

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 the 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 lead 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.

**Sidley/Adler Review of
Jones Day Impact Analysis of CCWG-Accountability Second Draft Proposal**

	Current Model	CCWG Proposal	Motivation & Importance	Impact Analysis	Estimated Implementation	Jones Day Identified Potential Alternative(s) ¹	Potential Alternative(s) Implementation	Sidley/Adler Comments
ACT1: Proposal Element: Community Mechanism: Sole Membership Model <i>CCWG-Accountability Proposal Section 6</i>								
1.	ICANN currently does not have members	ICANN would amend its Bylaws to provide for a “Sole Member” (in the form of a newly formed unincorporated association) that would exercise statutory and Bylaw designated membership rights at the direction of the Community. The CCWG believes that the Sole Member is the best structure to implement the proposed enhanced accountability measures (such as the proposed budget “veto” right) and ensure that SOs/ACs are able to ultimately enforce their rights through the Independent Review Panel with the force of binding arbitration and through	<p>For CCWG: The CCWG wants SOs/ACs to have the ability to fully implement and enforce the proposed enhanced accountability mechanisms, including through the ability to ultimately enforce such rights in a California court, and believe the Sole Member model is the best way to do so.</p> <p>For Transition: Other governance models could be employed to provide the Community with most (if not all) of the proposed accountability</p>	<p>While the Sole Member model is workable as a matter of law, neither ICANN nor the Community has experience operating ICANN under a membership structure, which suggests the need to test the model prior to implementing the Transition.</p> <p>It does not appear that the CCWG has conducted a comprehensive regulatory impact analysis, as suggested by the Board, which would be helpful in identifying and mitigating potential unintended</p>	<p>Requires Bylaw amendments to provide for Sole Member and Community Mechanism (and associated proposed accountability enhancements).</p> <p>Time: In terms of Bylaw revisions, 45-90 days to finalize revisions to implement the Sole Member model and related accountability enhancements, which would then be followed by one or more public comment periods.</p> <p>A considerably longer period of time is</p>	<p>Two primary alternatives are (1) retaining the current model, with sufficient accountability enhancements to demonstrate to NTIA and the Community that ICANN will be accountable following the Transition, or (2) moving to a “designator” model. Each of these alternatives would mitigate the risks associated with a potentially significant governance shift, but provide the Community with a governance structure that facilitates most (if</p>	<p>If ICANN’s existing structure is maintained, implementation would be limited to preparing revisions to Bylaws to reflect the proposed accountability enhancements. If a designator model is adopted, Bylaw amendments would be more significant, but likely require less revisions and time to implement than compared to implementing the proposed Sole Member model and related structures at this time.</p>	<p>Validity of Concerns:</p> <p>JD 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 CSM 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</p>

¹ The alternatives set forth below in the “Jones Day Identified Potential Alternative(s)” column are intended to facilitate the Board’s review and assessment of the CCWG’s Proposal by identifying potential alternatives structures and mechanisms.

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		<p>judicial proceedings in a California court, if necessary.</p> <p>The manner in which the Community would direct the Sole Member would vary depending upon the right or power being exercised by the Sole Member, but the rights generally would be exercised through the “Community Mechanism” described in the Proposal. Decisions to appoint and remove directors would not require SOs and ACs to vote as a group.</p> <p>Each existing SO and AC is eligible to elect to become a “voting participant” in the Community Mechanism, but a SO/AC is not required to become a voting participant (although if a SO/AC does not elect to become a voting participant, it will not be able to direct the</p>	<p>enhancements in one form or another, and adequately ensure the Board’s compliance with the accountability enhancements.</p>	<p>consequences and risks of capture.</p> <p>The move to a membership model is a significant governance shift that should be approached carefully and pursued only when the details of the model are fully defined, completed and tested.</p> <p>California law provides the Sole Member with significant statutory rights. These rights include, among other things, (1) the right to amend the Bylaws without Board approval, (2) the ability to initiate litigation against ICANN and the Board, and (3) the ability to remove directors without cause. In many cases, it is unclear whether</p>	<p>required to test the Sole Member model prior to the Transition in order to (1) ensure that ICANN and the Community are able to operate the model in an efficient, effective, nondiscriminatory and responsible manner, (2) ensure against unintended consequences, (3) address the occurrence of unanticipated events and (4) resolve any drafting ambiguities.</p> <p>In addition, various aspects of the Sole Member model appear dependent on SOs, ACs and the NomCom modifying current processes and procedures in order to implement the model. These dependencies should be completed (albeit contingent on the Board’s approval</p>	<p>not all) of the proposed accountability enhancements sought by the CCWG in one form or another. Under either approach, a community mechanism for discussion, consultation and advisement could be implemented (i.e. something similar to the Community Mechanism contemplated by the Proposal).</p> <p>Prior to adopting any alternative to the Sole Member model, the Board could assess the CCWG’s rationale for favoring the Sole Member model over these alternatives, each of which has been discussed by the CCWG. For example, as discussed in various materials provided to</p>		<p>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.</p> <p>Comments on Alternatives:</p> <p>The alternatives suggested by JD – a board-centric model with some enhanced accountability or a full designator model – are also untested as applied to ICANN. Indeed, even the status quo is untested in a post-NTIA environment.</p> <p>We also note that community consideration of future accountability mechanisms has prompted closer scrutiny of the status quo, and revealed questions (or even differences of opinion) among legal counsels consulted as to what rights the community may already have, and what the legal status of various community segments might be. This has increased uncertainty and the potential for</p>

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		<p>Sole Member). However, it is contemplated that even those that do not elect to become voting participants will have opportunities to participate in the petition phase and share in deliberations before any vote, in a proposed ICANN Community Forum. Following the initial election of SO/AC voting participants, if a SO/AC elects to become a participant, the election will be effective following a three month waiting period. New SOs and ACs that are formed in the future could be included in the Community Mechanism, provided the Fundamental Bylaws are amended to provide for this.</p> <p>If they elect to be a voting participant, each of the ASO, ccNSO, GNSO, At-Large and GAC would have 5 “votes” in the Community Mechanism,</p>		<p>ICANN could enforce provisions of the Bylaws that attempt to waive or modify many of the Sole Member’s statutory rights. A review of the revised Bylaws implementing the Proposal will be needed to fully assess this item.</p> <p>In addition, the Proposal states that the ASO, ccNSO, GNSO and ALAC are the only SOs/ACs that have indicated that they intend to be voting participants in the Sole Member model. The Proposal contemplates that each SO/AC can resolve to immediately cease being a voting participant at any time. Given that it appears that only four of the seven SOs and ACs will be voting participants (at least</p>	<p>of the Transition) as part of Work Stream 1 to ensure a smooth Transition.</p>	<p>the CCWG, one critique of the designator model is that that SOs and ACs would need to establish legal personhood in order to maximize their ability to enforce their rights under the designator model, which certain SOs and ACs appear uncomfortable doing. The Board could then assess whether tools could be developed to address these concerns. For example, it may be possible to borrow upon the Single Sole Member model to address these concerns, such as constructing a single designator model, whereby the Community would exercise its designator rights through a legal entity formed for this purpose (similar to the</p>		<p>disruptive disagreements in the current model.</p> <p>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.</p> <p>Validity of Concerns:</p> <p>JD criticizes CCWG for not conducting a “comprehensive regulatory analysis” as suggested by the Board. It would be helpful to have more information about the analysis that JD and the Board contemplate. CCWG has undertaken significant analysis of the key aspects of the Sole Member model and the</p>

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		<p>while the RSSAC and SSAC would have only 2 votes (subject to the minority views expressed in the Proposals that proposed alternative voting weights).</p> <p>The Community Mechanism is essentially the manner through which SO and AC votes are tabulated and communicated to the Sole Member to determine how the Sole Member should act on a matter. The voting SOs/ACs are encouraged to apportion their votes (i.e. reflect the views of their constituency) and are encouraged not to vote as a block. Fractional votes would be permitted. Another important aspect of the CMSM is the ICANN Community Forum.</p>		<p>initially) and that any one of these groups could resolve to not be a voting participant in the future, the Board could assess whether there should be a minimum level of SO and AC participation past which point the Sole Member model would present a risk of capture or enhanced influence by the voting participant SOs and ACs? This risk of capture and increased influence could be increased by the fact that the Proposal contemplates a three month minimum waiting period for an SO/AC to elect to become a voting member (and a one year waiting period to re-engage as a voting participant).</p> <p>The creation of the Community</p>		<p>Sole Member).</p> <p>A meaningful number of CCWG participants view a mechanism that can be enforced through binding arbitration and, if necessary, litigation as essential to ensuring ICANN’s accountability. For these participants, “accountability” arises only if someone has the ultimate right to enforce the accountability measures in a courtroom. The enforceability of selected model is a valid and understandable goal. One potential alternative solution would be reliance upon an enhanced IRP mechanism, rather than ultimately relying on California courts, which would (when</p>		<p>alternatives it considered and we may be able to point JD to the analysis they seek or otherwise augment what has been done to date.</p> <p>JD raises concern that the Sole Member will have certain statutory rights (such as the rights to unilaterally amend Bylaws, initiate litigation for breach of fiduciary duty and remove directors without cause) that will be difficult to waive or modify. The statutory rights of the Sole Member 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.</p> <p>JD identifies concerns that some SOs and ACs will decide not to participate in the Community</p>

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				<p>Mechanism ICANN Community Forum is a meaningful addition to the Proposal, and could serve as a venue for the Community to openly discuss important matters affecting the Community. Before the Sole Member can use any of its powers, there would be a discussion and debate across the whole ICANN community in this forum, which would be open to members of the public. Given the importance of the Community Mechanism ICANN Community Forum as a tool to ensure broad community participation (beyond the voting participant SOs and ACs) and community-based decision making, the CCWG should</p>		<p>coupled with other proposed accountability enhancements) hold the Board accountable because other accountability tools would be available to the Community to address any circumstance where the Board failed to adopt the recommendations of an IRP Panel.</p> <p>Prior to accepting the CCWG’s Proposal, the Board could assess whether ICANN’s current governance model can be modified in a manner that significantly enhances ICANN’s accountability and provides NTIA and the Community the necessary assurances to complete the Transition, while at the same time</p>		<p>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. These requirements will be further developed in implementation. 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.</p> <p>Comments on Alternatives:</p> <p>One significant area of apparent misunderstanding that CCWG may wish to clarify relates to the degree to which the Proposal contemplates litigation to enforce the community powers. JD suggests that the Proposal focuses on the ability to go to</p>

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				<p>consider developing and publishing the rules of procedures for the Community Mechanism ICANN Community Forum. These rules of procedures should, to the extent possible, ensure that global stakeholders who are not directly involved in a voting participant SO/AC have a voice and can effectively participate within ICANN in the future. The Community would appear to benefit most if these rules of procedures are developed as part of Work Stream 1 and subjected to public comment. The proposal contemplates that the CCWG will pursue the establishment of the ICANN Community Forum in the implementation phase</p>		<p>preserving a governance model that has been developed and refined over a period of 16 years.</p> <p>ICANN's accountability could be significantly enhanced through enhancing the existing model, or transitioning to the Sole Member model or the designator model. One of the key distinctions between the various models is the level of legal enforcement available under the models. In practice, enhancing ICANN's existing model or implementing the designator model would likely enhance ICANN's accountability in a manner comparable to the Sole Member model in practice.</p>		<p>court, and that an alternative would be to rely on enhanced IRP mechanisms. In fact the CCWG Proposal establishes a robust IRP process, which will be developed further in the implementation phase, in order to reduce the need for litigation and, in certain instances, even preclude access to courts. 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.</p> <p>Validity of Concerns:</p> <p>JD raises the concern that voting procedures contemplated by the community mechanism will undermine the consensus-based decision making culture of ICANN. However, voting in the Community Mechanism will not replace the community's current involvement in ICANN activities and decision making.</p>

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				<p>of Work Stream 1.</p> <p>In addition, If it has not already done so, the CCWG should examine the impact that the proposed voting-based Community Mechanism will have on ICANN’s historical consensus-based decision making processes, and whether a shift from consensus-based decision making to “voting” may limit participation in ICANN and the consideration of minority views. This may be a difficult exercise, but it seems worthwhile given ICANN’s history and the benefits of consensus-based decision making. In addition, if it has not already done so, the CCWG should assess</p>		<p>However, as discussed above, what the alternatives to the Sole Member model lack (to some degree depending on the alternative) is the ultimate ability to seek enforcement of the model and its related accountability enhancements through a court of law, if warranted.</p> <p>See below for further assessment of other accountability enhancements.</p> <p>Following its deliberations, the Board should adopt the model that it believes is in the best interests of ICANN and the global public interest.</p>		<p>The Community Mechanism only allows the community to exercise the new community powers when and if needed. JD 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.</p> <p>Finally, JD raises the concern that the proposed Bylaws require the Board to adopt CCWG recommendations coming out of Work Stream 2, potentially violating director</p>

