

MEMORANDUM

TO: Legal Sub-team (“Legal Sub-team”) of the Cross-Community Working Group on Enhancing ICANN Accountability (“CCWG”)

FROM: Sidley Austin LLP

RE: Preliminary Response to Legal Sub-team Questions Identified in Memorandum Ref CCWG/SA/001 Initial Discussion Draft 1

DATE: March 27, 2015

Overview and Qualifications

You have asked that we respond to certain questions set forth in a memorandum (reference: CCWG/SA/001) from the Legal Sub-team (the “Question Memorandum”) attached as Annex A, which relate to the draft CCWG Legal Scoping Document (the “Scoping Document”) attached as Annex B.

Please note that the draft responses below are preliminary in nature and are provided on a general level in keeping with the general level of the questions posed in the Question Memorandum. Our draft responses are tailored to the questions posed by the Legal Sub-team, and are provided for the benefit of the Legal Sub-team, to help facilitate its consideration of the accountability mechanisms (as outlined in the Scoping Document), and should not be relied upon by any other persons or for any other purpose. These draft responses reflect Sidley’s preliminary independent reactions regarding the questions and have not been reviewed by any third parties.

Unless otherwise stated, the draft responses contained in this memo are based on California law, and in particular, the laws governing California nonprofit corporations (*California Corporations Code, Title 1, Division 2*). In our effort to prepare these responses for the Legal Sub-team in a very limited time frame, we have not completely and fully explored and researched all of the potential options and nuances posed by each of the questions. Also, please note that where we were uncertain as to underlying concerns reflected in a particular question, we have made certain assumptions about the focus of the question.

Preliminary Draft Responses

Our preliminary draft response follows each of the numbered questions set forth in italics below.

1. *Which available legal mechanisms would provide the means for achieving the CCWG’s above-stated goals and concerns and how would we do it?*

Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community “veto” process, designators, etc.

What additional legal (or legally viable) mechanisms are available to achieve the above-stated goals and concerns?

(The stated goals of the CCWG are: “1) Recalling members of the ICANN board of directors. 2) Community empowerment over ICANN’s management. 3) Limiting the scope of ICANN’s activity.”)¹

Sidley Response:

- The stated goals and concerns can be achieved under ICANN’s current status as a California nonprofit public benefit corporation. While other legal structures and entity types are available, including a mutual benefit corporation, a benefit corporation, a limited liability company, a partnership or an unincorporated association, these structures and entity types do not provide any clear benefits with respect to accountability mechanisms over what can be achieved using ICANN’s current legal entity structure. We note also that changing the legal structure and entity status of ICANN may require re-qualification for federal tax exempt status, with no guarantee as to the result of that process.
- Under the California nonprofit public benefit corporation structure, there are a number of additional accountability mechanisms that can be implemented.
 - As a general concept of corporate law, including the corporate laws of California, the board of directors of a corporation is the body with the authority and responsibility for managing and directing the affairs of the corporation in compliance with the corporation’s articles of incorporation and bylaws, whether the corporation is organized as a for-profit or as a nonprofit entity. As an accountability mechanism, each director is a fiduciary and is obligated to act

¹ The stated goals of the CCWG are found in the Scoping Document.

prudently (duty of care) and in good faith and in the best interests of the corporation (duty of loyalty). In addition, in a nonprofit corporation such as ICANN, an additional “duty of obedience”—a duty to carry out the mission expressed in the articles of incorporation—applies.

- Directors may delegate some of their powers to officers, employees, experts and others (including designated committees). However, the board bears ultimate responsibility for corporate decisions and must provide oversight of the exercise of those powers it has delegated.
- Under California law, there are means to provide a multi-stakeholder body with certain decision rights with respect to a nonprofit public benefit corporation, depending on how the relation of the multi-stakeholder body to the corporation is structured and the articles and bylaws are drafted. For example, the multi-stakeholder body or certain of its representatives could be the “members”² of the nonprofit public benefit corporation with certain statutory rights which can be altered and augmented in the articles and bylaws. The articles and bylaws may also specifically reserve certain decision rights to designated non-member entities or persons. Thus, through express provisions in ICANN’s articles and bylaws, mechanisms can be designed to provide the multi-stakeholder community with enhanced means to: (i) influence board composition, including through removal of individual directors and recall of the entire board; (ii) limit the ability of the board to make unilateral changes to all or certain bylaws (for example, as through a requirement that a membership body approve any bylaw change or certain fundamental bylaw changes, or through a “golden bylaw” that reserves to a third party the ability to approve a key provision of a corporation’s charter documents); and/or (iii) provide a membership body or a designated representative of a multi-stakeholder body approval rights with respect to certain board decisions, for example that relate to budget or key policies or strategies. Through these means appropriate independent review and redress mechanisms can also be created and protected.
- As reflected above, a California public benefit corporation may be organized with or without members. Currently, ICANN has no members. Note that to have membership rights, the member(s) (including any multi-stakeholder body) must be organized in some legally cognizable form—an individual, a corporate or similar entity, or an unincorporated association.
 - In a California public benefit corporation with members, certain decisions may be reserved to the members. Depending on the articles and bylaws, such members may be vested with significant voting and other statutory rights, similar to those

