

The Empire Strikes Back: ICANN Accountability at the Inflection Point

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[See accompanying post on CircleID](#)

“When you come to a fork in the road, take it.” —Yogi Berra

The members of the ICANN community engaged in the work of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-ACCT, or just plain “CCWG” for this article) has been engaged since late 2014 in designing an enhanced ICANN accountability plan to accompany the transition of oversight of the IANA root zone functions from the National Telecommunications and Information Administration (NTIA) to the global multistakeholder community. On August 3rd the CCWG released its 2nd [Draft Report \(Work Stream 1\)](#) for a public comment period that closed on September 12th.

But, regardless of the overall content of those comments, one may be treated as more equal, or at least as warranting more consideration, than others – that of the ICANN Board. And the first weeks of September 2015 led the process toward a make or break it decision point, culminating in a late month face-to-face (F2F) meeting in Los Angeles, that will determine whether the ICANN community will remain unified behind strong and binding accountability measures -- or will become divided and distracted, lose sight of its goals, and fumble an opportunity that will not recur again. Based on its performance to date, and to ongoing email conversations among CCWG members, the author is optimistic that the CCWG will not abandon its goals or guiding principles.

The purpose of this article is to inform members of the ICANN community as well as policymakers and other interested parties of the maneuvers and details underlying these recent and critical turns of events as we move toward the end game on determining the contours and substance of enhanced ICANN accountability.

Key Takeaways

The quest to impose substantially greater accountability on ICANN by its community is approaching a historic juncture that will decide this matter for years to come. Not

altogether surprisingly, ICANN's Board is raising major questions about the latest version of the CCWG Accountability proposal that seem to constitute a broad pushback, particularly against the Sole Membership Model (SMM) that would confer significant community powers under California law.

The major points made in this article are:

- Regardless of the wisdom of the IANA transition, there is no turning back and the moment must be seized.
- The CCWG Proposal analysis prepared by ICANN's outside counsel, Jones Day, amounts to a broad dispersal of fear, uncertainty and doubt (FUD). Ironically, many of the alleged (and very overblown) concerns regarding capture, instability, paralysis, and being untested could just as readily be lodged against the Board's alternative proposal.
- The outside legal assistance secured by the CCWG has been absolutely invaluable in constructing a strong and sound accountability proposal, as well as confronting and refuting the Jones Day analysis.
- The three hour Board reaction call held with the CCWG on September 2nd was a substantive train wreck destructive of trust between the groups, and a repetition should be avoided like the plague. So far the event seems to have had a sobering effect on all sides.
- There are legitimate issues regarding how much weight the CCWG should accord to the Board's views, given that it is the prime target of accountability measures.
- The CCWG has now scheduled a two-day face-to-face meeting in Los Angeles on September 25th-26th. It is not yet entirely clear what the meeting's agenda and purpose will be and to what extent the CCWG will interact with the Board. This meeting, which the CCWG has vowed will not be a negotiating session with the Board, carries substantial risk as well as opportunity to make key decisions and move toward completion.
- The Board's formal comments on the accountability proposal contain some suggestions for fine-tuning the CCWG's proposal that may be worthy of consideration. But the heart of the Board's proposal is a very different membership model which could bring complaints against a much narrower range of potential Board transgressions, and would allow the Board far greater discretion in fashioning a "remedy", or even declining to do so. Unless a convincing case can be made that this alternative approach will result in

substantially greater accountability enforcement that that developed by the CCWG, it should be rejected.

- In addition, the Board proposes to essentially dissolve the CCWG post-transition and disperse “work stream 2” accountability measures to a variety of internal ICANN processes, where many will likely disappear and never be fully developed and implemented.
- The time required to work out substantial differences, or at least seek to do so, may render it difficult or impossible to complete the IANA transition by September 30, 2016, the current end date of the IANA functions contract between ICANN and NTIA. This would require NTIA to extend the contract by at least another year, pushing it into the next U.S. Presidential Administration.
- Analysis of the Board’s proposal by the CCWG legal advisers finds it to be narrower in scope, less robust, more cumbersome, and with enforceability of arbitration decisions far less certain. Its adoption would leave the organization close to the status quo at a time when community members yearn for transformative change that empowers the MSM.
- Ultimately, the CCWG has time, leverage, and the U.S. Congress on its side and can achieve effective and transformative accountability enhancements – if it doesn’t blink first.

