

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

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## 1. Summary

- Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board has the final responsibility for the activities and affairs of ICANN.
- With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over 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.
- The CCWG-Accountability recommends creating a new entity that will act at the direction of the community to exercise and enforce Community Powers. The entity will take the form of a California unincorporated association and be given the role of sole designator of ICANN's Directors and will have the ability to enforce directly or indirectly the Community Powers. The entity will be referred to as the "Empowered Community".
- As permitted under California law, the Empowered Community will have the power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws may be provided to the Empowered Community.
- The CCWG-Accountability accepts that its statutory power will be limited as described above and that this is sufficient given:
  - The creation of Fundamental Bylaws that can only be modified jointly by the ICANN Board and Empowered Community.
  - All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
  - The right of inspection is granted to Decisional Participants in the Empowered Community.
  - The right of investigation is granted to the Decisional Participants in the Empowered Community.
- The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

## 2. CCWG-Accountability Recommendations

- 1 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:
  - This entity will take the form of a California unincorporated association and be given the role of sole designator of ICANN's Directors and will have the ability to enforce directly or indirectly the Community Powers. This entity will be referred to as the "Empowered Community".
  - The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the "Decisional Participants" in the Empowered Community.
  - The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
  - The Articles of Incorporation will be amended to clarify that the global public interest 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 code reference would not be mentioned in the Bylaws.
- Including in the ICANN Bylaws the right of investigation which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community 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.
- Including in the ICANN Bylaws the following limitation associated with GAC acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out"). In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power. The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus (as defined in Recommendation #11) while protecting the Empowered Community's power to challenge such Board decisions.

## Detailed Explanation of Recommendations

### 2 **Background**

- 3 With removal of NTIA as a perceived enforcement body over 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.

### 4 **Objectives**

- 5 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 to create the mechanism for these powers.
  - Organize the mechanism in line and compatible with the current ICANN Supporting Organization and Advisory Committee structures (with flexibility to evolve these structures in the future).
  - Address the CWG-Stewardship dependencies.
  - Provide the following powers and rights that would be constituted in the Fundamental Bylaws and would also be legally enforceable:
    - The power to reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans (CWG-Stewardship dependency).
    - The power to reject changes to ICANN Standard Bylaws.
    - The power to approve changes to Fundamental Bylaws (CWG-Stewardship dependency) and changes to the Articles of Incorporation, and to approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
    - The power to remove individual ICANN Board Directors (along with appointment, CWG-Stewardship dependency).
    - The power to recall the entire ICANN Board (CWG-Stewardship dependency).
    - The power to launch a community Independent Review Process (along with an appeal mechanism for issues relating to the IANA functions, CWG-Stewardship dependency) or Request for Reconsideration.
    - The power to reject 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).
    - The rights of inspection and investigation.

### 6 **Why the Sole Designator Model?**

- 7 The CCWG-Accountability's "[First Draft Proposal on Work Stream 1 Recommendations](#)" proposed a "Supporting Organization/Advisory Committee 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 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.

## 8 **Concerns with a Sole Member Model**

9 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.

## 10 **The Sole Designator Model**

11 To address the concerns described above, the CCWG-Accountability recommends implementing a "Sole Designator" model. The Empowered Community will have the power to appoint and, with that, the statutory power to remove individual 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. Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws may be provided to the Empowered Community.