² As used in this memorandum, references to “members” are intended to refer to members in a legally recognized nonprofit corporation, or to members of an unincorporated association, in each instance in a legal sense under California statute. “Members” is not intended to refer to participants under an informal group setting.

that may be reserved to a shareholder in a for-profit corporation. Rights commonly reserved to members include:

- the election of directors (whether by common vote, or through classes or designations);
- the removal of directors without cause;
- bylaw amendments that materially and adversely affect rights on voting of member interests or transfer;
- amendments to bylaws changing the number of directors;
- amendments to the articles of incorporation; and
- the transfer of all or substantially all of the assets of a corporation, outside the ordinary course.

In addition, the articles and bylaws may specifically reserve other decisions to the members.

- Note that the ability to elect and remove individual directors, to recall the board at large, and to approve bylaw amendments provide powerful accountability mechanisms.
- Other significant decisions of the corporation also may be conditioned upon both board and member approval, as enumerated in the articles or bylaws, as appropriate; for example, member approval of a budget may be required. These controls may provide a further lever for the members of the corporation to hold the board accountable for the conduct and affairs of the corporation.
- The rights provided to members as reflected in the articles and bylaws are enforceable—if necessary—through the ability of members to bring an action on behalf of the public benefit corporation.
- Note that the approval rights of members are prospective rather than retrospective. Members may be given the power to approve (or veto) certain board actions or decisions in the articles or bylaws, but are not generally able, under California law, to review or reject a board action already taken that was not subject to a requirement of further approval. However, the bylaws of ICANN could provide that the board follow a formal process to submit certain proposed decisions to members for approval. Careful consideration should be given to the need to balance accountability through member involvement in key decisions with the need for efficiency in decision-making. (In some circumstances, a board may be more efficient in making informed decisions that involve difficult tradeoffs.)
- Furthermore, in a public benefit corporation, the articles and bylaws can designate

committees or groups, as the ICANN bylaws do (e.g., Ombudsman, Independent Review Board, etc.), with powers to undertake certain actions or make certain recommendations to the board. These provisions may include specific approval rights over certain decisions delegated to such committee or group by the board. These committees or groups, however, generally cannot compel the board to act in a certain way.

- However, consideration may be given to providing in the bylaws that for certain types of decisions, if the ICANN Board does not accept the recommendation of a specified committee or group with respect to a specified issue, the Board decision becomes subject to member review and approval. This is a potential mechanism to require the Board to take a second look.
- As discussed further below in Response #2, a “golden bylaw” may also be implemented to restrict key provisions of ICANN’s articles or bylaws from being amended without a third party’s consent.
- In addition, ICANN could be bound by contractual agreements with outside entities (including members and designators), the breach of which, in limited circumstances, could give rise to a remedy of specific performance of the contract.

2. *What are the available legal mechanisms for constraining ICANN’s activities and preventing the organization from expanding the scope of its mission in the future?*

How could a contract, “golden bylaw” / “durable bylaw”, or some other enforceable agreement achieve this goal?

Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?

Sidley Response:

- As we discussed in greater detail in Response #1 above, there are a number of mechanisms available to constrain ICANN’s activities, including to provide members with (i) certain rights with respect to the election and removal of directors, and (ii) approval and veto rights with respect to certain board actions and company decisions.
- Purpose Statements: Generally, a nonprofit entity is created for a specific purpose stated in its articles³ and the board of directors is subject to a “duty of obedience” to act in

³ ICANN’s articles state that it is formed for the purpose of “lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing

furtherance of that purpose and not some other purpose. Under California law, if a nonprofit corporation includes a specific purpose section in its bylaws⁴, it may not be broader than the specific purposes contained in the articles, and to the extent it states a narrower purpose, the board must ensure that corporate activities are consistent with that stated purpose.

- California provides a private right of action to members of a corporation to enforce, on behalf of the corporation, the terms of the corporation's articles and bylaws against the directors in a case of breach of fiduciary duty, which could be used as an enforcement mechanism in addition to the mechanisms of member approval and director removal discussed above. If there are no members, the California Attorney General has the ability to bring a suit for breach of fiduciary duty or charitable trust.
- Changes to Articles and Bylaws: The articles and bylaws of ICANN could be reviewed to ensure that the purpose stated in the articles and also included in the bylaws is sufficiently narrow and specific.
 - Under California law, the power to amend the articles and bylaws resides with the board and the members (if any) of the corporation (although an entity can elect to have the power to amend the bylaws reside solely with the members of the corporation).
 - Under California law, the articles and bylaws may include provisions requiring a higher threshold of voting participation, thereby treating a particular matter as more fundamental or constitutional in nature. Articles and bylaws may also grant the right to a third party (including a third party that is not a member) to approve amendments to the articles or bylaws. This could be used as a so-called "golden bylaw" to ensure that a key provision of the articles or bylaws could not be altered without third party approval, such as by one or more specified bodies from the

functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)."