The details of the past month’s maneuverings, and the present state of play, follow.

The More Things Change, The More They Remain The Same

A lot has changed since the NTIA’s March 14, 2014 [announcement](#) of its “Intent to Transition Key Internet Domain Name Functions”. NTIA made clear that the proposal “must have broad community support” and “support and enhance the multistakeholder model”. The unexpected NTIA announcement was seen by many as a forced tactical move to defuse the potentially explosive atmosphere at the then-upcoming NETmundial conference scheduled in Sao Paulo, Brazil the following month. And it certainly succeeded in turning that meeting’s focus away from demands for the U.S. to end its unique stewardship of the IANA root zone functions and toward more constructive dialogue on other Internet issues.

The NETmundial meeting had been conceived by ICANN CEO Fadi Chehade and Brazilian President Dilma Rousseff after an October 2013 meeting authorized by a then-secret ICANN Board Resolution. CEO Chehade has since announced that he is

voluntarily departing ICANN in March 2016, and the upcoming ICANN 54 public meeting in Dublin next month will be the next-to-last he presides over. As for President Rousseff, she was reelected earlier this year but today is more concerned with possible impeachment than the Internet; as her public approval hovers below eight percent, the state-controlled Petrobras oil company corruption investigations continue (she was its Board Chairman during the time of its massive kickbacks for contracts scheme, with the proceeds going to her ruling party), and the Brazilian economy contracts at a worrisome pace. Indeed, Standard & Poor's earlier this month reduced Brazil's bond rating to "junk". As for Edward Snowden, whose revelations of NSA cyber-espionage triggered the Board's secret resolution and a September 2013 Rousseff denunciation of the U.S. before the UN General Assembly, he remains in Moscow under Vladimir Putin's protection even as Russia tightens its grip against Internet free expression.

One thing that hasn't changed is NTIA's commitment to enhanced ICANN accountability. In its Third Quarterly [Report](#) on the Transition of the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions, transmitted to Congress on August 28th, it stated:

These two multistakeholder processes – the IANA stewardship transition and enhancing ICANN accountability – are directly linked, and NTIA has repeatedly said that both sets of issues must be addressed before any transition takes place. ICANN has indicated that it expects to receive both the ICG and CCWG proposals at roughly the same time and that it will forward them promptly and without modification to NTIA.

Regardless of how we got to this point, the toothpaste is out of the tube and the community has expended far too much time and effort to abandon its efforts toward forging a comprehensive IANA transition and ICANN accountability package. The task ahead is to complete construction of the package as rapidly as due diligence in pursuit of strong accountability permits.

The Board Weighs In

While ICANN has stated that it will forward the final CCWG proposal to NTIA without "modification", that pledge clearly does not mean that its staff and Board will not attempt to modify the proposal before it reaches finality. There is of course nothing inherently wrong with that – the Board is both charged with acting on behalf of ICANN's organizational interests, and has valuable experience with overseeing ICANN that can usefully inform the CCWG.

While several Board members have been active participants in both the stewardship and accountability discussions, the first unified statement of Board views regarding the CCWG's developing proposal was [filed](#) on August 21st. In this "Preliminary ICANN Board Comments on the CCWG–Accountability Second Draft Proposal for Public Comment" the Board made some positive comments about the process to date:

The Board reconfirms its support of this process and its commitment to finding a final CCWG proposal that is acceptable to the whole community, including the Board and NTIA. We join with you in embracing the important goal of community empowerment in the ICANN multistakeholder model.... The Board believes that the four building blocks set forth by the CCWG provide a strong foundation on which to build, and look forward to working together as the details are developed.

The ICANN Board is committed to the CCWG's accountability enhancement goals and believes that much of what is contained in the proposal is encouraging and workable.

But the comment also laid the foundation for a coming Board critique based upon alleged concerns about stabilization and balance:

The Board understands the community's need to have a tool to ensure that the Board (as a whole and as individuals) does not act outside the scope of ICANN's mission. We also agree that the Independent Review Process needs to be refined. The Board agrees that a key part of successfully concluding the transition is to deliver these accountability enhancements.

