

CCWG-ACCOUNTABILITY

Webinars on Second Draft Proposal

List of Questions

This document is a repository of questions the CCWG-Accountability was asked during its webinars on the Second Draft Proposal. It attempts to encapsulate the responses that were given. For more information, please refer to webinar archives available at: <https://community.icann.org/pages/viewpage.action?pageId=54692681>

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1. **QUESTION:** In the past, the Board has had the responsibility to either resolve Community disputes or else to act in the face of disagreements between Community members. How does this change in the new framework and how does the new Accountability framework affect Board action in this regard?

ANSWER: The CCWG-Accountability Proposal would not change the day-to-day responsibilities or functioning of ICANN. It creates escalation mechanisms to deal with exceptional circumstances. As such there should be no changes in this regard. Where questions arise as to whether an ICANN action violates the Bylaws, aggrieved parties might be able to use the RFR or IRP and, depending on the subject concerned, one of the community powers might be invoked.

2. **QUESTION:** Are the “structural reviews” referenced on slide 6 the periodic reviews of ACs and SOs already contained in ICANN Bylaws -- or something different/additional?

ANSWER: Yes, slide 6 refers to the current periodic reviews of ICANN structure and operations that ICANN Bylaws require (see [section 4](#)).

3. **QUESTION:** With a need for so many panelists in the independent review process, is there a risk that we create a “community of panelists” that end up controlling ICANN's decisions?

ANSWER: It is envisioned that there would be at least seven panelists in total. This would be the same as the Public Interest Commitments Dispute Resolution Procedure (PICDRP) and far less than the Uniform Domain-Name Dispute-Resolution Policy (UDRP). The number was chosen to have a pool of panelists available and to meet diversity requirements. Moreover, the mandate of the IRP is limited to resolving questions about whether a particular action or inaction violates ICANN’s Bylaws and

Articles of Incorporation and should not impinge on ICANN's ordinary processes and procedures. Finally, an independent judiciary is not intended to control ICANN decisions or otherwise usurp the Board's governance role. Rather, it is intended to enhance Board accountability and to help ensure that the Board adheres to ICANN's Articles and Bylaws.

4. **QUESTION:** How likely is it that foreign sovereign governments will submit to voting membership in a California unincorporated non-profit association like the proposed Community Mechanism? Doesn't the GAC need to do this as a whole? How will refusal by one government to participate on that basis affect GAC participation in the CA unincorporated non-profit association?

ANSWER: The proposal does not require that foreign sovereign governments participate in ICANN in any manner different from the way that they already participate in GAC. Based on the CCWG Proposal, the GAC collectively could, if it chose to do so, become a voting participant in the Sole Member. It does not, however, have to become an unincorporated association itself to do so. In this model, governments do not have a different relationship to the GAC than they do today.

5. **QUESTION:** Does the CMSM process apply only to the five powers enumerated on slide 12? In other words, what is community recourse against Board decisions with which it disagrees but that do not fall within the five situations listed on slide 12?

ANSWER: The process is designed to support these five powers. We are not proposing that this mechanism would be used to interfere with other work (e.g., PDPs). The CMSM would have all the rights of a member provided for by the law, but exercising those powers would require a very high threshold of consent from CMSM participants – higher than is needed to exercise the five powers. In addition, community members may be able to use the RFR and IRP where it is applicable.

6. **QUESTION:** Is an SO/AC decision to use a community power based on a simple majority vote or some higher threshold?

ANSWER: At the CMSM Sole Member level, high voting thresholds for the SOs or ACs collectively are proposed for prompting the Sole Member to exercise any of the powers within ICANN.

How a given SO or AC decides to act internally is a separate matter. For example, as explained in Section 7 of the Proposal, a simple majority is all that is needed for a given SO or AC to petition the CMSM to use a power.

7. QUESTION: SOs and ACs definitely become part of a California unincorporated non-profit association governed by certain provisions of the California Code.

