

MEMORANDUM

TO: Legal Sub-team of the Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Legal Assessment: Executive Summary & Chart, Designator Model, Member Model, and Voluntary Model

DATE: June 10, 2015

Overview

This memorandum and summary chart provides an expansion of the information provided in the Memorandum and Governance Chart that we provided to you on April 23, 2015 ([Link](#)). This memo focuses specifically on the enumerated powers, and responds to the following questions:

- 1. Can the community groups (i.e. the SOs and ACs) enforce any of their rights with respect to the CCWG's "enumerated powers" if they are not legal persons?*
- 2. Which of the enumerated powers are enforceable by the SO/ACs, as currently organized, under the Member model, the Designator model, and a model that is premised on the ICANN Board's agreement to comply with the bylaws (i.e., the "voluntary model")?*
- 3. Does the answer to question number 2 change if the SO/ACs are legal persons?*

Short Answer

In response to Question No.1 above the short answer is "No".

If the SO/ACs are not legal persons (individuals or corporate entities such as unincorporated associations that represent the interest of such SO or AC) they cannot enforce, in their own name or in a representative capacity on behalf of the ICANN corporation, any of the rights reserved to them under the enumerated powers in the CCWG draft proposal. Only those SO/ACs that are legal persons can enforce any powers. To have "enforceable" rights, an individual or entity must be able to go to court, and that requires legal personhood. If there were a

Error! Unknown document property name.

dispute between ICANN and an SO/AC, the parties could agree to an IRP and binding arbitration, but there would be no mechanism to restrain ICANN from acting contrary to these decisions, nor would there be a mechanism to challenge an arbitration decision that exceeded the scope of authority of the arbitration panel, outside an unlikely, independent intervention by the California Attorney General.

The threat of being able to take a party to court is often an effective deterrent to bad acts, but without legal personhood, the SO/ACs cannot make this a credible threat.

In response to Question No.2 above, regardless of which model is used, the short answer is “none” if the SO/ACs are not legal persons.

Even if the SO/ACs currently are considered Designators (which might be an inferred result, but is not explicitly stated in the current bylaws), if they are not legal persons, then the SO/ACs cannot enforce the rights that could be afforded to Designators. The answer is the same as the response to Question No.1, namely, that without legal personhood, the SO/ACs have no means to hold the ICANN Board accountable if it chooses not to comply with the bylaws, with the IRP or even with any “contract” entered into with such SO or AC.

Moreover, California law requires Members of a public benefit corporation to be legal persons, so the Member model would not be available to an SO/AC that does not create a legal person -- an individual or entity such as an unincorporated association -- to represent its interests.

In response to Question No.3 above, the short answer is “yes,” with legal personhood, certain enumerated powers are enforceable under the various models, and we refer you to the attached summary chart for further detail (Annex A, the “Summary Chart”).

The primary takeaway is that the SO/ACs that are legal entities would be able to enforce certain enumerated powers under the governance documents or by contract with ICANN, but except for powers that are reserved specifically to the Members (e.g. budget, strategic plan or IANA function review), the community’s enforcement rights always will be limited by the ICANN Board’s exercise of its fiduciary duties, and its ability to override the community in the exercise of its duty.

If at least some of the SO/ACs create legal persons to represent their interests in some of the community powers, whether as Designators or Members, it may be possible to craft a mechanism by which those Designators or Members would enforce decisions of the community council in front of the ICANN Board, but the scope of the enumerated powers available to the community still will depend on whether those legal persons become Designators or Members, and what power is reserved to the Designator or Member. See the chart for a further details regarding those powers that are available.

ANNEX A
Summary Chart – Enumerated Powers

Power	Voluntary Model	Designator Organized ICANN	Member Organized ICANN
1. Full Board Recall	<p>Not viable¹ without legal personhood, and then subject to an agreement that may be overruled by the ICANN Board through the exercise of its fiduciary duty</p> <p>Individual SOs and ACs that are to have these powers must become legal persons (individuals, entities or unincorporated associations). This is a necessary change for all proposed powers, but is not repeated in each cell below.</p> <p>If the SOs and ACs are not legal persons, then the model depends on voluntary compliance by the ICANN Board with the decisions of the community or the IRP. As such, there is no enforcement mechanism to restrain the board from acting contrary to these decisions, with the possible exception of convincing the California Attorney General to bring an action for breach of charitable trust due to the board’s failure to follow the articles or bylaws of ICANN. This analysis applies to each of the powers below (hence the statement that the powers are not viable), but is not repeated.</p>	<p>Viable under bylaws with contract or “springing” resignation that takes effect on vote of no confidence.</p> <p><i>Key assumption: Designators will be legal persons (individuals, entities or unincorporated associations). This is a necessary change for all proposed powers, and is assumed in our answers. This assumption is not repeated in each cell below.</i></p>	<p>Viable under bylaws with contract or “springing” resignation that takes effect on vote of no confidence.</p> <p><i>Members must be legal persons (individuals, entities or unincorporated associations). This is a necessary change for all proposed powers, but is not repeated in each cell below.</i></p>
2. Individual Director Recall	Not viable without legal personhood, and then subject to an agreement that may be overruled by the ICANN Board through the exercise of its fiduciary duty	Viable under bylaws	Viable under bylaws
3. Approve Regular Amendments to the Articles/Bylaws	Not viable without legal personhood, and then subject to an agreement that may be overruled by the ICANN Board through the exercise of its fiduciary duty	<p>Viable under bylaws</p> <p>Designators cannot initiate bylaws amendments, only approve or reject board proposed amendments</p>	<p>Viable under bylaws</p> <p>Members can change bylaws without board approval. Board approval required to change articles.</p>
4. Approve Changes to Golden Bylaws or Articles	Not viable without legal personhood, and then subject to an agreement that may be overruled by the ICANN Board through the exercise of its fiduciary duty	Viable under bylaws	Viable under bylaws
5. Approve Strategic Plan	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable but with limits on how often and not ultimately binding</p>	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable but with limits on how often and not ultimately binding</p>	<p>Approval right viable under bylaws;</p> <p>Reconsideration right viable under bylaws</p>
6. Approve Budget	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable but with limits on how often and not ultimately binding</p>	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable but with limits on how often and not ultimately binding</p>	<p>Approval right viable under bylaws;</p> <p>Reconsideration right viable under bylaws</p>
7. Bind Board to	Approval not viable for anyone other than Members;	Approval not viable for anyone other than Members;	Approval right viable under bylaws;