Annex 01 - Recommendation #1: Establishing an Empowered Community for enforcing Community Power

1. Summary

- Under ICANN's current Bylaws, the ICANN Board has the final responsibility for all decisions.
- With removal of NTIA as a perceived enforcement body over ICANN, the CCWG-Accountability requires a mechanism to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.
- To manage the process of enforcement on the community's behalf, the CCWG-Accountability recommends creating a new entity, taking the form of a "Sole Designator" model available under California law. The entity created using the Sole Designator model will be referred to as the "Empowered Community."
- Under California law, the Empowered Community only has the legally guaranteed power (statutory right) to appoint and remove ICANN Board Directors (whether an individual Director or an aggregate entire Board).
- The CCWG–Accountability accepts that only having the above statutory power is sufficient given:
    - The creation of Fundamental Bylaws that can only be modified jointly by the ICANN Board and Empowered Community.
    - All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
    - The right of inspection is granted to the Sole Designator, as outlined in the California Corporations Code 6333, as a Fundamental Bylaw.
- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the community through consensus: engage, escalate, enforce.

2. CCWG-Accountability Recommendations

1 The CCWG-Accountability recommends creating an entity that manages the process of enforcement on the community's behalf:

1. This entity will take the form of the "Sole Designator" model, which has legal standing as a California-based unincorporated association
2. The Sole Designator will act as directed by participating Supporting Organizations and Advisory Committees
3. This entity will be referred to as the “Empowered Community”
4. The Empowered Community, and the rules by which it is governed, will be constituted in ICANN’s Fundamental Bylaws along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent.” (see Recommendation #3: Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’)
5. The Empowered Community will be granted rights of inspection as outlined in California Corporations Code 6333
6. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process

3. Detailed Explanation of Recommendations

Background

With removal of NTIA as a perceived enforcement body over ICANN, the CCWG-Accountability requires a mechanism to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.

Objectives

In developing a mechanism to ensure the community can effectively enforce its decisions, the CCWG-Accountability agreed to:

- Minimize the degree of structural or organizational changes required in ICANN to create the mechanism for these powers.
- Organize the mechanism in line and compatible with the current ICANN Supporting Organization and Advisory Committee structures (with flexibility to evolve these structures in the future).
- Address the CWG-Stewardship dependencies
- To provide the following powers that would be constituted in the Fundamental Bylaws and would also be legally enforceable:
    - The power to reject ICANN’s Budget, Strategic/Operating Plans or the IANA Functions Budget (CWG-Stewardship dependency)
    - The power to reject changes to ICANN Standard Bylaws
    - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency)
    - The power to remove individual ICANN Board Directors (along with appointment, CWG-Stewardship dependency)

- The power to recall the entire ICANN Board (CWG-Stewardship dependency)
- The power to launch a community Independent Review Process
- The power to reject ICANN Board decisions relating to reviews of the IANA functions; including the procedure to implement a separation process relating to Post-Transition IANA (CWG-Stewardship dependency)

Why the Sole Designator Model

The CCWG-Accountability 'First Draft Proposal on Work Stream 1 Recommendations' proposed a "Supporting Organization/Advisory Council Membership Model" as the reference model for the community enforcement mechanism. However, in the Public Comment, 4 May – 3 June 2015, significant concerns were expressed and the CCWG-Accountability initiated work on alternative solutions. A core concern of the Supporting Organization/Advisory Committee Membership Model was the ability of the ICANN community to fully participate in the new accountability framework, and was integral to the work in devising a new approach. The CCWG-Accountability 'Second Draft Proposal on Work Stream 1 Recommendations' proposed a "Sole Member" model instead of the Supporting Organization/Advisory Committee Membership Model.