Because these must be achieved without destabilizing or weakening the delicate balance of the stakeholders in the ICANN multistakeholder model, the Board is carefully reviewing the proposals to ensure we believe that they can maintain this balance and that there is a safe, stable way to implement the changes.

The Comment goes on to state that to further its review the Board was seeking input from its long-time outside counsel, Jones Day; "reaching out to independent third--party experts on governance to obtain an analysis of the governance impacts of the proposal, including considerations of how the proposal may impact the balance of the stakeholders in the multistakeholder model within ICANN today"; and continuing to work on its own comprehensive comments and suggestions, to be submitted by the comment period's closing date of September 12th.

The Board's Preliminary Comment then further fleshed out its concerns:

While the detailed review work is still forthcoming, a preliminary review of the Proposal indicates that there are still some areas where key details will need to

*be finalized before the transition of the stewardship from NTIA can occur... **Our fiduciary duty as Board members requires us to understand the operational impacts of the recommendations that the community will be asking the Board to accept in the near future, so the Board will work to identify the open areas that need to be finalized...** If the community is going to change this current model, as proposed in the CCWG's draft, the model that is the foundation of the decision to transition, we must all be absolutely confident that the new model will be as or more effective, stable and capture-proof than the current one...*

***Changing ICANN from having no members to a sole member-based organization without full detail of how that member considers and arrives at positions could jeopardize the delicate balance of ICANN's multistakeholder model. Clear and accurate detail to ensure this balance is therefore essential...** On the enhanced Independent Review Process, the Board notes the further detail that is now provided for consideration. We have a concern that the Process enhancements should not open the possibility for ICANN's work to be paralyzed through the lack of a clearly defined timeframes for filing. An important aspect of accountability is predictability, and there are many who rely on ICANN for a predictable business environment. (Emphasis added)*

Destabilization. Upsetting the delicate balance. Paralysis. These potential but entirely hypothetical problems are the underlying themes of this initial Board response, which it would soon amplify. Doubtless the Board is acting in good faith and in concert with its responsibilities. But its pointed questioning of the bedrock elements of the CCWG proposal – an empowered single member community that can take full advantage of the powers available under California law, and a binding IRP with ready judicial access as ultimate backstop – illustrates a distinct difference in perspectives between it and the CCWG's members, one that favors hewing close to the status quo rather than embracing transformative change.

The Board appears to believe that, by and large, the current ICANN governance model is proven and requires only modest tweaking, and that “untested” proposals are dangerous. The CCWG, on the other hand, believes that the current ICANN governance and accountability model has been tested by a decade and a half of experience, has been found to be deeply flawed, and that it must seize the current opportunity to effect fundamental change lest the opportunity be lost for good.

The Crocker Updates and the Jones Day Impact Analysis

Five days after the filing of the Board's Preliminary Comment, ICANN Board Chairman Steve Crocker posted a [blog](#) titled, "Updating our Community on our Review of the CCWG-Accountability Proposal".

It revealed, "A subset of ICANN Board Members and Staff Members have been meeting in Washington, DC on Tuesday and Wednesday this week to further consider the CCWG proposal and commence a review of an impact analysis from ICANN's external counsel. As part of this meeting, the group held a call together with the CCWG Chairs. For full transparency and to clarify the basis for the review points and comments, ICANN will share the impact analysis and publish it in the CCWG Public Comment forum." The post also stated that the Board would engage in an open teleconference with the CCWG the following week, as well as the Board's suggestion "that the CCWG-Accountability hold a public meeting in Los Angeles in late September to continue the dialogue with the Board on the CCWG proposal". (While the CCWG later decided on its own to hold an LA F2F for other purposes, it bears remembering that this suggestion originated from the Board for the express purpose of engaging in a dialogue that could readily transform into a negotiation.)