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				<p>whether the Sole Member model could result in voting participant SOs and ACs having a greater say in ICANN matters than currently in place, and provide participant SOs and ACs with the ability to override the policy recommendations of SOs or the advice given to the Board by ACs. For example, if the Board takes a specified action that it believed necessary to implement public policy advice of the GAC (e.g., advice that results in the Board seeking to amend the Bylaws to enact the public policy advice of the GAC, or a Board decision to increase or shift budgeted funding based on public policy advice of the GAC, etc.), could the voting</p>				<p>fiduciary duties. However, the Proposal in Section 11.1 is carefully worded to confirm ICANN's commitment to implementing CCWG's Work Stream 2 recommendations, rather than requiring automatic Board adoption; this can be clarified in implementation to avoid conflicting with director fiduciary duties.</p>

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				<p>participant SOs and ACs effectively override the GAC advice through the approval requirements set forth in the Proposal (e.g., reject the proposed Bylaw amendment or ICANN budget, or initiate a community IRP). The CCWG should assess whether the same situation applies to SO policy advice or SO requested Bylaw changes as well. The CCWG may be able to develop refinements to the Proposal to ensure against this potential impact.</p> <p>Finally, the Proposal also provides that a Bylaw provision will be adopted requiring the Board to adopt which would commit ICANN to implementing the</p>				

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				CCWG’s Work Stream 2 recommendations. This would presumably be enforced through the Sole Member. This requirement could violate the Board’s fiduciary obligations as the Board will need to assess each recommendation when made and make a determination at that time.				
ACT2: Proposal Element: Appeals Mechanisms: Independent Review Process (IRP) <i>CCWG-Accountability Proposal Section 5.1</i>								
2.	In addition to the Office of the Ombudsman and its reconsideration process, ICANN has also established a separate process for independent third-party review of Board actions alleged by a materially affected	The CCWG proposes that ICANN amend its Bylaws governing the IRP to introduce multiple changes, including: (i) expanding the scope of the IRP to allow challenges to board “inaction” and staff action and/or inaction that is inconsistent with the Articles or Bylaws and	For CCWG: From the beginning of its work, the CCWG identified certain enhancements to the IRP that it viewed as essential, including the binding nature of decisions, refining the standard of review, improving the IRP process and	While certain aspects of the IRP should be improved, many of the CCWG’s proposed methods for improvement would have a significant impact on ICANN’s ability to function. The CCWG has proposed changes that	Requires Bylaw amendments as well as a significant amount of implementation work. Time: It appears that there is still much work to be done in developing the proposed enhancements to the	The IRP could be enhanced to address certain of the CCWG’s primary proposed areas of improvement, while leaving other broader issues concerning, for example, changes to the standing requirements, to a	Requires Bylaw amendments. Implementation work would still be required. For example, it will take time to get the standing panel operational, but this can proceed with much of the detail as	Validity of Concerns: JD has not raised any concerns about the legal viability or legal workability of the IRP. JD 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

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	<p>party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws. The Bylaws provide that requests for independent review will be referred to an Independent Review Panel. ICANN has designated the International Centre for Dispute Resolution to operate the independent review process.</p>	<p>also to reconcile conflicting determinations rendered by process specific expert panels; (ii) grant “the community” standing to bring an IRP; (iii) redefine the “harm” that can be alleged as the basis for an IRP provide that the IRP will be able to hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds); (iv) provide that an IRP Panel shall use an objective standard of review and may review the challenged action “<i>de novo</i>” or under an objective standard of review; (v) specify the development of a standing panel; (vi) give a right to appeal IRP decisions; (vii) make IRP decisions binding upon ICANN (to the extent permitted by law doing so would not infringe on the Board’s statutory and fiduciary obligations); (viii) provide</p>	<p>achieving the implementation of the standing panel.</p> <p>For Transition: ICANN [and the NTIA] agree with the community that the IRP enhancements are an important accountability enhancement.</p> <p>At the same time, the mechanisms contemplated by the CCWG to achieve such enhancements must be sufficiently developed, articulated and understood so as to allow for appropriate evaluation and possible implementation.</p>	<p>considerably expand the type of conduct that may be subject to challenge under the IRP; “who” has the ability to bring an IRP; and the timeframe within which an IRP must be filed, all of which could lead to less surety and the possibility of the paralysis of ICANN to maintain its operations in a predictable fashion.</p> <p>Moreover, under the Proposal, there is a lack of clarity in how the Board will fulfill its statutory and fiduciary obligations in the event IRP Panel determinations become binding on ICANN.</p> <p>Further, the proposed expansion of the IRP to expert panels enters</p>	<p>IRP. Among other things, (i) it is unclear how, under the Proposal, “inaction” would be analyzed in the context of an IRP; (ii) more defined requirements as to what staff action/inaction could be subject to an IRP must be developed; (iii) more defined requirements as to what aspects of such “conflicting decisions” could be subject to an IRP must be developed; (iv) it is unclear how attenuated a harm the CCWG envisions as sufficient for purposes of establishing standing; and (v) it is unclear what the CCWG means when it states that “the IRP panel will not replace the Board’s fiduciary judgment with its own</p>	<p>scheduled review cycle, including experts and taking on inputs from the enhancements achieved during this transition period.</p>	<p>proposed by the Community.</p>	<p>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. Further, since the IRP process focuses on complaints that ICANN’s Articles or Bylaws have not been followed and presumably ICANN will continue to strive to conduct its affairs in accordance with its Articles and Bylaws (and the rough consensus of the community), resort to the IRP process should not be so common as to disrupt operations. A better understanding of JD’s concerns would be helpful.</p> <p>JD raises concern 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. If an IRP panel finds that the Board has not</p>

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		<p>for interim relief; and (ix) require certain settlement efforts in advance of or in connection with filing an IRP claim.</p>		<p>the IRP into operational matters, where violations of Bylaws and Articles are less clear and less likely. The current Bylaws limit IRPs to Board decisions, which are most likely to implicate the Bylaws or Articles.</p> <p>Finally, giving the IRP Panel the authority to review a claim under a <i>de novo</i> standard of review, effectively puts the IRP Panel in the place of the actual Board, since the IRP Panel is essentially able to substitute its views for the views of the Board, which is opposite of the usual business judgment rule deference that courts traditionally grant Board decisions.</p> <p>The proposed</p>	<p>judgment.”</p>			<p>complied with the Articles or Bylaws, it is for the Board to determine how to cure the inconsistency. This avoids an IRP infringing on the Board’s fiduciary or other legal duties. Moreover, IRP decisions are only binding to the extent “permitted by law” (i.e., they do not infringe on statutory and fiduciary duties). Access to <i>de novo</i> review is required to recognize the role of an independent IRP in filling part of the accountability gap of NTIA oversight. The Board will not be constrained in its fiduciary duties since <i>de novo</i> review focuses on whether the Articles or Bylaws are abided by.</p> <p>A common law system of precedential rulings is expressly contemplated and familiar common law processes will define the separation of powers. Procedural devices such as pleading standards can be adopted to give appropriate deference to matters of business judgment. The IRP is not</p>

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				<p>revisions to the IRP will likely result in a significant increase in IRPs, which will also lead to a significant increase in ICANN's costs and expenses, which would need to be reflected in future budgets.</p>				<p>intended to replace or second guess business judgment by the Board or Staff.</p> <p>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.</p> <p><i>Comments on Alternatives:</i></p> <p>The CCWG Proposal provides broad principles to guide the development of an enhanced IRP process but refers development of procedural rules to a collaborative effort of CCWG, the Standing Panel, legal counsel and experts, with the Board itself giving final approval. This need not undermine concurrence with the broad concepts for the IRP outlined in the Proposal since there will be opportunity for the Board and its counsel and the community to weigh in on the particulars when developed.</p>

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3.	An IRP may be filed by “[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”	ICANN would amend its Bylaws to provide that the IRP will be available to reconcile conflicting decisions of process-specific “expert panels.”	<p>For CCWG: The CCWG wants IRPs to be accessible from a standing perspective, and apply to conflicting decisions of process-specific “expert panels.”</p> <p>For Transition: See above.</p>	Allowing IRPs to be filed to challenge conflicting decisions of process-specific “expert panels” is a considerable expansion of the current model, which could lead to (i) an increase in costs to ICANN, (ii) potential paralysis of ICANN’s operations and result in a chilling effect and (iii) potentially be redundant of the proposed enhanced reconsideration process.	<p>Requires Bylaw amendments.</p> <p>Time: It appears that there is still much work to be done on this proposed mechanism. Among other things, more defined requirements as to what aspects of such “conflicting decisions” could be subject to an IRP must be developed. For example, does the CCWG contemplate that IRPs may be used to challenge both the merits of conflicting decisions of process-specific “expert panels” or only the process utilized by such panels?</p>	Two primary alternatives are: (1) retain current model and allow IRPs only to challenge Board action that is allegedly inconsistent with the Articles or Bylaws (while enhancing Board accountability through other measures); or (2) retain the existing model, but provide that the consideration and possible development of appropriate appeals from “expert panel” determinations be assessed in the review of the New gTLD Program, with the possibility that such mechanisms will be implemented in future rounds.	Nothing required to maintain existing model (other than revisions to Bylaws to reflect other accountability enhancements). If the IRP is expanded to allow for challenges to conflicting decisions of process-specific “expert panels,” further work must be done to understand the extent to which such decisions may be challenged in the IRP. Once formulated, Bylaw amendments would be required.	<p>Validity of Concerns:</p> <p>JD raises concern that the IRP enabling IRP review of conflicting decisions of process-specific “expert panels” will led to potential paralysis and a chilling effect. A better understanding of JD’s concerns would be helpful.</p> <p>Comments on Alternatives:</p> <p>The alternative proposals do not address any legal failure of CCWG’s IRP. CCWG may or may not wish to consider the alternatives at this stage.</p>

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4.	The Bylaws provide that “[i]n order to be materially affected [and thus have standing to bring an IRP], the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s actions.”	ICANN would amend its Bylaws to eliminate the current definition of “materially affected,” and instead simply state that <u>The concept that standing to bring an IRP is limited to “any person/group/entity “materially affected” by a violation of the Articles or Bylaws is not changed in any significant respect” by an ICANN action or inaction” may bring an IRP.</u>	<i>For CCWG:</i> The CCWG wants IRPs to be accessible from a standing perspective. <i>For Transition:</i> See above.	The CCWG is proposing to change the definition of “materially affected” as currently stated in the Bylaws. Under the CCWG’s proposal, it is unclear how attenuated a harm the CCWG envisions as sufficient for purposes of establishing standing. Potential for multiple IRPs to be filed that relate to the same action, which could risk overwhelming the IRP Panel and leading to conflicting rulings.	Requires Bylaw amendments. <i>Time:</i> It appears that there is still much work to be done on this proposed mechanism. Among other things, under the Proposal, it is unclear how attenuated a harm the CCWG envisions as sufficient for purposes of establishing standing.	Retain current model with its definition of “materially affected” pending any further articulation by the CCWG of how it intends to revise the definition of “materially affected.”	Nothing required to maintain existing model.	Validity of Concerns: The Proposal does not contemplate eliminating the current definition of “materially affected.” The existing definition could be carried forward consistent with the Proposal. Procedures to consolidate multiple similar IRPs and allow for intervention into existing IRPs are planned for consideration in the implementation phase.
5.	The Community does not have standing to bring an IRP.	ICANN would amend its Bylaws to provide that the “Community Sole Member” <u>would have standing to bring an IRP on behalf of the “Community”. The standing requirements are specified in the Proposal.</u>	<i>For CCWG:</i> The CCWG wants IRPs to be accessible from a standing perspective. <i>For Transition:</i> See above.	Allowing IRPs to be filed by the Community is a considerable expansion from the current model. It is also unclear what the “Community” is for purposes of the IRP	Requires Bylaw amendments. <i>Time:</i> It appears that there is still much work to be done on this proposed mechanism. The CCWG has not	Retain current model pending any further articulation by the CCWG of how the “Community IRP” would work. Rather than permit the Community to bring	Nothing required to maintain existing model.	Validity of Concerns: One significant area of apparent misunderstanding that CCWG may wish to clarify relates to the degree to which the Proposal contemplates litigation to enforce the community powers. JD suggests that the Proposal

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		<p>as discussed in Item 4 above.</p>		<p>(i.e., the Sole Member?) or how it would act or direct an IRP.</p> <p>Increase in costs to ICANN, as the CCWG proposes that ICANN will bear the costs in such instances. The IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.</p>	<p>presented a proposal concerning the mechanism or process by which the “Community” could bring an IRP, including standing requirements.</p>	<p>IRPs, it may be more productive to develop an alternative process whereby the Community could express its concerns and require the Board to consider and/or act on those concerns.</p>		<p>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, which will be developed further in the implementation phase, in order to reduce the need for litigation and, in certain instances, even preclude access to courts. 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.</p> <p>JD’s concerns about costs are valid and were considered by the CCWG. Although ICANN will bear the costs associated with the standing panel, the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of process (see para. 268.7).</p> <p>We agree that significant work</p>

