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FROM: Douglas N. Varley
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CLIENT: American Registry for Internet Numbers

DATE: December 16, 2015

RE: Demonstration Draft Bylaws for ICANN Implementing CCWG-
Accountability Draft Proposal on Work Stream 1 Recommendations

You have asked us to review the Cross Community Working Group on Enhancing ICANN Accountability's "CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations" (30 November 2015) (the "**CCWG-A Proposal**"), to prepare a demonstration draft of bylaws for ICANN that implement the CCWG-A Proposal, and to comment on the CCWG-A Proposal based upon observations gathered in preparing the draft bylaws. We also prepared a demonstration draft of amended articles of incorporation for ICANN, which are also included with this memo, but changes to the articles were minimal and so our comments focus on the bylaws.

In our draft bylaws we included each of the 12 recommendations of the CCWG-A Proposal in the place either indicated in the recommendations themselves or where we thought the provision most appropriately belonged. We added provisions concerning the empowered community and its enforcement mechanism as new "Article V-A" and provisions on the seven new community powers as new "Article V-B" in order to place those provisions most centrally in the bylaws but to avoid completely renumbering the rest of the document. A guide to where we added, deleted, and modified provisions is included at the end of this memo as "Appendix A: Drafting Notes." Two items not addressed in our draft bylaws or this memo are the transition provisions and the proposed IANA reviews. With one exception for a provision relating to Recommendation #12 on CCWG-Accountability's Work Stream 2 proposals, we did not make any changes to the transition provisions of Article XX, which seemed both beyond the scope of this project and to be dependent on a variety of practical variables that are almost entirely to be determined. With regard to the proposed IANA reviews (IANA Function Review, Special IANA Function Review, the Separation Process, and the Post-Transition IANA Governance and Customer Standing Committee), while the CCWG-A Proposal included a few references to those items, the recommendations contained no concrete proposals with regard to them, and so we included bracketed references only where they were clearly appropriate.

With regard to the issues raised by the exercise of implementing the CCWG-A's 12 recommendations into ICANN's bylaws, our comments focus on:

- the ICANN Community Mechanism as an unincorporated nonprofit association;
- ICANN's governing documents;
- the appointment and removal of directors; and
- the engagement, escalation, and enforcement processes.

ICANN Community Mechanism as Unincorporated Nonprofit Association

CCWG-A's Recommendation #1 is that the ICANN community be organized as an unincorporated nonprofit association ("UNA") so as to qualify as a separate legal person in order to have standing to enforce its actions against the ICANN board in a California court. We stated the intention to form an UNA explicitly in the draft bylaws.¹ Because the California nonprofit association law makes reference to an UNA's typically having "governing documents" that govern the purpose or operation of the UNA,² we made the ICANN bylaws those governing documents while also authorizing the UNA to adopt other governing documents if necessary.³ We also explicitly stated that the UNA, under the name "ICANN Community Mechanism," is ICANN's sole "designator" with regard to the appointment and removal of directors and is a "specified person" with regard to approving changes to the bylaws.⁴ We thought it best to be explicit on all of those points to avoid the confusion of the current bylaws, which follow a designator model without making that explicit.

The draft bylaws specifically name the members of the ICANN Community Mechanism: the Address Supporting Organization, the Country-Code Names Supporting Organization, the Generic Names Supporting Organization, the At-Large Advisory Committee, and the Governmental Advisory Committee.⁵ The California nonprofit association law permits an UNA to define its membership in its governing documents.⁶ Under the statute, if the governing documents do not define the membership, then the members are the persons who have voting rights or rights in the development of the UNA's policies.⁷ For purposes of the California unincorporated association law, "person" is defined as "a natural person, corporation, partnership, or other unincorporated organization, government, or governmental

¹ ICANN Demonstration Draft Bylaws art. V-A, sect. 1.

² Cal. Corp. Code § 18008.

