

**MEMORANDUM**

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: **High Level Review of Jones Day Analysis re CCWG Second Proposal**

DATE: September 1, 2015

---

On August 28, 2015 you requested that we provide a very short memo with our preliminary high level observations regarding the detailed analysis of CCWG's Second Proposal provided by Jones Day to the ICANN Board of Directors and shared by the Board with CCWG and the public on August 27, 2015 (Jones Day Analysis). We focus our discussion here on general observations and observations regarding the Sole Member and the IRP. We will augment this short memo with a more detailed set of comments on the Jones Day Analysis by the end of this week.

**A. General Observations**

1. The Jones Day Analysis provides assurance regarding the Second Proposal in two key respects:
  - The Analysis does not identify any legal flaws or legal “workability” issues with respect to the viability of the community mechanism as sole member (CMSM or Sole Member), the community powers, accountability and review mechanisms, or other key elements of the Second Proposal.
  - The Analysis does not identify any significant issues that the CCWG, its working groups and/or its advisors have not already considered.
2. The focus of Analysis is on the practical impact of aspects of the Second Proposal and potential alternatives. Coming from a respected third party, the Analysis is particularly helpful in highlighting issues that may not be clear to persons not fully immersed in the CCWG process. For example, CCWG has devoted considerable attention to the practical impact of its recommendations and has also assessed a number of potential alternatives. From the Jones Day Analysis, it appears that this has not been clearly conveyed in the Second Proposal: the CCWG may wish to consider how best to summarize this activity for the Board from the extensive public record of these efforts.
3. While observers and even participants might have made different choices writing on a blank slate as a sole decision-maker, the conclusions of CCWG's deliberative bottom-up consensus-seeking multistakeholder process deserve a significant degree of deference. The CCWG and its

work groups , with the advice of independent legal counsel and input from Board members, ICANN staff and internal counsel, engaged in an inclusive and open process involving numerous lengthy calls and face-to-face meetings. This work included extensive discussion, analysis, stress testing and consideration of public comment regarding options and alternatives similar to and in many instances identical to those that the Jones Day Analysis has identified.

- CCWG may wish to consider how best to clarify this for the benefit of the Board, its legal advisors and ultimately the NTIA and the public. While the record of the CCWG’s deliberation and supporting analyses is publicly available, the record is so voluminous that an outline of the process and key decisions and considerations (perhaps with references back to the record) may provide reassurance of the rigor involved.

## **B. Observations on Key Points in the Jones Day Analysis**

### **1. The Sole Member**

- Jones Day deems the Community Mechanism as Sole Member to be workable as a matter of law but also observes that neither ICANN nor the Community has experience operating under a membership structure. While the specifics of CMSM are unique, membership is common in nonprofit governance systems and a sole member structure is relatively simple. ICANN’s ACs and SOs already have significant relevant knowledge and experience in matters of ICANN operations and governance. Based on our work advising nonprofits on governance over many years, we do not expect that the transition to a Sole Member poses any significant risks related to inexperience. The Second Proposal contemplates that ICANN and its ACs and SOs will continue to operate as they do now, but with a backstop of community powers available to hold the Board accountable in extraordinary circumstances.
- We also note that the alternatives suggested by Jones Day – a board-centric model with some enhanced accountability or a designator model – are also untested as applied to ICANN. Indeed, even the status quo is untested in a post-NTIA environment.
- The CCWG proposed the Sole Member model based on its assessment of the model’s ability to deliver on the CCWG’s goals relative to its risks. The CCWG considered and rejected an enhanced board-centric model and a designator model after extensive analysis and deliberation indicated that neither would adequately support the enforceability of all the powers deemed essential, not only by the CCWG but by the CWG as well.
- Jones Day suggests that CCWG conduct a “comprehensive regulatory analysis.” It would be helpful to have more information about the analysis that Jones Day contemplates. CCWG has undertaken significant analysis of the key aspects of the Sole Member model and the alternatives it considered and we may be able to point Jones Day to the analysis they seek or otherwise augment what has been done to date.
- As to Jones Day’s concerns about the statutory rights of the Sole Member, this was an area of considerable discussion in the CCWG that will be addressed through Bylaw provisions. Since the Sole Member only takes action as directed by the SOs and ACs with voting rights, the Sole Member’s exercise of statutory rights can be limited by requiring a high

supermajority of votes in the community mechanism to authorize action.