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								<p>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.</p> <p>Comments on Alternatives:</p> <p>The alternative fails to provide independent accountability. A process in which the community expresses its concerns only to the Board for its review lacks independence. The alternative could allow the Board to use its discretion to ignore the concerns of the community, potentially leading disputes into the courts as opposed to resolution through an internal ICANN process.</p>
6.	<p>The IRP Panel must apply a defined standard of review to the IRP request, focusing on:</p> <p>(1) did the Board act without conflict of interest in taking its</p>	<p>ICANN would amend its Bylaws to provide that the standard of review be an “objective examination,” and that the IRP Panel may undertake a “<i>de novo</i>” review of the case, make findings of fact, and issue decisions based on those</p>	<p>For CCWG: The CCWG is calling for a fully independent judicial/arbitral function that is “not beholden to ICANN.”</p> <p>For Transition: See above.</p>	<p>By giving the IRP Panel the authority to review a claim under a <i>de novo</i> standard of review, it effectively puts the IRP Panel in the place of the actual Board, meaning that the IRP Panel is essentially able to</p>	<p>Requires Bylaw amendments.</p> <p>Time: Minimal.</p> <p>Cost: Potentially significant. The IRPs that have been initiated to date have been much more</p>	<p>Two primary alternatives include: (1) retain current model; or (2) create a standard by which some level of consideration or deference is given to decisions of the Board.</p>	<p>Requires Bylaw amendments (except if current model is retained).</p> <p>Cost: Minimal.</p>	<p>Validity of Concerns:</p> <p>As explained in Item 2 above, the jurisdiction of the IRP would be limited and would not extend into matters of fiduciary judgment. The Proposal would not place the IRP into the Board’s shoes but would provide a means of holding the</p>

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	<p>decision?;</p> <p>(2) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and</p> <p>(3) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?</p>	<p>facts.</p> <p>The proposal recommends that IRP decisions be “precedential” – meaning, that panelists should consider and may rely on prior decisions” and that by “conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers.”</p>		<p>substitute its views for the views of the Board, which is opposite of the usual business judgment rule that courts traditionally grant Board decisions.</p>	<p>expensive than anticipated, costing millions of dollars.</p> <p>De novo review, if adopted, would place the IRP Panels in the Board’s shoes, with less information and less accountability to the Community. Expanding that review to staff/operational work is not the stated intent of the IRP enhancements. While we recognize that the “business judgment rule” may not be viewed as strong enough, <i>de novo</i> review would effectively move the power of the organization to IRP Panels as opposed to the Board, which is ultimately responsible for the governance of the organization.</p> <p>Moreover, a <i>de novo</i></p>			<p>Board accountable to the Articles and Bylaws. IRP review should limit Board operational discretion no more than the potential for judicial review limits, Board or executive action generally.</p> <p>The enhanced IRP process would judge the actions of the Board against its own Articles and Bylaws. The Board would retain the ability to amend those Bylaws, consistent with the processes for doing so which would allow for the Community Mechanism as Sole Member veto with a 66% supermajority. Changes to IRP enhancements and other Fundamental Bylaws would require a higher threshold. Accordingly, the Board would retain authority for directing the affairs of ICANN but must enlist considerable community support for significant Bylaw changes. The IRP would function to ensure that the Board abided by ICANN’s Articles and Bylaws.</p> <p>Consistency of decisions is not</p>

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					review does not support consistency in decision-making among IRP Panels.			<p>undercut by <i>de novo</i> review and the Panel is not obligated to undertake <i>de novo</i> review of each case (para. 268.10). The Proposal contemplates procedural rules to discourage frivolous claims and the Proposal also recommends that IRP decisions create a body of precedent.</p> <p>JD's analysis does not recognize that the largely procedural IRP was deemed to be an ineffective oversight method by the CCWG under the current organization.</p>
7.	IRPs are considered by one or three member IRP Panels, but in practice demonstrates the prevalence of three member panels.	<p><u>The standing panel will be comprised of a minimum of seven panelists.</u> The decisional panel will consist of three panelists <u>selected by the petitioner and ICANN from the standing panel.</u></p> <p>The panel members must be independent of ICANN, including SOs/ACs.</p> <p>The panel should be</p>	<p><i>For CCWG:</i> This does not appear to be critical. <u>Independence and diversity are critical to the IRP.</u></p> <p><i>For Transition:</i> See above.</p>	Potential increase in time necessary to convene the IRP Panel, although all IRP Panels to date have been three member panels.	<p>Requires Bylaw amendments.</p> <p><i>Cost:</i> The cost of compensating one <u>versus three-seven</u> panelists <u>(in the form of a salary)</u> is real, but likely not significant.</p>	<p>Amend Bylaws to provide that the decisional panel may consist of a single panelist or, if an IRP relates to certain specified issues, to three panelists.</p> <p>Consideration should also be given to whether the removal right should be strengthened by, for example, giving each</p>	<p>Requires Bylaw amendments.</p> <p><i>Cost:</i> Minimal.</p>	<p><i>Validity of Concerns:</i></p> <p>It is not clear why JD believes that there is potential for an increase in the time necessary to convene the IRP. The existence of a standing panel should decrease time delays.</p> <p><i>Comments on Alternatives:</i></p> <p>See comments on Item 23.</p>

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		geographically diverse. Panelists will serve fixed terms of five years with no removal except for specified cause.				of ICANN and the Community the ability to remove and replace one panelist a year.		
8.	The IRP Panel may (i) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and (ii) recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.	The Proposal contemplates that an IRP Panel will be able to direct the Board and staff to take actions, but that the IRP panel will not replace the Board’s fiduciary judgment with its own judgment. To the extent permitted by law, IRP decisions should be binding on ICANN.	For CCWG: The CCWG is calling for a fully independent and authoritative judicial/arbitral function. For Transition: See above.	Potentially considerable, depending on the nature of the relief awarded by the IRP Panel. Significant risk that by giving the IRP Panel powers even stronger than those of the Board, including with respect to operational matters, the IRP Panels will infringe on the Board’s statutory obligations and fiduciary duties because the Board will lose authority to make final decisions on behalf of the corporation.	Requires Bylaw amendments. Time: It appears that there is still much work to be done on this proposed mechanism. It is unclear what the CCWG means when it states that “the IRP panel will not replace the Board’s fiduciary judgment with its own judgment.”	Two alternatives include: (1) retain current model; or (2) grant the IRP Panel authority to order ICANN to remedy the violation, but leave to ICANN’s discretion the manner in which the remedy is effectuated.	Nothing required to maintain existing model. Perhaps devise a procedure that would allow a sub-set of the Board to initially assess (either prior to the constitution of an IRP Panel or following the decision of an IRP Panel) whether the IRP would infringe on the Board’s statutory obligations and fiduciary roles. The threshold for such a determination could be sufficiently high such that the Board should search for ways of determining	Validity of Concerns: The Proposal is clear that the relief will be declaratory in nature; it could only be injunctive in extreme cases where interim relief is required pending a final resolution (see Item 10 below). Express preservation of the Board’s fiduciary role is contemplated. ICANN would not lack discretion in the manner in which it will comply with the IRP decision – provided that such discretion did not amount to avoidance of the IRP declaration. 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. The IRP decides cases

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							<p>that the Panel's decision could be implemented without violating its fiduciary duties.</p>	<p>based on reference to the Articles and Bylaws (i.e., whether the Board has complied with the Articles or Bylaws), not by replacing the Board's fiduciary judgment (i.e., does not direct the Board with respect to any action). This avoids any infringement by the IRP of the Board's fiduciary or other legal duties. 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.</p> <p>The Board does not lose its ability to amend Standard Bylaws, although it would be subject only to a veto by a 66% supermajority vote within the Sole Member.</p> <p>Comments on Alternatives:</p> <p>The alternative implementation does not appreciate that having the Board rule on the limits of its fiduciary powers risks rendering the IRP an ineffective oversight mechanism. The IRP is expressly charged with</p>

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								preserving the Board’s fiduciary independence.
9.	IRP Panel declarations are not binding on ICANN.	To the extent permitted by law , IRP Panel declarations would be binding on ICANN.	<p>For CCWG: The CCWG is calling for a fully independent and authoritative judicial/arbitral function.</p> <p>For Transition: See above.</p>	<p>Potentially considerable, depending on the nature of the relief awarded by the IRP Panel.</p> <p>Significant risk that the IRP Panel will infringe on the Board’s statutory obligations and fiduciary duties.</p>	Requires Bylaw amendments.	Two alternatives include (1) retain current model; or (2) develop a framework to ensure that IRP Panel declarations may not bind the Board where doing so would override the Board’s fiduciary duties and statutory obligations.	<p>Nothing required to maintain existing model.</p> <p>Perhaps devise a procedure that would allow a sub-set of the Board to initially assess (following the decision of an IRP Panel) whether the IRP Panel’s decision, if implemented, would infringe on the Board’s statutory obligations and fiduciary roles. The threshold for such a determination could be sufficiently high such that the Board should search for ways of determining that the Panel’s decision could be implemented without violating its fiduciary duties.</p>	<p>Validity of Concerns:</p> <p>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. The IRP decides cases based on reference to the Articles and Bylaws (i.e., whether the Board has complied with the Articles or Bylaws), not by replacing the Board’s fiduciary judgment (i.e., does not direct the Board with respect to any action). This avoids any infringement by the IRP of the Board’s fiduciary or other legal duties. 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.</p> <p>Comments on Alternatives:</p> <p>The alternative does not appreciate that having the Board rule on the limits of its fiduciary</p>

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								powers risks rendering the IRP an ineffective oversight mechanism.
10.	No interim relief is permitted in advance of Board action.	Interim (including injunctive) relief will be available in advance of Board/staff action where a complainant can demonstrate (i) Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken; (ii) Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and (iii) A balance of hardships tipping decidedly toward the party seeking the relief.	<i>For CCWG:</i> The CCWG is calling for a fully independent and authoritative judicial/arbitral function. <i>For Transition:</i> See above.	Permitting interim relief before any actual action is taken by ICANN (Board or staff) could have serious adverse consequences on ICANN’s ability to function.	Requires Bylaw amendments.	Two alternatives include (1) retain current model; or (2) provide for interim relief only where there is a definite, concrete, real and substantial controversy amenable to specific relief, and where the complainant demonstrates that (i) the harm cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken; (ii) it has a likelihood of success on the merits; and (iii) a balance of hardships tips decidedly toward the party seeking relief.	Nothing required to maintain existing model. Defining a standard for interim relief will require amendments to the Bylaws.	Validity of Concerns: The Proposal already has a standard for determining when interim relief will be available. Comments on Alternatives: The proposed alternative seems quite similar to the actual Proposal. Interim relief is appropriate for serious questions going to the merits and would be undermined by a narrowly drawn definition of “controversy”.
11.	Cooperative engagement and conciliation in	The CCWG contemplates that the parties engage make reasonable	<i>For CCWG:</i> This does not appear critical (although	It appears that there is still much work to be done on this proposed	Requires Bylaw amendments.	Consider limiting cooperative engagement to a	Requires Bylaws amendments.	Validity of Concerns: JD raises concern that requiring

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	<p>advance of filing an IRP are both voluntary.</p>	<p>settlement efforts in advance of or in connection with the filing filing of an IRP, including by claim, which efforts may include mediation.</p>	<p>timing issues need to be addressed). <i>For Transition:</i> See above.</p>	<p>mechanism. However, the injection of a mediator in CEP raises serious questions, including, for example, how the mediator is selected, whether the mediation would be nonbinding, whether an IRP may be pursued following non-binding mediation, whether the IRP Panel has access to the mediation materials. Having a non-binding mediation prior to an IRP risks a serious drain on ICANN’s resources. Cooperative engagement should be designed to narrow the issues for an IRP or preferably resolve the issues entirely. Incentives should be provided in this respect.</p>		<p>defined period of time so that neither side can stall the process. One alternative is to provide for mediation in CEP only if both parties agree.</p>	<p>Cost: Potentially significant if mediation is pursued regularly.</p>	<p>reasonable efforts at settlement prior to recourse to the IRP that could include mediation if the parties so choose raises serious questions. The Proposal contemplates that either party may propose a mediator after the initial CEP meeting. Such efforts would be voluntary and non-binding, in contrast to the binding IRP process, and are intended to encourage resolution without IRP involvement. <i>Comments on Alternatives:</i> The CCWG may wish to consider providing a time limit for cooperative engagement and clarifying that mediation is voluntary and must be agreed to by both parties.</p>

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	Current Model	CCWG Proposal	Motivation & Importance	Impact Analysis	Estimated Implementation	Jones Day Identified Potential Alternative(s) ¹	Potential Alternative(s) Implementation	Sidley/Adler Comments
				The CEP will be reviewed as part of Work Stream 2.				
12.	A request for independent review must be filed within 30 days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.	A materially affected party may <u>must</u> bring an IRP “within [number of days to be determined by the IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them.”	For CCWG: The CCWG appears to want to make the IRP more accessible and to cover more issues and to “broaden the types of decisions” subject to reconsideration. For Transition: See above.	This “actual knowledge” standard could result in IRPs being filed long after the allegedly offending action occurs. A mechanism for “finality” needs to be added to avoid this result. An important aspect of accountability is predictability and there are many who rely on ICANN for a predictable business environment. The IRP (and the Reconsideration Process) should provide for some level of predictability for when challenges must be brought. Clarity of other issues, such as the exact expectations of what ICANN	Requires Bylaw amendments.	Two alternatives include (1) retain current model; or (2) allow a materially affected party to file an IRP within a certain number of days after the affected party became aware of, or reasonably should have become aware of, the challenged action.	Nothing required to maintain existing model. Revising the deadline for when an IRP must be filed will require amendments to the Bylaws. Cost: Minimal.	Validity of Concerns: The Proposal was intended to liberalize the timing requirement so that more disputes would be able to be addressed through the IRP as opposed to the courts. Unduly narrow IRP time periods will undermine this objective. Finality is provided by the binding result of the IRP process.