ANSWER: Currently, SOs and ACs are already participating in ICANN, which is a California nonprofit public benefit corporation, and to the extent that they exist as recognized in ICANN Bylaws, they are already a part of ICANN. In participating in the CMSM, the SOs or ACs do not change in any way from their current status. CMSM will be an unincorporated association (the CMSM itself), but SOs and ACs do not need to become unincorporated associations. The CMSM is specifically designed to address the need for legal personhood to enforce community rights while at the same time avoiding any requirement that SOs and ACs become legal persons to participate. Therefore, individual SOs and ACs will be able to participate in the exercise of the community rights without any need to change their current status. This addresses one of the key concerns raised in comments regarding the previous model of individual SO/AC membership from the First CCWG-Accountability Proposal from May.

8. QUESTION: How many votes does each AC/SO get in the Decision phase?

ANSWER: The proposal is to allocate five votes to each of the following: ASO, ccNSO, GNSO, GAC and ALAC. There would be two votes available to each of the following: RSSAC and SSAC.

9. QUESTION: On slide 14, what is the “governing body” of e.g., GNSO?

ANSWER: The discussion inside the GNSO would likely be held at the stakeholder group level and conveyed via the GNSO Council Chair. However, it would be up to the GNSO to determine how decisions are made.

10. QUESTION: My understanding is the “Single Member” is a California unincorporated non-profit association governed by certain specific provisions of the California Corporations Code.

ANSWER: Yes.

11. QUESTION: Shouldn't the voting be weighted depending on the issue? For example, if it is a gTLD issue, should the GNSO vote be weighted above that of the ccNSO and ASO and vice versa?

ANSWER: What ICANN does regularly does not change. Accordingly, the GNSO and the ccNSO will continue to be responsible for policy development within their respective domains. Voting is for special powers that affect all parties equally and is not a specific SO/AC issue. When it comes to specific group issues there is the Independent Review

Process (IRP). Members of a particular AC or SO can directly file an IRP and seek a binding decision based on the new bylaws standard of review. In other words, the community powers won't generally affect one SO or AC particularly.

12. QUESTION: Is there a consequence of the GAC not deciding to vote?

ANSWER: GAC can decide not to participate in the CMSM voting mechanism and continue to act in an advisory capacity as it does now if it so chooses. The consequence would be fewer votes available to be cast to direct the Sole Member to take action. Since all the voting thresholds are a percentage of available votes, there would not be direct impact if GAC or any other SO or AC decides that it would prefer not to participate. If GAC or an SO or AC determines that it generally will participate, but decides not to vote on a particular issue, its abstention will lower the likelihood that the positive vote threshold necessary for a measure to pass is achieved.

13. QUESTION: Slide 16 seems to imply that GNSO has already decided to participate in the Community Mechanism. Is this correct?

ANSWER: No one has reached the decision-point yet, but initial signals indicate that the GNSO is favorably inclined to participate.

14. QUESTION: The CMSM has, for example, five RIR members (i.e., one for each of the RIRs) and five GNSO members (i.e., one for the 1000+ gTLD registries). This is an apparent disparity but I am interested in the discussion that led to this model so I can better understand it. There is a similar disparity that there are only 5 ccTLD members.

ANSWER: The CMSM does not have any members. ACs and SOs are participants in the Sole Member in that by voting they direct the Sole Member how to exercise powers. Each AC/SO will be allocated votes and may subdivide its allocated votes as it sees fit. There is no requirement to do it by region. The five SOs and ACs with five votes each are those the CCWG sees as most tightly connected to large Internet community constituencies. The lesser voting weight proposed for the remaining ACs are due to their advisory nature or the small number of parties involved in their work. Voting is for special powers that affect all parties equally and is not a specific SO/AC issue, so all groups are likely affected equally.

