

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 [Collaboration](#) Model

DATE: June ~~10~~16, 2015

Overview & Questions

This memorandum and summary chart [amends the prior memorandum provided to you on June 10, 2015, and](#) 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~~[amended memorandum explains the distinction between standing and legal personhood in relation to enforcement mechanisms](#), 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".~~

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? No. ~~If the SOs and ACs are not legal persons, they cannot enforce any of their rights (whether Member rights or~~

Designator rights) with respect to the CCWG’s “enumerated powers.” Note that by “enforce” we mean “bring suit in court to hold another party accountable for disregarding rights.” Note also that Designator rights are more limited than Member rights, although both require a legal person to enforce their respective rights.

Regardless of enforcement of rights, to participate as a Member in ICANN, California corporate law requires an SO or AC to be a legal person (or designate an individual person to be the member on its behalf). It is unclear whether California corporate law also requires Designators to be legal persons, and to avoid that uncertainty, counsel recommends that Designators also be formed as legal persons.

There is an important distinction between “standing” or authority to bring a claim, and “legal personhood,” which is necessary both to be a Member and to appear in court.

If the ICANN Board causes ICANN to breach the charitable trust under which all ICANN assets are held, or if individual directors of ICANN breach their fiduciary duties to ICANN (e.g., through theft of charitable assets, diversion of assets to purposes outside ICANN’s purposes, material self-dealing that harms ICANN), California law empowers several groups to take action in court to remedy the breach. In other words, the law gives them “standing” to file a complaint. Specifically, the Members, acting as representatives of ICANN and in the name of ICANN, an individual director of ICANN, an officer of ICANN, or the California Attorney General (the “AG”), each have standing to bring such suit. (If any party other than the AG brings such a suit, the AG must be notified, and may intervene in the suit, at its discretion.) Notice that a “Designator” is not listed here, because California law does not grant Designators that express authority. In fact, for *anyone* to bring suit alleging a breach of charitable trust, or, for example, to enforce any IRP or arbitral decision that is not adhered to by the ICANN Board, he/she/it also must be a legal person, namely an individual or legally recognized entity (such as an unincorporated association).

~~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~~ Accordingly, an SO or AC must be a legal person, or create a legal person to represent its interests, in order to enforce, in a representative capacity on behalf of the ICANN corporation, any of the rights (whether Member rights or Designator rights) reserved to ~~them~~that SO or AC 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 both legal personhood, and standing. If there were a dispute between ICANN and an SO/AC, the parties could agree to an IRP and binding arbitration, but there would be no mechanism for that SO or AC directly to restrain ICANN from acting contrary to ~~these~~the resulting 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.~~ Of course, if that SO or AC had the power to appoint a director to the ICANN Board, then that director, or any other ICANN director, has standing (i.e. authority) to bring an enforcement action, but that would depend on the director agreeing with the view of the community that there had been a

breach of charitable trust, and then being willing to bring suit to remedy the breach. Finally, as we've noted previously, the AG always has the power to intervene directly.

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 direct, 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.~~

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 collaboration model"? Regardless of which model is used, none. If the SO/ACs are not legal persons, they are not able to enforce directly the rights afforded to them (and the Member model would not be available to them).

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 directly the rights that could be ~~afforded~~given to Designators through amending the bylaws. 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. (We put "contract" in quotes here, because contract law in the U.S. requires legal personhood in order to enter into a contract, so any agreement with an SO or AC without legal personhood is not a legal contract.)

Moreover, as noted above, California law requires Members of a public benefit corporation such as ICANN to be legal persons, so ~~the Member model~~rights 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 as a Member.

3. In response to Question No.3 above, the short answer is "yes," with Does the answer to question number 2 change if the SO/ACs are legal persons? Yes. With legal personhood, all of the enumerated powers are enforceable in the Member model and certain enumerated powers are enforceable under the ~~various~~other two models, and we. 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 have both standing and the necessary legal personhood to 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~~, and 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 [particular](#) Designator or Member. See the chart for a further details regarding those powers that are available.

ANNEX A
Summary Chart – Enumerated Powers

Power	Voluntary Collaboration Model	Designator Organized ICANN	Member Organized ICANN
	<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 direct enforcement mechanism for the SO or AC 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. Individual directors can bring an action, but this depends on the director agreeing that a breach has occurred, and his/her willingness to sue. 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>
	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
	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>
	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
	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable (with legal personhood) 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>
	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable (with legal personhood) 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>
	<p>Approval not viable for anyone other than Members;</p> <p>Reconsideration right viable (with legal personhood) 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>

¹ Throughout this chart, “viable” is used to mean enforceable through a judicial process (including by enforcement of contracts consistent with the Board’s fiduciary duties).

ANNEX A
Summary Chart – Enumerated Powers

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Summary report: Litéra® Change-Pro TDC 7.5.0.145 Document comparison done on 6/16/2015 11:06:49 AM	
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Modified filename: v2Legal Assessment - Revised Summary Chart and Governance Chart.DOCX	
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Delete	28
Move From	5
<u>Move To</u>	5
<u>Table Insert</u>	0
Table Delete	0
<u>Table moves to</u>	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	97