Annex 01 – Recommendation #1: Establishing an Empowered Community for Enforcing Community Power

~~2nd READING CONCLUSIONS :~~

~~1. Scoping of Inspection rights (§19 and beyond) to address Board concerns, based on Board suggestion and lawyer memo (details on pages 5-6):~~

~~a. scope and limitations confirmed, stressing the difference between DIDP and Inspection Rights – Board confirmed agreement on new language~~

~~b. Inspection rights for accounting books and records and minutes based on a one SO/AC threshold~~

~~c. Introduce additional suggestion by Icann Board regarding Investigation right (audits), based on 3 SO/ACs threshold.~~

~~d. Confirmed direction for implementation to avoid abusive claims~~

~~e. Included Board comment edits (see below)~~

1. Summary

- Under the current Bylaws of the Internet Corporation for Assigned Name and Numbers (~~ICANN~~ICANN), the ~~ICANN~~ICANN Board has the final responsibility for all decisions.
- With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ~~ICANN~~ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.
- To manage the process of enforcement on the community's behalf, the CCWG-Accountability recommends creating a new entity, taking the form of a “Sole Designator” model available under California law. The entity created using the Sole Designator model will be referred to as the “Empowered Community.”
- Under California law, the Empowered Community only has the legally guaranteed power (statutory right) to appoint and remove ~~ICANN~~ICANN Board Directors (whether an individual Director or an aggregate entire Board).
- The CCWG-Accountability accepts that only having the above statutory power is sufficient given:
    - The creation of Fundamental Bylaws that can only be modified jointly by the ~~ICANN~~ICANN Board and Empowered Community.

- All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
- The right of inspection is granted to ~~the Sole Designator, as outlined in the California Corporations Code 6333, as a Fundamental Bylaw.~~Decisional Participants in the Empowered Community.
- The right of Investigation
- ~~o~~

- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engage, Escalate, Enforce.

2. CCWG-Accountability Recommendations

1 The CCWG-Accountability recommends creating an entity that manages the process of enforcement on the community's behalf:

~~1.~~• This entity will take the form of the Sole Designator model, which has legal standing as a California-based unincorporated association.

~~2.~~• The Sole Designator will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs).

~~3.~~• This entity will be referred to as the Empowered Community.

~~4.~~• The Empowered Community, and the rules by which it is governed, will be constituted in ~~ICANN~~ICANN's Fundamental Bylaws along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Redefining ~~ICANN~~ICANN's Bylaws as "Standard Bylaws" and "Fundamental Bylaws").

~~5. The Empowered Community will be granted rights of inspection as outlined in California Corporations Code 6333.~~

~~6.~~• The Articles of Incorporation will be amended to clarify that the interests of the corporation will be determined through a bottom-up, multistakeholder process.

Additionally, the CCWG-Accountability recommends:

- Including in the ICANN Bylaws the right for Decisional Participants in the Empowered Community to inspect as outlined in California Corporations Code 6333, although this specific article reference would not be mentioned in the Bylaws.
- Adding the right of Investigation which includes the adoption of the following audit process: upon three SO/ACs coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.

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Commented [BT2]: I have removed the right of inspection as it no longer is for the Sole Designator and moved it to the section below.

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Detailed Explanation of Recommendations

Background

With removal of NTIA as a perceived enforcement body over ~~ICANN~~ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the Board may object to the results.

Objectives

In developing a mechanism to ensure the community can effectively enforce its decisions, the CCWG-Accountability agreed to:

- Minimize the degree of structural or organizational changes required in ~~ICANN~~ICANN to create the mechanism for these powers.
- Organize the mechanism in line and compatible with the current ~~ICANN~~ICANN Supporting Organization and Advisory Committee structures (with flexibility to evolve these structures in the future).
- Address the CWG-Stewardship dependencies.
- To provide the following powers that would be constituted in the Fundamental Bylaws and would also be legally enforceable:
    - The power to reject ~~ICANN's Budget, Strategic/Operating Plans~~ICANN Budgets, IANA Budgets or Strategic/Operating Plans, ~~or the IANA Functions Budget~~ (CWG-Stewardship dependency).
    - The power to reject changes to ~~ICANN~~ICANN Standard Bylaws.
    - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency).
    - The power to remove individual ~~ICANN~~ICANN Board Directors (along with appointment, CWG-Stewardship dependency).
    - The power to recall the entire ~~ICANN~~ICANN Board (CWG-Stewardship dependency).
    - The power to launch a community Independent Review Process.
    - The power to reject ~~ICANN~~ICANN Board decisions relating to reviews of the IANA Functions, including the procedure to implement a separation process relating to Post-Transition IANA (CWG-Stewardship dependency)
    - ~~o~~