15. QUESTION: What is the mechanism through which future changes/corrections could be made? For example, it is theoretically possible that (a) if there are only seven members of the IRP standing panel; and (b) each IRP has a three-person panel, it could be the case

that, depending on the number of IRPs, the panelists could be overwhelmed. Similarly, for example, the proposal to have the Ombudsman make the initial recommendations on Requests for Reconsideration to the BGC can only achieve its purpose of taking the ICANN legal dept. out of the loop, if the Ombudsman is required to work independently of and without consulting the ICANN Legal Department. If that requirement is not dealt with as an “operational detail”, what's the mechanism to fix in the future? A Bylaws amendment?

ANSWER: The current proposal is to create a standing IRP panel of at least seven members, but that number could change based on experience, case load, etc. The mechanisms for adjustments of this type will be developed as part of Work Stream 2 and, of course, subject to community review and input. It is unclear at this time whether this would require a further bylaw change. Likewise, the whole question of the Ombuds role is the subject of Work Stream 2, again subject to community review and input. As part of Work Stream 2, the CCWG may well recommend that the Ombuds charter now spelled out in the Bylaws be adjusted to provide greater independence, which would require a bylaw change. Even today, however, the Office of the Ombudsman enjoys a certain measure of independence that makes it a better choice for advising the BGC upon initial review of the Requests for Reconsideration.

16. **QUESTION:** Would the co-chairs wish to comment on the numerous objections which have been raised on the CCWG mailing list regarding process, lack of adherence to the WG's charter, the rapid turn-around of documents for discussion, the general rapidity of discussion and decision making process, etc.?

ANSWER: CCWG-Accountability has been working for many months now (weekly teleconferences and multiple face-to-face meetings) in an open and transparent manner. This Proposal is the result of an iterative process. We have thoroughly reviewed the public comment received on the First Proposal. The number of individuals objecting - as opposed to the number of participants - is low. It is normal for bigger projects to be criticized about speed. Some areas of the Proposal already enjoy broad community support although we have outstanding questions to discuss. The process is as inclusive as possible.

17. **QUESTION:** Not all of the five powers are “last resort” or “community wide” powers. E.g., review of a bylaw amendment that affects only one SO.

ANSWER: Bylaw changes affect all groups as they are the rules by which ICANN shall work. Hence, the community power needs to be jointly exercised following the described escalation path.

18. QUESTION: Does the CMSM process apply only to the five powers enumerated on slide 12?

ANSWER: See answer to Question 5 above. (This is the same question.)

19. QUESTION: We are relying too heavily on Board removal, which is a nuclear option. In ICANN's history, the nuclear option doesn't work. We need a mechanism to override a decision of the Board by overwhelming majority of the community where the Board just got a decision wrong not due to malfeasance which would warrant removal.

ANSWER: Board removal offers a powerful mechanism for enhancing ICANN accountability to the community by creating a strong incentive for ICANN Board and staff to work pro-actively with the community to avoid a situation where community displeasure became so significant and extensive that recall of the entire Board was seen as the only means to resolve a dispute.

Other powers available to the community through the CMSM are designed to avoid this nuclear option, and it would only be in a highly unusual circumstance that the community would be likely to invoke its power to recall the entire Board. Also note that the hurdles for Board recall are extremely high. The binding IRP in particular is likely to help resolve issues before they reach a point of such dissatisfaction.

20. QUESTION: What is basis for CCWG conclusion it has met all CWG-Stewardship requirements, when it has not made ccTLD delegation/redelegation decisions subject to review?

ANSWER: Please refer to Stress Test 21 which addresses redelegations, ccTLDs and IRP. The ccNSO has formally requested to be exempt given their wish to develop policy on this. The CWG has recently provided a comment letter indicating that all requirements have been met except for an appeals mechanism related to PTI. The CWG-Stewardship has advised that the IRP being developed by the CCWG should not cover issues relating to ccTLD delegation/re-delegation until such time as the ccTLD community has developed an appropriate mechanism.