³ ICANN Demonstration Draft Bylaws art. V-A, sect. 2.

⁴ ICANN Demonstration Draft Bylaws art. V-A, sect. 1.

⁵ ICANN Demonstration Draft Bylaws art. V-A, sect. 4.

⁶ An unincorporated association's "membership" can be defined in its "governing principles," which are in turn embodied in its "governing documents." Cal. Corp. Code §§ 18015(a), 18010, 18008.

⁷ Cal. Corp. Code § 18015(b).

subdivision or agency, or any other entity.”⁸ Under that definition, it is unclear whether all of the ICANN Community Mechanism’s members are persons. Of course, some members meet the definition, e.g., the Address Supporting Organization is defined as the Number Resource Organization, which is an unincorporated association. But we remain concerned that others among the named members are not legal persons and so may not qualify to be members of an UNA. *The attempt to organize the ICANN community as an UNA may not have resolved all questions of legal personality and standing but in some cases merely kicked them up one organizational level.* Nonetheless we have attempted to address that concern by specifically naming the members in the ICANN bylaws in reliance on the statute’s apparent deference to an UNA’s governing documents.

The California nonprofit association law also sets default rules for UNA members’ voting unless varied in the governing principles,⁹ so we have included a short catch-all member-voting provision in the ICANN bylaws.¹⁰

Finally, we thought it important to address the role of the Nominating Committee in the ICANN Community Mechanism. While it is not a member of the UNA, it serves a role very similar to most of the members when it nominates directors for appointment by the ICANN Community Mechanism. We have noted that the Nominating Committee serves as an advisor to the ICANN Community Mechanism in the ICANN bylaws article on the empowered community.¹¹

ICANN’s Governing Documents

In dividing ICANN’s governing provisions into Fundamental and Standard Bylaws, we modified the existing provision on amendments to simply list the Fundamental Bylaws and indicate that provisions not listed are Standard Bylaws.¹² In designating the Fundamental Bylaws, we largely followed CCWG-A’s Recommendation #3 and limited the Fundamental Bylaws to:

- ICANN’s Mission, Commitments, and Core Values (Article I);
- the Independent Review Process (Article IV, Section 3);
- the process for amending the Articles of Incorporation (Article 9) and Fundamental Bylaws (Article XIX);
- the seven new Community Powers (Article V-B);
- the ICANN Community Mechanism (Article V-A);

⁸ Cal. Corp. Code § 18030.

⁹ Cal. Corp. Code § 18330.

¹⁰ ICANN Demonstration Draft Bylaws art. V-A, sect. 3.

¹¹ ICANN Demonstration Draft Bylaws art. V-A, sect. 5.

¹² ICANN Demonstration Draft Bylaws art. XIX, sect. 1.

- the IANA reviews and bodies (not included, but merely referenced in Article XIX); and
- the right to review books and records (Article V-A, Section 1.6—as included in Article V-A).

We also made the provisions of Article VI that deal with the appointment and removal of directors (Article VI, Sections 2, 11, and 12) as Fundamental. These provisions are closely tied to the ICANN Community Mechanism’s fundamental rights and powers and therefore need protection as Fundamental Bylaws. Further, one could argue that all of Article VI concerning board governance is fundamental to ICANN’s mission and operations so that the entire article should be made a Fundamental Bylaw. However, since the goal of the Fundamental Bylaws is to preserve the ICANN community’s rights while granting significant flexibility to the ICANN board, and since the ICANN community retains the right to reject even Standard Bylaw amendments, we generally hewed closely to the specifics of CCWG-A’s Recommendation #3.

