

MEMORANDUM

TO: Cross-Community Working Group on Enhancing ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Community Enforcement Vehicle Implementation

DATE: October 31, 2015

We have been asked to provide a short memo as to how the Community Enforcement Vehicle (“CEV”) would be operationalized, including a description of its administration and how it would implement its actions.¹ The CEV would be the sole designator of ICANN’s directors and would have the ability to enforce certain rights and powers it would be given in ICANN’s Bylaws; because its role is broader than just designating directors, we refer to it here as the CEV. Although the governance structure discussed here has been referred to as the Sole Designator Model, the CEV could be given any name.

Legal Form

- The CEV would be established at the outset as a legal person with legal capacity and standing to enforce designator and other community rights provided under the ICANN Bylaws.
- ICANN Bylaws creating the CEV should contain a statement establishing the CEV as an unincorporated association, specifying the key participants (the ACs, SOs, and individuals -- such as chairs of the SOs and ACs -- with a role in the CEV’s operations), and identifying it as the sole designator of ICANN.
- In addition to the powers to designate and remove directors, individually and collectively, ICANN Bylaws would give the CEV the community empowerment rights discussed

¹ Note as a general matter that our legal analysis is provided on a level in keeping with the question posed. Our legal analysis is tailored to the context in which the particular question arises. It is provided to inform and help facilitate your consideration of the governance accountability models under discussion and should not be relied upon by any other persons or groups for any other purpose. Unless otherwise stated, our legal analysis is based on California law and in particular the laws governing California nonprofit public benefit corporations (California Corporations Code, Title 1, Division 2). In our effort to respond in a limited time frame, we may not have completely identified, researched and addressed all potential implications and nuances involved.

elsewhere (relating to bylaws amendments, budget/strategic/operating plans, IRP enforcement, and IANA function review recommendations). The CEV could also be named in ICANN's Articles of Incorporation as being required to approve some or all amendments to the Articles.

When Would the CEV Be Invoked?

As the designator, the CEV will have the ongoing role of formally implementing the appointment of ICANN directors based on input from the different selecting bodies (SOs/ACs/NomCom). Apart from that role, as a preliminary matter, we must decide ***at what point*** in the Community Decision-Making escalation "staircase" (see slide 13 from the CCWG-Accountability Engagement Session on 19 October 2015, on page 4 below, for an example) the CEV is needed: not every step of the staircase requires that the CEV be involved. We suggest the simplest approach generally is that the CEV would engage only after the "Resolution Dialogue" step of the staircase, to enforce community rights, as follows:

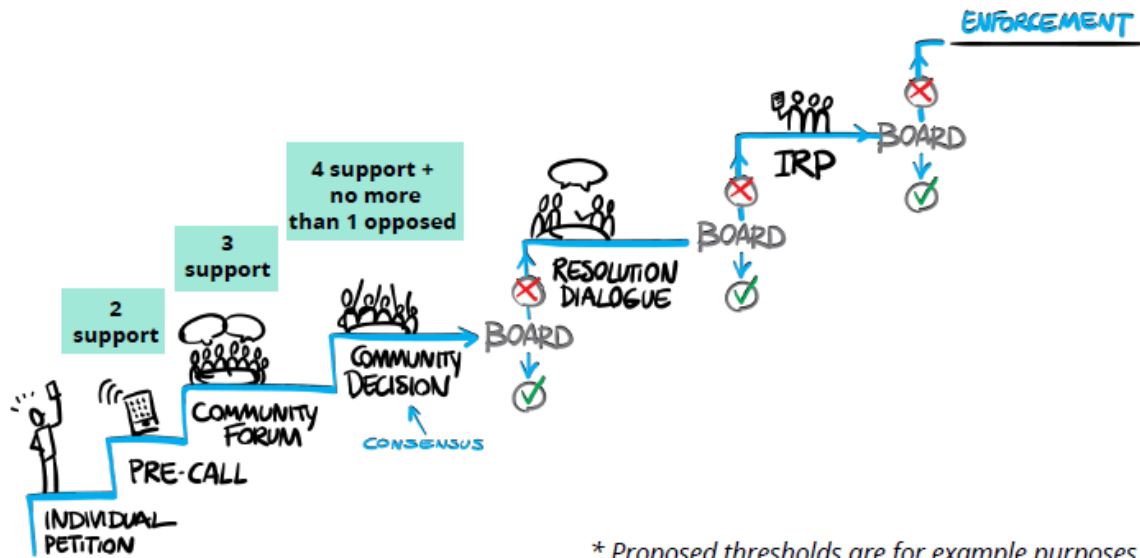
- A version of the escalation staircase on page 4 would apply to most of the community powers. For appointment of directors by individual SOs and ACs and the NomCom, no escalation staircase applies; a modified staircase would apply to removal of individual SO/AC directors (see page 5 for the working version developed in Dublin) and NomCom directors, as well as possibly to board recall. The various escalation staircases would be described in the Bylaws.
- The Bylaws would provide that the CEV's rights would only arise after the community had expressed its will through the initial steps of the applicable escalation staircase, through the point where (1) the community has expressed its consensus decision (details of which remain to be worked out for each community power, but presumably along the lines indicated in the notes from the CCWG breakout session on 17 October 2015, found on pages 6-7 below), (2) that decision has been rejected by the board, and (3) the following Resolution Dialogue has been unsuccessful. Up to this point, the CEV need not come into play at all.
- At that point, each of the SOs and ACs would need to reaffirm their decisions with respect to the community power *within* the CEV. (It is possible that as a result of the Resolution Dialogue, SOs or ACs that previously supported the exercise of the community power may alter their position, undoing the previously-established consensus; in such a case, the CEV would not be directed to act.) If the community consensus decision is affirmed, the CEV would act to enforce the decision accordingly.
- As an alternative to CEV enforcement, in some escalation scenarios, individual SO/ACs may be in a position to bring an IRP or, if they have personhood, enforce an IRP award in court.