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				would fund for IRPs is needed. The potential for ICANN to fund panel costs for the expanded IRPs, which in the past have been quite expensive, could have a significant impact on ICANN’s budget.				
ACT3: Proposal Element: Appeals Mechanisms: Request for Reconsideration <i>CCWG-Accountability Proposal / Section 5.2</i>								
13.	ICANN’s Board Governance Committee is responsible for receiving requests from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such	The CCWG proposes that ICANN amend its Bylaws governing the reconsideration process to introduce multiple changes, including: (i) expanding “who” has standing to file a reconsideration request to include those materially affected by a recent Board or staff action or inaction that contradicts ICANN’s missions mission , core values, commitments and policies, and also those challenging seeking	For CCWG: From the beginning of its work, the CCWG identified certain enhancements to the reconsideration process that it viewed as essential, including expanding the scope of permissible requests, particularly as it relates to staff behavior, and also removing ICANN’s counsel (inside and outside) from the reconsideration process. The Proposal	While certain aspects of the reconsideration process should be improved, some of the CCWG’s proposed methods for improvement would have a significant impact on ICANN. The CCWG has proposed changes that appear to conflate the reconsideration process with the IRP process.	Requires Bylaw amendments as well as implementation work.	The reconsideration process could be enhanced to address certain of the CCWG’s primary proposed areas of improvement (including expanding the deadline from 15 to 30 days), while leaving other broader issues concerning, for example, changes to the standing requirements and involvement of the Ombudsman and the	Requires Bylaw amendments. Implementation work would still be required.	Validity of Concerns: The Proposal does not state that ICANN’s counsel (inside and outside) should be removed from the reconsideration process but rather emphasizes the need for more active involvement by the Ombudsman and the Board Governance Committee. Comments on Alternatives: JD provides no rationale for distinguishing those enhancements that it would readily accept from those it

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	affected person or entity believes has been taken without consideration of material information.	reconciliation of conflicting/ inconsistent “expert opinions” ; (ii) having the Ombudsman review a reconsideration request in the first instance and recommending a course of action to the Board Governance Committee, followed by the BGC’s review and recommendation to the full Board, which would make the ultimate decision; and (iii) extending the time for filing a Request for Reconsideration from 15 to 30 days.	<p>states that there is need to rely less on the ICANN legal department to guide the BGC on its recommendations and that more Board member engagement is needed in the overall decision-making process.</p> <p>Transparency improvements are also desired regarding the information that goes into the Board’s decision-making process and the rationale for decisions.</p> <p>For Transition: ICANN and the NTIA agree with the community that the reconsideration enhancements are an important accountability enhancement.</p>			entire Board in the reconsideration process to a scheduled review cycle, including experts and taking on inputs from the enhancements achieved during this transition period.		would delay to a periodic, scheduled review cycle.
14.	Reconsideration is currently available to	Amend “who” has standing to file a reconsideration	For CCWG: The CCWG wants to	By amending the reconsideration	Requires Bylaw	Provide that (i) IRPs are available to	Requires Bylaw	Validity of Concerns:

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	<p>challenge staff actions/inactions that contradict ICANN policy(ies) or Board actions/inactions that are taken without consideration of material information or based on false or inaccurate material information.</p>	<p>request to include those materially affected by a recent Board/staff action/inaction that contradicts ICANN’s mission and core values, commitments and policies, and also those challenging seeking reconciliation of conflicting/ inconsistent “expert opinions.”</p>	<p>expand the scope of permissible requests, particularly as it relates to staff behavior. <i>For Transition:</i> See above.</p>	<p>process to include challenges to recent Board or staff actions/inactions that contradict ICANN’s mission and core values, commitments and policies, the CCWG appears to conflate the reconsideration process with the IRP process (because the IRP process contemplates that an IRP may be initiated to challenge an alleged violation of the Articles or Bylaws, and the Bylaws contain ICANN’s mission and core values). Consider further articulating the degree to which the IRP and reconsideration processes overlap with and/or complement the other. Increase in</p>	<p>amendments. <i>Time:</i> Minimal.</p>	<p>challenge Board actions; (ii) reconsideration is available to challenge staff actions/inactions taken in violation of ICANN’s mission and core values and “policies”; and (iii) reconsideration is available to challenge board actions/inactions taken without consideration of material information or based on false or misleading information. Here, the only change is expanding the scope of reconsideration to include challenges to staff actions/inactions taken in violation of ICANN’s mission and core values (instead of just policies).</p>	<p>amendments. <i>Time:</i> Minimal. <i>Cost:</i> Moderate.</p>	<p>While there is no intent to conflate the reconsideration and IRP processes, it is intended that reconsideration will resolve matters that might otherwise lead to an IRP, thereby reducing reliance upon, and the frequency with which, a more costly IRP process is invoked. <i>Comments on Alternative:</i> None.</p>

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				<p>reconsideration requests could lead to a substantial increase in costs to ICANN.</p> <p>In addition, allowing parties to seek reconsideration requests based on conflicting/ inconsistent “expert opinions” is a considerable expansion from the current model. Consider developing more defined requirements as to what aspects of such “conflicting/ inconsistent expert opinions” could be subject to a reconsideration request.</p> <p>This expansion could also potentially paralyze ICANN’s operations, and cause a chilling effect.</p>				

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15.	The Board has designated the Board Governance Committee (BGC) to review and consider any Reconsideration Requests.	<p>Reconsideration requests will be reviewed by the Ombudsman in the first instance. Requests should no longer go to ICANN’s lawyers (in-house or out-house) for the first substantive evaluation.</p> <p>The Ombudsman would make an initial recommendation to the BGC. The BGC would then make a recommendation to the Board, which would make the final decision on all reconsideration requests.</p> <p>It is also proposed that ICANN’s lawyers (in-house or outside) should be removed from the reconsideration process entirely.</p>	<p>For CCWG: The CCWG states that “there is need to rely less on the ICANN legal department ... to guide the BGC on its recommendations” in the reconsideration process.</p> <p>For Transition: See above.</p>	<p>The review and recommendations concerning reconsideration requests require substantial time and effort. Given that ICANN has, in recent years, received between 20 and 45 requests for recommendation (per year), it seems that tasking the Ombudsman with making recommendations to the BGC would overwhelm the Ombudsman.</p> <p>Furthermore, requiring the entire Board to review and determine all reconsideration requests could place an undue burden on the Board.</p> <p>In addition, there may be instances where,</p>	Requires Bylaws amendments.	<p>The Ombudsman could make its initial recommendation to the BGC. The BGC would continue to have the delegated authority to determine all reconsideration requests concerning staff action/inaction. The entire Board would continue to decide reconsideration requests concerning Board action.</p> <p>Whether it is the BGC or the Board making the determination, the BGC or Board needs to have the ability to obtain whatever advice and expert counseling it requires in order to carry out its obligations. Any limitation on this ability infringes upon the Board’s authority and conflicts with the BGG’s and Board’s fiduciary obligations</p>	Requires Bylaw amendments.	<p>Validity of Concerns:</p> <p>The Proposal does not state that “ICANN’s lawyers (in-house or outside) should be removed from the reconsideration process entirely.” See above relating to Item 13. Rather, the Proposal emphasizes the need for more active involvement by the Ombudsman and the Board Governance Committee. Counsel could be involved as needed to advise the Ombudsman, the BGC and/or the Board.</p> <p>Comments on Alternatives:</p> <p>None.</p>

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				<p>before filing a Reconsideration Request, the requester had lodged a complaint with the Ombudsman about an ICANN staff or Board action or inaction and the Ombudsman has already investigated and attempted to resolve the complaint in his Ombudsman capacity. The CCWG has not proposed what the Ombudsman role should be in such circumstances, and whether the Ombudsman's involvement prior to a reconsideration request being filed is problematic.</p> <p>Finally, consideration of reconsideration requests are inherently legal in nature and necessitate the provision of legal advice in their</p>		<p>to make decisions on an informed basis.</p> <p>In addition, the Proposal does not address what confidentiality requirements should be imposed on the Ombudsman, as it relates to confidential information provided by the parties to the reconsideration request.</p>		

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				resolution. Eliminating lawyers from involvement in the reconsideration process would be quite detrimental to the organization, particularly insofar as limiting the Board’s inputs to those of the Ombudsman may impair the Board’s ability to comply with its fiduciary obligations.				
ACT4: Proposal Element: Bylaws: Mission/Commitments/Core Values CCWG-Accountability Proposal / Section 3								
16.	Mission: ICANN’s current Bylaws provide for a Mission statement that defines and limits ICANN’s Mission.	<u>It is contemplated that the</u> The Proposal would amend ICANN’s Mission as follows: (1) Provide that ICANN has no power to act “other than in accordance with, and as reasonably appropriate to achieve its Mission.” <u>and clarify that ICANN’s powers are</u>	For CCWG: The CCWG views ICANN’s Mission statement, Core Values and Commitments <u>as</u> at “the heart of ICANN’s accountability.” For Transition: It is important that ICANN avoid mission creep.	The expanded IRP and reconsideration request processes will likely increase the number of IRPs and reconsideration requests raised by the aggrieved parties. As such, <u>contemplated</u> revisions to ICANN’s Mission aimed at tightening the scope	Requires Bylaw amendments to reflect revised Mission statement. Time: Not overly time consuming from a drafting perspective.	Maintain current Bylaw provisions (which probably would not be acceptable to the Community), or, to the extent possible, modify the <u>contemplated</u> proposed revisions to more clearly specify ICANN’s Mission in	Depends upon approach taken. Time: Minimal, assuming the path is to revise CCWG’s proposed revisions.	Validity of Concerns: It is premature to suggest that the IRP process enhancements, coupled with contemplated clarifications of ICANN’s Mission, “will likely increase the number of IRPs and reconsideration requests.” Given that the IRP process focuses on complaints that ICANN’s Articles or Bylaws

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		<p><u>'enumerated' – meaning that anything not articulated in the Bylaws are outside the scope of ICANN's authority.</u></p> <p>(2) Provide that ICANN “shall not engage in or use its powers to attempt the regulation of services that use the Internet’s unique identifiers, or the content that they carry or provide.” <u>(i.e., clarify that ICANN’s Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide).</u></p> <p>(3) Provide that, with respect to domain names, ICANN’s Mission is limited to coordinating policy development and implementing policy that <u>(i) for which uniform or coordinated resolution</u> is reasonably necessary to facilitate the openness, interoperability, resiliency</p>	<p>In addition, holding ICANN to its technical Mission is important for the Transition to ensure that ICANN is focused on IANA.</p>	<p>and limiting ICANN’s role and actions will likely only increase the potential for IRPs and reconsideration requests as parties will likely make claims that actions/inactions were outside of ICANN’s Mission. In addition, while well intentioned, the <u>contemplated</u> proposed revisions understandably lack clarity and are in some respects ambiguous, which also will likely lead to an increased number of IRP and reconsideration requests processes.</p>		<p>order to avoid confusion, reduce ambiguity and minimize competing interpretations in the future.</p> <p>The <u>contemplated</u> proposed revisions would be less challenging if the proposed IRP and reconsideration request modifications are scaled back.</p>		<p>have not been followed and presumably ICANN will continue to strive to conduct its affairs in accordance with its Articles and Bylaws (and the rough consensus of the community), resort to the IRP process should be relatively uncommon.</p> <p>To the extent that there are IRPs about the scope of the contemplated revised ICANN Mission, it is contemplated that a common law system of precedential rulings will assist in resolving such disputes in an orderly manner so that they will, over time, tend to decrease. Some potential disagreement about the meaning of added Bylaws language is an inevitable consequence of the addition of new terminology to enhance accountability, and an effective IRP process will help efficiently resolve such disagreements.</p> <p><i>Comments on Alternatives:</i></p> <p>JD does not provide an</p>

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		<p><u>resilience</u>, security and/or stability of the DNS and (ii) that are developed through bottom-up, <u>consensus-based</u> multi-stakeholder processes and designed to ensure DNS stability and security <u>the stable and secure operation of the Internet's unique names systems</u>.</p> <p>(4) ICANN's role with respect to IP addresses and AS numbers is as described in an MOU between ICANN and RIRs.</p> <p>(5) ICANN's role with respect to protocol port and parameter numbers is as TBD by the IETF.</p> <p>(6) ICANN's role with respect to the DNS root server system is as TBD by the root server operators.</p>						alternative, other than scaling back the IRP process or clarifying the Bylaws language. The latter can be accomplished during the drafting process.
17.	Core Values: The Bylaws also include Core Values that "should guide the	<u>It is contemplated that the</u> The Proposal <u>would</u> significantly revise ICANN's existing Core	<i>For CCWG:</i> The CCWG views ICANN's Mission, Core Values and	When measured with the proposed changes to the IRP and reconsideration	Requires Bylaw amendments to reflect revised Core Values.	Maintain current Bylaw provisions, or modify <u>contemplated</u> proposed revisions to	Depends upon approach taken. Time: Minimal,	Validity of Concerns: Same as Item 16 above.

