5A) Community Mechanism as a Sole Member Model

In developing a mechanism to empower the ICANN multistakeholder community, the CCWG-Accountability agreed on the following:

- To enhance ICANN's accountability.

- To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.

- To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC structures (without making it impossible to change these in future).

- To include the following powers which would be legally enforceable

    - Reconsider/reject budget or strategic/operating plans (CWG-Stewardship dependency - Budget)

    - Reconsider/reject changes to ICANN "standard" Bylaws

    - Approve changes to "Fundamental" Bylaws

    - Appoint and remove individual ICANN Directors (CWG-Stewardship dependency)

    - Recall the entire ICANN Board (CWG-Stewardship dependency)

    - Reconsider/reject Board decisions relating to reviews of the IANA functions; including ability to trigger a separation of PTI (CWG-Stewardship dependency)

- To address the CWG-Stewardship dependencies

The first CCWG-Accountability draft proposal presented the community mechanism as an SO/AC Membership Model.[1] However, there were significant concerns expressed in the Public Comment from 4 May – 3 June 2015, and in order to respond to the feedback received, the CCWG-Accountability initiated work on alternative solutions. At the Paris meeting on 17-18 July 2015, the CCWG-Accountability considered 3 distinct models:

- The "Community Mechanism as Sole Member Model (CMSM)" as an alternative that builds upon the more favorable concepts in the other models and simplifies certain

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[1] For further detail on the proposed SO/AC Membership Model, please see the first draft proposal (Section 5.1.1). In addition, please refer to Appendix [G] that provides a comparison of the three models.

implementation aspects. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member ("CMSM").

- The "Empowered SO/AC Designator Model" would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood and would allow opt-in re legal status.
- The "Empowered SO/AC Membership Model" would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood and would allow opt-in re legal status.

Following discussions, and consultations with external legal counsel, the CCWG-Accountability concluded that it should proceed in its next public consultation only with the Community Mechanism as Sole Member Model (CMSM) given the understanding that:

- It provides the required legal enforceability that the Empowered SO/AC Designator Model could not.
- It removes the problematic requirement for some SOs/ACs that they become legal persons to participate in the Empowered SO/AC Membership Model.
- It avoids the problem of differential rights with respect to statutory rights of Members associated with the Empowered SO/AC Membership Model.
- It limits the issues related to the statutory rights of members associated with the Empowered SO/AC Membership Model which would allow members to dissolve corporation and bring derivative suits.

The subsections below explain the Sole Member Model however it is important to note that the CMSM is currently based on the initial work of external legal counsel on this topic and that work is ongoing to fully develop all aspects of this model.

5A.1 The Community Mechanism: Sole Member Model

As the name implies the Sole Member Model (CMSM) would have ICANN become a California public benefit corporation (also known as a not-for-profit corporation in some jurisdictions) with only one member (ICANN currently is a California public benefit corporation without members).

As required by law the member in this model would have to be a legal person and it is expected that it would be created as an Unincorporated Association (UA) given this type of legal person has few requirements for operating (e.g. no need for officers or directors) and is simple to create.

Only ICANN SOs and ACs could participate in this Member. Participating in the Member would allow the participating SOs/ACs, as a group, to provide instructions to the Member to use its powers (such as approving a change to the ICANN Bylaws). The SOs and ACs that wish to participate in the Member would simply indicate they wish to do so at the time of its creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to participate initially, or new SOs or ACs that could

be created at a later date, could choose to participate in the Member at any time but this would require the current participants to approve this and the Bylaws to be amended to reflect their participation.

The SOs/ACs that participate in the Member would do so according to a set of rules described in the ICANN Bylaws that would be created specifically for this purpose. The SOs/ACs could only instruct the Member to exercise its powers as a group and would do so by using a voting mechanism as defined in the Bylaws (the exception to acting as a group is related to the appointing and removing individual directors – see next paragraph for details). The rules would describe the number of votes each SO/AC would have in this process and the minimum number of votes required to instruct the Member to exercise a power. Each power could have a different minimum number of votes required to instruct the Member (e.g. approving a Bylaw change could require a minimum of 66% support vs. approving a fundamental Bylaw change could require a minimum of 75% support). Each SO/AC would be responsible for defining their processes for voting under these rules.

As a membership organization ICANN directors have to be appointed or removed by the Member. In order to maintain the current arrangements for the appointment of directors, which is a requirement, the Member rules would require the Member to use its power to appoint or remove a director to/from the ICANN Board on the instructions of the specific SO/AC/NomCom responsible for appointing that director as per the current ICANN Bylaws, without requiring a vote.

Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of participants in the member (however all SOs/ACs can decide to participate until the creation of the Member or at a later date). Each of these SOs/ACs would have 5 votes on any proposal to instruct the member which requires a vote (for a total of 20 votes). There is no requirement or expectation than a participating SO/AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against).

Under these arrangements the decisions powers of the CMSM could be enforced through the internal IRP process with the force of binding arbitration and, if necessary, further backed through judicial proceedings.

DRAFTING NOTE – The issue of what statutory rights and obligations are applicable to the Member and the impact of these remain to be clarified and agreed to.

5A.2 Influence in the Community Mechanism

Drafting note: WP1 will be completing the details on voting thresholds.

5A.3. Governance models and community powers

Please refer to Appendix G produced by legal counsel.