

(DRAFT) Legal Scoping Document

CCWG's Role and Responsibilities:

ICANN's Cross Community Working Group (CCWG) on Accountability is responsible for developing improvements to ICANN's accountability processes. This includes making recommendations to improve existing mechanisms that are intended to insure the bottom-up organization is accountable to the community. It also includes the creation of new mechanisms including the possibility of new legal structures or agreements that could improve the organization's ability to serve its community.

In this context, "community" means the collective participants in ICANN's various Supporting Organizations, Advisory Committees, Stakeholder Groups, and other sub-grouped interests ([comments](#) [Please give example\(s\) of these other sub-groups or add the term "relevant "before sub-group to avoid an unintended coverage of any undefined group \)](#) that together comprise ICANN. As a bottom-up organization, ICANN must remain [accountable answerable](#) to the various participants in the community that the corporation was established to serve. The CCWG aims to provide recommendations to ICANN's board of directors for approval in June 2015.

Several issues have arisen in the course of the CCWG's work that require input from independent legal expertise to aid the CCWG in the further evaluation of proposals and recommendations. The CCWG retains this legal advice to assist it in creating mechanisms that can provide the means for the community to hold the organization accountable to it for the organization's actions and decisions. Specific questions are provided below to obtain legal clarifications and information needed by the CCWG to proceed in its evaluation of recommended mechanisms. As such, the CCWG is the "client" in the

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

Goal 1. Recalling Members of the ICANN Board of Directors

ICANN board members are individually appointed ~~from~~by different sub-groups within the ICANN community for a fixed term. The individual community sub-groups([see above comments about sub-group](#)) seek a mechanism to recall nonperforming or inadequately /insufficiently performing board members before the member's term expires.

Concerns:

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

Board members should only be recalled under a narrow set of prescribed reasons and with high threshold of difficulty to recall the board member. Board members may be recalled at the sole discretion of the appointing AC/SO according to rules established by that AC/SO, but requiring a high voting threshold.e.g 3/4 or 4/5 criteria ,

Generally, it would be expected that each individual ICANN sub-group ([see above comments for sub-group](#)) would have the power to recall its own board appointees, but not the board appointees from other sub-groups. ([see above comments for sub-group](#))

However, 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.

Proposal Under Consideration:

Amend ICANN's corporate bylaws (and/or Articles of Incorporation) to provide for the ability to recall all or some board members in exceptional circumstances.

Goal 2. Community Empowerment Over ICANN's Management

ICANN community members seek the means to hold ICANN to account on certain key issues and to challenge the ICANN board or management on a narrow set of key decisions.

The community requires an ability to block (to the extent legally permitted) the ICANN board or management on a narrow set of key decisions. The community wants the ability to design, [initiate, launch and sunset, and launch](#) organizational review ([comment . are we only dealing with review team or with review and redress team](#)) teams and to appoint their [own members and/or](#) representatives ~~to them~~.

Concerns:

The risks undertaken by board members and community members ([comment : what do we mean by community members?](#)) pursuant to the different corporate structures available under California nonprofit corporations law (including liability for ICANN's actions and decisions).

"Capture" ([what do we mean by "capture"](#) or one sub-group ([see above comments for sub-group](#)) of the community being able to game [comments \(what do we mean by "game" the system \(comment what](#)

[do we mean by “system” which system ? \)](#) in some way to skew votes([comment skew votes is not a legal term please propose alternative language](#)) or obtain over-representation([comments overrepresentation in what sense and compared to what threshold](#)) in the overall balance between sub-groups ([see comments on sub-group](#)) with respect to the ICANN community’s decisional process.

Complexity of changes (and length of time) required to alter ICANN’s existing corporate structure 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 possible.

The types of high-impact issues, where decisions would be subject to community review and challenge would only be key decisions such as the approval of the organization’s budget, bylaws changes, strategic plan adoption, etc.