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	<p>decisions and actions of ICANN.” Under the Bylaws, the Core Values apply to all ICANN bodies, and not just the corporation.</p> <p>Per the Bylaws, the Core Values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and, because they are statements of</p>	<p>Values:</p> <p>(1) Providing that <u>in performing its Mission</u>, the Core Values are absolutes, and not principles that should <u>“continue to guide the decisions and actions of ICANN,” as currently provided in the Bylaws.</u></p> <p>(2) Adding new <u>Revising</u> Core Values, such as “depending upon market mechanisms to promote and sustain a <u>healthily healthy</u> competitive environment in the DNS market” and <u>adding new Core Values, such as</u> “striving to achieve a reasonable balance between the interests of different stakeholders.”</p> <p>(3) Adding qualifying text to existing Core Values, such as “to ensure that the bottom-up, multi-stakeholder policy development process is used to ascertain the global</p>	<p>Commitments <u>as</u> at “the heart of ICANN’s accountability.”</p> <p>For Transition: Holding ICANN to enhanced Core Values could further ICANN’s accountability.</p>	<p>requests processes, the <u>contemplated</u> revisions will create additional grounds for aggrieved parties to allege actions/inactions of the Board and staff taken in violation of the Bylaws.</p> <p>The <u>contemplated</u> modifications of the Core Values and the <u>contemplated</u> revisions to the “balancing” test will potentially create an environment where ICANN will be subject to a number of IRPs and reconsideration requests and possibly result in staff and Board action (and inaction) being second-guessed on a daily or weekly basis through IRPs and reconsideration requests, which would</p>	<p>Time: Not overly time consuming from a drafting perspective.</p>	<p>(1) more clearly specify ICANN’s Core Values, (2) preserve the concept that Core Values are guiding principles rather than absolutes, and (3) preserve the existing Bylaw “balancing test”: “any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”</p> <p>Each Core Value should be reviewed and assessed to ensure that the Core Value is appropriate for</p>	<p>assuming the path is to revise CCWG’s.</p>	<p>Comments on Alternatives:</p> <p>Same as Item 16 above.</p> <p>Regarding (2), it is contemplated that the Proposal does in fact preserve the concept that Core Values should “guide the decisions and actions of ICANN;” however JD is correct that it is contemplated that the current Bylaw language referring to Core Values as “statements of principle rather than practice” will not continue to be incorporated into the Bylaws.</p> <p>Regarding (3), the Proposal contemplates providing a modified balancing test that the CCWG believes is more in line with accountability enhancements.</p>

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	<p>principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.</p>	<p>public interest and that those processes are accountable and transparent.”</p> <p>(4) Removing certain existing Core Values and relabeling them as “Commitments”, with revised text (see below).</p> <p>(5) Modifying the “balancing” language in the Bylaws to provide that “where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN’s Mission that is identified through the bottom-up, multi-stakeholder processes.</p> <p>(6) Limiting the scope of application to ICANN and not other ICANN bodies (SOs and ACs).</p>		<p>divert staff and Board attention away from operating ICANN and fulfilling ICANN’s mission, and, in some circumstances, could result in organizational paralysis and inaction.</p>		<p>ICANN, including the impact of the Core Value when coupled with the expansion of the IRP and reconsideration request processes.</p> <p>The contemplated proposed revisions would be less problematic if (1) the proposed IRP and reconsideration request modifications are scaled back, and (2) the current “balancing” test is maintained, in each case, following appropriate revisions along the lines discussed above.</p>		

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18.	<p>Commitments: Bylaws do not currently contain the “Commitments” provided for in the Proposal.</p>	<p><u>It is contemplated that the</u> Proposal would create a category of “Commitments”:</p> <p>(1) Adding entirely new concepts, such as ICANN respecting international human rights (specific wording to be provided by the CCWG at a later date) and “Maintain[ing] the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single interoperable Internet”</p> <p>(2) Importing and revising existing Core Values, such as importing Core Value #1 (preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet) and revising it to also commit ICANN to “Preserve and enhance the neutral and judgment free operation of the DNS” and</p>	<p>For CCWG: The CCWG views ICANN’s Mission statement, Core Values and Commitments <u>as</u> at “the heart of ICANN’s accountability.”</p> <p>For Transition: holding ICANN to absolute Commitments could further ICANN’s accountability.</p>	<p>Essentially, the <u>contemplated</u> Commitments raise similar concerns to the modifications of the Core Values. In addition, the Proposal does not <u>contemplate</u> provide for a “balancing” test that would guide Board or staff decisions when perfect fidelity to all Commitments and Core Values is not possible, which seems like a possible occurrence.</p> <p>In addition, the revised Proposal contemplates a Bylaw provision requiring a Commitment by ICANN to respect internationally recognized human rights. While this <u>contemplated</u> Commitment is laudable and it is understandable why</p>	<p>Requires Bylaw amendments to reflect revised Commitments.</p> <p>Time: Not overly time consuming from a drafting perspective.</p>	<p>There are various alternatives, including (1) modifying the proposed Commitments to more clearly specify ICANN’s Commitments and in some cases not include certain Commitments, (2) preserving the concept that Core Values are guiding principles rather than absolutes and extend this concept to the Commitments, and (3) extending the existing Bylaw “balancing” test to Commitments.</p> <p>In addition, each Commitment should be reviewed and assessed to ensure that the Commitment is appropriate for ICANN, including the impact of the Commitment when coupled with the</p>	<p>Depends on the approach taken.</p> <p>Time: Minimal, assuming the path is to revise CCWG’s proposed text.</p>	<p>Validity of Concerns: Same as Item 16 above.</p> <p>Comments on Alternatives: Same as Item 16 above. In addition, the community has thoroughly discussed and evaluated many alternatives, including the status quo. The current Proposal, including the commitment to include a reference to human rights in the governing documents, received the broadest support from the community.</p> <p>(Note that under the proposed structure, the Sole Member implements all decisions by SOs, ACs, or NomCom to appoint or remove directors; no SO or AC or the NomCom will implement such decisions directly.)</p>

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		<p>the “openness of the DNS.”</p> <p>(3) Expanding the scope of existing Core Values and labeling them as Commitments, such as making policies and decisions in a neutral manner but “without singling out any particular party for discriminatory treatment.”</p> <p>(4) Providing that in performing its Mission, ICANN will act in a manner that complies with and reflects ICANN’s Commitments are absolutes, and not principals that should guide the decisions and actions of ICANN.</p> <p>(5) Not including any “balancing” test if Commitments or Core Values conflict (or if multiple Commitments conflict) as it relates to any staff or Board decision (the</p>		<p>the CCWG would favor inclusion of such a Commitment in the Bylaws, it may be challenging when actions/inactions of ICANN staff and the Board are subject to IRPs and reconsideration requests based on interpretations of principles of human rights and an assessment of ICANN’s actions relating thereto.</p> <p>The inclusion of a human rights Commitment could also force ICANN to seek inclusion of “human rights” provisions in its registry and registrar agreements, as failing to do so (i.e., inaction) could be viewed as a violation of the Bylaws. In addition, parts of the</p>		<p>expansion of the IRP and reconsideration requests processes.</p> <p>The proposed revisions would be less challenging if the (1) proposed IRP and reconsideration request modifications are scaled back, and (2) the current “balancing” test is included.</p>		

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		balancing test only applies to Core Values).		Community could pressure ICANN and the Board (particularly if each SO/AC can unilaterally and without cause decide to remove its appointed directors (with any such decision implemented by the Sole Member) or, for SOs/ACs participating in the Community Mechanism as Sole Member , initiate a removal process for NomCom directors) to incorporate such provisions and introduce them through the amendment and negotiation provisions of registry and registrar agreements.				

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ACT5: Proposal Element: Incorporation of the AoC Reviews into the Bylaws <i>CCWG-Accountability Proposal / Section 9</i>								
19.	<p>ICANN’s Bylaws currently do not require ICANN to conduct the reviews contemplated by the Affirmation of Commitments (AoC).</p> <p>ICANN’s AoC with the USG sets forth various commitments by ICANN, including commitments to conduct several periodic reviews related to ICANN’s governance, processes and programs.</p>	<p>The Proposal incorporates the commitments and reviews called for in the AoC in the Bylaws.</p> <p>The Proposal also outlines a process that would be followed when conducting the reviews that goes beyond the text of the AoC.</p> <p>The Proposal provides that the review teams would consist of up to 22 review team members (21 Community members <u>selected by the chairs of the participating SOs and ACs</u> and one <u>ICANN</u> Board member participant). Each SO/AC participating in the review may nominate<u>suggest</u> up to 7 prospective review team members (balanced for diversity and skills), which would include 3 members</p>	<p>For CCWG: The incorporation of <u>relevant parts of</u> the AoC into the Bylaws is seen as one of the most critical aspects of replacing the USG’s stewardship of the IANA function.</p> <p>For Transition: ICANN staff and Board have committed to incorporating <u>relevant parts of</u> the AoC into the Bylaws given that the relationship between the USG and ICANN will change post-Transition.</p>	<p>The incorporation of the reviews themselves may have minimal impact on ICANN as these reviews are already undertaken by ICANN.</p> <p>However, an assessment of each review is advisable to ensure such review should be included in the Bylaws or whether it is better left to existing or alternative review mechanisms that are not dictated or provided for in the Bylaws.</p> <p>In addition, it may be unwise to incorporate and enshrine reviews and review processes into the Bylaws when the reviews and</p>	<p>Requires Bylaw amendments to reflect incorporation of AoC and related reviews.</p> <p>Time: Not overly time consuming (other than the future risk associated with an increased number IRPs and reconsideration requests).</p>	<p>One alternative is to incorporate the reviews from the AoC but not the “commitments” into the Bylaws.</p> <p>The Board could also consider whether it is appropriate to incorporate all “reviews” into the Bylaws or if some reviews are better suited to remain subject to existing review and consideration mechanisms outside of the Bylaws (such as the directory services review).</p> <p>In addition, an analysis of the text of the reviews needs to occur to determine whether what “made</p>	<p>Depends upon approach taken.</p> <p>Time: Minimal if path is to revise CCWG’s proposed revisions.</p>	<p>Validity of Concerns:</p> <p>As JD states, “the incorporation of the [AoC] reviews themselves may have minimal impact on ICANN as these reviews are already undertaken by ICANN.” To the extent that any reviews upon further experience prove to be unnecessary, this can be addressed by subsequent Bylaw amendments. For purposes of assuring accountability, CCWG considered this question and determined that this was a critical part of its proposal.</p> <p>Bylaws incorporating relevant commitments and review concepts from the AoC, once drafted, will be subject to extensive vetting by the community and by ICANN, which will help to ensure that the provisions ultimately added to the Bylaws avoid the possible pitfalls mentioned by JD.</p>

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		<p>from theeach participating SO/AC. Review team members may solicit the advice of experts, but is not required to follow or give deference to the advice.</p> <p>The Proposal also outlines ICANN’s contemplated obligations as it relates to disclosure of confidential information to the review teams. The Proposal contemplates establishing a presumption that review teams will have access to all ICANN information, including confidential information, but that ICANN may require review team members to sign customary confidentiality agreements. The Proposal also contemplates “levels of classification” that documents and information may be subject to, and the classes of individuals who may access such</p>		<p>processes could be outdated or require modification in the relatively near future, especially since they may be difficult to amend in the future as Fundamental Bylaws.</p> <p>In addition, the incorporation of the contemplated “commitments” set forth in the AoC could have material impact on ICANN because the commitments are imprecise and/or aspirational in nature and, when coupled with the expanded scope of the revised IRP and reconsideration request processes, could result in ICANN being subject to numerous IRPs and reconsideration requests stemming from interpretation of the commitments</p>		<p>sense” several years ago remains sensible today and in the future.</p>		<p>The need for ready access by reviewers to confidential ICANN information as part of a review process is seen as a key accountability protection. Details of the disclosure framework for confidential information remain to be worked out, but nondisclosure agreements, while useful, are unlikely to be the sole protective measure utilized to ensure against unauthorized distribution of confidential ICANN information.</p>

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		<p>documents and the related process for such access.</p> <p>The Proposal contemplates that any documents and information designated as confidential and not disclosed by ICANN to the review team will be identified, and, if the review team disagrees with ICANN’s designation, the review team can appeal to the Ombudsman and/or the Board.</p>		<p>(including potentially competing interpretations) and the scope of the obligations implied by the commitments.</p> <p>The new contemplated “commitments” include:</p> <p>(1) A commitment to enforce WHOIS / directory service policy, subject to applicable laws.</p> <p>(2) A commitment to ensure that, as ICANN expands the TLD space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protection.</p> <p>Each of these represent laudable</p>				

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				<p>goals, but difficult and challenging commitments to be held accountable for through IRPs and reconsideration requests.</p> <p>For example, it is conceivable these commitments could make launching future rounds of new gTLDs very challenging, and subject ICANN to numerous competing IRPs and reconsideration requests (both for and against moving forward with a subsequent round of new gTLDs), based on whether ICANN acts to move forward or declines to act to move forward with a subsequent round. For example, how does ICANN attain certainty that it has “adequately</p>				

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				<p>address[ed] issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protection” before opening another round of new gTLDs?</p> <p>In addition, the CCWG should further consider whether the Bylaws should prescribe the manner in which reviews will be conducted and standardized. While it is probably important that this work be done (i.e. creation of a review process that optimizes Community participation, sets review team sizes and selection processes, facilitates processes and review procedures that will enhance consensus building</p>				

