



CCWG COMMUNITY EMPOWERMENT PROPOSALS – A PRIMER¹

In its Scoping Document, the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG) identified certain proposals that could potentially enhance the Corporation’s accountability through community empowerment. This draft examines four such proposals: Membership Corporation, Representative Delegates with Decisional Authority, Community “Veto” Process to Challenge Board Decisions and Supervisory Board / 2-Tier Board Construction, with a view to check its viability under the current California law. The Centre for Communication Governance at the National Law University Delhi has identified a list of broad questions for some proposals, keeping in mind concerns raised by the CCWG:

1. Whether an amendment of the Articles/Bylaws is required
2. Method of appointment/setting up
3. Who constitutes the members/delegates/supervisory board
4. Rights afforded to them
5. Liability
6. Limitation on rights

With most proposals, there is great leeway for the bylaws to decide the extent of powers that are to be assigned to the member/delegate/community/board. Therefore, it is necessary to reach an agreement about the extent of power to be given to these bodies before the bylaws are amended.

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MEMBERSHIP CORPORATION

Amendment of bylaws: The CCWG proposal suggests that existing ICANN bylaws contemplate the possibility of ICANN as a true membership corporation. However, Article XVII, as it currently stands, clearly states that ICANN shall *not* have any members. Prior to its amendment in 1999, the bylaws did provide for the possibility of a membership corporation.

Therefore, if ICANN is to consist of statutory members, the bylaws will first have to be amended to specifically provide for the same.² As stated in Article XIX, ICANN bylaws can be amended by a 2/3 vote of all Board members. In order to change ICANN into a membership corporation, it is essential to get 2/3rd of the existing Board members to vote for such amendment.

How appointed: Subject to the articles or bylaws, memberships may be issued by a corporation for no consideration or for such consideration as is determined by the board.³ Any person may be admitted to membership, unless restricted by the articles or bylaws. The bylaws should also specify who has the power to admit or reject new members, as it isn't provided in the statute.

Who are the members: According to California law, a member is "any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or [...] has the right to vote on changes to the articles or bylaws". These are Statutory Members. The code provides that a person is not a "member" merely by virtue of any rights such person has to "designate or select" a director or directors.⁴ Therefore, the law draws a distinction between electing a director and designating/selecting one. Further, any person associated with a corporation can be referred to as a member, even if they don't meet the statutory definition under §5056.⁵ According to §5056(b), a corporation can confer all the rights of a member upon a person who doesn't have the voting rights of a member. Therefore, it is important to determine what kind of rights should be assigned to a member, whether voting or or for just selecting directors. This is vital, as it establishes whether the person is a statutory

² California Corporations Code, §§5310, 7310- In the absence of any provision in a corporation's articles or bylaws providing for members, it shall have no members.

³ California Corporations Code, §5311.

⁴ California Corporations Code §5056.

⁵ California Corporations Code §5332.

member or not, and accordingly determines the extent to which the existing ICANN structure needs to be changed.

Rights of members: All members have the same rights, privileges, preferences, restrictions and conditions, unless otherwise provided in the articles or bylaws. As pointed out by Sidley Austin LLP in its memo, the rights of members include the election of directors, adoption/amendment/revocation of bylaws affecting the rights of members as to voting or transfer require member approval, amendments to the articles of incorporation, and the transfer of all or substantially all of the assets of a corporation, outside the ordinary course. Once members have been admitted, amendments to change the board or its composition can only be adopted by approval of members. They also have the right to receive the annual report, inspect books of accounts and records.

In addition to these, the articles or bylaws can provide for specific rights. Whether all members are given the same rights vis-à-vis the option of creating classes of members is a question that needs to be considered. The articles and bylaws are of utmost importance as they can curtail or expand rights of the members.

Liabilities: A member is not personally liable for the debts, liabilities or obligations of the corporation. However, various liabilities can be created for the member through the articles or bylaws.

Limitation on rights: Membership may be terminated, giving regard to due process laid out in the California Corporations Code. From what I understand, the bylaws must provide the procedure and substantive grounds for termination.

REPRESENTATIVE DELEGATES

Amendment of bylaws: At present, ICANN bylaws do not provide for representative delegates. Therefore, they must be amended to provide for delegates, as well as set forth “delegates’ terms of office, any reasonable method for delegates’ selection and removal, and any reasonable

method for calling, noticing and holding meetings of delegates and may set forth the manner in which delegates may act by written ballot”.⁶

How appointed: §5152 gives corporations the responsibility of deciding on a reasonable method of selection of delegates, which must be provided in the bylaws.

Who are the delegates: A delegate can be given any other name. However, a person does not become a member by virtue of their rights as a delegate, however similar the rights may be. [§5056] Therefore, there is a distinction drawn in law between a member and a delegate. What this difference is, is not entirely clear from a reading of California law.

Rights of delegates: The Scoping Document lists certain rights and powers that are to be vested with the delegates. The California Code makes it clear that delegates can be given some or all powers of the members. The rights of a delegate can include some or all of the rights of members, depending on what has been provided in the bylaws. In addition to statutory rights, members can be given a wide array of powers through the bylaws. However, it isn’t clear whether a non-membership corporation can provide for delegates, and if so, what is the extent of powers that can be provided through the bylaws.

Limitation on rights: The bylaws must also set forth a reasonable method for removal of delegates. Substantive grounds and procedure must be given.

COMMUNITY “VETO”

§5210 permits the board to delegate the management of its activities to any person or committee however composed. This delegation is permissible as long as the board has the final say, *vide*, “ultimate direction of the board”. Therefore, there cannot be a community “veto”, as the community’s vote cannot override the board’s decision. The bylaws currently provide for a ‘Reconsideration’ procedure, whereby any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.⁷ It also provides

⁶ California Corporations Code §5152.

⁷ Article IV, Section 2.

for an independent review of board actions on allegations of inconsistency with bylaws or article, by an affected party.⁸

Directors have the right to remove a director from the board in certain cases, like gross abuse of power. By virtue of §5210, such power can be delegated to the community. Further, members have the right to prospectively approve or veto certain board actions. The bylaws can confer these rights of a member on any person.⁹ With amendments in the bylaws, the community can be empowered with certain rights of directors and members, which can be used to challenge board decisions, and hold them accountable. However, it must be emphasised that even with this power, the community does not override the board.

SUPERVISORY BOARD/2-TIER BOARD

Our research (ongoing) could find scarce literature on whether the Supervisory/2-tier board system is permissible by law in California. Therefore, this note is based entirely on an interpretation of the California Code.

California law does not expressly allow or bar a two-tier board. However, it allows a Board of Directors to set up committees, and delegate its powers, so long as the board is the ultimate oversight authority. Therefore, the only way to “fit” in a 2-tier board into the legal structure is if there is a Board of Directors that acts in a supervisory manner, akin to what the Scoping Document suggests. This supervisory board will delegate all other powers and functions to a committee consisting of a few (not all) board members, which can operate as a second ‘board’. The second board will be much more active, performing executive functions, and tasked with the smaller, day-to-day operations, while the supervisory board will act as an oversight authority, which can overturn decisions made by the second board. The ICANN bylaws will need to be amended for this purpose.

Further, the bylaws should also (continue to) provide for the term of the boards (up to 4 years; 6 years if no members). If there is no term specified, law dictates that the board members will

⁸ Article IV, Section 3.

⁹ California Corporations Code §5056.

serve for one year. Therefore, in the interest of stability, it must be ensured that the bylaws specify a term.