

**MEMORANDUM**

**TO:** John Curran  
Steve Ryan

**FROM:** Douglas N. Varley  
William M. Klimon

**CLIENT:** American Registry for Internet Numbers (#11411)

**DATE:** March 31, 2015

**RE:** Proposed Articles and Bylaw Amendments for ICANN

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We have prepared the attached amendments to the articles of incorporation and bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) to clarify the status of ICANN's stakeholders as "designators" and to make explicit their ability to hold ICANN's board accountable. The applicable California law gives designators—persons who are neither directors nor members of the corporation—the power to appoint, remove, and replace the corporation's directors. In connection with clarifying the power vested in ICANN's designators, we have also drafted amendments permitting the designators to call a special accountability meeting of the designators, at which the designators could ask questions of the board with regard to specific allegations of board actions contrary to ICANN's governing documents or the board's own policies or resolutions. While the board would not be required to take any specific actions at that meeting, the designators' power to remove the directors that they appointed should provide significant motivation for the directors to address the designators' concerns. Finally, in order to secure all of these provisions for the future, we have prepared amendments that require the written approval of a supermajority of the designators in order to amend the articles or bylaws.

At the end of this memo, we have also included a short addendum on what rights the designators have under the statute and ICANN's current bylaws. Under the statute, although not enunciated in the bylaws, the designators have the right to remove the directors they appoint. But, as a technical matter, as long as ICANN does not have members, the board of directors could amend the bylaws to restrict or eliminate the rights of the designators including the right to remove directors that the designators appoint. Obviously that would be an extraordinary action for ICANN's board to take—and it would be effective only with regard to directors designated after the changes—but the California Nonprofit Public Benefit Corporation Law does not rule it out.

Among the attachments that we have prepared to accompany this memo, we have included a short list showing just our proposed changes to ICANN's articles and bylaws, as well as redlined versions of the articles and bylaws, showing our changes in context.

### **Identifying the Designators**

The first proposed change simply identifies the bodies that currently select ICANN's directors—the Nominating Committee, the Supporting Organizations, and the At-Large Community—by their statutory title as “designators” and makes explicit that they have the rights of designators under the California Nonprofit Public Benefit Corporation Law.<sup>1</sup> The rights of the designators don't depend on the title, but rather on their role as specified in the governing documents.<sup>2</sup> Nevertheless, it is useful to state their authority because some of the designators' statutory rights are not reflected in ICANN's current bylaws. So we have proposed a new sentence in Article 4 of the ICANN's articles and a new Article VI, section 2.4 in the bylaws, each of which indicates that the designators have the power to select the directors and any other rights that belong to designators under the statute.

### **Right to Remove the Directors**

Under the Nonprofit Public Benefit Corporation Law, each designator has these dual rights with regard to any director it appointed: (a) to remove that director without cause and (b) to block the removal without cause by the Board of that director by withholding consent.<sup>3</sup> Those rights are not clearly presented in ICANN's current bylaws. Consequently, we have proposed a new Article VI, section 11.1 of the bylaws that makes explicit each designator's right to remove any director it appoints. With regard to removal by the board without cause, the current bylaws require notice of removal to a subset of the designators (to the Supporting Organizations and the At-Large Community but not to the Nominating Committee). We also propose a change to current Article VI, section 11.1 (renumbered as section 11.2) of the bylaws to conform to the statute by making consent by the relevant designator a necessary precondition to the removal without cause by the board.<sup>4</sup>

### **Right to Fill Vacancies on the Board**

ICANN's current bylaws permit the Nominating Committee and the Supporting Organizations to fill vacancies of directors that they designated. But the same is not true of a vacancy of the director appointed by the At-Large Community, which is filled by the Nominating Committee. We have proposed a simple bylaw amendment (to Article VI,

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<sup>1</sup> Cal. Corp. Code § 5220(d).

<sup>2</sup> Cal. Corp. Code § 5220(d).

<sup>3</sup> Cal. Corp. Code § 5222(f)(1)-(2).

<sup>4</sup> Cal. Corp. Code § 5222(f)(2).

Section 12.1) that would give the right to each designator to fill any vacancy of a director that that designator appointed. While this change is not strictly required by the statute—which requires only that the relevant bylaw provision provide for the designation of a replacement director<sup>5</sup>—it does accord with the spirit of the designator statutory scheme, which gives significant rights over the selection and removal of directors to the designators, and it would better align with the goals of making the ICANN board responsive to its stakeholders, in particular the broader Internet community.