Please refer as well to the response to Question 32.

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21. **QUESTION:** Is there a stress test designed for situations of regulatory capture?

ANSWER: There is a stress test in the *category III. Legal/Legislative Action ST#4*. Please refer to page 96 of the Proposal.

22. **QUESTION:** There is no mention of the duration of examination of complaints by the IRP. Will this be added when you submit the final report to Chartering Organizations?

ANSWER: There is a reference in the Proposal that indicates that they should strive to render decisions efficiently in a 6-month timeframe. If they are unable to render that decision, they will issue an update and estimated completion schedule.

23. **QUESTION:** The findings/summary of public comments ought to be offered formally to the CCWG and made generally available. Discussions in Buenos Aires on entirely new legal accountability mechanisms began before the first public comment period findings could be reported.

ANSWER: The public comments on our First Proposal were reviewed and discussed by the CCWG in detail and changes based on those comments are reflected in our Second Proposal. A summary of the public comments on the Second Proposal received will be published and all comments are already publicly available. The comments made by the community have been the basis for the Second Proposal and have led to many changes over the First Proposal, some of which were substantial.

24. **QUESTION:** On point 4: is the appointing body the only one with the authority to remove its appointed director (item 5 notwithstanding)?

ANSWER: Yes, this applies to the seven directors appointed by the SOs and ALAC. (There are special procedures for removing individual directors appointed by the Nominating Committee, which are described on pages 59-60 of the Proposal and discussed briefly in the response to the next question.) The appointing SO/AC is only the removing body with respect to these seven directors. The alternative is the removal of the entire Board by the community.

25. QUESTION: What was the problem in removal of a NomCom Director?

ANSWER: Please refer to pages 58-59 of the Proposal. SO/ACs can petition for the removal of a NomCom Director. Any SO/AC can pass the petition to trigger the process. This would be followed by dialogue. Participating SO/ACs will then decide whether to remove that Director or not. Please note that none of these powers would apply to the CEO.

26. QUESTION: Is the community empowered to take checks on the flow of revenues? Is there financial accountability to the community?

ANSWER: Under California law, the ICANN Board acts in a fiduciary capacity and must avoid waste of assets. There are limits to the powers that can be taken away from the Board under California law although in a membership organization, members – here the Community Mechanism as Sole Member – may exercise additional oversight rights regarding budget. The power of the CMSM to veto the budget as proposed provides the community with significant ability to hold the Board accountable on financial matters, while at the same time recognizing the importance of Board judgment on financial matters

27. QUESTION: Who can answer the question of why the Board's right to remove individual Directors is being restricted?

ANSWER: Please refer to the memo from April 23, 2015, entitled “Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart”. If the CCWG-Accountability’s Single Member Model is implemented, the Board could only remove directors for causes specified in the California corporate code. For further detail on legal advice provided, see Appendix G.

CCWG Legal Counsel's Response: Under applicable California law, where the Articles or Bylaws provide a Member with the right to elect or appoint one or more directors, then only that Member may remove such director(s) without cause. The Board may only remove such director(s) for cause, such as conviction for a felony crime. (For detail, see row 3 and supporting footnotes in the June 8, 2015, chart at this [link](#). Footnote 4 more completely lists causes for which the Board may remove a member-elected director.)

28. QUESTION: According to the 5/5/5/5/5/2/2 power exercising distribution, does CCWG consider the number of members in each AC or SO in determining to exercise the community power?

ANSWER: No.

29. QUESTION: Is the voting pool always 27 or 25 without SSAC / RSSAC and 20 without GAC?

ANSWER: Yes. As explained in the Proposal, early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of voting participants in the Sole Member. Each of these SOs and ACs would have five votes on any proposal to instruct the Sole Member, for a total of 20 votes. If GAC decided to participate in the voting mechanism, it would have five votes, raising the total number of votes to 25. If SSAC or RSSAC decided to participate as well, each would receive two votes, further raising the total to 27 (if only one participates) or 29 (if both participate). Consequently, if all the current SO/ACs were participating, there would be 29 votes in total.