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				<p>and decision making, etc.), practical challenges could arise if these processes and procedures are enshrined in the Bylaws (because, among other reasons, Bylaws are not typically easily and quickly changed) rather than Board adopted processes and procedures, in consultation with the Community.</p> <p>In addition, the CCWG should consider refinements to the Proposal providing the Board with the authority to prioritize reviews, extend reviews, delay reviews, etc. when necessary or advisable (for example, as a result of Community burnout, lack of financial resources,</p>				

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				<p>etc.).</p> <p>The CCWG should assist the Board in developing protections (in process and procedures materials, not the Bylaws) designed to ensure that reviews will not be used as a means to obtain confidential information for the purpose of misusing, leaking or otherwise disclosing that information.</p> <p>Confidentiality agreements are of limited value in terms of actually preventing the disclosure of confidential information when the receiving party is intent on disclosing the information, using the information for personal gain or does not adequately protect such information from</p>				

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				accidental disclosure. In the end, ICANN may be required to initiate litigation proceedings against reviewers who do not comply with their confidentiality agreements, which is something that should be examined because the multi-stakeholder process only works because of the hard work and often exhaustive efforts extended by the volunteer Community.				
ACT6: Proposal Element: Empowered Community Powers – Reconsider/Reject Budget or Strategic or Operating Plans <i>CCWG-Accountability Proposal Section 7.1</i>								
20.	ICANN currently develops the Budget with community input (including through an informal working group). The Budget is posted for public comment,	SOs and ACs (through instructing the Sole Member as directed by the Community Mechanism) would <u>could</u> veto/reject both the IANA/PTI Budget <u>and</u> the ICANN Budget <u>and/or the ICANN-wide strategic and/or operating</u>	For CCWG: The CCWG wants the SOs/ACs to have greater input in ICANN’s Budgets and strategic plan. Through allocating resources and defining organizational goals,	Ensuring that IANA/PTI is properly funded is essential to the Transition. ICANN should, to the maximum extent possible, ensure stability for, and confidence in,	Requires Bylaw revisions to provide for the Budget and strategic plan veto processes and related activities of the Sole Member and Community Mechanism (required	ICANN could adopt a Board Policy or Bylaw setting forth requirements that must be followed before the Board approves any Budget or strategic plan.	Need to draft Board Policy/Bylaw and get agreement upon them if that approach is taken. Time: Not overly time consuming from	Validity of Concerns: Reserved powers allowing members to reject Board decisions on matters such as budgets or strategic plans are permitted by California law and common in our experience with

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	<p>and then finalized by Board Finance Committee.</p> <p>The Budget is finally approved when the full Board votes to approve it.</p> <p>Strategic plans undergo a similar process.</p> <p>The public consultation requirements for these are not embedded into the Bylaws.</p>	<p>plan, after the Board approves them, but before they take effect. This right could be exercised an unlimited number of times.</p> <p>If a Budget is not in place (i.e. the Community vetoes the IANA or ICANN Budget), a “caretaker” budget at the previous year’s Budget, as applicable, will apply and the Board will continue to have the ability to make out-of-budget funding decisions on the same basis as it does today.</p> <p>The process would proceed as follows:</p> <p>(1) Any SO or AC could submit a petition to the Sole Member within 15 days (30 days if a strategic plan) of the announcement of the Board decision to approve a budget/plan.</p> <p>(2) A 15 day (30 days if a</p>	<p>ICANN’s Budget and strategic plans have a material impact on how ICANN fulfills its Mission.</p> <p>CWG has also articulated the need for clarity and a veto power over the PTI/IANA budget as a key aspect of its proposal.</p> <p>For Transition: As it relates to IANA, it is essential to ensure that IANA operations are properly funded.</p>	<p>ICANN’s ability to oversee the IANA functions. ICANN’s strategic plans are also important, and the Community has a vested interest in ensuring these plans are consistent with ICANN’s limited technical Mission and the outcome of bottom-up stakeholder input and consensus.</p> <p>Continuing to engage the Community in the ICANN Budget and strategic plan processes is beneficial in ensuring that ICANN remains responsive to the Community and the global public interest.</p> <p>However, irrespective of the manner through which a budget veto is provided (either through the Proposal or an alternative</p>	<p>for all enhancements).</p> <p>Time: Not overly time consuming from a drafting perspective.</p>	<p>This could include a community right to reject a Budget or plan (e.g., polling of SO/AC Chairs as to the consensus views of their stakeholder groups, or use of a “community mechanism” where the consensus of the Community can be measured). If so “rejected”, the Board could be required to consider the public comments, the reasons stated for the rejection and address such comments and reasons when approving a revised Budget or strategic plan. In addition, there could be an institution of a higher threshold for the Board to approve a Budget/plan over the consensus objection of the Community, and/or a requirement for a consultation,</p>	<p>a drafting perspective.</p>	<p>nonprofit governance.</p> <p>Although the veto power could in theory cause a deadlock or be used offensively to disrupt and capture ICANN, the focus on such concerns in the JD analysis underestimates practical and procedural limits on the Sole Member’s use of the power. As proposed, an SO or AC must first decide to petition the community within a relatively short timeframe, and then 2/3 of the community must agree within another relatively short timeframe, before a Board-approved budget or strategic plan can be blocked the first time. An even higher 75% of the votes in the Community Mechanism is needed for subsequent vetoes. Even the first veto requires significant and pervasive community frustration over the Board’s actions, as well as quick coordination among the disparate groups in the Community Mechanism. Outreach by the Board and staff to involve the community and</p>

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		<p>strategic plan) discussion period would follow, which will include an online meeting of the Community Forum (i.e. an online meeting of the Community to discuss petitioned actions.</p> <p>(3) A second 15 day (30 days if a strategic plan) period would follow the discussion period, during which the voting participant SOs and ACs would vote on the matter in the Community Mechanism.</p> <p>(4) Initial veto requires 66% level of support in Community Mechanism; thereafter 75% support is required for a second veto on the same budget or plan.</p> <p>Work Stream 2 would develop improvements to the process by which budgets, operating plans and strategic plans are</p>		<p>mechanism), removal of Board members remains the ultimate accountability mechanism on this topic because (1) the Board cannot be forced to adopt a Budget or strategic plan that it does not agree with or believe is in the best interest of ICANN and the global public interest, and (2) the Proposal appropriately contemplates allowing the Board to continue to make unbudgeted expenditures.</p> <p>The additional process will increase the amount of time for Budgets and strategic plans to be developed, which could lead to Budgets and possibly plans being more projective and assumption-based (i.e., the process may</p>		<p>similar to the GAC/Board consultation requirement if the Board is seeking to act inconsistently with advice.</p> <p>IRP enforcement mechanism could allow the Community to ensure that the Board follows the Bylaws' procedural requirements. This policy or process could be implemented without transitioning to the Sole Member model or the designator model.</p> <p>These alternatives would also give community increased power, but ultimate control over the Budget (if that is the goal) is more likely achieved through a veto power through the Sole Member</p>		<p>solicit feedback, and good faith efforts to address legitimate concerns in the proposed budget or strategic plan, would make such deep and unified opposition extraordinary. But if present, it would in fact indicate that the Board should reconsider its action. Encouraging Board and staff attention to community concerns before Board action, through the possibility of community rejection after Board action, is at the core of the CCWG Proposal.</p> <p>The CCWG's decision not to limit the number of vetoes reflects substantial discussion of the issue and was made so the Board could not simply wait out the community without addressing its concerns. Should the CCWG wish to address the concern raised by the JD analysis over potentially unlimited vetoes, the number of vetoes could be capped at a certain number (but more than two), or the voting requirement could be raised for subsequent</p>

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		<p>developed, to allow Community concerns to be voiced and addressed before the Board approves them.</p>		<p>need to accelerate to the point where certain data points are not available).</p> <p>Separate vetoes for the ICANN Budget and the IANA/PTI Budget create the assumption that the Budgets are not interlinked. Revisions to one may require revisions to the other (even if the other was not vetoed by the Community).</p> <p>In addition, as there does not currently exist an IANA/PTI Budget, there does not exist a “caretaker” IANA/PTI Budget if that Budget is rejected in the first year following the Transition. The CCWG should refine the Proposal to provide the Board with further discretion</p>		<p>model. That said, the utility of the Budget and strategic plan “veto” right may be overstated, as discussed under “Impact on ICANN.”</p>		<p>vetoed.</p> <p>With respect to the separate veto rights on the ICANN budget and the PTI/IANA budget, it was important to the community that the PTI/IANA budget not be delayed due to an issue with the ICANN budget. A separate veto allows the PTI/IANA budget to proceed even if there is no consensus on the ICANN budget. If the PTI/IANA budget is approved and the ICANN budget is vetoed, we would expect ICANN to adapt the ICANN budget as necessary to accommodate the agreed upon PTI/IANA budget.</p> <p>Regarding the baseline PTI/IANA budget to be used in the event that the second-year budget is vetoed, there are two potential alternatives: (1) ICANN could assess current IANA expenditures and prepare a “carve out” budget for the first year post-transition based on the current IANA-related spending and/or (2) ICANN and the community could agree as part</p>

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				<p>in this case.</p> <p>There is also a potential risk that SOs/ACs could use budgetary approval power as leverage in other matters and potentially lead to areas of capture within the Community or “trades” among the different parts of the Community (e.g., “we’ll support a veto on your stated ground if you support our position in another area”). This risk could be partially mitigated if the number of vetoes is limited and the Board is authorized to adopt a Budget/plan at some point notwithstanding the prior veto(es).</p> <p>In addition, Budget and plan vetoes could also be used offensively by certain</p>				<p>of the transition on a first-year budget which would form the baseline for the second year.</p> <p>Comments on Alternatives:</p> <p>Given that the proposed veto power presumes such a deep and widespread disagreement between the Board and the community, we do not believe that the suggested alternative binding-consultation and reconsideration requirements alone would be as effective in persuading the Board to engage community concerns. Under the Proposal’s approach, in considering what is in the best interests of ICANN as part of discharging their fiduciary duties, directors would need to take into account the potential disruption if a veto were to occur.</p> <p>Some version of these alternatives could be added to the CMSM in addition, and prior, to the veto process, if desired.</p>

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				<p>segments of the Community, as simply delaying an initiative (for example, through a Budget funding veto) could result in permanently stymieing an initiative. In this respect, the Board could determine to trust that the Community will act in a responsible manner.</p> <p>Numerous Budget vetoes could also cause instability within ICANN (and the anticipated PTI), but this would seem unlikely to occur in practice.</p> <p>In addition, numerous vetoes over Budgets or strategic plans and the staff and Board attention required to address, respond, etc. to these vetoes would divert staff and Board</p>				

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				<p>attention away from operating ICANN and fulfilling its Mission, and, in some circumstances, could result in organizational paralysis and inaction if, for example, a Budget disagreement between the Community and the Board persists. The Board could determine that the benefits of the Community involvement, couple with a limitation on the number of vetoes, outweighs and mitigates this concern.</p> <p>The CCWG's first proposal contained <u>did not contain</u> a limitation on the number of "vetoes" relative to a Budget or plan. The revised Proposal does not provide the rationale</p>				

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				<p>for removing this limitation. CCWG discussed limiting the number of community vetoes both before and after the First Proposal in May, but no limit was ever incorporated. Paragraph 205 (Section 5.2) of the First proposal reads in part as follows: “A 2/3 level of support in the mechanism would be required in the mechanism to reject a first time; a 3/4 level of support for subsequent rejection/s.” The CCWG should consider re-instituting this instituting a limitation, as a maximum of two vetoes would help guard against operating ICANN for an extended period of time pursuant to an outdated budget or plan. With two</p>				

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				vetoes, the Community would effectively communicate its concerns to the Board, while at the same time respecting the fiduciary obligations of the Board to ultimately adopt Budgets or plans that the Board determines are in the best interests of ICANN and the global public interest. Forcing ICANN to operate under an outdated Budget or plan would not seem to serve the interests ICANN or the Community.				
ACT7: Proposal Element: Empowered Community Powers – Reconsider/Reject changes to ICANN ‘Standard’ Bylaws <i>CCWG-Accountability Proposal / Section 7.2</i>								
21.	By laws may be amended and new Bylaws adopted only upon action by a two-thirds vote of all	Standard Bylaw amendments could be vetoed by the Sole Member (acting based on a 66% approval of the veto	For CCWG: “Veto” over Bylaw amendments affords the Community with greater input on	The Proposal will increase the amount of time for amendments to Standard Bylaws due to potential vetoes	Requires Bylaw revisions to provide for Sole Member/Community Mechanism approval	Implementation of the Sole Member Model is not required to provide the Community with the right to	Requires Bylaw amendments to provide for third party approval requirement.	Validity of Concerns: The unilateral power of a membership body to amend bylaws (as opposed to the power