⁴ ICANN's by-laws state that its mission is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are: a. Domain names (forming a system referred to as "DNS"); b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and c. Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions."

multi-stakeholder community.

- A “golden bylaw” may serve as an alternative to a membership structure or may be used in addition to a membership structure. Note that to have these approval rights, a third party (including any multi-stakeholder body) must be organized in some legally cognizable form—an individual, a corporate or similar entity, or an unincorporated association. In addition, if an entity there should be appropriate governance documents in place for this third party so that its legitimacy is preserved and respected over time.
- Effectiveness: We consider that either membership (with specifically defined rights articulated in articles and bylaws as outlined above in Response #1) and/or a “golden bylaw” may be designed to serve as effective tools for achieving CCWG’s governance and accountability goals. Membership may, however, provide additional flexibility in the decisions that may be made subject to approval and in available remedies for enforcement via a private right of action (perhaps in a derivative capacity on behalf of the corporation) for breach of fiduciary duty.

3. *Which legal jurisdictions provide for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG’s above-stated goals and concerns?*

Should ICANN consider relocating its headquarters to another legal jurisdiction (outside of California), and if so, where and why?

Should ICANN consider being subject to international legislation (which includes, e.g. in the case of an ordinary international organization, abiding by its Constitutive Treaty and other international norms) in order to reduce the influence of the legislation of a single country on ICANN?

How would a relocation of ICANN’s legal jurisdiction influence the aforementioned proposed accountability mechanisms under consideration by the CCWG?

Sidley Response:

- ICANN could be redomiciled in one of the 50 United States (or the District of Columbia), all of which have legal regimes governing the formation of nonprofit corporate entities. A detailed examination of the various state statutes is beyond the scope of this memorandum providing preliminary advice. However, various states are more commonly used than others for the formation of new nonprofit corporate entities, and a few observations are set forth below.
- Reincorporation of ICANN in a different state would require either a merger or dissolution of the current California entity, as well as new filings with the relevant state

officials to establish the corporate status of ICANN. In addition, it would require seeking a new determination of tax-exempt status from the U.S. Internal Revenue Service.

- The state of incorporation of ICANN does not need to coincide with the principal jurisdiction in which ICANN has an office or offices. For example, it is common for Delaware nonprofit corporations to be used for the conduct of operations in states which do not have a flexible or well developed body of corporate law.
- Although there are variations among states as to corporate governance, and variations in the level of oversight of state officials in regulation of nonprofit organizations organized or doing business in the state, in the abstract, it is difficult to identify any major variations in the statutory schemes that would recommend one state over another. Delaware is often a common choice because many questions of law have been the subject of judicial opinions. In general, however, most of the basic features of nonprofit corporate organization do not vary significantly from state to state. If specific California law impediments to various forms of governance are identified, additional research could be done to identify alternatives.
- ICANN could reincorporate in a jurisdiction such as Switzerland that provides a specific legal structure designed to be used by international non-governmental organizations (“NGOs”). Additional research would be necessary to identify other jurisdictions that have a special legal structure for such organizations.
- Swiss NGO: Under Swiss law, ICANN could be established as a Swiss NGO.
 - Swiss NGOs are typically set up as nonprofit associations. Such associations have members, which must be organized in some legally cognizable form.
 - Associations generally have two main bodies, the competences of which can be freely defined in the articles of association, subject to certain statutory limitations:
 - The General Assembly of members is the highest body of the association, responsible for: (i) enacting and amending the articles of association; (ii) dissolving the association; and (iii) supervising the other bodies, in particular the board of directors, including the right to obtain information, to grant discharge, and to remove the board members (which does not exclude the possibility to also vest other bodies with the right to remove board members, in addition to the right of the General Assembly).
 - The board of directors manages the association, and must do so in compliance with the governance documents and the law. They are also under a general fiduciary duty to safeguard the interests of the association. The board members are elected as stipulated in the articles of association, which can also provide that third parties appoint the board members. The General Assembly has the right to remove board members without legal cause unless the articles of association limit this right.

