

FAQ - CCWG proposal for public comments (draft)

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MEMBERS AND UNINCORPORATED ASSOCIATIONS

Question 1. What are the requirements to create an unincorporated association, are there any special criteria?

Answer. CCWG legal counsel advised that under California law the requirements for forming and operating an unincorporated nonprofit association are minimal and there is great flexibility. The group needs to set out their basic rules and define who members shall be. Simple steps would include:

- Prepare articles of association or another document in the nature of a charter, as the governing document for the group that:
 - describes who qualifies to participate
 - establishes a governance mechanism for decision-making by the participants
 - sets basic procedures for meetings of the participants and
 - addresses any other key management functions that are necessary for the association to operate
- Currently the ICANN bylaws address many of these requisites for some of the key groups and these provisions could be crafted into separate and intentional governance documents, with additions as necessary to meet the minimal standards.

This information is then filed with California Secretary of State using an online form and very low fee. A draft example sample article of incorporation can be found as an Annex to legal counsel's [Revised memo on Unincorporated Associations](#) date 3 May 2015.

Question 2. Are there any qualifying requirements for the internal governance of SO/ACs?

Answer. There are no special qualifying requirements. There would be no need for individuals or organizations to change the ways in which they participate in ICANN or the SOs or ACs as a result of creating the new "Members" or "unincorporated associations." The current ICANN SO/AC should not have to make many, if any, changes to the way they operate to create an unincorporated association.

Question 3. If a new SO/AC was created within ICANN would they be able to join the membership structure.

Answer. Yes, once a recognized SO/AC entity's bylaws and other documents could be used to form an unincorporated association in the same way as current SOs/ACs.

Question 4. Is it correct that all SO/AC can participate in the community mechanism, but only those that appoint a voting director can form an unincorporated association?

Answer. All SO/AC can form unincorporated associations, including the GAC. ICANN can have classes of Members that do not have the right to select Directors. This applies to the GAC, RSSAC and SSAC.

Consequently, ICANN could have 7 Member Entities – GNSO, CCNSO, ASO, GAC, At-Large AC, SSAC, and RSSAC. All 7 Members would share the right to exercise the Community Powers over (a) Budget, (b) Strategic Plan, (c) changes to Fundamental Bylaws, (d) changes to bylaws, and (e) recalling the full Board. These decisions would be coordinated through the community group, with Members exercising their influence as articulated in Section 5.1.2 of the proposal (with the weighted votes).

Question 5. If one or more of the SO/AC chose not to be unincorporated association or members, what arrangement can be made and how can they exercise power? And specifically, will they be able to participate in the process for recalling the whole Board?

Answer. If one or more SO/AC chooses not to form an unincorporated association and become members of ICANN then they can still have those Community Powers exercised through the 29 vote community group as proposed in section 5 of the proposal.

However, there would be a need to be an additional step for implementation purposes, which would put the decision of the community group to the voting Members. The details of this arrangement have not been discussed in detail by the CCWG and are considered a matter for implementation. They would then be able to exercise Community Powers and participate in the process of recalling the whole board, but with lower abilities to enforce these powers themselves.

Question 6. What is the relationship between the members and those SO/AC that form an unincorporated association and the Board?

Answer. The unincorporated association (or member body) is a subordinate organization to the SO/AC, which directs its decisions.

Question 7. What other options for creating a legal person other than forming an unincorporated association are available under California law.

Answer: CCWG legal counsel advised that creating an unincorporated association is the simplest way to establish a legal person, i.e. an individual or entity that is recognized under law such as a corporation or an unincorporated association.

The proposal also suggests that SO/AC might become "designators" rather than members under California corporate law. Designator status is a simpler form of membership and some SO/AC may see it as less onerous than the Member model. Designators would have the right to exercise the Community Powers over changes to Fundamental Bylaws, changes to bylaws, and recalling the full Board, but not over the Budget and Strategic Plan, which are the fiduciary responsibility of the Board.

California corporate law is unclear whether a designator must be a legal person, however, unless a designator is a legal person, it will not be able to enforce any rights in court.

Other options proposed by Counsel included not for profit corporations and other forms of legal person, even outside of US jurisdiction, might be found more appropriate to SOs or ACs. These options would also enable the SO/ACs to assume all of the powers cited above.

Question 8. Is it possible to become a member of ICANN without having an unincorporated association?

Answer. Yes. To have the right to exercise the Community Powers over (a) Budget, (b) Strategic Plan, (c) changes to Fundamental Bylaws, (d) changes to bylaws, and (e) recalling the full Board, the SO/AC must be a legal person. While the proposal recommends forming and unincorporated association as the easiest way to create a legal person, other forms of legal persons would work as well.

Question 9. What general powers do members have?