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	<p>members of the Board. Prior to adopting any Bylaw amendment, the Board holds a public comment period relating to the proposed amendment.</p> <p>The public consultation requirements for these are not embedded into the Bylaws.</p>	<p>by the voting participant SOs/ACs in the Community Mechanism).</p> <p>Although only tangentially referred to in the Proposal with other statutory rights, under California law, the Sole Member has the statutory right to unilaterally amend the Bylaws without any requirement that the Board also approve the amendment (unless the Bylaws require the approval of a third party, other than the member or the Board, which does not appear to be contemplated).</p>	<p>Bylaw amendments on provisions of the Bylaws that are not focused on accountability (which are covered below as Fundamental Bylaws).</p> <p>For Transition: The ability to veto standard Bylaw amendments appears important to the CCWG to guard against unilateral Board action, either without notice to or input from the Community, or in face of substantial opposition. That said, standard bylaws would not appear to be essential to the Transition because the Standard Bylaw provisions will not relate to IANA/PTI or the material accountability enhancements proposed by the</p>	<p>and possible negotiations with the SOs/ACs on the substance of such an amendment in order to avoid or respond to a Community Mechanism veto. That said, it seems unlikely (although not impossible) that amendments to Standard Bylaws would not be extremely time sensitive and that the potential delays would cause significant problems in practice.</p> <p>The ability of Sole Member to unilaterally amend the Bylaws could be destabilizing.</p> <p>In addition, the Proposal could negatively impact the balance of power/influence of the existing SO/AC</p>	<p>requirement to amend Standard Bylaws.</p> <p>Time: Minimal from a drafting perspective.</p>	<p>approve/veto Bylaw amendments. California law permits ICANN to adopt a provision that requires the approval of a third party to approve amendments to the Bylaws.</p> <p>In a designator model, the Bylaws could provide that approval of a majority of the designators (i.e. Chairs of SOs and ACs) would be required to amend the Bylaws. A similar mechanic could be incorporated into ICANN’s current governance model by giving the Chairs of SOs/ACs third party approval rights. There is also the potential of using the “community forum” concept to identify areas of Community consensus to guide those designators or Chairs,</p>	<p>Time: Minimal from a drafting perspective.</p>	<p>to reject Board-recommended bylaw amendments), while not part of the community powers deemed key for accountability, is a statutory right and therefore unavoidable in the Sole Member model.</p> <p>While California law does not allow the Sole Member to be stripped of the power to amend the Bylaws unilaterally, we have discussed with the CCWG Bylaws provisions that could make it difficult or practically impossible for the Sole Member to exercise. These could include requiring a very high threshold vote in the Community Mechanism to authorize the Sole Member to take any action outside the enumerated community powers, and/or requiring a third party to consent to any Bylaws amendment, as mentioned in the JD analysis. A decision on this will be needed prior to or during implementation.</p> <p>The CCWG has not yet considered refining approval of</p>

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			CCWG.	<p>structure. For example, SOs currently recommend Bylaw amendments modifying their processes, etc. as set forth in the Bylaws. In ICANN’s current structure, Board approval would be sufficient to implement the requested amendments (and likely would be granted). In a model where the Community Mechanism could “veto” Bylaw amendments, the Community Mechanism could veto Bylaw amendments proposed by an SO (e.g., the GNSO), which would significantly alter the current balance.</p> <p>Numerous Bylaw amendment vetoes could cause instability within ICANN,</p>		<p>as applicable, in this process.</p> <p>One key benefit of maintaining the current structure or implementing the designator model is that the Sole Member would not have the statutory right to unilaterally amend ICANN’s Bylaws.</p>		<p>Bylaws amendments beyond Standard and Fundamental. If desired and consistent with the CCWG’s accountability concerns, some Bylaws could be designated as subject to amendment by the Board without triggering the procedures for Sole Member veto, while others could be designated as subject to veto by the Sole Member only if the affected SO or AC supported the veto (analogous to the way specific SOs and ACs will cause the Sole Member to elect the directors they choose).</p> <p>Comments on Alternatives:</p> <p>As noted above, the CMSM model was developed to give a level of enforceability to the desired community powers that cannot be achieved with any of the alternatives presented. The power to unilaterally amend the Bylaws is not one of the desired community powers, and as discussed above, practical safeguards will be put in place</p>

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				<p>depending upon the subject matter of the Bylaw amendment.</p> <p>Finally, the Board could consider whether the Community should have the power to veto Standard Bylaw amendments, which are in many cases tied to operational or day-to-day matters, such as officers, SO/AC provisions, Board committees, indemnification, etc., or whether approval of Standard Bylaws is properly within the fiduciary capacity of the Board.</p>				to effectively constrain it.
ACT8: Proposal Element: Empowered Community Powers – Approve Changes to ‘Fundamental’ Bylaws <i>CCWG-Accountability Proposal / Section 4</i>								
22.	By laws may be amended and new Bylaws adopted only upon action by a two-	Amendments to “Fundamental Bylaws” (principally the Bylaw provisions covering	For CCWG: Affirmative approval over Fundamental Bylaw amendments	The CCWG’s view that the Community should have the right to reject amendments	Requires Bylaw amendments to provide for Sole Member/Community	Implementation of the Sole Member Model is not required to provide the Community with	Requires Bylaw amendments to provide for the third party approval	Validity of Concerns: Because the Fundamental Bylaws will reflect critical

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	<p>thirds vote of all members of the Board. Prior to adopting any Bylaw amendment, the Board holds a public comment period relating to the proposed amendment.</p> <p>The public consultation requirements for these are not embedded into the Bylaws.</p>	<p>IANA/PTI matters and the accountability enhancements, including ICANN’s Mission Statement, Core Values and Commitments) require the approval of the Boarddirectors then in office (by a 75% threshold) and the approval of the Sole Member (i.e. the Community Mechanism by a 75% vote of the participating SOs/ACsall votes in the Community Mechanism).</p> <p>Although only tangentially referred to in the Proposal with other statutory rights, under California law, the Sole Member has the statutory right to unilaterally amend the Bylaws without any requirement that the Board also approve the amendment (unless the Bylaws require the approval of a third party, other than the member or the Board, which does not</p>	<p>affords the Community with increased power and assurance that the Board will not reverse or minimize the newly adopted accountability enhancements.</p> <p>CWG has also articulated the need for the community to have the ability to approve amendments to Fundamental Bylaws as a key aspect of its proposal.</p> <p>For Transition: The requirement that the Sole Member affirmatively approve Fundamental Bylaw amendments appears important to the CCWG to guard against unilateral Board action, either without notice to or input from the Community, or in face of substantial</p>	<p>to Fundamental Bylaws (particularly those that implement the enhanced accountability measures) is understandable.</p> <p>That said, the Proposal will increase the amount of time for amendments to Fundamental Bylaws due to the approval process (and potential vetoes) and possible negotiations with the SOs/ACs on the substance of any amendment in order to obtain the Community Mechanism approval.</p> <p>The ability of Sole Member to unilaterally amend the Bylaws could be destabilizing. While the Proposal protects the global stakeholder community against unilateral Board</p>	<p>Mechanism approval requirement to amend Fundamental Bylaws and to designate which Bylaws qualify as Fundamental Bylaws.</p> <p>Time: Minimal from a drafting perspective.</p>	<p>the right to approve/veto Bylaw amendments. California law permits ICANN to adopt a provision that requires the approval of a third party to approve amendments to the Bylaws.</p> <p>In a designator model, the Bylaws could provide that approval of a majority of the designators (i.e. Chairs of SOs and ACs) would be required to amend the Bylaws. A similar mechanic could be incorporated into the current governance model by giving the Chairs of SOs/ACs third party approval rights.</p> <p>There is also the potential of using the “community forum” concept to identify areas of Community</p>	<p>requirement and to designate which Bylaws qualify as Fundamental Bylaws.</p> <p>Time: Minimal from a drafting perspective.</p>	<p>elements of the accountability enhancements, as well as other key governance elements, it is reasonable for amendment of these provisions to require additional time, attention, and community approval.</p> <p>As noted in Item 21 above with respect to Standard Bylaws, the Proposal would be implemented with significant constraints on the power of the Sole Member to act unilaterally.</p> <p>Comments on Alternatives:</p> <p>As discussed in Item 21 above, while it is correct that a community power to reconsider or reject bylaw amendments could be accomplished by giving this power to one or more designators or other third parties (whether acting pursuant to community direction or otherwise) and would not in itself require a membership model, the CMSM model was developed to provide maximum enforceability for other powers</p>

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		appear to be contemplated).	opposition.	<p>action to amend the Bylaws, the Proposal does not necessarily protect the global stakeholder community from unilateral action by the Sole Member. This protection serves against the Board making changes to Fundamental Bylaws, and not against the will of the limited number of SOs and ACs that are voting participants in the Community Mechanism that will direct the Sole Member's action.</p> <p>Numerous vetoes to Fundamental Bylaw amendment proposals of the Board could cause instability within ICANN, depending upon the matter subject to the</p>		<p>consensus to guide those designators in this process.</p> <p>One key benefit of maintaining the current structure or implementing the designator model is that the Community would not have the statutory right to unilaterally amend ICANN's Bylaws.</p>		desired by the community.

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				Bylaw amendment.				
ACT9: Proposal Element: Empowered Community Powers – Remove Individual ICANN Board Directors <i>CCWG-Accountability Proposal / Section 7.3</i>								
23.	<p>Any director may be removed, following notice to that director, by a three-fourths vote of all directors. If the director was selected by an SO/AC, notice must be provided to that SO/AC at the same time notice is provided to the director.</p> <p>With the exception of the non-voting liaison appointed by the GAC, any non-voting liaison may be removed, following notice to that liaison and to the organization by which that liaison was selected, by a three-fourths vote of all</p>	<p>SO/AC Nominated Directors: Any SO or AC may initiate a process to remove one of its appointed directors by a simple majority vote of the governing body of the applicable SO or AC. When such a vote is obtained, then the following process is initiated:</p> <p>(1) Within 15 days, a Community Forum will be convened, at which the removing SO/AC must explain why it is seeking the director’s removal, the director in question will have the opportunity to reply, and a Q&A will be held for all participants in the Community Forum.</p> <p>(2) Within 15 days</p>	<p>For CCWG: Director removal is the ultimate accountability mechanism. The CCWG wants SOs and ACs to have meaningful and constant influence over Board members to ensure that an SO/AC’s nominated director(s) remain accountable to the body that appointed him or her.</p> <p>CWG has also articulated the need for the community to have the ability to appoint and remove members of the Board as a key aspect of its proposal.</p>	<p>Potentially could lead to a “representative” Board where appointed directors feel compelled to represent the interests of their appointing SO/AC rather than the best interests of ICANN and the global public interest. This would largely arise from the lack of objective standards against which Board member actions would be measured, and the ability of the SOs and ACs to direct the Sole Member to remove a director appointed by that SO or AC for any reason.</p> <p>As noted in a minority statement included</p>	<p>Requires Bylaw revisions to provide the Sole Member (through the direction of the SOs and ACs, as applicable) with the right to remove individual directors, as well as the removal procedures and process.</p> <p>Time: Developing the removal procedures could take time. Additionally, development of the removal standards should be a Work Steam 1 matter, particularly if “standards” are to be employed or otherwise limit director removal.</p>	<p>Implement a model or mechanism whereby directors can be removed by the Community or, if the Board determines appropriate, the appoint SO or AC, in each case upon a showing of “cause.”</p> <p>This could be implemented under ICANN’s current Bylaws through advance resignation letters, or through a designator model provided in the Bylaws (the Bylaws can limit the right of designators to remove directors without cause, which is a significant difference</p>	<p>Requires Bylaw amendments to provide for director removal whether through advance resignation letters or a designator model. Draft applicable “cause” or other standards by which director service will be measured.</p> <p>Time: Moderate, when prepared at the same time as the other proposed provisions.</p>	<p>Validity of Concerns:</p> <p>We understand from our interactions with the CCWG that concerns about the accountability of ICANN’s Board arise in part from the perception that once a director joins the ICANN Board, s/he is strictly prohibited by fiduciary duties from representing the interests of the appointing community. We do not believe this accurately reflects the law or how nonprofits with constituency-appointed boards operate. An increase in a director’s representational relationship to the appointing body will increase accountability of the Board without undermining individual directors’ fiduciary duties. Directors selected by an SO or AC have no fiduciary duties to the SO or AC, but they do have</p>