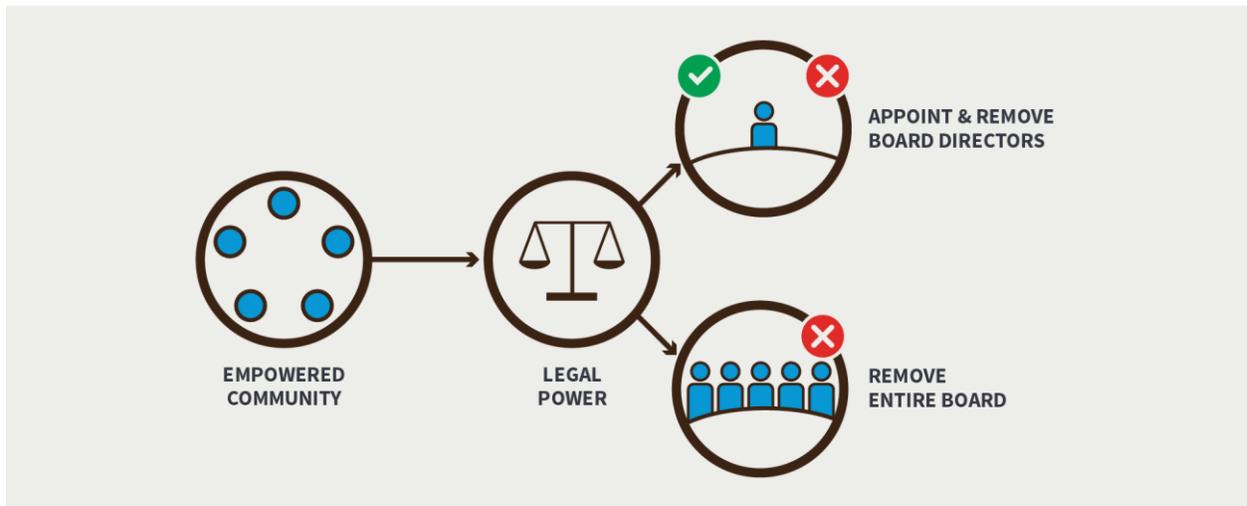
- Given that the right to inspect, as outlined in California Corporations Code 6333, is not a statutory right of a sole designator, and that the community felt this was a critical requirement, the CCWG-Accountability recommends this right be granted to Decisional Participants in the Empowered Community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

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.

## 13 **Legal Advice on Implementing the Empowered Community**

14 To implement the Sole Designator model, 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.

15 The Empowered Community will have the right to appoint and remove ICANN Board Directors, whether individually or the entire Board.



- 16 If the 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 Board to comply with that decision.
- 17 The CCWG-Accountability accepts that its statutory power will be limited as described above and that this 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 the Empowered Community’s power to launch a community IRP challenge if it believes the ICANN Board is in breach of its Articles of Incorporation or Bylaws.<sup>1</sup>
- The ICANN Board would be in breach of 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 Empowered Community could petition a court that has jurisdiction to force the ICANN Board to comply with that decision.
- Alternatively, the Empowered Community could remove the Board with the expectation that the new Board would respect the decision.

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

<sup>1</sup> 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 Decision-making: Seven New Community Powers.

- The Empowered Community will act as directed by participating SOs and ACs (the Decisional Participants in the Empowered Community).

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

**4. The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.**

Note: Legal counsel indicated that the Articles of Incorporation could be amended to ensure that the ICANN Board must consider the community's interpretation of the "global public interest" as 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 global public interest will be determined through a bottom-up, multistakeholder process.

## 18 **Additional Rights Granted by Inclusion in the ICANN Bylaws**

- **Right to inspect accounting books and records of ICANN**

19 In addition to the statutory rights that the Empowered Community will have and the new Community Powers described in Recommendation #4, the CCWG-Accountability recommends including in the ICANN Fundamental Bylaws the right for Decisional Participants in the Empowered Community to inspect as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.

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 Decisional Participants in the Empowered Community. The scopes are also different as explained below.

This inspection right would include the accounting books and records of ICANN and the minutes of proceedings of the Board of Directors and committees of the Board of Directors, on the conditions discussed below. Since ICANN will not have statutory "members", the right 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 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 Empowered Community, the

CCWG-Accountability recommends that a petition for inspection be brought directly by a single Decisional Participant in the Empowered Community or by multiple Decisional Participants in the Empowered Community through making a written demand on ICANN for the requested materials. If the Board refused or ignored the request, the petitioning Decisional Participant(s) could enforce its inspection right directly through the IRP or by petitioning the Empowered Community to initiate the escalation processes for a community IRP or for removing the Board.