We have been concerned that ICANN’s articles of incorporation had been neglected by the CCWG-A when it considered what governing-document provisions to classify as Fundamental Bylaws. Because ICANN’s articles of incorporation supersede its bylaws in the hierarchy of governing documents,¹³ we recommended that all of the articles of incorporation be treated like the Fundamental Bylaws, thus requiring a three-quarters supermajority board vote and the affirmative approval by the ICANN community before any change to them is effective. The CCWG-A’s current approach to the articles of incorporation appears to be internally inconsistent, in one place seeming to maintain the status quo,¹⁴ while at another point apparently recommending that the articles of incorporation be treated the same way as the Fundamental Bylaws.¹⁵ In our draft documents, we have treated ICANN’s articles of incorporation in the same way that the Fundamental Bylaws are treated.¹⁶

Finally, the ICANN Community Mechanism’s approval process for Fundamental Bylaws permits the skipping of the usually required Community Forum (Step 5 in the ICANN Community Mechanism’s Escalation Process). If the required level of ICANN Community Mechanism member consent is not reached, then, instead of terminating the Escalation Process and presumably rejecting the proposed amendment, as would be the case under the usual rules of the process,¹⁷ the Community Forum is omitted and the matter proceeds

¹³ Cal. Corp. Code § 5151(c).

¹⁴ CCWG-A Proposal, Annex 03, para. 20.

¹⁵ CCWG-A Proposal, Annex 04, paras. 25-27.

¹⁶ ICANN Demonstration Draft Articles of Incorporation art. 9; ICANN Demonstration Draft Bylaws art. XIX, sect. 3.1.

¹⁷ ICANN Demonstration Draft Bylaws art. V-A, sect. 3.4.

directly to the approval process.¹⁸ To sidestep an important transparency event like the Community Forum seems contrary to the entire ICANN accountability process. Further, if there is insufficient consensus among the members of the ICANN Community Mechanism to hold a Community Forum, presumably there is not enough consensus to approve the proposed amendment. Allowing approval of a Fundamental Bylaw change in that context would at least be odd and could allow for complications or strategic action that would not be in the ICANN community's best interest. For example, one can imagine a scenario in which one or more members of the ICANN Community Mechanism approve of a proposed amendment but do not want significant debate or disclosure about it. Those members of the ICANN Community Mechanism could decline to support the Community Forum but then, under the proposed procedure, approve the amendment without subjecting it to in-depth consideration by the ICANN community. At minimum, that result would be inconsistent with the community's interest in transparency. Presumably the proposed procedure is meant to speed up the fundamental-bylaw-approval process for noncontroversial amendments, but the tradeoff of transparency for efficiency needs to be weighed carefully. We drafted this exception from the usual ICANN Community Mechanism's Escalation Process as a separate subsection, so eliminating the exception can be accomplished by simply deleting that subsection (if desired upon further contemplation).

Appointment and Removal of Directors

The CCWG-A Proposal describes the removal of individual directors and the entire board in some detail,¹⁹ it is almost entirely silent on the appointment of directors in the first place. Since designator powers of removal are premised entirely on the appointment power,²⁰ it is critical to implement the ICANN Community Mechanism's appointment power in some detail. Consequently, we have proposed edits to the bylaws articles on the board and on the supporting organizations ("SOs") and advisory committees ("ACs") to indicate that those bodies are nominating directors to be appointed by the ICANN Community Mechanism as sole designator.²¹

Additionally, the CCWG-A Proposal includes an odd restriction on the power of the ICANN Community Mechanism to remove an individual director: the ICANN Community Mechanism can consider removing each director only once during the director's term if, as part of the Escalation Process, a Community Forum is held but ultimately removal does not occur.²² But imagine the scenario in which an SO as a member of the ICANN Community

¹⁸ ICANN Demonstration Draft Bylaws art. V-B, sect. 3.4.

¹⁹ CCWG-A Proposal paras. 169-84.

²⁰ Cal. Corp. Code §§ 5220(d); 5222(f).

²¹ ICANN Demonstration Draft Bylaws art. VI, sects. 2.1, 4.3, 5, 8.3, 8.4, 11, and 12; art. VII, sect. 1; art. VIII, sect. 2.2; art. IX, sect. 9; art. X, sect. 3.6; art. XI, sect. 2.4.j.1.