Three days later, Crocker published a follow-up [blog post](#) titled, "The Latest Update on the Board's Review of the CCWG Proposal". It revealed that the Board-CCWG interchange scheduled for the following week had been expanded to a 90-minute call on August 31st, in which the CCWG would present its proposal to the Board; to be followed two days later, on September 2nd, by a three hour "call for the Board to share its feedback on the proposal". Three hours is a lot of feedback (Too much, as events would soon prove).

The post also stated that, "A subset of the ICANN Board and staff members finished a productive series of meetings this week focused on the CCWG proposal." The author has received reports that these meetings were held at the offices of ICANN's outside lobbyists and that attendees included a broad cross-section of organizations and companies with substantial inside-the-beltway influence. During the meeting ICANN staff stated that the organization had "quietly" supported the yet-un-enacted DOTCOM Act, which would provide Congress with thirty legislative days to review any final transition and accountability proposal; and that ICANN also expected more Congressional hearings before the transition is completed once critical accountability measures had been adopted. Staff also communicated a somewhat self-serving belief that Congress and the NTIA were primarily concerned with the impact of accountability on governmental influence within ICANN, and the potential risk of capture from both private and government interests.

Overall, participants in the meeting received an implicit message that they were being looked to as key players to address Congressional concerns. Many of the invited organizations are directly involved in or closely monitoring the work of the CCWG, and almost all are on the record as favoring strong accountability reforms along the lines of its recommendations.

Beyond acknowledging the DC meetings, the key revelation of this Crocker post was that “we have received an impact analysis of the proposal from our external counsel Jones Day (JD). The impact analysis has been posted to the [Public Comment forum](#).”

The one-page introduction to the JD analysis explains:

Jones Day, ICANN’s external counsel, was asked to review the CCWG--Accountability’s proposal and provide advice to ICANN on the impacts of the proposal. This work included identification of areas where the proposal had sufficient detail to proceed to implementation as well as identification of areas where additional detail is needed prior to being able to advise ICANN on its ability to ultimately adopt the proposal. For the areas where additional detail was needed, Jones Day was asked to identify potential alternatives to the implementation that could still achieve the bulk of what the CCWG was attempting to accomplish. In developing the impact analysis, Jones Day was also asked to explain the CCWG proposal as they understood it; if there are areas where the explanation does not match the CCWG’s intent, the Board and CCWG should engage in discussions to reach a common understanding.

This impact assessment is advice to the Board. The Board is taking this advice, along with its discussions with the CCWG--Accountability, advisors and staff, as inputs into developing detailed comments on the Proposal. There may be areas where the Board comments will not reflect the Jones Day advice. (Emphasis added)

In other words, JD was asked to raise multiple questions about the unknowable – how an untested proposal will play out in the real world in unpredictable scenarios – and to propose “potential alternatives”, a review of which indicates that they generally amount to substantial dialing back of the CCWG proposal.

What follows that one-page introduction is a withering 42-page dissection of the CCWG Proposal. God must be happy that Jones Day wasn’t around to raise questions and counterarguments when Moses unveiled the then-untested Ten Commandments. (That’s hyperbole – but not by much.)

On the “sole member model”, JD called for advance testing (without explaining how that could possibly be done); proclaimed the lack of a “comprehensive regulatory impact analysis” (again without explanation of what regulations it had in mind), and suggested retaining the current model with a few accountability tweaks, or moving to a “designator model” that the CCWG had already explored and rejected. They did note that “California law provides the Sole Member with significant statutory rights” – which is exactly why the CCWG settled upon it as the preferred route to enforceable accountability.

Regarding the proposed post-transition Independent Review Process (IRP), for which there appears a community consensus that a strengthened and binding one is essential for effective accountability, JD contends that this would have “a significant impact on ICANN’s ability to function” and introduce “the possibility of paralysis”; claims that its de novo review authority effectively puts the arbitration panel in place of the Board; and alleges that it could impose substantial financial burdens. In the alternative, JD suggests that the present IRP be enhanced to address just some of the CCWG’s proposed areas of improvement, while putting off other decisions for a “scheduled review cycle”.

These are just high level summaries of JD’s position on the single member model and the IRP, and its analysis goes on for scores of pages to address proposed alterations of ICANN’s Mission Statement and Core Values, incorporation of Affirmation of Commitments reviews into the Bylaws, changes in the budget and planning processes, adoption of fundamental and standard Bylaws, and removal of Board members individually or en bloc.