- Jones Day identifies concerns that some SOs and ACs will decide not to participate in the Community Mechanism as Sole Member. Any governance system is vulnerable to problems should stakeholders opt out in significant degrees. This issue was closely considered by the CCWG which developed trigger procedures, quorum requirements and supermajority provisions to help assure that the CMSM cannot take action unless a significant number of participants are involved. Giving powers to the community inevitably requires that the community commit to exercise them to work. This will be true of any mechanism that empowers the community.
- The Jones Day analysis seems to assume the Sole Member will exercise community powers far more frequently than CCWG expects. The short list of clearly enumerated accountability mechanisms do not involve any day to day operational matters. Moreover, based on our governance experience, where stakeholders are given significant powers. designed with appropriate protections to be used as a last resort to hold a board accountable, the result is greater effort on the part of the board, staff and community to seek solutions based on consensus, thereby avoiding actual exercise of the community powers.

## 2. IRP Issues

- We are pleased to note that Jones Day has not raised any concerns about the legal viability or legal workability of the IRP.
- One significant area of apparent misunderstanding that CCWG may wish to clarify relates to the degree to which the Second Proposal contemplates litigation to enforce the community powers. The Jones Day Analysis suggests that the Proposal focuses on the ability to go to court, and that an alternative would be to rely on enhanced IRP mechanisms. In fact the CCWG Proposal establishes a robust IRP process in order to reduce the need for litigation and even preclude access to courts in many situations. In addition, as explained above the Sole Member can only access courts if a supermajority of the participating SOs and ACs direct it to, and this should further limit litigation while at the same time providing a real potential for such enforcement activity in the extreme case.
  - CCWG may wish to clarify that the IRP is designed to help support internal resolution of disputes and thereby help assure that going to court is a last resort when other efforts to resolve an issue have failed.
- Jones Day raises concern that the IRP enhancements will have a significant impact on ICANN's ability to function. This is not at all what CCWG intends or expects given the limited scope of matters that could give rise to an IRP and the standing requirements, including a requirement that parties first seek other means to resolve disputes. Similarly, we are not clear how enabling IRP review of conflicting decisions of process-specific "expert panels" will led to potential paralysis and a chilling effect. A better understanding of Jones Day's concerns would be helpful.
- Points of clarification:

- Regarding who may access the IRP, the Second Proposal does not contemplate eliminating the current definition of “materially affected.”
- Procedures to consolidate multiple similar IRPs and allow for intervention into existing IRPs are planned for consideration in the implementation phase.
- The Proposal contemplates procedural rules to discourage frivolous claims and the Proposal recommends that IRP decisions create a body of precedent.
- An IRP concerning Board action or inaction is limited to determining whether the Board’s action or inaction was consistent with the Articles or Bylaws. If an IRP panel finds that the Board has not complied with the Articles or Bylaws, it is for the Board to determine how to cure the inconsistency.
- As to concerns about the relationship between the Board’s fiduciary functions and the IRP process, we note that the IRP decisions only address whether the Board has complied with Articles or Bylaws and do not direct the Board with respect to any action. This avoids an IRP infringing on the Board’s fiduciary or other legal duties.
  - The CCWG may wish to clarify by way of emphasis that the Proposal intends to preserve rather than usurp the Board’s role. At the same time, the IRP is an important element in the mechanisms that CCWG has designed to hold the Board accountable and independence of the panelists is key.
- We agree that significant work on IRP implementation will be needed in the implementation phase and that ICANN will need an appropriate budget for the IRP with appropriate cost controls to be developed.