   The Bylaws could provide that the SDCEV's enforcement rights would only arise after the community had expressed its will through the initial steps of the applicable escalation staircase, through the point where:

■   the community has expressed its consensus decision,[3]

■   that decision has been ignored or otherwise rejected by the ICANN Board; *and*

■   the steps up to and including the Resolution Dialogue have been unsuccessful.

---

[2] See for example slide 13 from the CCWG-Accountability Engagement Session held on 19 October 2015 in Dublin. (The slide is included on page 6 below.)

[3] The details remain to be worked out for each community power, but we presume that details will be along the lines indicated for, as an example, the individual director removal power in the notes from the CCWG breakout session on 17 October 2015 (set forth on page 7 below).

- It is possible that as a result of the Resolution Dialogue, SOs or ACs that previously supported the exercise of the community power may alter their position, in effect unraveling the previously-established consensus; in such a case, the SDCEV's decision would be not to act.   If after the Resolution Dialogue, the community consensus is intact,

    o   The SDCEV could be tasked in the Bylaws with pursuing enforcement without further community direction; *or*

    o   The community could determine whether to pursue enforcement as set forth in the process described in Section 2 above. (*We recommend this alternative.*)

- Note that in addition to the potential for SDCEV enforcement, in some escalation scenarios, individual SO/ACs may be in a position to bring an IRP and, if they have legal personhood, to enforce an IRP award in court.

4.   How Would the SDCEV Take Enforcement Action?

- A decision to invoke enforcement action would be made on the same basis as other community decisions, as outlined in Section 2 above. (The affirmation of the community consensus decision that the SDCEV will invoke enforcement would be a matter of determining whether the requirements for support and lack of objection have been met.) [4]

- Should it ever be required to take enforcement action, the SDCEV will need one or more individual representatives to handle the ministerial tasks required to implement the SDCEV's enforcement decision, for example by hiring and working with counsel to bring the SDCEV's claim to binding IRP arbitration, or to seek enforcement of an IRP decision in court.

- Options for consideration by the CCWG include:

    o   The chairs of those participating SOs and ACs that supported the prevailing decision could automatically be designated as the "SDCEV Chairs Council" with authority to take action to enforce the decision on behalf of the SDCEV.

    o   A small "SDCEV Clerk Council" could be chosen through a community process, perhaps by the SO/AC chairs, and given the authority to take action to enforce the decision on behalf of the SDCEV.

    o   An independent third-party professional, such as a trustee or law firm, could be hired to serve in this function – although because someone would need to

---

[4] See for example the draft matrix from Community Decision-making breakout session, on pages 7-8.

make this decision it is likely only workable if done on a standing basis in advance, *and we recommend against this option*.

- We recommend that whatever option is adopted by the CCWG, *this should not be a standing body*. Given that it is only likely to be necessary to go to enforcement in rare circumstances, we recommend that the SDCEV representative for enforcement purposes be designed to come into being only in the event the SDCEV decides enforcement action is required.

- Careful consideration is needed to ensure that the SDCEV representative for enforcement purposes is limited to taking action to implement the SDCEV decision to seek enforcement; however, this will require having sufficient authority to conduct their ministerial functions, with appropriate transparency given the circumstances. (Taking legal action to enforce a decision against the ICANN Board may require discussions about legal strategy with counsel to be undertaken in a confidential setting.)

- The duties of the SDCEV representative for enforcement would be strictly limited by ICANN Bylaw provisions to carrying out the ministerial functions set out in the ICANN Bylaws implementing the SDCEV. Details remain to be worked out regarding when and how the community would be involved by the SDCEV representative for enforcement in strategic decisions during arbitration or litigation, and how the working and ethical relationships with legal counsel would be handled.

- Provisions in ICANN Articles and Bylaws will be needed to ensure that ICANN must provide sufficient on-going funding and other support to allow the SDCEV representative for enforcement to carry out enforcement activities.