- The articles of association can provide for additional bodies subject to oversight by the General Assembly. In addition, directors may delegate some of their powers to officers, committees, and others, if so authorized by the articles of association.
- The association has its own separate legal identity. It can enter into contracts, and can sue and be sued.
- An association may apply for tax exemption if its objective is purely of public interest, it carries out a disinterested activity and is nonprofit making.
- The following rules on liability apply in an association:
 - If the association breaches a contract or otherwise causes damage to a third party, it is liable to the third party and can be sued. The members are not liable for the liabilities of the association, neither directly to the third party nor to the association, unless the articles of association provide otherwise. The board members who carried out the damaging act are shielded from any contractual liability, but may be subject to tort liability.
 - If the association does not adhere to its mission, there is in principle no remedy for third parties or the Swiss government.
 - If board members breach their duties under the governance documents or statutory duties, they are personally liable to the association for the damage caused to the association. In addition, the General Assembly (and any other body authorized by the articles of association) may remove the board members concerned (which does not require proof of any breach of duties, unless the articles of association provide otherwise).
- International NGO:⁵ A Swiss NGO may request the status of an international NGO (“INGO”) by filing its articles of association with the Swiss federal authorities.
 - An INGO is exempt from direct taxes. An INGO is not exempt from indirect taxes, customs duties, Swiss social security, and other charges.
 - An INGO is required to: (i) be organized as a Swiss association (or foundation); (ii) have individual members of different nationalities or private entities governed by different national laws; (iii) carry out activities in several countries; (iv) pursue public or charitable purposes; (v) cooperate with an international organization or institution, for example by having an observer status; and (vi) demonstrate that its presence in Switzerland is of particular interest for Switzerland. ICANN may be able to meet these requirements.

⁵ Swiss law also provides an additional category of “international organization,” which must be established through international agreements.

4. *What antitrust legal issues could arise in the context of the CCWG’s work and possible recommendations, and how can those issues be most effectively addressed given the CCWG’s stated goals and concerns?*

Particularly in light of the fact that a portion of the ICANN community are contracted parties, what protections can be built in to make sure that the recommendations do not run afoul of antitrust laws and subject ICANN or its participants to antitrust liability?

Do any particular models or mechanisms under discussion give rise to more antitrust related concerns than others?

Sidley Response:

- Close attention to the antitrust laws by the CCWG is warranted for several reasons. First, ICANN includes competitors and potential competitors within the organization and its operations. Second, the administration of the internet is considered by some a natural “monopoly.” Third, the work of the CCWG here, and ICANN generally, will impact the success of commercial interests in the marketplace and may be perceived to create “winners” and “losers.” Lastly, the work of the CCWG is high profile, subject to scrutiny and ICANN has been subject to antitrust challenges in the past. The principal United States antitrust laws most likely to be relevant to the CCWG, or entities that may be created as a result of the CCWG’s efforts, are Sections 1 and 2 of the Sherman Act. Of course, if ICANN and its jurisdiction of organization were to be moved outside the United States, a similar antitrust analysis would need to be undertaken for the applicable country or region.
- Overview of Relevant U.S. Antitrust Laws: The antitrust laws seek to promote free and fair competition in the marketplace. One of the principal U.S. antitrust laws is the Sherman Act, which can be enforced by the government, either civilly or criminally (by the Department of Justice), and civilly by private parties that have been injured or may be injured.
 - Section 1 of the Sherman Act
 - Section 1 of the Sherman Act prohibits agreements, contracts, combinations or conspiracies between two or more persons or entities that unreasonably restrain trade.
 - Ordinarily, the determination of whether a restraint “unreasonably” restrains trade requires an analysis of its effect on competition, including a consideration of the justifications for the restraint and its pro-competitive and anti-competitive effects in the marketplace as a whole. This consideration is known as a “rule of reason” analysis.

- Over time, however, the courts have concluded that a certain subset of restraints are so inherently anti-competitive that they can be conclusively presumed to be anti-competitive without a detailed review of their economic effects and without consideration of the justifications for the restraint. Such conduct is deemed a *per se* violation of the Sherman Act.
 - Conduct analyzed under this *per se* rule includes price fixing, bid rigging, output restrictions and allocation of markets, customers or territories, among horizontal competitors. Horizontal group boycotts, also known as “refusals to deal,” among competitors are also considered *per se* violations under some circumstances.
 - As noted above, for there to be a Section 1 violation there must be an agreement, and there must also be two or more separate economic entities involved. Thus, the courts have held that a corporation cannot conspire with itself, or with its wholly-owned subsidiary. Agreements made within an entity, however, can still violate Section 1 if the parties to the agreement act on interests separate from those of the entity, or if the entity is just a shell formed for the purposes of carrying on concerted activity.
- Section 2 of the Sherman Act. Section 2 prohibits monopolization, attempted monopolization and conspiracy to monopolize. While a Section 1 violation requires two or more separate economic actors and an agreement, Section 2 can be violated by a single entity alone. Violations of Section 2 of the Sherman Act typically involve allegations that an entity with market power or a large share of a relevant market has engaged in questionable practices intended to keep competitors out of the market. Thus, Section 2 violations are “exclusionary” in nature. Simply having a monopoly position or market power is not, by itself, illegal. Entities can come by their monopoly positions in legal ways. (For example, it has been suggested that ICANN came by a monopoly position as administrator of the domain name system by historical accident, *i.e.* it had a monopoly thrust upon it by the Department of Commerce.) In order to violate Section 2, a monopolist must willfully engage in some anticompetitive, exclusionary conduct.
- The formation or operation of entities, groups or associations, such as the CCWG and ICANN, which include competitors is not illegal. Such groups often serve pro-competitive purposes that are clearly permissible under the antitrust laws. Development of standards or specifications to be used in an industry is a good example. Such standards and specifications are legitimate goals of such groups. In the case of groups involved in administering the internet and the domain name system, it is clear that uniform and coordinated resolution of issues is necessary to facilitate interoperability, technical reliability, and stability. Because standardization can impose costs on some industry participants and can appear to reduce choice, the group must exercise care in how it formulates such standards. And care must be taken to avoid straying from legitimate conduct to anticompetitive conduct.