Why the Sole Designator Model

The CCWG-Accountability's "First Draft Proposal on Work Stream 1 Recommendations" proposed a "Supporting Organization/Advisory Council Membership Model" as the reference model for the community enforcement mechanism. However, in the Public Comment Period, 4 May – 3 June 2015, significant concerns were expressed and the CCWG-Accountability initiated work on alternative solutions. A core concern of the Supporting Organization/Advisory Committee Membership Model was the ability of the ~~ICANN~~ICANN community to fully participate in the new accountability framework, and was integral to the work in devising a new approach.

The CCWG-Accountability's "Second Draft Proposal on Work Stream 1 Recommendations" proposed a "Sole Member" model instead of the Supporting Organization/Advisory Committee Membership Model.

Concerns with a Sole Member Model

In the Public Comment Period on the "Second Draft Proposal on Work Stream 1 Recommendations," concerns were raised about the Sole Member model. Under California law, such members have certain statutory powers that cannot be waived. Commenters expressed concern that these rights, such as the ability to dissolve the corporation, could not be adequately constrained and might have unintended and unanticipated consequences.

The Sole Designator Model

To address the concerns described above, the CCWG-Accountability ~~now~~ recommends implementing a Sole Designator model. Under California law, the Sole Designator only has the statutory power to appoint and remove individual ~~ICANN~~ICANN Board Directors or the entire Board, which is a requirement of the CCWG-Accountability and the CWG-Stewardship. This removes the concerns related to unintended and unanticipated consequences of the additional statutory powers associated with a member.

~~12~~ Given that the right to inspect, as outlined in California Corporations Code 6333, is not a statutory right of a Designator, and that the community felt this was a critical requirement, the CCWG-Accountability recommends this right be granted to Decisional Participants in the Empowered Community~~to the Sole Designator~~ in the Fundamental Bylaws.

~~13~~12 The CCWG-Accountability external legal counsel informed the group that adopting a Sole Designator model could effectively be implemented while meeting the community's requirements and having minimal impact on the corporate structure of ~~ICANN~~ICANN.

~~14~~13 Legal Advice on Implementing the Empowered Community

~~15~~14 To implement the Sole Designator model, ~~ICANN~~ICANN's SOs and ACs would create a unified entity to enforce their Community Powers. This unified entity will be referred to as the Empowered Community.

~~16~~15 Under California law, the Sole Designator has the right to appoint and remove ~~ICANN~~ICANN Board Directors, whether individually or the entire Board.

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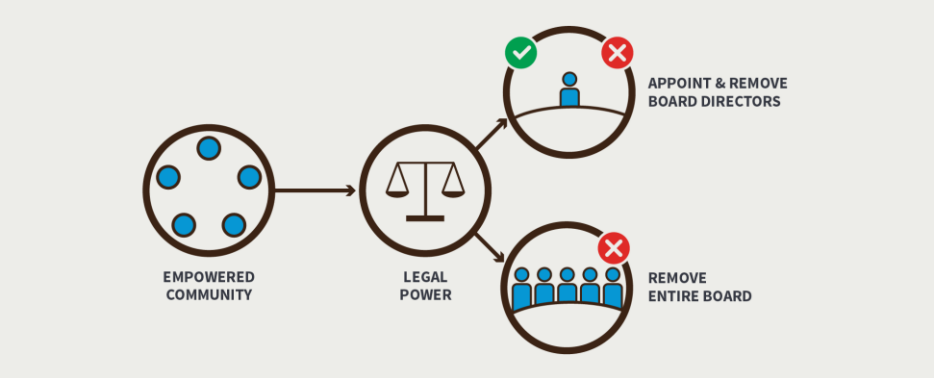

~~17~~16 If the ~~ICANN~~ICANN Board refused to comply with a decision by the Empowered Community to use the statutory rights, the refusal could be petitioned in a court that has jurisdiction to force the ~~ICANN~~ICANN Board to comply with that decision.