21 **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. To address these concerns the CCWG-Accountability recommends the adoption of the following audit process: upon three Decisional Participants in the Empowered Community 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. This right of investigation would be included in the ICANN Fundamental Bylaws.

22 **The Empowered Community**

23 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the At-Large AC, and Governmental Advisory Committee (if the GAC chooses to participate) would participate in the Empowered Community—that is, they will be listed in the Bylaws as the five Decisional Participants. However, if the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out"). In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power. The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus (as defined in Recommendation #11) while protecting the Empowered Community's power to challenge such Board decisions.

24 Clarifications relating to the GAC carve-out:

- The GAC carve-out will only apply to Empowered Community challenges to ICANN Board actions that were based on GAC consensus advice, meaning the GAC advice was "approved by general agreement in the absence of any formal objection." The GAC carve-out will not apply to Empowered Community challenges to Board decisions that were based on GAC advice that was not supported by consensus (i.e., not "approved by general agreement in the absence of any formal objection").
- Process for identifying GAC consensus advice, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, and applying the GAC carve-out:

- GAC confirmation: When the GAC provides advice to the Board, the GAC will need to indicate whether the advice was approved by consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.
  - Board confirmation: When the Board takes action that is based on GAC consensus advice, the Board will need to state in its resolution that its decision was based on GAC consensus advice.
  - GAC carve-out identified in petition to use Community Power: When a Board action that is based on GAC consensus advice is challenged, the petitioning SO or AC will need to indicate in the initial petition that the matter meets the requirements for the GAC carve-out and clearly identify the applicable Board action and GAC consensus advice at issue. The decision thresholds (as revised when the GAC carve-out is invoked in accordance with Annex 2) required for the escalation and enforcement processes will need to be met for the Community Power that is being exercised.
- Timing for invoking the GAC carve-out: The petitioning SO or AC will need to indicate in the initial petition to the Empowered Community that the matter meets the requirements for the GAC carve-out. Therefore, the timing restrictions for this aspect of the escalation process will apply (i.e., the petition must be brought within 21 days of a Board decision being published). While this addresses timing of the Board challenge, the Board decision that is being challenged could be based on standing GAC consensus advice that the GAC had provided at an earlier date.
- 25 The thresholds presented in this document were determined based on five Decisional Participants. If fewer than five of 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 changes to have more SOs or ACs.

## 4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, stressing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduced additional suggestion by the ICANN Board regarding investigation right (audits), based on 3 Decisional Participants in the Empowered Community threshold.
- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the “GAC carve-out.”

## 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 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 Board and recall the entire ICANN Board.

## 7. How does this address NTIA Criteria?

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

- Decentralizing power within ICANN through an Empowered Community.
  - Providing a legal set of powers to the community while avoiding the risks of making changes to ICANN's organizational structure.
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28 **Maintain the security, stability, and resiliency of the Internet DNS.**

- Creates an effective system of checks and balances on the ICANN Board, which could affect the security, stability, and resiliency of the Internet DNS.
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29 **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.
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30 **Maintain the openness of the Internet.**

- Preserving policies of open participation in ICANN's SOs and ACs.
  - Retaining decision-making based on consensus rather than voting.
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31 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- To the extent the Government Advisory Committee (GAC) wishes to participate in decision-making by the Empowered Community, which the GAC has the flexibility to determine, it would be one of five Decisional Participants. In addition, the GAC will not participate as a decision-maker in community deliberations involving a challenge to the Board's implementation of GAC consensus advice. This "carve out," combined with the

safeguards in Recommendation #11, leads the CCWG-Accountability to believe that this NTIA requirement is met, even when considering the increased threshold from 50 to 60% for the Board to reject GAC consensus advice.

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