5. **What Responsibility Would an Individual Acting on Behalf of the SDCEV Have?**
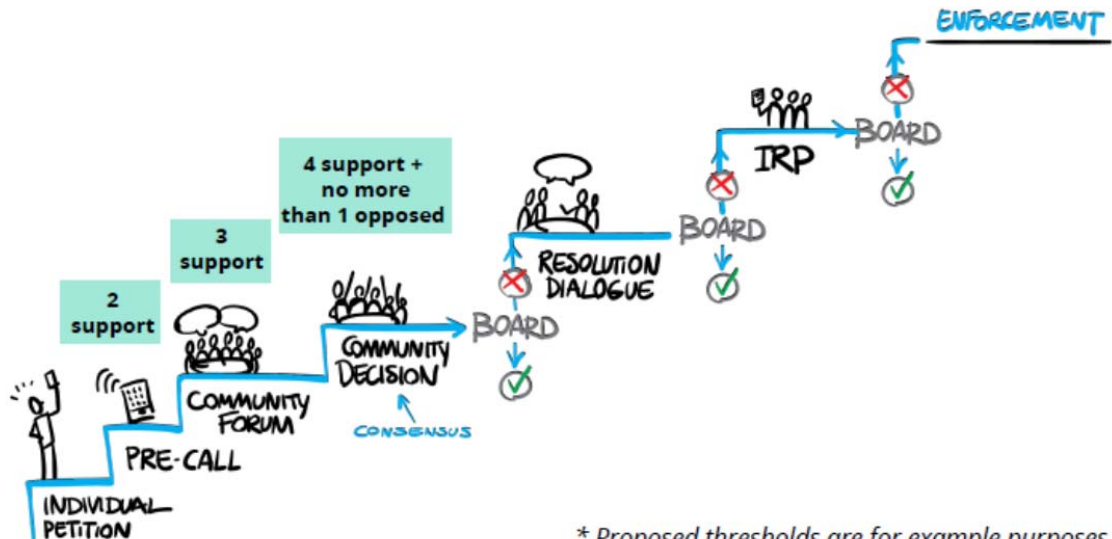
- To clarify, we recommend the CCWG consider a very simple approach in which the chairs of the various SOs and ACs that participate in the SDCEV's community decision-making be charged with the ministerial actions to implement and enforce SDCEV decisions. We note that the chairs of the SOs and ACs are known to the community, knowledgeable about ICANN, and have accountability to their respective stakeholder groups built into their roles as chairs. While other arrangements are possible, giving the responsibility for implementing decisions of the SDCEV to individuals chosen by their communities to operate in an existing and familiar framework is a straightforward solution.

- The SO and AC chairs would support implementation of SDCEV decisions in the following ways:

    o The chairs of all the SOs and ACs who participate in the SDCEV's community decision-making with respect to the community powers would have responsibility for communicating their AC or SO decision to the SDCEV (through its dedicated portion of the ICANN website), the other ACs and SOs, the ICANN Board, and the community at large (through the

website posting), with the collective outcome as evidenced by the AC and SO communiqués constituting the decision of the SDCEV as described in Section 2 above;

o For enforcement action, the chairs of those SOs and ACs that supported the prevailing decision would be tasked with the ministerial steps to implement the SDCEV's decision as the SDCEV enforcement representative either by taking on that role themselves in an SDCEV Chairs Council or by establishing an SDCEV Clerk Council as described in Section 4 above. The chairs (sitting on the Chairs Council) or other persons (on the Clerk Council) serving as the enforcement representative would be responsible for carrying out the duties detailed in the Bylaws, but they would not be held to fiduciary standards.   Their legal position would not be different in terms of liability concerns than current chairs of ACs and SOs. (Article and Bylaw provisions to hold such persons harmless and indemnify them will be provided as an extra safeguard.)