Proposals Under Consideration:

i) Membership Corporation

Restructuring ICANN’s organization to be a true “membership” corporation (California Corporations Code §5310 / §7310) with existing ICANN community participants, including both individuals and companies, serving as corporate Members.

ii) Representative Delegates with Decisional Authority

Create “delegates” (California Corporations Code §5152 / §7152) empowered to represent existing ICANN community sub-group ([see comments on sub-group](#)) interests in ICANN’s decisional process (at a

level as high as the law permits) via bylaws provisions or ~~as~~ otherwise ,
as appropriate.

iii) Community Veto Process to Challenge Board Decisions

California Corporations Code §5210 provides the means for ICANN's community to challenge board decisions via process provided for in the bylaws that are 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 and raise the standard by which the board could reject community decisions. The community could challenge a board decision and the board would be required to accept the community's decision unless the board subsequently voted by a super-majority (comment define super majority by ¾ or 4/5 criteria) (consensus or unanimously) to retain its original decision and reject the community's decision to veto the board's initial decision. This would provide a means for challenging board decisions by community members, while providing the board with an ultimate decisional authority because it could over-ride the community if a high-level(comment ,what is high level , please clarify the matter or provide criteria to define high level 0) of agreement among board members could be reached.

Goal 3. Limit Scope of ICANN's Activities

The community seeks a legal mechanism that could prevent ICANN from acting outside its narrow(comment ,what do we mean by narrow ,perhaps we could replace "narrow"by "predetermined", or "specifically defined "-technical mission of managing the domain name system.

Concern:

To prevent organizational “mission creep” and the future expansion of ICANN’s activities beyond its technical mandate and specifically into issues related to content regulation. ([comment ,what do we mean by “current regulations” which regulations](#))

Proposal Under Consideration:

“Contract” to Limit ICANN’s Scope

ICANN could sign a contract or some other type of legally binding and enforceable agreement in which the organization agrees to limit its activities (i.e. ICANN constrain ICANN’s activity, possibly through contract, bylaws provisions, etc.).[comments,](#)
[The issue is clear but the way it is described needs further linguistic improvement to clealy address the concerns\)](#)

Specific Questions Related to Goals and Concerns:

Which available legal mechanisms would provide the means for achieving the CCWG’s stated goals and concerns([comment which stated goal and which concerns? Are we talking about goals and concerns mentioned above or other goals and concerns , please clarify?](#)) 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, contracts, community “veto”, etc. What additional legal mechanisms are available to achieve the stated goals and concerns? [comment which stated goal and which concerns? Are we talking about goals and concerns mentioned above or other goals and concerns , please clarify?](#))

What are the benefits, responsibilities, and risks (both collectively and individually) including but [not](#) limited to the legal and financial liability

of board members, community members, and representative [comments](#)

([We need to separate boards, issues from community issues](#)) “delegates” for ICANN’s actions (including debts, bankruptcy, etc.) under the different legal structures available under California nonprofit corporations law?

What are the costs or barriers to participation at ICANN ([comments, participation of whom?](#)) under the different legal structures and mechanisms under consideration?

What are the available legal mechanisms for constraining ICANN’s activities and prevent the organization from expanding the scope of its mission or activities? [Comments](#)

[This issues was addressed in previous paragraph?](#)

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

Which legal jurisdiction provides for the ideal balance between community control, technical stability, and responsible corporate governance given the CCWG’s stated goals and concerns? Should ICANN consider relocating to another legal jurisdiction (outside of California), and if so, where and why?

To what extent can a board member meet her legal obligations as a corporate fiduciary while also representing the interests of a particular segment of the community that appointed [him or](#) her to the board?

How to maximize a director’s ability to represent the community that appointed [him or](#) her in the course of board decisions, given legal duties of board members?

How could the board ensures agree to be bound to decisions made by an Independent Review Panel (or other independent entity) regarding decisions pertaining to the management of the organization?

How could the California Attorney General (or other public official) intervene in ICANN's operation on behalf of community members regarding ICANN's operation?

-How typical is such an intervention by the California Attorney General in the operation of a California nonprofit corporation, (comment the sentence is not solid and requires improvement)

what are the grounds for such intervention, and what is a reasonable expectation for a successful remedy in this situation?

To what extent are ICANN's board members required to approve or reject a community decision based upon the board's interpretation of "what is in the best interest of ICANN" or "the global public interest"?

What anti-trust legal issues are possible to arise in this context and how can those issues be most effectively addressed given the CCWG's stated goals and concerns?

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?