

5A Community Mechanism as a Sole Member Model

In developing a mechanism to empower the ICANN multistakeholder community, the CCWG-Accountability agreed on the following:

- To enhance ICANN’s accountability.
- To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.
- To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC structures (without making it impossible to change these in future).
- To address the CWG-Stewardship dependencies
- To include the following powers which would be embedded in “Fundamental Bylaws” (a CWG-Stewardship dependency) and would also be legally enforceable
 - Reconsider/reject the ICANN budget, the IANA budget and ICANN strategic/operating plans (CWG-Stewardship dependency)
 - Reconsider/reject changes to ICANN “standard” Bylaws
 - Approve changes to “Fundamental” Bylaws (CWG-Stewardship dependency)
 - Remove individual ICANN Directors (along with appointment, a CWG-Stewardship dependency)
 - Recall the entire ICANN Board (CWG-Stewardship dependency)
 - Reconsider/reject Board decisions relating to reviews of the IANA functions; including the procedure to implement a separation process relating to PTI (CWG-Stewardship dependency)

The first CCWG-Accountability draft proposal presented as a reference model for the community mechanism an SO/AC Membership Model.¹ However, there were significant concerns expressed in the Public Comment from 4 May – 3 June 2015, and in order to respond to the

¹ For further detail on the proposed SO/AC Membership Model, please see the first draft proposal (Section 5.1.1). In addition, please refer to Appendix G, which provides key legal documents that informed the CCWG-Accountability, including a comparison of the three models considered.

feedback received, the CCWG-Accountability initiated work on alternative solutions. Core concerns about the ability of the ICANN community to fully participate in the new accountability framework were integral to the work in devising a new approach.

At the Paris meeting on 17-18 July 2015, the CCWG-Accountability considered 3 distinct models:

- The “**Empowered SO/AC Membership**” Model, which would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood (except for enforceability) and would allow opt-in re legal status.
- The “**Empowered SO/AC Designator**” Model, which would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood (except for enforceability) and would allow opt-in re legal status.
- The “**Community Mechanism as Sole Member**” Model, which is an alternative that builds upon the more favorable concepts in the other models and simplifies certain implementation aspects. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member.

Following discussions, and consultations with external legal counsel, the CCWG-Accountability concluded that it should proceed with the Community Mechanism as Sole Member given the understanding that:

- It provides the required legal enforceability that the Empowered SO/AC Designator Model and Empowered SO/AC Membership Model could not.
- It removes the problematic requirement for some SOs and ACs that they become legal persons, whether to participate as a member in the Empowered SO/AC Membership Model or to enforce rights in both the Empowered SO/AC Membership Model and Empowered SO/AC Designator Model.
- It avoids the problem of differential statutory rights between SOs and ACs that become members and SOs and ACs that were not members, associated with the Empowered SO/AC Membership Model.
- By allowing action only upon support of the community through the Community Mechanism, it limits the issues related to the statutory rights of members associated with the Empowered SO/AC Membership Model which would allow members to dissolve ICANN and bring derivative suits.

The subsections below explain the Community Mechanism as Sole Member Model. (As with any model, it is anticipated that there may be a level of detail that must be resolved in the drafting of appropriate Bylaws. Draft Bylaws implementing the model, as refined after this Public Comment

process, will be subject to further review and approval by the ICANN community).

5A.1 The Community Mechanism as Sole Member Model

[Insert XPLANE Slide 11]

As the name implies, under the Community Mechanism as Sole Member Model ICANN would remain a California public benefit corporation (also known as a not-for-profit corporation in some jurisdictions), but its internal governance structure would be transformed from a structure having no members, to a structure having a single member. This change will not require any re-incorporation or affect ICANN's status as a nonprofit or tax-exempt organization, and can be simply implemented through Bylaw amendments approved by the ICANN Board.

As required by law, the Sole Member in the Community Mechanism as Sole Member Model would be a legal person created through the ICANN Bylaws as an unincorporated association. The Community Mechanism as Sole Member Model would rely on direct participation by SOs and ACs in this sole member for exercise of community powers but would not require any of them to have legal personhood. The Sole Member would have no officers or directors and no assets.

ICANN's SOs and ACs would participate in this Sole Member. Participating in the Sole Member would allow the participating SOs and ACs, as a group, to provide instructions to the Sole Member to use its member powers to exercise the community powers only as directed by the SOs and ACs (for example, to approve change to the Fundamental Bylaws). Participating SOs and ACs would not meet as the Member, and no representatives would cast votes. The directions for voting would come from the SOs and ACs themselves. No SO or AC, or any individual, has to 'join' ICANN or the Sole Member in order to exercise their rights, and no new legal obligations arise for any stakeholder.

It is important that before participating SOs and ACs make decisions regarding how to vote in exercising a community power, they discuss the matter among themselves and with each other. Section 5A.2 below sets out the CCWG-Accountability's proposal on how to implement a simple system to do this, based on experience with the work of the CCWG-Accountability itself.