Concerns with a "Sole Member" Model

In the Public Comment Period on the 'Second Draft Proposal on Work Stream 1 Recommendations', concerns were raised about the "Sole Member" model. Under California law such "members" have certain statutory powers that cannot be waived. Commenters expressed concern that these rights, such as the ability to dissolve the corporation, could not be adequately constrained and might have unintended and unanticipated consequences.

The "Sole Designator" Model

To address the concerns described above, the CCWG-Accountability now recommends implementing a "Sole Designator" model. Under California law, the Sole Designator only has the statutory power to appoint and remove individual ICANN Board Directors or the entire Board, which is a requirement of the CCWG-Accountability and the CWG-Stewardship. This removes the concerns related to unintended and unanticipated consequences of the additional statutory powers associated with a member.

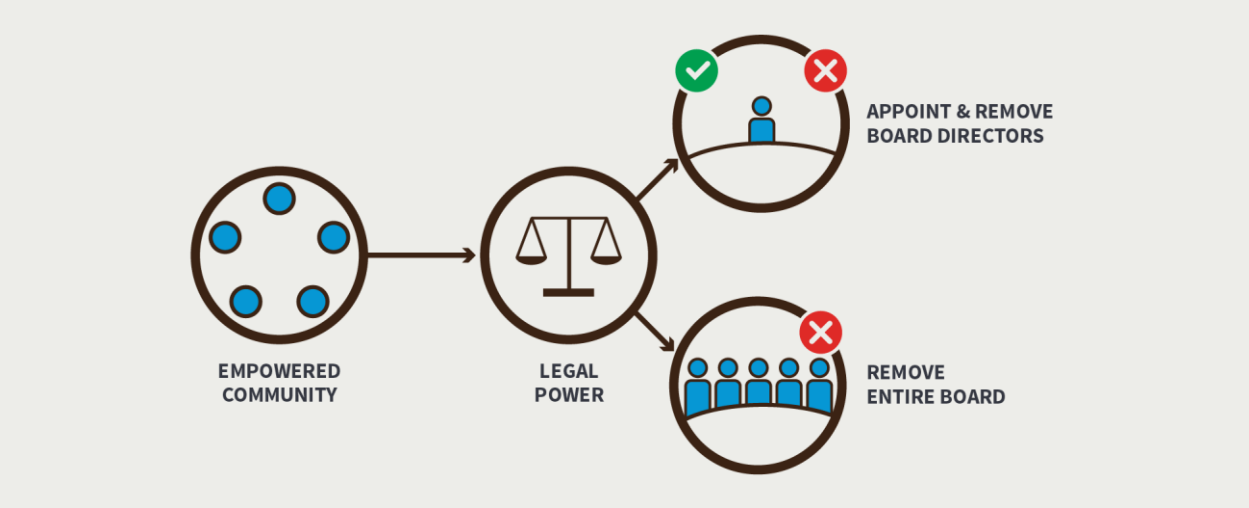
Given that the right to inspect, as outlined in California Corporations Code 6333, is not a statutory right of a designator, and that the community felt this was a critical requirement, the CCWG-Accountability recommends this right be granted to the Sole Designator in the Fundamental Bylaws.

The CCWG-Accountability external legal counsel informed the group that adopting a "Sole Designator" model could effectively be implemented while meeting the community's requirements and having minimal impact on the corporate structure of ICANN.

Legal advice on implementing the Empowered Community

To implement the "Sole Designator" model, ICANN's Supporting Organizations and Advisory Committees would create a unified entity to enforce their Community Powers. This unified entity will be referred to as the "Empowered Community".

Under California law, the Sole Designator has the right to appoint and remove ICANN Board directors, whether individually or the entire Board.



17 If the ICANN Board refused to comply with a decision by the Empowered Community to use the statutory rights, the refusal could be petitioned in a court that has jurisdiction to force the ICANN Board to comply with that decision.

18 The CCWG–Accountability accepts that only having the above statutory power is sufficient given:

1. All of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws and protected from any changes without Empowered Community approval.

