

## **(DRAFT) Legal Scoping Document**

### **CCWG's Role and Responsibilities:**

ICANN's Cross Community Working Group (CCWG) on Accountability is responsible for developing improvements to ICANN's accountability processes. This includes making recommendations to improve ICANN's existing mechanisms that are intended to insure that the bottom-up organization is, in operation, accountable to its community. The CCWG's responsibility also includes consideration of new mechanisms such as new legal structures or agreements that could improve the organization's accountability.

In this context, "community" means the collective participants in ICANN's various Supporting Organizations, Advisory Committees, Stakeholder Groups, and other relevant sub-grouped interests that together comprise ICANN. As a bottom-up organization, ICANN must remain ultimately accountable to the various constituent participants in the community that the corporation was established to serve. The CCWG aims to provide recommendations to ICANN's board of directors for approval in June 2015.

Several questions have arisen in the course of the CCWG's work that require input from independent legal expertise to aid the CCWG in the further evaluation of proposals and recommendations. The CCWG retains<sup>1</sup> this legal advice to assist it in creating mechanisms that provide the means for the community to hold the organization accountable to it for the organization's actions and decisions.

Three specific accountability goals and the concerns related to those goals are provided below, followed by specific questions intended to obtain needed information for the CCWG to proceed in its evaluation of recommended mechanisms. Follow-up questions and clarifications from the CCWG are anticipated in response to the initial answers from counsel.

### **Goal 1. Recalling Members of the ICANN Board of Directors**

ICANN board members are individually appointed by different sub-groups within the ICANN community for a fixed term. The relevant individual community sub-groups seek a mechanism to recall under-performing board members before the board member's term expires.

#### **Concerns:**

Board member recall is to be considered as a "last resort" option that is not often used.

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<sup>1</sup> The CCWG is the "client" in the attorney-client relationship established through this retention of legal expertise, and all reports and communications are to be made directly between independent legal counsel and the CCWG.

Board members may be recalled at the sole discretion of the appointing Supporting Organization / Advisory Committee according to rules established by that Supporting Organization / Advisory Committee, although possibly requiring a high voting threshold.

Generally, it would be expected that each relevant individual ICANN sub-group would have the power to recall its own board appointees, but not the board appointees from other relevant sub-groups. However, the community as a whole would need the power to remove board members that are appointed by the Nominating Committee.

And the community would also like to consider the ability to call for a “vote of no confidence” on the entire board of directors with the effect of recalling the entire board at once, in rare and exceptional situations.

### **Proposal Under Consideration:**

#### **i) Amend Bylaws to Create Power to Spill the Board**

Amend ICANN’s corporate bylaws (and/or Articles of Incorporation) to provide for the ability of the ICANN community to recall all or some board members [in exceptional circumstances].

## **Goal 2. Community Empowerment Over ICANN’s Management**

ICANN community members seek the means to hold ICANN to ultimately account to it on a narrow set of “high-impact” issues and key decisions. The community requires an ability to challenge and block (to the extent legally permissible) the ICANN board and management on these key decisions. The community further calls for a mechanism that empowers it to design, initiate, launch, and sunset organizational review teams, and to appoint their own members and/or representatives to them.

### **Concerns:**

The risks undertaken by board members, the various community members, and other participants, pursuant to the different corporate governance structures available under California nonprofit corporations law (including liability for ICANN’s actions and decisions).

“Capture”, which means when one sub-group of the community is able to “game the system” or obtain disproportionate representation in the overall balance of interests between relevant sub-groups in ICANN’s organizational framework. ICANN’s existing organizational framework represents a balancing of interests, and these mechanisms should not upset that balance.

Complexity of changes (and length of time) required to alter ICANN’s existing corporate governance structure to improve accountability is a concern, and the group seeks mechanisms that achieve the group’s goals with the minimal amount of changes or disruption to ICANN’s existing organizational framework as possible.

The types of high-impact issues, where board and management decisions would be subject to community review and challenge include key decisions such as the approval of the organization’s budget, bylaws changes, strategic plan adoption, etc.

### **Proposals Under Consideration<sup>2</sup>:**

#### **i) Membership Corporation**

Restructuring ICANN’s corporate governance structure to become a true “membership” corporation (California Corporations Code §5310 / §7310). Existing ICANN community participants, including both individuals and companies, would serve as the initial corporate Members with all the rights and responsibilities provided by the statute. The possibility of ICANN as a true membership corporation is contemplated in ICANN’s existing bylaws.

