

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Adler & Colvin

RE: Comments on Draft Memorandum dated July 15, 2015, from Caplin & Drysdale to John Curran and Steve Ryan of the American Registry for Internet Numbers (the “Draft ARIN Memo”)

CC: Sidley Austin LLP

DATE: July 20, 2015

On July 19, 2015, you asked us to respond briefly to the Draft ARIN Memo circulated on July 18, 2015 ([link](#)), which proposes Articles and Bylaws amendments to implement the Empowered SO/AC Designator Model. Because Adler & Colvin’s practice focuses on the nonprofit corporate law of California, our firms have agreed that Adler & Colvin would respond, with Sidley Austin LLP’s review. As directed by the CCWG, this memorandum summarizes our legal conclusions; if desired, we can later supply a detailed analysis in support of these conclusions.

Respectfully, we disagree with the legal analysis the Draft ARIN Memo relies on to posit that *all* the community empowerment rights identified by CCWG as important could be given directly to designators or other non-member third parties. The Draft ARIN Memo relies on a provision of the California statute that provides that non-member third parties may be given all of the rights of members.¹ On this basis, the Draft ARIN Memo concludes that bylaws

¹ The Draft ARIN Memo states: “While the board of a California nonprofit corporation generally has the exclusive power to adopt the annual budget and corporate plans, the statute says that that power can be made subject, by specific provisions in the bylaws, to the right of the members to approve those actions. In turn, the statute permits that rights that could be held by members may be conferred upon any persons who are not members of the corporation. (Those persons would have only the rights conferred under the bylaws and would not become members of the corporation as a result of holding those rights.) Therefore, these two statutory provisions permit ICANN’s

validly may give designators the power to reject ICANN's annual budget or strategic or operating plan by a supermajority of the designators, and reject board actions or decisions related to IANA function review recommendations. We believe that this is an unduly broad reading of the statutory provision.

As California lawyers whose practice focuses on nonprofit corporate law in that state, we reach a different conclusion based on additional statutory provisions and analysis that we performed when advising on governance options prior to development of the initial reference model. We concluded that the statutory provision cited in the Draft ARIN Memo cannot be read so broadly. A careful analysis of the cited provision and how it interacts with other related provisions, together with due respect for well-established corporate governance principles, the public policy underlying board fiduciary duties, and principles of statutory interpretation, all require a narrower reading.

We agree with the Draft ARIN Memo that bylaws may give non-members (such as designators) certain rights that are *expressly given to members by the statute*.² This would include, for example, the right to receive notice of and attend member meetings, or the right to inspect corporate books and records. California corporate law *does not* expressly give members the right to reject the budget, reject the strategic plan, or force implementation of IANA functions review recommendations, however. In our opinion, California corporate law does allow the bylaws to reserve powers such as those to the members -- but *only* to the members.

Accordingly, as we have advised you (see, for example, the Legal Assessment: Revised Summary Chart and Governance Chart from June 10, 2015 ([link](#)); the Empowered SO/AC Membership & Designator Models, dated July 7, 2015 ([link](#)); and the revised draft with Community Mechanism as Sole Member, dated July 14, 2015 ([link](#))), the three powers in question may only be given to designators indirectly, through their right to remove directors who do not act as the designators wish in these three areas. We believe the proposed bylaws in the Draft ARIN Memo giving designators such powers directly would be invalid under California law.

Again, as directed by the CCWG, we have briefly summarized our conclusions, but can provide a detailed analysis in support of them, if you wish.

bylaws to grant designators the right to consider and reject ICANN's annual budget and plan." (Draft ARIN Memo, page 3 (*footnotes omitted*)).

² Please see our guidance provided in the Legal Assessment: Revised Summary Chart and Governance Chart from June 10, 2015 ([link](#)); the Member Rights Memorandum from June 8, 2015 ([link](#)); and the Sidley Austin, Adler & Colvin Joint Preliminary Analysis from April 10, 2015 ([link](#))).