~~18~~17 The CCWG-Accountability accepts that only having the above statutory power is sufficient given:

1. All of the recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws and protected from any changes without Empowered Community approval.

- This includes the Independent Review Process (IRP)~~,~~ which issues binding decisions. This also includes ~~and grants~~ the Empowered Community's ~~the~~ power to launch a community~~n~~ IRP challenge if it believes the ~~ICANN~~ICANN Board is in breach of its Articles of Incorporation or Bylaws.[1]
- The ~~ICANN~~ICANN Board would be in breach of following its own Bylaws if it refused to comply with a decision by the Empowered Community with respect to an accountability mechanism defined in the Fundamental Bylaws.
- If a community IRP challenge with respect to such a decision is successful and the Board still refused to comply with the decision, the Sole Designator, on instructions from the community, could petition a court that has jurisdiction to force the ~~ICANN~~ICANN Board to comply with that decision.
- Alternatively, the Sole Designator, on instructions from the community, could remove the Board with the expectation that the new Board would respect the decision.

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[1] For example, if the Board were not to accept the decision of the Empowered Community to use one of its Community Powers. Community Powers are documented in Recommendation #4: Ensuring Community Involvement in ~~ICANN~~ICANN Decision-making: Seven New Community Powers.

2. The Empowered Community has legal standing as a California-based unincorporated association.

- The members of the unincorporated association would be representatives of ~~ICANN~~ICANN's SOs and ACs that wish to participate.

3. The Empowered Community and the rules by which it is governed will be constituted as a Fundamental Bylaw along with provisions to protect it from any changes without its own approval.

4. The Articles of Incorporation will be amended to clarify that the interests of the corporation will be determined through a bottom-up, multistakeholder process.

~~a.~~ Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ~~ICANN~~ICANN Board must consider the community's interpretation of the "global public interest" as ~~ICANN~~ICANN pursues the charitable and public purposes set forth in Article III. The CCWG-Accountability recommends this change as part of the shift from a Sole Member to a Sole Designator model. The Articles will be amended to clarify that the interests of the corporation will be determined through a bottom-up, multistakeholder process.

~~19~~18 Additional Power~~s~~ Granted by Inclusion in the ~~ICANN~~ICANN Bylaws

- **~~a)~~ Right to inspect accounting books and records of the corporation**

~~20~~19 In addition to the statutory right granted to a Designator under California law, the CCWG-Accountability recommends including in the ~~ICANN~~ICANN Bylaws the right for SOs or ACs to inspect as outlined in California Corporations Code 6333, although this specific article reference would not be mentioned in the Bylaws.

~~21~~20 This inspection right is distinct from the Document Information Disclosure Policy (DIDP). While any eligible party can file a request according to the DIDP, Inspection Rights are only accessible to SOs or ACs. The scopes are also different as explained below.

This right would include the accounting books and records of the corporation and the minutes of proceedings of the board of directors and committees of the board of directors, on the conditions discussed below. Since ~~ICANN~~ICANN will not have statutory "members," the rights to inspect "member" meeting minutes would not apply.

Although the Corporations Code does not define "books and records of account," the term is generally understood to refer to the journals and ledgers in which financial transactions are originally entered and recorded, and the statements compiled from them. The term generally does not extend to source documents on which books and records of account are based, such as canceled checks and invoices. Similarly, the term generally encompasses documents relevant to the operation of the corporation as a whole, and not to those relevant to only a small or isolated aspect of the corporation's operations.

Authority under Section 6333 is sparse, but it is nonetheless clear that a "purpose reasonably related to [a] person's interests as a member" does not include a member's commercial or political interests, harassment, or massive and repeated inspection demands probing the minutiae of financial records and details of management and

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administration. Similar limitations will be applied to rights of inspection provided by the Bylaws.

