Annex 01 – Recommendation #1: Establishing an Empowered Community for Enforcing Community Power

1. Summary

- Under California law and the current Bylaws of the Internet Corporation for Assigned Name and Numbers (ICANN), the ICANN Board has the final responsibility for the activities and affairs of ICANNall decisions.

- With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method 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 The CCWG-Accountability recommends creating a new entity that will act at the direction of the community to exercise and enforce community powers, 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."

- As permitted Uunder California law, the Empowered Community only haswill have the legally guaranteed power (statutory right) to appoint and remove ICANN Board Directors (whether an individual Director or an aggregate the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws may be provided to a Sole Designator.

- The CCWG-Accountability accepts that its statutory power will be limited as described above and that this 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 Decisional Participants in the Empowered Community.

  - The right of Iinvestigation is granted to the SOs and ACs.

- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engage, Escalate, Enforce.

Comment [A1]: As discussed by co-chairs

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2. CCWG-Accountability Recommendations

1   The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce community powers manages the process of enforcement on the community's behalf:

- This entity will take the form of the a Sole Designator model, which has legal standing as a California-based unincorporated association.

- The Sole Designator will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs).

- This entity will be referred to as the Empowered Community.

- 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").

- The Articles of Incorporation will be amended to clarify that the interests of the corporationglobal public interest will be determined through a bottom-up, multistakeholder process.

Additionally, the CCWG-Accountability recommends:

- Including in the ICANN Bylaws the right for Decisional Participants in the Empowered Community to inspect as outlined in California Corporations Code 6333, although this specific article reference would not be mentioned in the Bylaws.

- Adding the right of Iinvestigation which includes the adoption of the following audit process: upon three SOs/ACs coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.

> **Comment [A2]:** I have removed the right of inspection as it no longer is for the Sole Designator and moved it to the section below.

> **Comment [A3]:** Given it is significant it seemed like a good idea to add it.

Detailed Explanation of Recommendations

2   **Background**

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

4   **Objectives**

5   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 Budgets, IANA Budgets or Strategic/Operating Plans, (CWG-Stewardship dependency).
  - The power to reject changes to ICANN Standard Bylaws.
  - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency) and changes to the Articles of Incorporation, and to approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
  - 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 (along with an appeal mechanism for issues relating to the IANA functions, CWG-Stewardship dependency).
  - 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)

6 Why the Sole Designator Model

7 The CCWG-Accountability's "First Draft Proposal on Work Stream 1 Recommendations" proposed a "Supporting Organization/Advisory Committee Council Membership Model" as the reference model for the community enforcement mechanism. However, in the Public Comment Period, 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's "Second Draft Proposal on Work Stream 1 Recommendations" proposed a "Sole Member" model instead of the Supporting Organization/Advisory Committee Membership Model.

8 Concerns with a Sole Member Model

9 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.

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10 **The Sole Designator Model**

11 To address the concerns described above, the CCWG-Accountability recommends implementing a Sole Designator model. ~~Under California law, the~~ The Sole Designator ~~only has~~ will have 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. Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws may be provided to a Sole Designator.

   o 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 Decisional Participants in the Empowered Community in the Fundamental Bylaws.

12 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.

13 **Legal Advice on Implementing the Empowered Community**

14 To implement the Sole Designator model, ICANN's SOs and ACs would create a unified entity to enforce their Community Powers. This unified entity will be referred to as the Empowered Community.

15 ~~Under California law, the~~The Sole Designator ~~has~~ will have the right to appoint and remove ICANN Board Directors, whether individually or the entire Board.
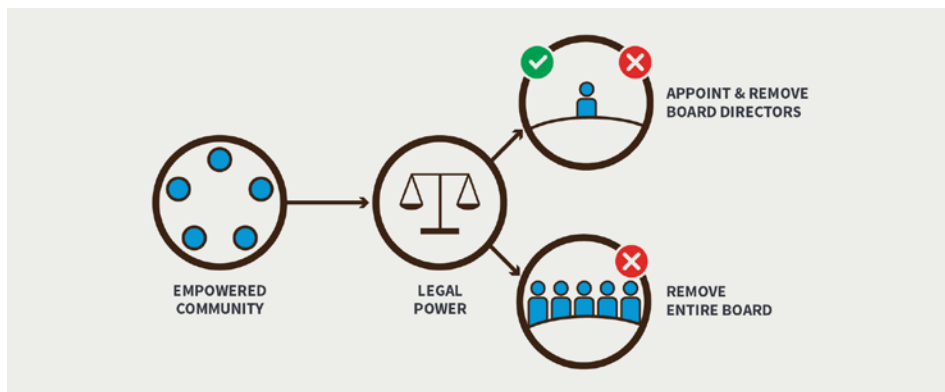
16 If the ICANN Board refused to comply with a decision by the Empowered Community to use the statutory rights, the refusal could be petitioned in a court that has jurisdiction to force the ICANN Board to comply with that decision.