#### **ii) Representative Delegates with Decisional Authority**

Create “delegates” (California Corporations Code §5152 / §7152) empowered to represent existing relevant ICANN community sub-group interests in ICANN’s decisional process (at a level as high as the law permits) via bylaws provisions or otherwise, as appropriate.

#### **iii) Community “Veto” Process to Challenge Board Decisions**

California Corporations Code §5210 provides the means for ICANN’s community to challenge board decisions via a process provided for in the bylaws that are subject to an ultimate decision of the ICANN board. Under this mechanism, ICANN could amend its existing bylaws to empower the community to challenge certain board decisions and raise the standard by which the board could reject those community decisions. Thus, the community could challenge a board decision, and the board would then be required to accept the community’s over-riding decision -- unless the board subsequently voted by a super-majority (or unanimously) to retain its original decision. This would provide a means for challenging board decisions by community members, while still providing the board with the requisite ultimate decisional authority, since the board could ultimately

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<sup>2</sup> The proposals are considered non-mutually exclusive to the extent permitted, and not the only possibilities on the table for consideration by the CCWG. Other options for available mechanisms and legal structures that would achieve the CCWG’s stated goals are welcome and encouraged for exploration.

over-ride the community if a high-level of (3/4 or unanimous) agreement among board members could be reached to reject the community “veto”.

### **Goal 3. Limit Scope of ICANN’s Activities**

The community seeks a legal mechanism to prevent ICANN from acting outside its specifically defined technical mission of managing the domain name system.

#### **Concerns:**

To prevent organizational “mission creep” and the future expansion of ICANN’s activities beyond its technical mandate and specifically into issues related to the lawful regulation of Internet content or speech.

#### **Proposal Under Consideration:**

##### **i) “Contract” to Limit Scope of ICANN’s Activities**

ICANN could sign a contract or some other form of legally binding and enforceable agreement in which the organization agrees to limit its own activities (i.e. ICANN agrees to constrain ICANN’s activity to the extent permissible, possibly through contract, bylaws provisions, etc.). Stakeholders or some representation of them could possibly be party to this agreement.

#### **Specific Questions Related to Goals and Concerns:**

1. Which available legal mechanisms would provide the means for achieving the CCWG’s above-stated goals and concerns and how would we do it? Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community “veto” process, etc. What additional legal mechanisms are available to achieve the above-stated goals and concerns?
2. What are the benefits, responsibilities, and risks including but not limited to the legal and financial liability of board directors, statutory members, representative delegates, and community participants (both collectively and individually) for ICANN’s actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?

3. What are the costs or barriers to participation in ICANN's decision making process under the different legal structures and mechanisms under consideration for existing participants and potential participants?
4. What are the available legal mechanisms for constraining ICANN's activities and preventing the organization from expanding the scope of its mission or activities in the future? Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?
5. Which legal jurisdictions (including the possibility of international jurisdiction) provide for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG's stated goals and concerns? Should ICANN consider relocating its headquarters to another legal jurisdiction (outside of California), and if so, where and why? Considering that ICANN's current jurisdiction may eventually impose restrictions with regards to some of the mechanisms addressed in the preceding questions (i.e. dismissal of individual Board members, IRP overthrowing Board decisions, requirements for the appeals panel, membership structure), do these same restrictions also potentially apply in a scenario where ICANN has an international status, i.e. it is not subject to the legislation of a single country?
6. To what extent can a board member meet her/his legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed her/him to the board? How to maximize a director's ability to represent the interests of the community that appointed her/him in the course of board decisions, given legal duties of board members to the corporation?
7. How could the board be bound to accept decisions made by an Independent Review Panel (or other independent entity) including decisions pertaining to the management of the organization?
8. How could the California Attorney General (or other public official) intervene in ICANN's operation on behalf of community members? How typical is such an intervention by the California Attorney General in the operation of a nonprofit corporation, what are the grounds for such intervention, and what is a reasonable expectation for a successful remedy in this situation?
9. To what extent are ICANN's board members required to approve or reject a community decision regarding the management of ICANN based upon the board's separate and distinct interpretation of "what is in the best interest of ICANN" or "the global public interest"?
10. What antitrust legal issues are possible to arise in this context and how can those issues be most effectively addressed given the CCWG's stated goals and concerns?

11. How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?
12. What is recommended for an interim mechanism/caretaker board arrangements if the board of directors are spilled by the community?
13. How would it be possible under California law for the community to limit the direct or other damages of third parties (ex: gtld applicants) in a lawsuit against ICANN and how to create disincentives to frivolous claims against ICANN? How could such limitations be created so there is little "wobble room" in contract negotiations for ICANN, for example through boilerplate contract clauses?