Answer. Members have extensive rights and protections under California corporate law, including the collective rights to amend the Bylaws, approve any amendment to the Articles of Incorporation, and approve the disposition of substantially all the corporation's assets or any merger or dissolution; the class right to remove directors they elected; and the individual right to inspect certain corporate records. In addition to the rights members have under law, the law permits the Articles and Bylaws to specify additional corporate governance rights that may or must be exercised by the members. Members may be divided into classes with different voting and other rights. Members must be legal persons, and they have standing to enforce their rights.

Question 10. Why can't the proposed powers be implemented without the SO/ACs forming legal persons?

Answer: See answer to question 9 above, for an entity to have the enforceable powers proposed by the CCWG, they must be a member and be a "legal person".

Question 11. Could governments through the GAC establish an unincorporated association?

Answer. Yes, the GAC could form an unincorporated association. The unincorporated association could be a committee of the GAC or two or more individuals (associates) who represent the GAC members in the unincorporated association.

Question 12. If SO/ACs move forward and create unincorporated associations, would the process involve reviewing their own accountability mechanisms, or even strengthening them? Are the accountability mechanisms of the community structures sufficiently strong?

Answer. While noting that the creation of subordinate unincorporated associations would not prevent the ongoing practice of structural reviews of SO/ACs, the CCWG Accountability would welcome input related to the perceived need to enhance the community structure's accountability.

Question 13. What is a reasonable timeframe for the reconsideration of budget, and strategic and operating plans?

Answer. Time would be included in planning and budgeting processes for the community to consider adopted plans and decide whether to reject such plans (timeframe to be determined). These processes would also need to set out the required level of detail for such documents. Note that improvements to the community's input into these processes are for consideration by the CCWG-Accountability as part of Work Stream 2 efforts.

RECALLING BOARD MEMBERS

Question 14. What criteria would be used to remove a Director? What information would be available?

Answer. Criteria for removing a Director have been discussed by the CCWG, but no conclusions reached. The CCWG would welcome ICANN



community participants and public comment respondents opinions on this matter.

INDEPENDENT REVIEW PANEL (IRP)

Question 15. Has the CCWG considered how members of the Independent Review Panel can be independent if they get paid by ICANN?

Answer. CCWG proposes that panelists should be compensated at a rate that cannot decline during their fixed term. The criteria for defining independence include: That panel members must be independent of ICANN, including ICANN SOs and ACs. Panelists may not be removed during their fixed term except for specified cause (corruption, misuse of position for personal use, etc.) Appointments would be term limited, and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited.

Question 16. Are IRP decisions final and binding? Can the decisions be appealed in court based on merits?

Answer. The intent of the proposal is that IRP decisions should be binding on ICANN. Decisions of the IRP Panel are not subject to appeal (except for review of very limited issues such whether the outcome exceeded the permissible scope of the arbitration or was procured by fraud or corruption). However, the panel may not direct the Board or ICANN on how to amend specific decisions, it shall only be able to make decisions that confirm a decision by ICANN, or cancel a decision, totally or in parts.

The CCWG has attempted to create a balance between the absence of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid that the panel's outcome overcomes the Board in its fiduciary duties.

Question 17. We understand that anyone can initiate an IRP if they are materially affected or harmed by ICANN actions or inactions in violation of ICANN's Articles of Incorporation and/or Bylaws. How is "harm" defined or detected?

Answer. The standard of "materially harmed" is the one that is used today, the panel decides if a material harm has been done. No change being proposed. A step requiring that the parties first make a good faith effort to resolve their dispute, including the ability to invoke a mediator, has been introduced before the issue is raised to the IRP process.

Question 18. Is the Board ultimately responsible for "harm", although it comes from a different party, e.g. originating from an SO or AC?

Answer. The language in the proposal is that that the panel can consider actions and inaction by ICANN decision-makers, and those could include Board, staff and theoretically a SO or AC. But the action must have a material affect, and SO/AC don't have the power to unilaterally "harm", in practice it will require some action/inaction by the staff or Board.

Question 19. What would be the threshold or trigger for the dispute to go to the IRP? How would case workload be managed?

Answer. The process for causing an issue to be considered by the IRP will be easier (more accessible and lower cost) than the current arrangement. The CCWG is proposing a streamlined process, but has not discussed implementation details. The CCWG would welcome ICANN community participants and public comment respondents opinions on this matter.

Question 20. How will members of the IRP be selected and neutrality ensured?

Answer. A third party international arbitral body(s) will nominate candidates. The ICANN Board selects possible panelists and proposes confirmation. The community mechanism would confirm appointments. The use of an expert body to propose the initial slate of candidates, followed by the dual process of ICANN Board and community is proposed as ensuring expert neutral panelists.

Question 21. What does lower cost translate into for IRP?

Answer. ICANN would bear the administrative the costs of maintaining the system (including Panelist compensation). The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access to pro bono representation for community, non-profit complainants. Panel should complete work expeditiously.