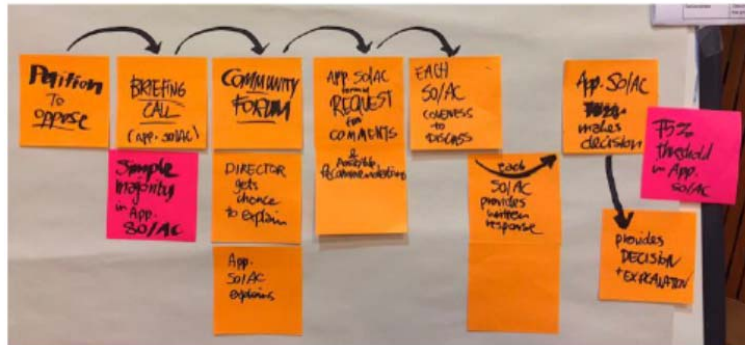**Slide 13 from CCWG-Accountability Engagement Session 19-Oct-2015**

Notes from CCWG breakout session 17-Oct-2015: Individual Director Removal Power

Individual Board Member Removal

Petition to Oppose	Briefing Call	Community Forum	Request for Comments	SOs/ACs Discuss	SOs/ACs Decisions	App. SO/AC Decides
App. SO/AC initiates process	Simple majority in app. SO/AC	Both sides get chance to explain their perspectives		Convenes own process to discuss	Written responses delivered	75% Threshold in App. SO/AC Decision & explanation provided

Notes from CCWG breakout session 17-Oct-2015: Community Decision-making

Community Decision Process, as described in CCWG breakout session on 17-Oct-2015

Required Community Powers	Should we have a Conference Call?	Should we Convene a Community Forum?	Consensus Support to exercise the power?	
1. Block a proposed Operating Plan/Strategic Plan/Budget	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	
2. Approve changes to Fundamental Bylaws and Articles of Incorporation	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	
3. Block changes to regular bylaws	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	
4. Remove individual board directors appointed by NomCom	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	
5. Recall the entire board of directors	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection*	*minority said 1 objection to block consensus
6. Mechanism for binding IRP where a panel decision is enforceable in any court recognizing international arbitration results	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	Require mediation before IRP begins

7. Reconsider/reject board decisions relating to reviews of IANA functions, including trigger of PTI separation	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	

Notes:

Column 2: **Should we have a Conference Call?** Any individual can begin an online petition in any AC or SO. Each AC/SO defines its own threshold for petition support. If any 2 AC/SOs support the petition, all AC/SOs are invited to participate in a conference call to discuss the petition and decide whether to have a Community Forum. The Petitioning ACs/SOs circulate written justification for exercising the Community Power in preparation for the conference call. ICANN hosts a conference call open to representatives of the SO/ACs and any interested participants, and the call would be recorded, transcribed, translated, etc. Representatives of the ICANN board would be expected to attend.

After the call, ACs and SOs use their own decision-making methods to decide whether they support convening a Community Forum. The threshold for convening a Community Forum is proposed in column 2 of the table.

Column 3: **Should we Convene a Community Forum?** This needs to be developed further, but the basic idea is a one-day face-to-face meeting, supported by ICANN staff and with travel funding for participants designated by ACs and SOs. If timing is right, just add this day to a scheduled ICANN meeting; otherwise it's an inter-sessional meeting. The Community Forum would be open to all via Adobe Connect, and would be recorded, transcribed, translated, etc. Representatives of the ICANN board would be expected to attend. AC/SOs may request independent legal advice to the community, depending upon the issue and power being considered.

Column 4: **Is there Consensus Support to exercise the power?** After the Community Forum, each AC/SO would decide, using its own methods, whether it supports the proposed exercise of the community power, whether it objects to the exercise of the community power, or whether it wishes to remain silent on the matter. If the Community Mechanism achieves the required levels of support, including absence of the specified number of objections, to proceed, it must publish a statement of explanation. A minority statement could be published by any AC/SO that objected to the decision or explanation.