Of course, there may be some merit to portions of the JD analysis. But its overall tone and thrust is of the classic fear, uncertainty and doubt (FUD) variety-- and its overarching message is one of “dilute and defer”. If the JD prescription was followed, it would result in near-term accountability changes of a minimalist cast, with truly fundamental alterations of the internal power structure put off until who knows when, if ever. Not surprisingly, the headline on the Bloomberg BNA [story](#) reviewing the submission was “Lawyers’ Analysis Throws Cold Water on ICANN Accountability Plan”.

That is especially true since there is nothing in the CCWG proposal or JD riposte that proposes fundamental changes in the manner in which ICANN makes policy decisions, a process that can often be of interminable length with negligible, if any, results. Given that history, there is scant reason to believe that accountability opportunities forfeited now will ever be available in the future.

The Sidley-Adler (SA) Riposte

Fortunately, early on in its task the CCWG had insisted on obtaining ICANN's commitment to fund independent legal advice answerable solely to the CCWG. The two firms retained – the national law firm of Sidley Austin LLP, and the California-based one of Adler & Colvin -- have provided invaluable counsel that has assisted the CCWG in assembling a proposal that fits squarely within California public benefits corporation law while considering other key corporate governance principles.

And they were to prove even more valuable in the provision of rapid-fire responses to the JD critique.

First, on September 1st, they delivered a "[High Level Review](#) of Jones Day Analysis re CCWG Second Proposal". It starts by noting:

The Jones Day Analysis provides assurance regarding the Second Proposal in two key respects:

- The Analysis does not identify any legal flaws or legal "workability" issues with respect to the viability of the community mechanism as sole member (CMSM or Sole Member), the community powers, accountability and review mechanisms, or other key elements of the Second Proposal.*
- The Analysis does not identify any significant issues that the CCWG, its working groups and/or its advisors have not already considered.*

In other words, the CCWG proposal is both complete and legally sound.

It goes on to note something particularly important within an exercise whose objective is to strengthen and secure the benefits of the MSM for a considerable time going forward – **"the conclusions of CCWG's deliberative bottom-up consensus seeking multistakeholder process deserve a significant degree of deference"** – including, one presumes, deference by the Board.

It then proceeds to make a number of salient observations that substantially refute the concerns expressed in the JD memo:

- While the specifics of CMSM are unique, membership is common in nonprofit governance systems and a sole member structure is relatively simple. ICANN's ACs and SOs already have significant relevant knowledge and experience in matters of ICANN operations and governance. Based on our work advising nonprofits on governance over many years, we do not expect that the transition to a Sole Member poses any significant risks related to inexperience.*
- [T]he alternatives suggested by Jones Day – a board-centric model with some enhanced accountability or a designator model – are also untested as applied to ICANN. Indeed, even the status quo is untested in a post-NTIA environment.*

- *The CCWG considered and rejected an enhanced board-centric model and a designator model after extensive analysis and deliberation indicated that neither would adequately support the enforceability of all the powers deemed essential.*
- *Giving powers to the community inevitably requires that the community commit to exercise them to work. This will be true of any mechanism that empowers the community.*
- *The Jones Day analysis seems to assume the Sole Member will exercise community powers far more frequently than CCWG expects.*
- *Jones Day has not raised any concerns about the legal viability or legal workability of the IRP.*
- *One significant area of apparent misunderstanding that CCWG may wish to clarify relates to the degree to which the Second Proposal contemplates litigation to enforce the community powers...In fact the CCWG Proposal establishes a robust IRP process in order to reduce the need for litigation and even preclude access to courts in many situations. In addition, as explained above the Sole Member can only access courts if a supermajority of the participating SOs and ACs direct it to.*
- *Jones Day raises concern that the IRP enhancements will have a significant impact on ICANN's ability to function. This is not at all what CCWG intends or expects given the limited scope of matters that could give rise to an IRP and the standing requirements, including a requirement that parties first seek other means to resolve disputes.*
- *As to concerns about the relationship between the Board's fiduciary functions and the IRP process, we note that the IRP decisions only address whether the Board has complied with Articles or Bylaws and do not direct the Board with respect to any action. This avoids an IRP infringing on the Board's fiduciary or other legal duties.*

Two days later, the CCWG's legal team provided a [comprehensive review](#) of the JD Impact Analysis. Their responses and comments expanded the original document's 42 pages to 71, and provide a much more informed and balanced analysis.