- Prohibited conduct. It would be unfeasible to establish a detailed and comprehensive list of specific conduct that might lead to antitrust liability. In broad strokes, however:
 - The group should not adopt policies or rules that would prohibit members from competing with one another.
 - Competitors within the group must not enter into agreements on prices, or an agreement to allocate customers, markets, or territories.
 - The group should not agree to exclude a specific firm or entity without a legitimate reason.
 - All interested parties, including those who are not formally part of the group, should be allowed the ability to comment on proposed standards or policies that may affect them.
 - Market-dominant participants should not be allowed to control decision-making to the detriment of their competitors.
 - Arbitrary or inequitable actions, policies or procedures should be avoided.
 - Disparate treatment and or decisions that single out specific entities for special treatment should be avoided.
- Policies and Procedures to Mitigate Antitrust Risk. The CCWG should adopt prophylactic policies and procedures to reduce antitrust risk, which our firm can help develop if requested. They include the following:
 - Antitrust policy statement: A written policy committing the group and its participants to compliance with laws, substantive consequences, including expulsion from the group, for participants violating those laws, and a process for distributing the policy to participants in the group's activities.
 - Written or recorded communications.
 - Group meetings:
 - Meetings of the group, or committees of the group, should be structured with agendas (reviewed by antitrust counsel if appropriate) rather than informal or free-flowing. The agenda should be followed, minutes should be kept and reviewed.
 - A version of the antitrust policy statement should be read at the beginning of each meeting.

- Avoid informal, post-meeting gatherings, *i.e.* rump sessions at a bar or restaurant.
- Information that is commercially sensitive to individual entities should not be disseminated, exchanged or discussed.
- Avoid conduct or statements that would give the false impression that the group is party to any anti-competitive agreement. Discussion of such matters should not be allowed.
- Avoid statements or conduct that would give the false impression that participation in the group's activities is not available to some for competitive reasons.
- Do not speculate as to the legal propriety or consequences of specific conduct.
- Meetings should be open and transparent.
- Meetings should be attended by antitrust counsel (at least those in which sensitive subjects are to be discussed).

The above guidance is not intended to cover all antitrust issues that may arise during the activities of the group. It is meant to alert participants to the types of situations to be aware of and steps to take to mitigate antitrust risk.

5. *How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?*

Sidley Response:

- As we discussed in greater detail in Response #2 above, it is possible to include a purpose statement in the articles and/or bylaws and the board must then direct the activities of the corporation so as to be consistent with such stated purposes. Consideration can be given to incorporating ICANN's Affirmation of Commitments into its articles or bylaws as a purpose statement, which may be enforced by members (if any) pursuant to the mechanisms we discussed above in Response #1. In addition, any changes to such purpose statement could require the approval of the members or a third party as discussed in Response #2.

Annex A
Question Memorandum

[Attached]

Memorandum

From: CCWG Legal Sub-team

To: Sidley Austin

Ref: CCWG/SA/001

The CCWG Legal Sub-team requests your legal advice on the following questions:

1. Which available legal mechanisms would provide the means for achieving the CCWG's above-stated goals and concerns and how would we do it? Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community "veto" process, designators, etc. What additional legal (or legally viable) mechanisms are available to achieve the above-stated goals and concerns?
2. What are the available legal mechanisms for constraining ICANN's activities and preventing the organization from expanding the scope of its mission in the future? How could a contract, "golden bylaw" / "durable bylaw", or some other enforceable agreement achieve this goal? Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?
3. Which legal jurisdictions provide for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG's above-stated goals and concerns? Should ICANN consider relocating its headquarters to another legal jurisdiction (outside of California), and if so, where and why? Should ICANN consider being subject to international legislation (which includes, e.g. in the case of an ordinary international organization, abiding by its Constitutive Treaty and other international norms) in order to reduce the influence of the legislation of a single country on ICANN? How would a relocation of ICANN's legal jurisdiction influence the aforementioned proposed accountability mechanisms under consideration by the CCWG?
4. What antitrust legal issues could arise in the context of the CCWG's work and possible recommendations, and how can those issues be most effectively addressed given the CCWG's stated goals and concerns? Particularly in light of the fact that a portion of the ICANN community are contracted parties, what protections can be built in to make sure that the recommendations do not run afoul of antitrust laws and subject ICANN or its participants to antitrust liability? Do any particular models or mechanisms under discussion give rise to more antitrust related concerns than others?