How Would the CEV Take Action?

- The affirmation of the community consensus decision to invoke the CEV is simply a matter of determining whether the requirements for support and lack of objection stated in the final version of the draft matrix on page 6 have been met.

- o Similar to the way the CCWG’s chartering organizations register their approval of the CCWG’s final proposal, the chair of each SO and AC would be tasked in the Bylaws with issuing a communique publicizing its decision to support or object to the CEV’s exercise of its community power.
- o Each SO/AC’s decision to support or object would be made under its existing procedures, which are not affected by changes proposed by the CCWG-Accountability.
- o These communiqués could be required to be delivered to each other SO or AC chair, the ICANN board, and posted on the ICANN website.
- o Any deviation in a communique from the SO/AC’s actual decision would be evident to participants in the SO or AC. The presence or absence of consensus will be similarly evident from the collected communiqués of the SOs and ACs.
- o Within a specified period after receiving sufficient communiqués to confirm a community consensus to invoke the CEV and exercise a community right, the CEV representative(s) discussed below would sign and deliver a written Action of CEV to the ICANN board, with a copy to each SO/AC chair.
- Should it ever be required to act, the CEV will need one or more individual representatives to handle the ministerial tasks required to implement the CEV’s decision, such as documenting the community consensus, and hiring and working with counsel to bring the CEV’s claim to binding IRP arbitration, or enforce an IRP decision in court.
 - o Determining the identity of the CEV representatives will require input from the CCWG:
 - A single “Clerk” or small “CEV Clerk Council” could be chosen through a community process, perhaps by the SO/AC chairs.
 - An independent third-party professional fiduciary, such as a trustee or law firm, could be hired to serve in this function.
 - Representatives could be chosen in advance, to be available on a standing basis if needed, or could be appointed only in the event CEV action is required.
 - Careful consideration is needed to ensure that the CEV representatives are limited to implementing the decisions of the Community, while being given sufficient authority to conduct their ministerial functions, with sufficient oversight and transparency.
 - o The duties of the Clerk would be strictly limited by ICANN Bylaw provisions to carrying out the ministerial functions set out in the ICANN Bylaws implementing the CEV. Details remain to be worked out regarding when and how the Community would be involved by the Clerk in strategic decisions during arbitration or litigation, and how the working and ethical relationships with legal counsel would be handled.
 - o Provisions in ICANN Bylaws will be needed to ensure sufficient funding and other support to allow CEV representatives to carry out enforcement activities.

Community Decision-Making



* Proposed thresholds are for example purposes
(Blocking strategic plan in this case)

Individual Board Member Removal



Community Decision Process, as described in CCWG breakout session on 17-Oct-2015

Required Community Powers	Should we have a Conference Call?	Should we Convene a Community Forum?	Consensus Support to exercise the power?	
1. Block a proposed Operating Plan/Strategic Plan/Budget	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	
2. Approve changes to Fundamental Bylaws and Articles of Incorporation	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	
3. Block changes to regular bylaws	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	
4. Remove individual board directors appointed by NomCom	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	
5. Recall the entire board of directors	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection*	*minority said 1 objection to block consensus
6. Mechanism for binding IRP where a panel decision is enforceable in any court recognizing international arbitration results	2 AC/SOs support	2 AC/SOs support	3 support, and no more than 1 objection	Require mediation before IRP begins
7. Reconsider/reject board decisions relating to reviews of IANA functions, including trigger of PTI separation	2 AC/SOs support	3 AC/SOs support	4 support, and no more than 1 objection	

Notes:

Column 2: Should we have a Conference Call? Any individual can begin an online petition in any AC or SO. Each AC/SO defines its own threshold for petition support. If any 2 AC/SOs support the petition, all AC/SOs are invited to participate in a conference call to discuss the petition and decide whether to have a Community Forum. The Petitioning ACs/SOs circulate written justification for exercising the Community Power in preparation for the conference call. ICANN hosts a conference call open to representatives of the SO/ACs and any interested participants, and the call would be recorded, transcribed, translated, etc. Representatives of the ICANN board would be expected to attend.

After the call, ACs and SOs use their own decision-making methods to decide whether they support convening a Community Forum. The threshold for convening a Community Forum is proposed in column 2 of the table.

Column 3: Should we Convene a Community Forum? This needs to be developed further, but the basic idea is a one-day face-to-face meeting, supported by ICANN staff and with travel funding for participants designated by ACs and SOs. If timing is right, just add this day to a scheduled ICANN meeting; otherwise it's an inter-sessional meeting. The Community Forum

would be open to all via Adobe Connect, and would be recorded, transcribed, translated, etc. Representatives of the ICANN board would be expected to attend. AC/SOs may request independent legal advice to the community, depending upon the issue and power being considered.

Column 4: Is there Consensus Support to exercise the power? After the Community Forum, each AC/SO would decide, using its own methods, whether it supports the proposed exercise of the community power, whether it objects to the exercise of the community power, or whether it wishes to remain silent on the matter. If the Community Mechanism achieves the required levels of support, including absence of the specified number of objections, to proceed, it must publish a statement of explanation. A minority statement could be published by any AC/SO that objected to the decision or explanation.