The JD document, as annotated by the SA team, will undoubtedly be a critical resource as the dialogue both within the ICANN community between the Board and CCWG continues. But its very complexity illustrates why the road ahead consists of far more than a "last mile" before final agreement is reached.

The CCWG Presentation Call

On Monday, August 31st, in a 90-minute call commencing at 22:00 UTC, the CCWG [briefed](#) the Board on its proposal. Co-Chair Thomas Rickert predicted accurately that the call would initiate a "more intense period of dialogue".

CEO Fadi Chehade stated that Rickert's introductory remarks were helpful and constructive, and that the Board and senior staff were committed to a constructive approach.

Rickert went on to explain that workstream 1's pre-transition requirements were intended to require no new accountability "building blocks" or interference with ICANN's day-to-day operations, and rested on four key pillars:

1. An empowered community
2. An engaged Board
3. Guiding principles
4. Independent appeals mechanism

The briefing format then proceeded through a detailed [slide presentation](#) on the proposed accountability measures.

CCWG Co-Chair Mathieu Weill added that the key principles were embodied in difficult to change Fundamental Bylaws; and that the beefed-up IRP was the key accountability change, along with an enhanced Request for Reconsideration process.

CCWG member Becky Burr expressed concern that the JD analysis seemed to miss the point that the scope of the proposed enhancements was narrow; and that the IRP was only binding to the extent permitted by law, did not raise fiduciary concerns, and would not allow the community to direct Board actions.

As the call proceeded there was general consensus that the procedure for drafting implementing Bylaws remained to be worked out via a joint effort of all the involved law firms plus ICANN's office of General Counsel; and that the first drafting "experiment" would probably be that of placing the Affirmation of Commitments (AOC) reviews into the Bylaws.

Overall, the call was calm and constructive. There was little warning of the storm to come two days later.

The Board Feedback Call

On Wednesday, September 2, again commencing at 22:00 UTC, the three hour [call](#) requested by the Board to share its views on the CCWG proposal took place.

It degenerated, at first slowly and then rapidly, into what one industry blogger [described](#) as “some kind of weird, Orwellian, passive-aggressive piece of emotional domestic abuse”. Unfortunately, that description is not far off the mark. Another industry journalist [wrote](#):

In an extraordinary, almost surreal three-hour teleconference, the working group drawing up plans to make ICANN – wannabe masters of the internet – more open and responsive to the public were treated to a level of Orwellian “double speak” rarely seen outside the British civil service.

Most significant was a complete rejection of the group's main recommendation that the internet community be formally represented as an official “member” of the organization, giving it a legal right to insist on change.

To the group's bemusement, then frustration and then anger, representatives of the board repeatedly argued that they were in agreement with the idea before pushing for a completely different proposal.

Those descriptions, likewise unfortunately, were not exaggerations.

The call started with Chairman Crocker stating that the Board had been looking forward to it, and was extremely appreciative of all the effort reflected in the Accountability proposal. He then said that the Board agreed on the goal of enforceability, but thought it could be achieved without changing ICANN’s governance model, thereby avoiding the risks of “instability” and “adverse consequences”. The Board wanted to work together to achieve goals within the existing timelines, while creating a “process for continuous improvement” that would persist post-transition. It was not intervening to undermine the CCWG’s objectives and was actually trying to achieve them faster and better – and it hoped that the result of the call was “positive forward motion” while recognizing the remaining work to be done.

It was not yet clear how the more than 100 community members on the call were reacting to that message when Board member Chris Disspain launched into a rapid-fire review of ten separate topics on which the Board was focused. While it was clear that he was speaking from notes, no outline was posted in the Adobe chat room to assist community members in understanding his narrative (at 35 minutes into the call, fellow Board member and Vice-Chair Bruce Tonkin [posted](#) the outline to the CCWG mail list). Subsequent review of that outline reveals it to be rather general in nature, with no prioritization of subjects in terms of their importance to the Board.