²² ICANN Demonstration Draft Bylaws art. V-B, sects. 3.3, 4.3.

Mechanism initiates a removal process for one of the directors it nominates that reaches the Community Forum stage. Upon receiving the report of the Community Forum, the SO decides that the director's faults (perhaps missing a significant number of meetings) will be cured going forward and refuses to authorize the removal of the director. But the director continues in his or her bad practices or perhaps a more significant problem, like conviction of a felony, is brought to light, then the ICANN Community Mechanism is left with no recourse but to wait out the director's term. Although that eventuality may seem unlikely, given the stakes for ICANN's functioning and reputation, a process that was presumably proposed to limit frivolous removal attempts and create other efficiencies should not allow for even the possibility that a bad director could be secure through the end of his or her term regardless of conduct. Again, we included this limitation on the ICANN Community Mechanism's removal power as two separate subsection in Article V-B—one applying to directors nominated by the Nominating Committee and one applying to directors nominated by the SOs and ACs—so eliminating the exception can be accomplished by simply deleting those subsections (if desired upon further contemplation).

Even without the odd restriction on the power of the ICANN Community Mechanism discussed above, we also note that the removal process for individual directors is very long and public. The ICANN Community Mechanism's Escalation Process—with its public petition, conference call, and Community Forum with published transactions—is well calibrated for community-wide transparency and participation on major issues that affect the entire ICANN community, like changes to the Fundamental Bylaws and the removal of the entire board. But the full Escalation Process might not be the best forum for the removal of a single director, which could involve private failings or other personal issues.²³ Whereas the omission of the Community Forum in the case of the approval of a Fundamental Bylaw change, also discussed above, seems like a possibly inappropriate shortcut, some abbreviation of the Escalation Process might be appropriate to consider in the case of the removal of a single director, particularly one nominated by an SO or AC, which should have significant authority to remove its nominated directors though exercising that power through the ICANN Community Mechanism.

Finally, after the exercise of the ICANN Community Mechanism's power to remove the entire board, the CCWG-A Proposal requires the ICANN Community Mechanism to appoint an interim board.²⁴ The interim board may serve no longer than 120 days and is required to consult with the ICANN Community Mechanism on important decisions and to submit to the Community Forum before making material changes, like the removal of the ICANN president. It is a sound policy choice to require that there always be a governing board. But,

²³ ICANN Demonstration Draft Bylaws art. V-B, sect. 4.

²⁴ ICANN Demonstration Draft Bylaws art. VI, sect. 12.2.

given the length and seriousness of the board removal process,²⁵ it is possible that the ICANN Community Mechanism will be prepared to name a permanent replacement board at the end of that process. Consequently, we recommend that the ICANN Community Mechanism have that as an additional option, instead of being *required in all cases* to appoint an interim board that will serve only a few months and under some restrictions on its authority. This recommendation gains force from the CCWG-A Proposal itself, which encourages the Nominating Committee to “amend its procedures so as to have several ‘reserve’ candidates in place” when it seeks removal of one of its nominated directors.²⁶ If the ICANN community has converged on a suitable permanent replacement board over the course of the board-removal process, stability would suggest that it have the option to proceed directly with its appointment. We have included the option of the ICANN Community Mechanism’s proceeding directly to appoint a permanent replacement board as bracketed language in the demonstration draft.²⁷

Engagement, Escalation, and Enforcement Processes

The heart of the ICANN Community Mechanism is its right to enforce its powers against the ICANN board. Those processes are included in the proposed bylaws.²⁸ In addition to the questions raised above about the application of specific provisions of the Escalation Process, we note a dichotomy in the provisions about the purpose and function of the Community Forum. The CCWG-A Proposal states that the purpose of the Community Forum is “information-sharing” and that it “will not make decisions nor seek consensus,” while at the same time offering the possibility that “the Empowered Community and ICANN Board can resolve the issue in the Community Forum,” thus terminating the Escalation Process.²⁹ The nondecisional yet potentially escalation-terminating nature of the Community Forum is contradictory in nature. It is reflected in the draft bylaws, but it would be better if clarified before implementation.