Please note that the Sole Member will include an opt-in mechanism where any SO/AC can decide whether to be a voting participant in the Sole Member or not. Also, the model is open to welcoming new entries, thereby raising the total number of votes above 29. Note that new additions and removals beyond those listed in Section 6.2 of the Proposal will require a bylaw change.

30. QUESTION: Who can take the vote position for each AC/SO? The same as the vote member for each AC/SO to vote for ICANN board member?

ANSWER: Each SO or AC could make the decision, as a matter of internal SO/AC governance consistent with already existing provisions of the ICANN Bylaws, on how their voting rights within the Sole Member would be exercised. There are no defined sets of representatives; no SO or AC will choose any representative(s) unless that is how the SO or AC wishes to make the decision on how its votes will be cast. The CCWG's proposal does not create any new rules around how SO/ACs need to organize themselves internally.

Aside from its internal decision making, each SO or AC must interface with the Sole Member to communicate its votes. Paragraph 310 of the Proposal explains that the Chair of each SO and AC would be responsible for reporting the votes or decisions of the SO or AC, with the Sole Member then taking action accordingly. Other procedural details for the sole member voting procedures will be addressed as the CMSM is implemented.

31. QUESTION: What are the proposed reviews for DIDP?

ANSWER: We have heard DIDP-related concerns and will be looking at them as part of Work Stream 2.

32. QUESTION: Have the CWG confirmed that you have met their requirements?

ANSWER: The CWG-Stewardship has recently provided a comment letter in which it advised that the current CCWG proposal meets all requirements except for an appeals mechanism related to PTI. We expect that CCWG and CWG will work together to address this CWG-Stewardship requirement.

Please refer to the response to Question 20.

33. QUESTION: Given the recent findings about the IRP in reference to the .africa domain is there work being done around strengthening and improving the process?

ANSWER: Making the IRP process accessible has been an important priority for the CCWG, and we are recommending both substance and process enhancements. We believe it is critical to have a standing panel of people familiar with ICANN's mission, rules and procedures. The proposed standing panel will allow for subject-matter expertise. An additional issue is that the IRP is currently limited to addressing procedural violations of the Articles of Incorporation or Bylaws. Our recommendation is to expand the IRP's scope of review to include substantive issues. We also suggest panel decisions that have precedential value. As part of Work Stream 2, there will be a work group to develop clear rules for operating procedures/appeals.

34. QUESTION: On the IRP slide, it says "reasonable efforts" will be used to populate the panel - how do we ensure that those efforts will be strong enough?

ANSWER: We have spent considerable time on diversity. With the "no more than two panelists from each region" principle in mind, we concluded that we would have a minimum of seven panelists. We foresee that there will be a tender for a provider to help identify qualified panelists from around the globe.

35. QUESTION: Given the long-term accountability work in place it would be beneficial to have a report that tracks the various IRP failures over the years and the learnings from those failures including what has been done by ICANN over the years to address the gaps.

ANSWER: We are envisioning institutionalized periodic reviews of how the IRP is working and how decisions are being handled.

36. QUESTION: Is cost containment (for all parties concerned) one of the goals of improvement?

ANSWER: Cost containment is an important aspect of the IRP. ICANN would bear all the administrative costs of maintaining the system (including Panelist salaries), while each party would bear the costs of their own legal advice, although the Panel may provide for a loser-pays or fee-shifting outcome in the event it identifies a challenge or defense as frivolous or abusive. Filing fees may also be put in place to deter abusive and frivolous requests. The Proposal recommends that ICANN seek to secure access to pro-bono legal representation for community, nonprofit, and other complainants in the IRP who may otherwise be prevented from utilizing the process because of cost considerations.

Otherwise, IRP rules that exist now will remain in place to maintain efficiency.