Unlike the exercise of the other community powers, which require community engagement and escalation before initiating a request for action by the EC, the CCWG-Accountability recommends that a petition for inspection be brought directly by a single SO/AC or by multiple SO/ACs through making a written demand on ~~ICANN~~ICANN for the requested materials. If the Board refused or ignored the request, the petitioning SO/AC(s) could then initiate an escalating community decision-making process to enforce the demand on the Board, requiring community consensus [2]

21 ~~b)~~ **Investigation right**

There could be areas where the community might wish to have additional power in having transparency into investigations of potential fraud or financial mismanagement in ~~Icann~~ICANN. To address these concerns the CCWG-Accountability recommends the adoption of the following audit process~~-~~: upon three SO/ACs coming together to identify a perceived issue with fraud or gross mismanagement of ~~Icann~~ICANN resources, ~~Icann~~ICANN will retain a third party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ~~ICANN~~ICANN Board will be required to consider the recommendations and findings of that report.

This process will first be developed outside of the ~~Icann~~ICANN Bylaws to enable flexibility and adjustments and can be incorporated when appropriate.

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22 **The Empowered Community**

23 Implementation of the Empowered Community currently anticipates that all of ~~ICANN~~ICANN's SOs, the At-Large AC, and Governmental Advisory Committee would participate in the Empowered Community—that is, they will be listed in the Bylaws as the five Decisional Participants.

~~24~~ The thresholds presented in this document were determined based on this assessment. If fewer than five of ~~ICANN~~ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds would also have to be adjusted if ~~ICANN~~ICANN changes to have more SOs or ACs.

Commented [BT6]: Removed the threshold exception text as this has been removed in rec. 2.

~~25~~24 ~~The CCWG also recommends that in a situation where use of a Community Power only attracts a decision to support or object to that power by four Decisional SOs or ACs, and the threshold is set at four in support (for Community Powers to block a budget, approve changes to Fundamental Bylaws, or recall the entire ICANN Board), the power will still be validly exercised if three are in support and no more than one objects. The CCWG-Accountability came to this decision after considering the extended escalation process now proposed prior to the use of Community Powers, and to avoid the risk of powers being un-useable (especially the risk of making changes to ICANN's Fundamental Bylaws effectively impossible).~~

[2] This power adds to the existing power of the Ombudsman, who has the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ~~ICANN~~ICANN staff and constituent bodies to enable an informed evaluation of a complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ~~ICANN~~ICANN).

4. Changes from the "~~Second~~Third Draft Proposal on Work Stream 1 Recommendations"

- ~~Change from a Sole Member to a Sole Designator model – and all related changes.~~Scope and limitations with respect to the Right to inspect accounting books and records of the corporation confirmed, stressing the difference between DIDP and Inspection Rights.
- Inspection rights for accounting books and records and minutes based on a one SO/AC threshold
- Introduce additional suggestion by ICANN Board regarding Investigation right (audits), based on 3 SO/ACs threshold.
- Confirmed direction for implementation to avoid abusive claims
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5. Stress Tests Related to this Recommendation

- ST5, 6, 7, 8, 9 10, 16, 24,
- ST28
- ST31, 32, 36

6. How does this meet the CWG-Stewardship Requirements?

~~26~~25 These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of community rights regarding the ability to appoint/remove Directors of the ~~ICANN~~ICANN Board and recall the entire ~~ICANN~~ICANN Board.

7. How does this address NTIA Criteria?

~~27~~26 **Support and enhance the multistakeholder model.**

- Decentralizing power within ~~ICANN~~ICANN through an Empowered Community.
- Providing a legal set of powers to the community while avoiding the risks of making changes to ~~ICANN~~ICANN's organizational structure.

~~28~~27 **Maintain the security, stability, and resiliency of the Internet DNS.**

- Creates an effective system of checks and balances on the ~~ICANN~~ICANN Board versus decisions which could affect the security, stability, and resiliency of the Internet DNS.

~~29~~28 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- Provides a clear set of mechanisms and processes for how the community can participate in and interact with the Empowered Community.

~~30~~29 **Maintain the openness of the Internet**

- Preserving policies of open participation in ~~ICANN~~ICANN's SOs and ACs.
- Retaining decision-making based on consensus rather than voting.

~~31~~30 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- Retaining decision-making based on consensus rather than voting.
- Maintaining the advisory role of governments in the SO and AC structure