5. How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?

Annex B
Scoping Document

[Attached]

(DRAFT) CCWG Legal Scoping Document

CCWG's Role and Responsibilities:

The ICANN community's Cross Community Working Group (CCWG) on Accountability is responsible for developing improvements to ICANN's accountability processes. The initial tranche of work tasked to the CCWG is identifying those accountability enhancements that must be in place or committed to before the IANA stewardship role transition can occur. The CCWG's work includes making recommendations to improve ICANN's existing mechanisms that are intended to insure that the bottom-up organization is, in operation, accountable to its community. The CCWG is also undertaking consideration of new mechanisms such as new legal structures or agreements that could improve the organization's accountability.

In this context, "community" means the collective individual participants in ICANN's various Supporting Organizations (SO), Advisory Committees (AC), GNSO Stakeholder Groups, and other relevant sub-grouped interests that together comprise ICANN. As a bottom-up organization, ICANN must remain ultimately accountable to the various constituent participants in the community that the corporation was established to serve, as well as demonstrating accountability and openness to the more global community involved in the Internet domain name system. The CCWG aims to provide initial recommendations to ICANN's board of directors for approval before the IANA stewardship transition window opens in late 2015.

Several questions have arisen in the course of the CCWG's work that require input from independent legal experts to aid the CCWG in the further evaluation of proposals and recommendations. The CCWG seeks to retain¹ these independent legal advisors to assist it in creating mechanisms that provide the means for the community to hold the organization accountable to it for the organization's actions and decisions.

Three specific accountability goals and the concerns are provided below, followed by specific questions intended to obtain needed information for the CCWG to proceed in its evaluation of possible mechanisms. The three specific accountability goals identified by the CCWG and explained below that require independent legal advice on how to best achieve these goals are:

1. Recalling members of the ICANN board of directors.
2. Community empowerment over ICANN's management.
3. Limiting the scope of ICANN's activity.

The initial work of the CCWG is expected to result in recommendations that will be forwarded to the NTIA in consideration with an IANA stewardship transition proposal.

¹ The CCWG is the "client" in the attorney-client relationship established through this retention of independent legal expertise, and all reports and communications are to be made directly between independent legal counsel and the CCWG.

To that end, the NTIA’s principles should be considered as part of any review of proposed accountability mechanisms. NTIA’s principles provide that the solutions should:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectation of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

The specific proposals listed below under consideration by the CCWG are non-mutually exclusive to the extent permitted, and should not be seen as the only possibilities on the table for consideration to achieve the goals. Other options for available mechanisms and legal structures that would achieve the CCWG’s stated goals are welcome and encouraged for exploration. Follow-up questions and clarifications from the CCWG are anticipated in response to the initial answers from independent legal counsel.

Goal 1: Recalling Members of the ICANN Board of Directors

ICANN board members are individually appointed by different sub-groups within the ICANN community for a fixed term. The relevant individual community sub-groups seek a mechanism to recall under-performing board members before the board member’s term expires.

Concerns:

Board member recall is to be considered as a “last resort” option that is not often used.

Board member(s) may be recalled at the sole discretion of the appointing Supporting Organization / Advisory Committee according to rules established by that Supporting Organization / Advisory Committee, although possibly requiring a high voting threshold.

Generally, it would be expected that each relevant individual ICANN sub-group would have the power to recall its own board appointees, but not the board appointees from other relevant sub-groups. However, the community as a whole would need the power to remove board members that are appointed by the Nominating Committee (as the Nominating Committee is comprised of delegates from across the community as a whole).

And the community would also like to consider the ability to call for a “vote of no confidence” on the entire board of directors with the effect of recalling the entire board at once, in rare and exceptional situations.

Proposals Under Consideration:

i) Amend Bylaws to Create Power to Spill the Board

Amend ICANN's corporate bylaws (and/or Articles of Incorporation) to provide for the ability of the ICANN community to recall all or some board members in exceptional circumstances. Spilling the entire board at once would register a clear "vote of no confidence". Individual board member recall would be determined based on which part of the community appointed the board member being recalled.

ii) Amend Bylaws to Create "Community Council"

Amend ICANN's bylaws to create a special "Community Council" empowered with recalling the entirety of ICANN's board of directors with a vote of no confidence. The Community Council could be comprised of leaders or appointees of ICANN's various SO/AC's and would have a very high threshold to meet to recall the board. Once recalled, all board directors would be removed with processes in place to appoint replacement directors.