The SOs and ACs that wish to participate by voting in the Sole Member would simply indicate they wish to do so at the time of its creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to participate through voting initially could opt in later as set out in Section 5A.2. New SOs or ACs that are created at a later date could choose to participate in the Sole Member at any time, but this would require the current participants to approve this and the ICANN Bylaws to be amended to reflect their participation.

The SOs and ACs that participate in voting in the Sole Member would do so according to a set of rules described in the ICANN Bylaws that would be created specifically for this purpose. The SOs and ACs could only instruct the Sole Member to exercise its powers as a group and would do so by using a voting mechanism as defined in the Bylaws (the exception to acting as a group

is related to the appointing and removing of individual directors, as explained in the next paragraph). The rules would describe the number of votes each SO and AC would have in this process and the minimum number of votes required to instruct the Sole Member to exercise a power. Each power could have a different minimum number of votes required to instruct the Sole Member (e.g. rejecting a Bylaw change will require a minimum of 66% support vs. approving a Fundamental Bylaw change will require a minimum of 75% support). Each SO and AC would be responsible for defining their processes for voting under these rules. The Chair of each SO and AC would be responsible for communicating the votes or decisions of the SO and AC to the ICANN Board. This pass-through of cumulative votes and decisions would become the act of the Sole Member.

ICANN Directors would technically be appointed or removed by the Sole Member.

The Sole Member would only be capable of acting at the direction of the entities specified in the Bylaws (SOs, ACs, and NomCom) with respect to the appointment of individual Directors. In order to maintain the current arrangements for such appointment, the member rules expressed in ICANN's Bylaws would require the Sole Member to use its power to appoint a director on the instructions of the specific SO, AC, and NomCom responsible for appointing that director as per the current ICANN Bylaws, without requiring a community-wide vote.

For Director removal, those directors appointed by an SO or the At-Large community could be removed by that SO or that community only. The Sole Member implements their decision. For directors appointed by NomCom, any SO or AC would be able to petition for removal and a process of SOs and ACs participating in the CMSM would vote on removal as detailed in Section 5.5

Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of voting participants in the Sole Member (with remaining and future SOs and ACs able to opt-in to voting participation). Each of these aforementioned SOs and ACs would have 5 votes on any proposal to instruct the Sole Member (for a total of 20 votes at the start of the system).

There is no requirement or expectation that a participating SO or AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against). Instead, CCWG-Accountability anticipates that the votes each SO and AC casts will be a reflection of the balance of views within that SO or AC (or where possible of that sub-division, where votes have been allocated to sub-divisions). That is, block voting (casting all votes in favor or against the use of a power, even where there are diverse views) is not encouraged.

Under these arrangements the decisions and powers of the Community Mechanism as Sole Member could be enforced through the internal Independent Review Panel process with the force of binding arbitration and, if necessary, further backed through judicial proceedings.

In circumstances where the Bylaws provide for the resolution of disputes between ICANN and other parties through the IRP, the Community Mechanism as Sole Member will also have the ability to require ICANN to enter into the IRP and abide by its outcome, should it not do so voluntarily. This power to require ICANN to abide by its Bylaws through the use of the IRP would be set forth in the Bylaws, backed, if necessary, due to the Community Mechanism as Sole Member membership status through judicial proceedings.

As the Sole Member of ICANN, the Community Mechanism would enjoy all the rights that the law provides to members. The general approach of the CCWG-Accountability is that none of these statutory rights should be easily exercised, other than the power mentioned in the preceding paragraph. As such, the recommendation is that to deploy any of those other statutory rights should require very strong to full consensus of the participating SOs and ACs (that is, a significant supermajority vote);² In contrast, the power to require ICANN to enter into an IRP through recourse to judicial proceedings if necessary should be exercisable based on a simple majority vote.

5A.2 Influence in the Community Mechanism

The CCWG-Accountability considered the decision weights of the various parts of the community. The following table sets out the voting distribution proposed by the CCWG-Accountability.

COMMUNITY SEGMENT	COMMUNITY MECHANISM “VOTES”
ASO	5
ccNSO	5
GNSO	5
At-Large	5
GAC ³	5
SSAC ⁴	2
RSSAC ⁵	2

This proposed voting weight is unchanged from the proposal made in our first Public Comment Report, and attracted the most support from CCWG-Accountability participants during the last meetings finalizing this Report. There were three minority views expressed:

- One is that there should be a distinction in voting authority between SOs and ACs, with SOs having greater voting influence (e.g. 5 votes for SOs, 2 votes for ACs).
- Another view is that there should be five votes allocated to each of the SOs and ACs.
- A third view is that there should be four votes each for ASO, ccNSO, and GNSO, and two votes for ALAC. The GAC, the SSAC and the RSSAC would participate fully in discussions in the ICANN Community Forum (introduced in Section 5A.2) but would not vote in the Community Mechanism

² Requiring unanimity is not advisable because it allows a sole participant to effectively veto the use of key statutory powers. For further detail on the mandatory statutory member rights in the Community Mechanism as Sole Member context, please see Appendix G for a chart and additional documents provided by external legal counsel.

³ At the time of publication, the GAC had not yet determined whether or not to participate in the Community Mechanism.