Comment [A4]: As discussed by co-chairs

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17   The CCWG-Accountability accepts that its statutory power will be limited as described above and that this 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 (IRP) which issues binding decisions. This also includes the Empowered Community's power to launch a community IRP challenge if it believes the ICANN Board is in breach of its Articles of Incorporation or Bylaws.[1]

  Comment [A5]: Edited for clarity.

- 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 IRP 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.

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

- The Sole Designator will act as directed by participating members of the unincorporated association would be representatives of ICANN's SOs and ACs 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 in the Articles of Incorporation and Bylaws to protect it from any changes without its own approval.

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

    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

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[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: Seven New Community Powers.

from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the global public interestinterests of the corporation will be determined through a bottom-up, multistakeholder process.

18 Additional Power Granted by Inclusion in the ICANN Bylaws

- **Right to inspect accounting books and records of the corporationICANN**

19 In addition to the statutory right granted to athat the Sole Designator will have and the new community powers described in Recommendation #4under California law, the CCWG-Accountability recommends including in the ICANN Bylaws the right for SOs or ACsDecisional Participants to inspect as outlined in California Corporations Code 6333, although this specific article reference would not be mentioned in the Bylaws.

20 This inspection right is distinct from the Document Information Disclosure Policy (DIDP). While any eligible party can file a request according to the DIDP, Iinspection Rrights are only accessible to Decisional ParticipantsSOs or ACs. The scopes are also different as explained below.

This inspection right would include the accounting books and records of the corporationICANN and the minutes of proceedings of the board of directors and committees of the board of directors, on the conditions discussed below. Since ICANN will not have statutory "members," the rights to inspect "member" meeting minutes would not apply.

Although the Corporations Code does not define "books and records of account," the term is generally understood to refer to the journals and ledgers in which financial transactions are originally entered and recorded, and the statements compiled from them. The term generally does not extend to source documents on which books and records of account are based, such as canceled checks and invoices. Similarly, the term generally encompasses documents relevant to the operation of the corporation as a whole, and not to those relevant to only a small or isolated aspect of the corporation's operations.

Authority under Section 6333 is sparse, but it is nonetheless clear that a "purpose reasonably related to [a] person's interests as a member" does not include a member's commercial or political interests, harassment, or massive and repeated inspection demands probing the minutiae of financial records and details of management and administration. Similar limitations will be applied to rights of inspection provided by the Bylaws.

Unlike the exercise of the other community powers, which require community engagement and escalation before initiating a request for action by the ECEmpowered Community, the CCWG-Accountability recommends that a petition for inspection be brought directly by a single Decisional Participant SO/ACor by multiple Decisional ParticipantsSO/ACs through making a written demand on ICANN for the requested materials. If the Board refused or ignored the request, the petitioning Decisional

Participant(s)SO/AC(s) could then initiate an escalating community decision-making process to enforce the demand on the Board[, requiring community consensus]. [2]

Sidley/Adler Note: The paragraph above provides that **"**If the Board refused or ignored the request, the petitioning Decisional Participant(s) could then initiate an escalating community decision-making process to enforce the demand on the Board, requiring community consensus." We recommend further clarifying the process for enforcing inspection rights. For example, must a Decisional Participant that seeks to exercise the inspection right obtain support from any other Decisional Participant in order to escalate and seek enforcement of this right (*i.e.,* is consensus required)? Or is it sufficient for the Decisional Participant seeking inspection to invite and consider comments from all Decisional Participants (similar to the process for removing an individual SO/AC nominated director)?

21 **Investigation right**

There could be areas where the community might wish to have additional power in having transparency into investigations of potential fraud or financial mismanagement in ICANN. To address these concerns the CCWG-Accountability recommends the adoption of the following audit process: upon three SOs/ACs coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.

This process will first be developed outside of the ICANN Bylaws to enable flexibility and adjustments and can be incorporated when appropriate.

22 **The Empowered Community**

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

24 The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs 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 SOs or ACs.

> **Comment [A6]:** Removed the threshold exception text as this has been removed in rec. 2.

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[2] This power adds to the existing power of the Ombudsman, who has the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of a complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN).

4. Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"

- Scope and limitations with respect to the ~~R~~right to inspect accounting books and records of ~~the corporation~~ICANN confirmed, stressing the difference between DIDP and ~~I~~inspection ~~R~~rights.
- Inspection rights for accounting books and records and minutes based on a one ~~SO/AC~~Decisional Participant threshold.
- Introduce additional suggestion by ICANN Board regarding ~~I~~investigation right (audits), based on 3 SOs/ACs threshold.
- Confirmed direction for implementation to avoid abusive claims.

5. Stress Tests Related to this Recommendation

- ST5, 6, 7, 8, 9 10, 16, 24,
- ST28
- ST31, 32, 36

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 ICANN 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.

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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.

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29 **Maintain the openness of the Internet**

- Preserving policies of open participation in ICANN's SOs and ACs.
- Retaining 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 decision-making based on consensus rather than voting.
- Maintaining the advisory role of governments in the SO and AC structure.

. . . .