Goal 2: Community Empowerment Over ICANN's Management

ICANN community members seek the means to hold ICANN to ultimately account to it on a narrow set of "high-impact" issues and key decisions. The community requires an ability to challenge and block (to the extent legally permissible) the ICANN board on these key decisions. The types of high-impact issues, where board and management decisions would be subject to community review and challenge include key decisions such as the approval of the organization's budget, bylaws changes, strategic plan adoption, etc. The community further calls for a mechanism that empowers it to design, initiate, launch, and sunset organizational review teams, and to appoint their own members and/or representatives to them.

Concerns:

The risks undertaken by board members, the various community members, and other participants, pursuant to the different corporate governance structures available under California nonprofit corporations law (including individual liability for ICANN's actions and decisions).

"Capture", which means when one sub-group of the community is able to "game the system" or obtain disproportionate representation or influence in the overall balance of interests between relevant sub-groups in ICANN's organizational framework. ICANN's existing organizational framework represents a balancing of interests, and these mechanisms should not upset that balance. Concern about "capture" apply to all

participants including governments, stakeholders, or other sub-groups within ICANN including its staff.

Complexity of changes and length of time required to alter ICANN's existing corporate governance structure to improve accountability is a concern; and the group seeks mechanisms that achieve the group's goals with the minimal amount of changes or disruption to ICANN's existing organizational framework as reasonably possible.

Proposals Under Consideration:

i) Membership Corporation

Restructuring ICANN's corporate governance structure to become a true "membership" corporation (California Corporations Code §5310 / §7310). Existing ICANN community participants, including both individuals and companies, would serve as the initial corporate Members with all the rights and responsibilities provided by the statute. The possibility of ICANN as a true membership corporation is contemplated in ICANN's existing bylaws. The proposal should ensure that existing members should not be an obstacle to admitting new members in the future under this model.

ii) Representative Delegates with Decisional Authority

Create "delegates" (California Corporations Code §5152 / §7152) empowered to represent existing relevant ICANN community sub-group interests in ICANN's decisional processes (at a level as high as the law permits) via bylaws provisions or otherwise, as appropriate.

Delegates would have authority to oversee ICANN's existing board on the management of certain fundamental high-impact issues. Delegates would be selected from ICANN's relevant sub-groups, and together would have the power to overrule ICANN's board and to amend or reject certain board decisions. They would also be empowered to remove one or more board members. Delegates would operate as "last resort" option for correcting board decisions that are widely unsupported by the community. Delegates would have a high voting threshold to execute a power.

iii) Community "Veto" Process to Challenge Board Decisions

Pursuant to California Corporations Code §5210, ICANN's community can be empowered to challenge certain board decisions via a process provided for in the organization's bylaws that is subject to an ultimate decision of the ICANN board. Under this mechanism, ICANN could amend its existing bylaws to empower the community to challenge certain board decisions, while also raising the standard by which the board could reject those community decisions. Thus, the community could challenge an eligible board decision, and the board would then be required to accept the community's overriding decision -- unless the board subsequently voted by a supermajority (or unanimously) to retain its original decision. This would provide a means for challenging

eligible board decisions by community members, while still providing the board with the requisite ultimate decisional authority, since the board could ultimately override the community if a high-level (¾ or unanimous) of agreement among board members could be reached to reject the community “veto”. The community “veto” process would only be available to challenge certain key high-impact board decisions such as amending the bylaws or articles, or adopting the organization’s budget or strategic plan.

Once the mechanism is triggered, the individual community sub-groups could use their existing decision making processes (ex: elections or consensus) to reach the ultimate or collective decision of the community to reject a board decision. If the board is not able to muster the super-majority of board votes to override a community “veto”, then the issue is sent back to the bottom-up processes for further work and development. A successful community “veto” cannot change or amend a board decision, but rather, can only reject and send an widely unpopular high-impact board decision back to the community for further work.

iv) Supervisory Board / 2-Tier Board Construction

Create a second or “supervisory” board of directors, consisting of representatives from ICANN’s community sub-groups to oversee ICANN’s existing board on the management of certain fundamental high-impact issues. The supervisory board would have the power to overrule ICANN’s existing board of directors and to amend or reject certain decisions of ICANN’s existing board of directors. It would also be empowered to remove one or more board members. The supervisory board would operate as “last resort” option for correcting decisions of the existing board that are widely unsupported by the community. The supervisory board vote would have to meet a high threshold to execute a power.

v) Permanent Cross-Community Working Group

Establish a permanent Cross-Community Working Group (CCWG), a pre-existing ICANN community consensus development mechanism, to review and coordinate recommendations to ICANN’s board of directors for improvements to ICANN’s accountability processes. One option for this would be to amend ICANN’s bylaws to provide for the permanent group and set its powers. The CCWG would be comprised of participants from the relevant ICANN sub-groups. To the extent possible, the CCWG would have the authority to:

- Review any board decision. Non-approval by the CCWG would send the board decision back to an ICANN bottom-up policy development process. The board could not revise bottom-up recommendations and would be required to adopt and implement them.
- Refer any board decision to a (possibly binding) independent review panel.
- Approve changes to ICANN bylaws or articles, with supermajority required to approve. The board could not revise CCWG’s changes to the bylaws or articles.
- Recall one or all ICANN board members.