37. QUESTION: One IRP issue is the interpretation of poorly drafted rules versus the spirit of the policy behind the rules. Are we allowing “discretion” in the new IRP?

ANSWER: Our goal is to issue easily understood rules for IRP. We will be looking to clarify what is and what is not subject to independent review. The IRP would be a place to reconcile inconsistent or conflicting decisions of expert panels and a place to resolve some difficulties we could have in the gTLD process where the expert panel has different interpretations and decisions cannot be reconciled.

38. QUESTION: Are there many sole member non-profit corporations in California?

ANSWER: It is not uncommon.

CCWG Legal Counsel's Response: While we do not know of a data set that would provide the number of sole-member nonprofit corporations in California, in our experience, the sole-member structure is not uncommon. We have experience with its use both in California and in other US jurisdictions.

39. QUESTION: Do we have any “role models” for CMSM structure - since this model was suggested by external legal counsel?

ANSWER: The details of the CMSM structure were quite specifically developed for the ICANN context.

CCWG Legal Counsel's Response: While many nonprofit corporations have sole members, the Community Mechanism as Sole Member was not modeled on any particular organization. Rather, the CMSM emerged over time as a better way to achieve the community empowerment objectives that the CCWG had identified (and related CWG dependencies), in light of the significant concerns expressed about other models under consideration. In particular, the Community Mechanism as Sole Member model provides

a means to empower the community while avoiding any requirement that ACs and SOs become legal persons.

40. **QUESTION:** To make the rejection not happen, we need efficient cooperation between staff, Board, community for budget-related matter. This is already in place but let's make it compulsory to avoid a situation where the budget gets rejected.

ANSWER: We will make sure that the collaborative budget development process is addressed as part of Work Stream 2.

We also note that the possibility of community rejection of a budget should encourage the Board and staff to engage the community and address its concerns before the Board adopts a budget; an enhancement of accountability that is at the core of the CCWG Proposal.

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41. **QUESTION:** Once the new Bylaws are approved, can the community suggest amendments to Standard Bylaws or Fundamental Bylaws? If not, why? If the community is authorized to propose amendments to the Bylaws, it must be clearly and specifically mentioned in the proposal. Bylaws are the constitution of the entire process and it is a prerogative of the community to be able to propose amendments to the Bylaws. Does the community have power to propose amendments to Bylaws either standard or fundamental (paragraph 237)?

ANSWER: The core reserve powers solely relate to the ability to veto changes and co-approve changes. In the current context, bylaw changes can be initiated by community proposals (most are, for example bylaw changes introduced by the ATRT). There is no "new" procedural route being created to raise bylaw changes: the CCWG-Accountability is not proposing that the community exercise the power to directly propose changes to the Bylaws in the future.

As indicated on page 35, the CMSM model would involve a statutory member power to initiate and adopt bylaw amendments, a power that cannot be waived under California law. The CMSM's use of this power would be subject to practical limitations, however, including a requirement for a very high threshold of approval within the CMSM.

42. **QUESTION:** Will the Policy Development Processes be Fundamental Bylaws?

ANSWER: Policy Development Processes will remain standard bylaws. If the Board chooses to ignore the multistakeholder process, appeal mechanisms can be triggered to change a decision.

43. **QUESTION:** Back on mission: is this setting it in stone and so a constraint on the evolution of ICANN and the DNS?

ANSWER: ICANN's mission is not set in stone.

The Mission and Core Values statements would be Fundamental Bylaws and would require a high threshold to be changed to help prevent ICANN mission creep into other areas. At the same time, we are cognizant that ICANN is working in a rapidly changing environment, and that changes to ICANN may be needed to fulfill a potentially revised mission at a future point in time. Amending Fundamental Bylaws, including the Mission and Core Values statements, can be achieved by reaching the higher threshold for approval.

44. **QUESTION:** To what extent is the Sole Member Community Mechanism dependent upon ICANN for resources?