- This includes the Independent Review Process, which issues binding decisions and grants the Empowered Community the power to launch an Independent Review Process challenge if it believes the ICANN Board is in breach of its Articles or Bylaws.[1]
- The ICANN Board would be in breach of following its own Bylaws if it refused to comply with a decision by the Empowered Community with respect to an accountability mechanism defined in the Fundamental Bylaws.
- If a community Independent Review Process challenge with respect to such a decision is successful and the Board still refused to comply with the decision, the Sole Designator, on instructions from the community, could petition a court that has jurisdiction to force the ICANN Board to comply with that decision.
- Alternatively the Sole Designator on instructions from the community could remove the Board with the expectation that the new Board would respect the decision.

[1] For example, if the Board were not to accept the decision of the Empowered Community to use one of its Community Powers. Community Powers are documented in Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers.

2. The Empowered Community has legal standing as a California-based unincorporated association.

- The members of the unincorporated association would be representatives of ICANN's Supporting Organizations and Advisory Committees that wish to participate.

3. The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw along with provisions to protect it from any changes without its own approval.

4. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.

a. Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ICANN Board must consider the community's interpretation of the 'global public interest' as ICANN pursues the charitable and public purposes set forth in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up multistakeholder process.

Additional Powers Granted by Inclusion in the ICANN Bylaws

In addition to the statutory right granted to a designator under California law, the CCWG-Accountability recommends including in the ICANN Bylaws the right for the Empowered Community to inspect as outlined in California Corporations Code 6333

The Empowered Community

Implementation of the Empowered Community currently anticipates that all of ICANN's Supporting Organizations, the At-Large Advisory Committee and Governmental Advisory Committee would participate in the Empowered Community - that is, they will be listed in the Bylaws as the five Decisional Participants.

The thresholds presented in this document were determined based on this assessment. If fewer than 5 of ICANN's Supporting Organizations and Advisory Committees agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ICANN changes to have more Supporting Organizations or Advisory Committees.

The CCWG also recommends that in a situation where use of a Community Power only attracts a decision to support or object to that power by four Decisional SOs or ACs, and the threshold is set at four in support (for community powers to block a budget, approve changes to fundamental bylaws or recall the entire ICANN Board), the power will still be validly exercised if three are in support and no more than one objects. This decision has come about considering the considerably extended escalation process now proposed before any use of the Community Powers, and to avoid the risk of powers being un-useable (especially the risk of making changes to ICANN's Fundamental Bylaws effectively impossible).

4. Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations'

- Change from a Sole Member to a Sole Designator model – and all related changes.

5. Stress Tests Related to this Recommendation

- ST5, 6, 7, 8, 9 10, 24, 16 (finances, through budget veto) + ST9 recall / remove Board powers
- ST28
- ST31 (rogue voting), ST32 ST36

6. How does this meet the CWG-Stewardship Requirements?

25 These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of Community rights regarding the ability to appoint/remove Directors of the ICANN Board, and recall the entire Board.

7. How does this address NTIA Criteria?

26 **Support and enhance the multistakeholder model**

- Decentralizing power within ICANN through an "empowered" community
- Providing a legal set of powers to the community while avoiding the risks of making changes to ICANN's organizational structure

27 **Maintain the security, stability, and resiliency of the Internet DNS**

- Creates an effective system of checks and balances on the ICANN Board versus decisions which could affect the security, stability, and resiliency of the Internet DNS

28 **Meet the needs and expectation of the global customers and partners of the IANA services**

- Provides a clear set of mechanisms and processes for how the community can participate in and interact with the Empowered Community.

29 **Maintain the openness of the Internet**

- Preserving policies of open participation in ICANN's Supporting Organizations and Advisory Committees
- Retaining a decision-making based on consensus rather than voting

30 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution**

- Retaining a decision-making based on consensus rather than voting
- Maintaining the advisory role of governments in the Supporting Organization and Advisory Committee structure