Goal 3: Limit Scope of ICANN’s Activities

The community seeks a legal (or legally viable) mechanism to prevent ICANN from acting outside from its specifically defined technical mission of managing certain operations of the Internet’s domain name system.

Concerns:

To prevent organizational “mission creep” and the future expansion of ICANN’s activities beyond its technical mandate and specifically into issues related to the lawful regulation of Internet content or speech. The mechanism should also prevent the community from modifying or expanding ICANN’s mission in the future, to the extent possible.

Proposal Under Consideration:

i) “Compact” or “Golden Bylaw” to Limit Scope of ICANN’s Activities

ICANN could sign a contract or some other form of legally binding and enforceable agreement in which the organization agrees to limit its own activities (e.g., ICANN agrees to constrain ICANN’s activity to the extent permissible, possibly through contract, bylaws provisions, etc.). Stakeholders or some representation of them could possibly be party to this agreement.

Specific Questions Related to the Above Goals and Concerns:

1. Which available legal mechanisms would provide the means for achieving the CCWG’s above-stated goals and concerns and how would we do it? Examples to evaluate: different corporate legal structures, amendments to bylaws or articles of incorporation, creation of internal or external decisional review mechanisms, legal contracts, community “veto” process, etc. What additional legal (or legally viable) mechanisms are available to achieve the above-stated goals and concerns?
2. What are the benefits, responsibilities, and risks including but not limited to the legal and financial liability of board directors, statutory members, representative delegates, and community participants (both collectively and individually) for ICANN’s actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?

3. What are the costs or barriers to participation in ICANN's bottom-up policy development or decision making processes under the different legal structures and mechanisms under consideration for both existing participants and potential participants? How do the different structures and mechanisms under consideration assess against each other with respect to concerns about "capture" or undue influence, costs, barriers to participation, and required time to transition to a new structure?
4. What are the available legal mechanisms for constraining ICANN's activities and preventing the organization from expanding the scope of its mission in the future? Which available mechanisms provide the most advantage to the community and the most effective means of enforcement?
5. Which legal jurisdictions provide for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG's above-stated goals and concerns? Should ICANN consider relocating its headquarters to another legal jurisdiction (outside of California), and if so, where and why? Should ICANN consider being subject to international legislation (which includes, e.g. in the case of an ordinary international organization, abiding by its Constitutive Treaty and other international norms) in order to reduce the influence of the legislation of a single country on ICANN? How would a relocation of ICANN's legal jurisdiction influence the aforementioned proposed accountability mechanisms under consideration by the CCWG?
6. What does it mean for an ICANN board member to hold a fiduciary duty to the organization? To what extent can a board member meet her/his legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed her/him to the board? How to increase (or even maximize) a director's ability to represent the interests of the community that appointed her/him in the course of board decisions, given legal duties of board members to the corporation? To what extent are ICANN's board members required to approve or reject a community decision regarding the management of ICANN based upon the board's separate and distinct interpretation of "what is in the best interest of ICANN" or "the global public interest"?
7. How could the board be bound to accept decisions made by an Independent Review Panel (or other independent entity) including decisions pertaining to the board's oversight of the management of the organization?
8. How could the California Attorney General (or other public official) intervene in ICANN's operation on behalf of community members? How typical is such an intervention by the California Attorney General in the operation of a nonprofit corporation, what are the grounds for such intervention, and what is a reasonable expectation for a successful remedy in this situation?
9. What antitrust legal issues could arise in the context of the CCWG's work and possible recommendations, and how can those issues be most effectively addressed given

the CCWG's stated goals and concerns? Particularly in light of the fact that a portion of the ICANN community are contracted parties, what protections can be built in to make sure that the recommendations do not run afoul of antitrust laws and subject ICANN or its participants to antitrust liability? Do any particular models or mechanisms under discussion give rise to more antitrust related concerns than others?

10. How to best incorporate certain aspects of ICANN's Affirmation of Commitments into the organization's corporate governance structure (possibly its bylaws) and also to provide for the effective enforcement of those commitments?

11. What is recommended for an interim mechanism/caretaker board arrangements if the entirety of the board of directors are spilled by the community?

12. Would it be possible under California law for the community to limit the direct or other damages of third parties (ex: gtld applicants) in a lawsuit against ICANN and if so, how? Are there ways to create disincentives to filing frivolous legal claims against ICANN? How could such limitations be created so there is little "wobble room" in contract negotiations for ICANN, for example through boilerplate contract clauses?