ANSWER: The CMSM, like the SOs and ACs currently, would depend on ICANN for resources.

While operating the CMSM may involve some new administrative and similar costs (e.g., conducting meetings of the community mechanism and counting votes), we do not expect significant additional operational costs above those currently incurred by the SOs and ACs in conducting their regular activities. The CMSM is just the means through which the community will take corporate member action inside ICANN and enforce the community's governance rights. Note that there is no requirement under the Proposal for in-person meetings in the CMSM.

45. **QUESTION:** Does it mean that community powers are exercised in a different way - no voting?

ANSWER: Voting by SOs and ACs would occur within the CMSM, which in turn would take the action as directed by that voting within ICANN as the organization's sole statutory member. With respect to electing ICANN directors, the CMSM would act at the direction of individual SOs and ACs.

Voting and other processes within the SOs and ACs themselves are not addressed in and would not be affected by the current CCWG Proposal.

46. QUESTION: From a legal point of view, who exactly is listed as the member?

ANSWER: The CMSM would be the sole voting statutory member of ICANN. The community, including the SOs/ACs, will participate in the decisions of the CMSM, which will then take action as the single member of ICANN.

47. QUESTION: If there is a public interest issue raised in the petition, could there be an obligation to seek GAC advice, or a stability issue to obtain formal SSAC advice - before going to a vote ACs would not participate in?

ANSWER: Currently, there is no hard coded requirement to ask for such advice. The CCWG recommendations would not change the current practice in place at ICANN. The Board would take decisions unless they get information from ACs prior to making a decision. ACs would chime in before a decision has been made, and their input would be handled in accordance with procedures described in the current Bylaws. The Board and GAC dynamic remains unaltered.

It should be noted that all ACs will be invited to participate in the community forum.

48. QUESTION: Which provisions of the California Code apply to the named Sole Member and set forth its obligations and responsibilities? CA Code Section 18630 applicable to CA unincorporated non-profit associations provides: Notwithstanding any other provision of this chapter, a member or person in control of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account the differences between a nonprofit association and a corporation.

ANSWER: The provisions of the California Nonprofit Corporation Law would govern the rights and powers of CMSM as a statutory member of ICANN. For an overview of the rights of statutory members in California nonprofit public benefit corporations like ICANN, please refer to our counsel's memorandum and chart from June 8, 2015, entitled "Response to questions from Samantha Eisner, Member Rights Chart," available [here](#).

Most of the obligations and responsibilities will be set out in the ICANN Articles and Bylaws; other statutory rights will be restricted in the Bylaws and Articles (as permitted by California law) or require high thresholds of the CMSM to exercise them.

CCWG Legal Counsel's Response: *If the sole member is formed as a California unincorporated association (since it would need to be a legal person in order to be a statutory member of ICANN), participants in the Sole Member unincorporated*

association would not liable for the debts, obligations, or liabilities of the association solely by reason of being participants, as stated in California Corporations Code Section 18605.

Corporations Code Section 18630 simply points out the legal principle of common-law alter-ego liability, applicable not only to unincorporated associations but also to corporations and other limited-liability entities such as limited liability companies. For example, under this principle a corporate shareholder could be held liable for the debts of a corporation that is operated so closely by or in connection with the shareholder that it has ceased to have a separate existence for practical purposes (i.e., the corporation has been operated as the shareholder's mere "alter ego"). Typically, however, a finding of alter-ego liability requires a number of egregious facts, including a commingling of funds between the shareholder and the corporation and a failure to observe corporate formalities. Courts may also require a demonstration of outright fraud. If the CMSM is administered according to the governance provisions to be included in the ICANN Bylaws, we do not believe there would be a basis for a court to assert alter-ego liability against its participants.