RECONSIDERATION PROCESS

Question 22. What does "rebuttal opportunity" mean? That the complainant can discuss the verdict?

Answer. The person/entity requesting reconsideration has the opportunity to rebut the Board Governance Committee's final recommendation

(although requesters can't raise new issues in a rebuttal) before the full Board finally decides. This is an opportunity for limited appeal.

Question 23. Would the findings of the Reconsideration Request be binding or would the Board have the opportunity to reject as it currently does?

Answer. The Board shall not be bound to follow the recommendations of the Board Governance Committee, however, the Board's decision on the recommendation is final.

Question 24. Regarding the Reconsideration process - is there a means to address Board member conflict of interest - for example that those who made an original decision should not be the ones reconsidering that decision

Answer. TBC. The CCWG would welcome ICANN community participants and public comment respondents opinions on this matter.

Question 25. How can less legal engagement be enforced?

Answer. The proposed enhancements to the process are intended to deliver great satisfaction with the outcomes, and therefore less likelihood of escalation to other processes.

IRP & OMBUDSMAN

Question 26. Please explain the difference between IRP and Ombudsman?

Answer. The role of the ICANN Ombudsman is to investigate and addresses complaints brought by the ICANN community. The Ombudsman is independent, impartial, and neutral, a reviewer of facts and an investigator of complaints about unfairness. The IRP is an independent panel of neutrals who shall be charged with comparing contested actions of the ICANN Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.

Question 27. Can one SO/AC vote to remove a Director appointed by another SO/AC from another constituency? Does this also apply to Directors appointed by the Nominating Committee?

Answer. Consistent with California corporate law, the general approach is that the appointing body is the removing body, and this principle also applies to Nominating Committee appointees. The CCWG is seeking advice on whether the this power should be exercised by the current Nominating Committee or by creating a new "removal" Nominating Committee if and when needed.

Question 28. For the process of removing individual Board directors appointed by both the SO/AC and the Nominating Committee, what limits to prevent abuse are being proposed.

Answer. CCWG has not discussed implementation and would welcome ICANN community participants and public comment respondents opinions on this matter.

Question 29. Did the CCWG consider the impact of abstention or non-voting on meeting the various voting thresholds described?

Answer. The CCWG notes it would be preferable if a decision to recall the Board were the result of cross-community consensus. However, where this consensus is not apparent, a suitably high threshold for the exercise of this power, 75% of all the support available within the community mechanism would have to be cast in favor to implement it. This ensures that non-participation does not lower the threshold required to remove the Board.

Question 30. After Board recall, what would an interim or caretaker board look like? What would be the scope of their powers?

Answer. This in an implementation question, however, legal counsel advise that any Board, interim or other, has the full powers of the ICANN Board. Some provisions are expected to be put in place to guide the actions of any temporary Board. CCWG would welcome ICANN community participants and public comment respondents opinions on this matter.

AFFIRMATION OF COMMITMENTS (AoC)

Question 31. Beyond reviews, were any other aspects of the Affirmation of Commitments considered to be brought over into ICANN by-laws?

Answer. CCWG proposes to incorporate Affirmation of Commitments Sections 3, 4, 7, and 8 (except Section 8b, which is already present in the current ICANN bylaws) and the four review processes. All of the other sections in the Affirmation of Commitments are either preamble text or commitments of the US Government. As such they don't contain commitments by ICANN, and so they cannot usefully be incorporated in the Bylaws.

STRESS TESTS

Question 32. What is the scope of the stress tests?

Answer. The CCWG-Accountability Charter calls for stress testing of accountability enhancements in both Work Streams 1 and 2.

'Stress Testing' is a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry. The 26 stress tests presented in the proposal are grouped into 5 categories: financial crisis or insolvency, failure to meet operational obligations, legal / legislative actions, failure of accountability and failure of accountability to external stakeholders.

Question 33. Could you provide documents on how these stress tests were performed?

Answer. Please see proposal Section 8, "Purpose and Methodology". Each contingency was considered against the following steps:

1. Analysis of potential weaknesses and risks;
2. Analysis of existing remedies and their robustness;
3. Definition of additional remedies or modification of existing remedies;
4. Description of how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies.

TIMELINE

Question 34. On the timeline presented in the proposal, when does the actual transition occur? Will work start on the Implementation project planning before or after the transition?

Answer. See, letter from Lawrence Strickling, NTIA, to CCWG Co-Chairs, 6 May 2015 <https://community.icann.org/display/acctcrosscomm/NTIA+Letter+to+CCWG> which asks for an update on transition planning, including asking for the community's views on how long it will take to finalize the transition plan and to implement it. Secretary Strickling asks for a reply by the end of June 2015. The CCWG will hold discussions about this matter During the ICANN meeting in Buenos Aires.