One option for reconciling the inconsistency would be to make plain that a Community Forum does not make any decisions (effectively striking “if the issue is resolved, the escalation process terminates”) thus relying upon the decision of the members of the ICANN Community Mechanism not to use the community power within 15 days after the end of the Community Forum. Alternatively, the ability for the Community Forum to terminate the escalation process could be made explicit—if that approach is taken, it is recommended that, for the avoidance of doubt, the process terminate only upon the unanimous consent of the Community Forum.

²⁵ ICANN Demonstration Draft Bylaws art. V-B, sect. 5.

²⁶ CCWG-A Proposal para. 173.

²⁷ ICANN Demonstration Draft Bylaws art. VI, sect. 12.2.

²⁸ ICANN Demonstration Draft Bylaws art. V-A, sects. 2-4.

²⁹ CCWG-A Proposal para. 79.

Appendix A: Drafting Notes³⁰

Recommendation #1. Establishing an Empowered Community for Enforcing Community Powers:

- Added as new Article V-A, Section 1.

Recommendation #2. Empowering the Community Through Consensus: Engage, Escalate, Enforce:

- Added as new Article V-A, Section 2-4.

Recommendation #3. Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’:

- Made appropriate changes to Article XIX.
- Made appropriate changes to Articles of Incorporation, Article 9.

Recommendation #4. Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers:

- Added description of powers as new Article V-B.
- Made various conforming changes (including regarding the appointment and removal of directors) to Articles VI, Sections 2.1, 4.3, 5, 8.3, 8.4, 11, and 12; Article VII, Section 1; Article VIII, Section 2.2; Article IX, Section 9; Article X, Section 3.6; and Article XI, Section 2.4.j.1.

Recommendation #5. Changing Aspects of ICANN’s Mission, Commitments and Core Values:

- Replaced existing mission statement and core values with new mission statement and core values and commitments in Article I, Sections 1 and 2.
- Replaced purpose-statement provisions in Articles of Incorporation, Article 3(i)-(iv)
- Included “bottom-up multistakeholder process” language in Articles of Incorporation, Article 3.

³⁰ References to “Article” without elaboration are references to the articles of the ICANN Demonstration Draft Bylaws.

Recommendation #6. Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as It Carries Out Its Mission:

- Added provision concerning respect for human rights as new Article I, Section 3.

Recommendation #7. Strengthening ICANN's Independent Review Process:

- Made amendments to Article IV, Section 3.

Recommendation #8. Improving ICANN's Request for Reconsideration Process:

- Made recommended amendments to Article IV, Section 2.

Recommendation #9. Incorporating the Affirmation of Commitments in ICANN's Bylaws:

- Included Commitments 3, 4, and 8(a) and (c) in Article I, Section 2.A. and B.
- Added Commitment 7 as new Article III, Section 8.
- Added Commitment 9 as new Article IV, Section 5.

Recommendation #10. Enhancing the Accountability of Supporting Organizations and Advisory Committees:

- Added accountability as a question for the periodic review of ICANN's Supporting Organizations, Advisory Councils, and other advisory structures in Article IV, Section 4.1.

Recommendation #11. Board Obligations With Regards to Governmental Advisory Committee Advice:

- Substituted new language concerning the Board's right to reject Government Advisory Committee's consensus advice in Article XI, Section 2.1.j.
- Added the requirement that each Advisory Committee provide clear advice supported by a stated rationale to Article XI, Section 3.

Recommendation #12. Committing to Further Accountability Work in Work Stream 2:

- Included Work Stream 2 goals as a transitional bylaw as new Article XX, Section 11.