49. **QUESTION:** Community forum an official structure that entails decision-making power. It is a venue for discussion in community and therefore a requirement. There are three-step for power exercise: petition – discussion – decision. Who will be coordinating the three steps? Who will define the window of petition? Who will receive the petition and verify the validity of petition? Who will inform opening of the windows? Who will connect results and liaise with Board/staff? Chair of community forum might be a coordinator.

ANSWER: With respect to first point, it is important to distinguish between the Sole Member entity – the place where SO/AC votes are cast and which then takes corporate action within ICANN – and the community forum, the place where discussions will take place.

The Sole Member entity itself should involve minimal additional procedural complexity.

Certain procedural specifics remain to be worked out during the implementation phase, such as the details mentioned in this question. If there is sufficient support for the CCWG to formalize the procedural details specifically for the community forum, we can take on this task.

50. **QUESTION:** Regarding the Empowered Community Powers, does the community have the power to remove the President individually?

ANSWER: No. The President and CEO serves in that capacity by virtue of being employed as such. The Board, not the community, has selected and will continue to select the President/CEO. The ICANN President and CEO role is specifically excluded from being removed from the Board either individually or when the entire Board is recalled.

51. **QUESTION:** Community Forum is a key element of the CCWG proposal. Will there be more detail given in Dublin on how it will work?

ANSWER: The CCWG has not set the Dublin agenda yet. It will be based on input received in the second public comment period.

52. **QUESTION:** Could ICANN simply ignore a decision of the sole member community mechanism? How would the sole member get them to comply? Is the only option to remove the Board? Do you have resources and funds for it to be robust enough?

ANSWER: If ICANN ignored an action taken by the CMSM as the sole member, the CMSM could go through an IRP process to enforce the Articles/Bylaws and could ultimately bring suit in court.

No one is contemplating a lawsuit as a likely scenario, but the CMSM's powers would be enforceable in court, if absolutely needed. Going to court would not be the preferred option. With respect to funds, the community could oversee that adequate resources are allocated to that area in the budget proposal. If the Board does not agree to that, budget-related community power would be invoked.

53. **QUESTION:** What is the status of the interim bylaw provision re Work Stream 2?

ANSWER: Refer to page 121. The Proposal includes a recommendation to adopt a transitional provision in the Bylaws that would require ICANN to implement CCWG recommendations and task the group with creating further enhancements.

54. **QUESTION:** Please clarify how/where the Human Rights issue will be addressed.

ANSWER: The CCWG received signs from the community that the human rights topic should be prioritized. A subteam was recently set up to work on language intended for the Bylaws that would enshrine the concept of human rights. A rationale will also be provided. The human rights work should be ready for inclusion in the final recommendations that will go to SO/ACs. An in-depth analysis of human rights will be

conducted as part of Work Stream 2.

55. QUESTION: Could you speak to what happens with respect to implementation and Work Stream 2?

ANSWER: Approval of the Work Stream 1 final report is expected to take place in Dublin. We anticipate Work Stream 1 implementation will be launched after ICANN 54. We are currently kicking off first steps of Bylaws drafting. Work Stream 2 development will include two 40-day public comment periods as well as two ICANN meetings so that discussion with community can be factored into Work Stream 2 recommendations. It is envisioned that Work Stream 2 implementation will follow.

56. QUESTION: What is the scope of the second bullet of elements considered for Work Stream 2 (further assessing enhancements to government participation in ICANN)?

ANSWER: This item was added as a placeholder should governments need more time to determine and refine how they would participate in the model, possibly moving this decision to Work Stream 2. We will consider whether this item is needed once we have received further feedback.

57. QUESTION: Who decides whether a decision from a three-member panel merits appeal to the full panel?

ANSWER: The panel itself would review the request and make a determination about whether review request meets the test.

58. QUESTION: How critical is the Board response and dialogue?

ANSWER: TBD

[Ultimately, the Board alone has the power to amend the current Articles of Incorporation and the Bylaws. As a result, engagement with the Board is necessary in order for the CCWG Proposal to be put into effect.]