⁴ At the time of publication, the SSAC had not yet determined whether or not to participate in the Community Mechanism.

⁵ At the time of publication, the RSSAC had not yet determined whether or not to participate in the Community Mechanism.

Although each SO/AC has a specific number of votes, those votes may be subdivided however the SO/AC decided and, in particular, fractional votes (e.g. allocating 0.75 of a vote or 1.25 votes) are allowed. This allows voting capability to be allocated within the SO or AC. Such allotment would be done through a formal decision of the SO or AC. The SO or AC or the appropriate sub-group must designate the individuals who officially communicate its decisions regarding votes. If no other decision is made, the Chair of the SO or AC is assumed to be the person who can communicate its votes.

At the time of drafting, it is anticipated that the first four SOs and ACs listed above will be initial participants with voting rights in the Community Mechanism. The Bylaws that establish the Community Mechanism as Sole Member model will provide for the voting rights set out above, even for those ACs that are not planning to participate at this stage.

If such an AC was to decide in future to participate, it would formally resolve to do so by means of its usual processes and give notice publicly to the ICANN community of this decision. Three months following such announcement (the “notice period”), that AC would “join” the Community Mechanism (that is, on that date it is granted the right to participate on the same basis as the other voting SOs and ACs). Such an incoming AC would not be able to cast votes on any decision that where the Decision Period (see Section 5B for a description of the various phases in the exercise of community powers) had begun on the date it “joined”, but would be eligible to do so for decisions that had not yet reached that point.

If an SO or AC at some future point decided it no longer wished to participate in the Community Mechanism as Sole Member on a voting basis, it could resolve to leave the mechanism through its usual processes. Such a decision would take effect immediately after notice was publicly given to the ICANN community.

When an SO or AC joins or leaves the community mechanism, it cannot reverse this decision until at least one year has passed from the end of the relevant notice period.

This proposal gives influence on an equal basis between the existing SOs and ACs. If a new SO or AC is formed in future, inclusion of that SO or AC in the Community Mechanism would require changes to the Fundamental Bylaws where the Community Mechanism as Sole Member is established.

The logic for multiple “votes” per participant in the Community Mechanism among the five SOs and ACs allocated this number is to allow for greater diversity of views, including the ability to represent all the ICANN regions in each participating group.

The CCWG-Accountability anticipates that the votes each SO and AC casts will be a reflection of the balance of views within that SO or AC (or where possible of that sub-division, where votes have been allocated to sub-divisions). That is, block voting (casting all votes in favour or against the use of a power, even where there are diverse views) is not encouraged.

As noted in Section 5B, no votes are exercised until after petitioning and discussion phases are completed.

Quorums and vote counting

The CCWG-Accountability proposes that for the purposes of the simplest possible administration of the voting system that the thresholds expressed for each community power should be **absolute thresholds**.

This means that if a threshold is 66%, then 66%+ of the votes that could be cast by participants in the Community Mechanism as Sole Member at that time need to be 'yes' votes for the threshold to be met. No votes, abstentions or non-participation would all be treated the same way.

An alternative approach that adjusted the thresholds based uniquely on the number of yes/no votes and not including the number of abstentions or non-votes was considered, but adds significant complexity and so is not the CCWG-Accountability's preference at this time.

5A.3 An ICANN Community Forum

In developing the Sole Member Model, the CCWG-Accountability has been careful to specify that any decisions made by the Member are simply decisions by those SOs and ACs who have votes within it (as set out in Section 5A.2). Those SOs and ACs make their decisions as to how to allocate their votes internally.

Alongside the powers granted to the community through the Sole Member Model, the CCWG-Accountability has determined that there needs to be a forum where the use of any of the powers is discussed across the whole ICANN community – **before** the power under consideration is used.

This discussion phase would help the community reach well-considered conclusions about using its new powers, and would ensure that decisions were taken on the basis of shared information as well as what was known within the individual decision-making processes of the SOs and ACs that cast votes in the Community Mechanism.

Importantly, it would also create an opportunity for Advisory Committees that aren't currently participating in the Community Mechanism to offer their insight, advice and recommendations on the proposed exercise of a community power.

An ICANN Community Forum would bring together people from all the SOs and ACs, the ICANN Board and Staff representatives.

Before a community power could be exercised, there would be discussion and debate in this forum. People would have a chance to examine the issue before a decision was made. Decisions made would thereby be better informed, and the community's views more considered, than simply allowing SOs and ACs to make decisions through the Community Mechanism without such conversation.

This sort of forum would have no standing and would make no decisions. It would be open to participation from the full diversity of the ICANN community. It should be open to members of

the public – certainly to observe all its proceedings, and probably to participate as well.

Such a forum could also be the basis of a Mutual or Public Accountability Forum, suggested as an annual meeting in conjunction with ICANN's Annual General Meeting at the third meeting of the year. Such an event would help the various components of the ICANN system hold each other to account, transparently and in public.

The CCWG-Accountability will pursue the establishment of the ICANN Community Forum in the implementation phase of Work Stream 1.