### **Special Accountability Meeting**

We have also proposed a new bylaw (Article IV, Section 5) that authorizes (a) a supermajority of the designators to call a special accountability meeting of the designators requesting the ICANN board to address alleged violations of ICANN’s governing documents or board resolutions, (b) representatives of the designators to attend that meeting, and (c) the representatives to put questions to the board.

Generally, under the California statute, the bylaws may include any provision for the management of the activities and for the conduct of the affairs of the corporation that is not contrary to law or the articles.<sup>6</sup> Since there are no contrary provisions in the law or ICANN’s articles, granting the right to the designators to hold a special accountability meeting seems well within the discretionary ambit of the bylaws.

More importantly, empowering designators to call and invite the directors to attend a special accountability meeting imposes no burden on the board’s statutory right to govern the corporation.<sup>7</sup> The board would not be required to take any action at a special accountability meeting. Nor would the holding of that meeting interfere with the board’s regular authority to oversee the corporation because the directors could (at their peril) refuse to answer questions and could call their own special meeting for discussion or the taking of any action the board is permitted to take.

### **Rights Over Articles and Bylaws**

Finally, we proposed amendments to ICANN’s articles (in Article 9) and bylaws (in Article XIX) that require the consent of a supermajority of the designators to any amendment to the articles or the bylaws

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<sup>5</sup> Cal. Corp. Code § 5222(e)(1).

<sup>6</sup> Cal. Corp. Code § 5151(c).

<sup>7</sup> Cal. Corp. Code § 5210.

The Nonprofit Public Benefit Corporation Law permits the articles of incorporation to include a provision requiring the written approval of any amendment to the articles by a “specified person or persons other than the board or the members.”<sup>8</sup> The California statute also permits the bylaws to grant an approval right over amendments to the bylaws to the same kind of nondirector, nonmember specified person or persons.<sup>9</sup>

#### **Addendum: The Rights of the Designators Under ICANN’s Current Bylaws**

- **Designators’ Removal Power.** Each designator can currently remove without cause any director it appoints. The removal power is linked to the appointment power under the statute, unless “otherwise provided in the articles or bylaws at the time of designation.”<sup>10</sup> ICANN’s current bylaws do not restrict the designators’ removal powers. The bylaws do grant removal power to the board itself, but that power is not described as exclusive.<sup>11</sup> And it is perfectly consistent with the statute that both designators and the board have removal power, although the board’s power is subject to the relevant designator’s written consent.<sup>12</sup>
- **Designators’ Rights Over Bylaws Affecting Them.** The designators currently have no rights over the bylaws that affect them, and the board of directors can amend the bylaws to remove the designators’ rights to appoint or removal directors. The statute authorizing designators includes the stipulation that bylaws regarding designators’ appointment powers can be changed only with the approval of the corporation’s members.<sup>13</sup> But the statute is also clear that in a nonmembership corporation, powers reserved by the statute to the members may be exercised by the board.<sup>14</sup> So, while the spirit of the statute is to require approval of bylaw changes affecting the designators by someone other than the board—and the statute certainly permits affirmative bylaw provisions that would require specified persons like the designators themselves to approve certain bylaw changes<sup>15</sup>—under the status quo, ICANN’s board could by a two-thirds vote of all the directors alter the designators’ rights.<sup>16</sup> Those changes would be effective, however, only upon the next designation of directors and each current director would still be subject to removal by his or her designator.<sup>17</sup>

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<sup>8</sup> Cal. Corp. Code § 5132(c)(4); *see also* Cal. Corp. Code § 5812(a).

<sup>9</sup> Cal. Corp. Code § 5150(d).

<sup>10</sup> Cal. Corp. Code § 5222(f)(1).

<sup>11</sup> ICANN, Bylaws art. V, sect. 11.1 (as amended 30 July 2014).

<sup>12</sup> Cal. Corp. Code § 5222(f)(2).

<sup>13</sup> Cal. Corp. Code § 5220(d)(2).

<sup>14</sup> Cal. Corp. Code § 5310(b).

<sup>15</sup> Cal. Corp. Code § 5150(d).

<sup>16</sup> ICANN, Bylaws art. XIX.

<sup>17</sup> Cal. Corp. Code § 5222(f)(1).