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	<p>directors if the selecting organization fails to promptly remove that liaison following such notice. The Board may request the GAC to consider the replacement of the non-voting liaison appointed by that GAC if the Board, by a three-fourths vote of all Directors, determines that such an action is appropriate.</p> <p>There is no requirement for “cause” for the Board removal of a director, however there are documents including the Conflicts of Interest Policy and the Code of Conduct that can guide both Directors and the Board in identifying situations where removal may be</p>	<p>following the Community Forum, the applicable SO/AC must make its decision whether to remove the director by a 75% vote of <u>the votes cast in the SO/ or AC</u>.</p> <p>(3) If the SO/AC votes to remove the director during such 15 day period, then the Sole Member will exercise its removal right and remove the director.</p> <p>(4) No new call to remove the same director can be made during the remainder of that director’s term (assuming the vote fails or no final vote<u>decision is held/made</u>).</p> <p>The applicable SO/AC will then be responsible for filling the vacancy.</p> <p>NomCom Directors: With respect to NomCom directors, the above process applies except that:</p>	<p>For Transition: The ability to remove directors has been identified as a key provision of expected accountability enhancements, including by the NTIA.</p>	<p>within the Proposal, an SO’s or AC’s removal of a Board member due to disagreement over the decisions made by the director (even when the director is acting in what he or she believes to be the best interests of ICANN and the global public interest) <u>jeopardizes/contradicts</u> director independence. In addition, given that it is likely that not all SOs and ACs will be voting participants in the Community Mechanism, some SOs and ACs could gain significant control over NomCom directors through their voting rights in the Community Mechanism.</p> <p>The Board could also consider whether the removal of any</p>		<p>between the designator model and the Sole Member model). It may be possible to fashion the Sole Member model in a manner the effectively incorporates a cause requirement, but it would be more challenging and possibly subject to judicial challenge.</p> <p>ICANN’s existing structure permits SOs and ACs to rotate directors every three years, if they are unsatisfied with their nominees.</p>		<p>fiduciary duties to ICANN. The risk of personal liability for breaching those duties acts as a compelling brake on the Board becoming too “representative,” but some sense of representation, of being a voice on the Board for the views of the selecting community, is fundamental to why directors are selected by segments of the community. Directors’ participation on the Board should be <i>informed</i> by the interests of the constituency they represent. While their ultimate duty is to act in the best interests of ICANN, directors’ subjective understanding of what that best interest is -- unlike the objective requirement that directors in a for-profit maximize shareholder value -- can vary, and may be influenced by the perspective the director brings from his or her selecting body, without violating fiduciary duties to ICANN.</p> <p>It is true that a failure by some SOs and ACs to participate in the Community Mechanism</p>

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	warranted or a defined penalty for violations.	<p>(1) A removal petition may be initiated by a simple majority vote of any SO/AC who is a voting participant in the Community Mechanism.</p> <p>(2) Each voting participant SO/AC will vote on the removal of the director.</p> <p>(3) 75% of the votes available in the Community Mechanism is required to remove the director.</p> <p>Even though the CCWG's Proposal states that "[i]t is expected that this power would only be exercised in cases of serious difficulty with a particular director" and that "community standards that will guide Board members" will be developed in Work Stream 2, the expectation and standards will not limit the ability of the SOs and ACs to unilaterally remove</p>		<p>director should be a Community decision, rather than an individual SO or AC. If the goal is to empower the Community, then a Community removal right would more accurately reflect the wishes of the entire Community.</p> <p>If ICANN forms a membership, then the Sole Member will have the right (as a matter of law) to remove directors without cause.</p> <p>The Sole Member model also significantly alters the dynamics associated with the Board's removal of a director. If the Sole Member model is adopted, the Board would no longer have the ability to remove a director without</p>				<p>may lead to excessive control by those who do participate; as discussed in Item 1 above, this is a fundamental effect of empowering the community: empowerment requires participation to work most effectively.</p> <p>The CCWG has discussed at length whether the community or the responsible SO/AC should be allowed to remove the director it chose. The latter approach reinforces the representational relationship between the director and the SO/AC. Without the ability to remove a director who no longer speaks for the SO or AC, there is little to counterbalance the fear of personal liability for breaching fiduciary duties. Both approaches can be implemented legally, and each has arguments pro and con; the CCWG has determined that removal by the selecting group is the better choice, and our experience with nonprofit corporate governance supports</p>

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		directors.		<p>“cause.” This right would belong to the Sole Member and not the Board. In addition, only However, the Board may declare vacant the office of a director for certain statutory causes (incapacity, conviction of a felony, found by a court to have breached fiduciary duties, etc.). Only a California court can remove a director for “cause certain other statutory <u>“causes”</u> (e.g., fraud, gross abuse of authority, breach of fiduciary duty, etc.) following a petition by a director or, the Sole Member, <u>or the Attorney General.</u></p>				<p>it.</p> <p>The Sole Member’s power to remove a director without cause and without the consent of the applicable SO or AC can and will be sufficiently constrained by internal voting procedures to be developed in the implementation phase.</p> <p>It is true that the introduction of the member model eliminates the Board’s right to remove a director without cause.</p> <p>Comments on Alternatives:</p> <p>We believe the terms “for cause” and “without cause” as applied to removal of directors have been a source of confusion. Under California law, ‘cause’ is a defined narrow set of reasons for removal. The CMSM model does not alter the Board’s or a court’s rights to remove for these causes. Removal ‘without cause’ does not mean arbitrary removal for no reason, but rather removal for any reason other than one on the short</p>

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								<p>statutory list of causes. We understand JD’s alternative to be that directors only be subject to removal for some sort of bad act that either appears on a list of reasons to be developed, or can be inferred from sources such as the Conflicts Policy. Based on our experience with nonprofits, we have concerns with that approach. If the selecting group no longer believes the director provides the group with any voice in Board deliberations, the representational purpose of selecting the director is frustrated, even if the director has done nothing ‘wrong’ (i.e., on the list) for which s/he can be removed. Removal can reflect nothing more than a sense that the director is not in touch with the selecting community, and someone else should represent their views on the Board.</p> <p>The Proposal provides that any removal would involve an explanation of the reasons for the proposed removal, and the CCWG has recommended that</p>

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								<p>WS2 develop community standards that will guide Board members and help to establish common expectations across the community.</p> <p>We agree that a designator model could provide director removal power, but the CMSM model offers full enforceability of all the desired community powers.</p>
<p>ACT10: Proposal Element: Empowered Community Powers – Recall the Entire ICANN Board of Directors <i>CCWG-Accountability Proposal Section 7.4</i></p>								
24.	Removal of the entire Board at once is not contemplated.	<p>Sole Member would be entitled to remove the entire Board.</p> <p>Process is initiated by a petition of at least 2 SOs or ACs, at least one of which must be by an SO (indicated by a decision of a simple majority of the SOs or AC's governing body).</p> <p>If the petition is deficient in some manner, the Sole Member <u>responsible person</u> will inform the petitioning</p>	<p>For CCWG: Board recall is the ultimate accountability mechanism. The CCWG wants SOs and ACs to have meaningful and constant influence over Board members to ensure that the Board is acting in accordance with the wishes of the Community.</p>	<p>In addition to many of the issues surrounding individual director removal, recall of the entire Board would at a minimum be extremely disruptive and potentially destabilizing to ICANN.</p> <p>As a result, the Board should assess the likelihood that a recall of the entire Board</p>	<p>Requires Bylaw amendments to provide the Sole Member (through the direction of the SOs and ACs, as applicable) with the right to remove the Board, as well as the Community Mechanism and removal procedures and process.</p> <p>Time: Moderate,</p>	<p>There are various potential alternatives, including (1) not providing for Board recall, (2) creating a construct where some number (e.g., a majority) directors are recalled, but not the entire Board, or (3) implementing a model or mechanism whereby the entire Board can be removed by the Community</p>	<p>Requires Bylaw amendments to provide for removal right through advance resignation letters or a designator model.</p> <p>Time: Moderate, when prepared at the same time as the other proposed provisions.</p>	<p>Validity of Concerns:</p> <p>Before addressing concerns raised by JD, it is important to emphasize, as JD acknowledges, that the Board recall power has been determined to be a key accountability mechanism. As with the discussion about the Sole Member power to veto Board-approved budgets and strategic plans, we recognize the disruptive potential of this power if it were ever exercised. Nonetheless, we believe it offers</p>

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		<p>SOs or ACs of the deficiency; the cure period is unlimited. If the petition is valid, the Sole Member responsible person will (1) provide notice to all SOs and ACs that the Sole Member has received participating in the Community Mechanism that a valid petition seeking removal of the entire Board has been received, (2) specify a 15 day discussion period and a 15 day decision period thereafter and (3) request that all SOs and ACs that have the right to name individuals for director positions select one (or two depending upon their allocation) interim director(s) by the end of the 15 day discussion period (including a signed statement by such interim directors of their willingness to serve, etc.). The NomCom would appoint, if required, two</p>	<p>CWG has also articulated the need for the community to have the ability to recall the entire Board as a key aspect of its proposal.</p> <p>For Transition: Board recall has been identified as a key provision of expected accountability enhancements, including by the NTIA.</p>	<p>would destabilize ICANN and jeopardize its ability to operate, particularly as it relates to the IANA functions. For example, the Board could assess, to the extent possible, the potential upheaval in staff in the event of Board recall. Would staff (particularly IANA staff) determine to seek a more stable work environment? Board-level dysfunction often times adversely affects the operations of the associated company.</p> <p>Given this risk, the Board could also assess whether “cause” or some other standard should be required for the Community to remove the entire Board, and, if desired, which</p>	<p>when prepared at the same time as the other proposed provisions.</p>	<p>upon a showing of “cause” or some other standard.</p> <p>This could be implemented under ICANN’s current Bylaws through advance resignation letters, or through a designator model through provisions provided in the Bylaws.</p>		<p>a powerful mechanism for enhancing ICANN accountability to the community by creating a strong incentive for ICANN Board and staff to work pro-actively with the community to avoid a situation where community displeasure became so significant and extensive that recall of the entire Board was seen as the only means to resolve a dispute. The potentially disruptive effect of a Board recall should itself serve as a strong motivator for maintaining accountability.</p> <p>Ultimately, as with the power to veto budgets and strategic plans, we observe that the exercise of the Board recall power would require an extraordinary extent of agreement and coordination among the groups in the Community Mechanism.</p> <p>Comments in the JD analysis here and elsewhere raise a general concern about maintaining director independence. We have responded extensively to that</p>

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		<p>interim directors if the recall vote succeeds.</p> <p>During the 15 day discussion period, SOs and ACs will individually and collectively deliberate and discuss the issue, including via a Community Forum.</p> <p>At the end of the discussion period, each SO and AC would have 15 days to follow its own internal processes to decide how to vote. At or before the end of the “decision” period, each SO and AC would certify its vote to the Sole Member.</p> <p>[75%] of all the votes of participating SOs and ACs available within the Community Mechanism (i.e. SOs and ACs that have elected to exerciseparticipate with voting rights in the Sole Member model) is required to recall the Board. It is contemplated that each of</p>		<p>governance model best facilitates such a requirement.</p> <p>In addition, the “interim” Board mechanism does not require compliance with Bylaws’ diversity requirements, does not contemplate director independence, and limits NomCom to two interim directors. The Board could consider whether the Proposal would have the affect of degrading ICANN’s governance standards at a time when ICANN is likely experiencing a crisis and would arguably be best served by relying upon the highest standards of governance.</p> <p>The interim Board would, as a matter of law, have the full powers and duties</p>				<p>concern in our comments on Item 23.</p> <p>Comments on Alternatives:</p> <p>Proposed alternatives (1) and (2) are unlikely to be as effective as the prospect of full Board recall in persuading the Board and staff to be pro-actively accountable to the community in order to avoid reaching the sort of situation where full Board recall would be considered under the current Proposal.</p> <p>Proposed alternative (3) is not necessarily different in kind from the proposed model, which could also incorporate some higher standard for Board recall to be triggered (e.g., only upon a showing of “cause” by the community).</p> <p>As we have discussed in our previous advice to the CCWG, a designator model could be set up to accomplish full Board recall and certain other community powers, but we have concluded that the Sole Member</p>

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		<p>the GNSO, ccNSO, ALAC, GAC and ASO would have 5 votes in the Community Mechanism and each of the RSSAC and SSAC would have 2 votes, if and only if such SOs and ACs elect to participate as voting participants in the Sole Member (if an SO or AC does not elect to be a voting participant, the votes of that SO and AC are eliminated from equation).</p> <p>If the recall is approved, then the nominated interim directors would immediately sit as the Board. The Proposal contemplates that the Bylaws would provide that, absent compelling circumstances, the interim Board would consult with the Community before taking any action that would materially change the strategy, policies or</p>		<p>(including fiduciary duties) of the normal Board. Accordingly, the Board should consider whether the smaller interim Board (which would consist of a majority of SO and AC appointments) creates a risk of capture because the Proposal does not impose any independence requirements (i.e. one of the two interim directors must independent from the appointing SOs and ACs).</p> <p>The Board could also examine whether the short-term nature of the interim Board adequately mitigates certain of potential impacts discussed above.</p> <p>The Proposal also assumes that the</p>				<p>model offers all the powers desired by the community, with full enforceability.</p>

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		<p>management of ICANN.</p> <p>A director that is a member of the Board subject to the recall vote is not eligible to serve on the interim board, but can be appointed to the permanent replacement Board.</p> <p>Recall of the entire Board would not apply to ICANN's President.</p> <p>The interim Board is <u>not</u> subject to the Bylaws diversity requirements.</p> <p>The interim Board would serve for no longer than [120 days].</p>		<p>Community will be able to quickly identify a sufficient number of qualified and willing candidates (including NomCom) to serve on the replacement Board prior to expiration of the interim Board's term (i.e. [120] days). The Board could assess this assumption.</p> <p>The Proposal contemplates that the Bylaws would provide that, absent compelling circumstances, the interim Board would consult with the Community before taking any action that would materially change the strategy, policies or management of ICANN. This limitation, while potentially helpful</p>				

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				<p>against capture, is unique and likely untested as a matter of law as to its enforceability against interim directors who act in what they believe is the best interests of ICANN and the global stakeholder community, particularly in cases where time is of the essence.</p> <p>If ICANN forms a membership, then the Sole Member will have the right (as a matter of law) to remove all directors without cause.</p>				