As soon as Disspain concluded his recitation, CCWG Co-Chair Rickert opined that it appeared to constitute a very substantial rewrite of the CCWG’s proposal. Disspain responded that the Board was quite concerned about wholesale change “at this delicate

time in the transition” and therefore had come up with an alternative “multistakeholder enforcement model”(MEM). (Note: It should also be noted that Disspain is Chief Executive Officer of .au Domain Administration Ltd (auDA) and that, on the day following the confrontational call, that Australian ccTLD operator posted [comments](#) fleshing out his organization’s views and stating the belief that the CCWG had to choose between the alternatives of addressing a wide range of issues in principle in WS 1, with details to be provided in WS 2; or to focus on a narrower range of issues in WS 1 and fully define them. That view fails to concede that the CCWG has already pruned the WS 1 issues down to those accountability enhancements it conclusively believes must be addressed and implemented before the IANA transition is permitted to proceed.)

Then CEO Chehade chimed in, opining that it was not good to make wholesale changes in the midst of the transition – and that “Larry wants a simple proposal” (in reference to NTIA head Larry Strickling), a theme he would repeat again as the call proceeded. He added that the Board was in sync with the CCWG’s goals, and just differed on their enforceability mechanisms, and that “we are saying we can get x by doing y”. Chehade later added that the Board was embracing accountability – just not the CCWG’s proposed methods of enforcement.

As the presentation continued the Adobe chat box remarks began to fill up with comments questioning the appropriateness of ICANN attempting to speak for the NTIA; expressing concern at the lack of detailed specificity or justification for the Board’s response; noting that the JD analysis was consistent with its unwavering position protecting Board authority over the past 15 years; and labeling the attempt to paper over substantial disagreement as disingenuous.

For his part, the author was reminded of this adage from the 19th century German leader Otto van Bismarck: “When you say you agree to a thing in principle you mean that you have not the slightest intention of carrying it out in practice.” If that seems too cynical, further reference is made to Ambrose Bierce’s definition of “cynic” in his “Devil’s Dictionary: “A blackguard whose faulty vision sees things as they are, not as they ought to be. Hence the custom among the Scythians of plucking out a cynic’s eyes to improve his vision”.

So far as NTIA’s views on the CCWG proposal, it can speak for itself and will undoubtedly do so at a later point. But it seems dubious that it expected any effective proposal for ICANN accountability to be truly simple (anyone who has ever looked at ICANN’s organization chart or experienced its inner workings knows that they do not mesh with concept of simplicity). And given its overriding support for perpetuating the MSM it seems unlikely that NTIA would reject an accountability proposal emerging from the remarkable embodiment of the Model reflected in the CCWG’s work, unless it

proposed measures that were clearly unlawful or at obvious odds with NTIA's stated evaluation criteria -- and that is not the case here.

As the call stumbled painfully toward conclusion, Chairman Crocker noted that everyone needed to figure out where they stood and what the next steps should be. He noted that the proposal for a F2F meeting in LA was entirely up to the CCWG, and Rickert responded that first the CCWG needed to better understand the Board's suggestions before making any decision.

Crocker then again played the NTIA card, stating that it had made clear that the accountability plan should be one supported by the Board; at this point, he thought the Board and CCWG were aligned on "overall objectives", but lacked a "shared understanding" of how to reach them.

Finally, Crocker questioned whether a joint statement should be issued on what had just been accomplished. But it was too late for that, as press reports were already being filed that labeled the call as a broad Board rejection of the CCWG proposal.

Operationalizing the Call's Aftermath

The day after the call, Crocker posted a [blog](#) optimistically titled "Working Together Through The Last Mile". After thanking all participants in the previous day's exchange, it proclaimed:

We support the important improvements for ICANN's accountability contained in the CCWG-Accountability's 2nd Draft Proposal. We endorse the goal of enforceability of these accountability mechanisms, and we believe that it is possible to implement the key elements of the proposal. We want to work together to achieve the elements of the proposal within the community's timeline while meeting the NTIA requirements.

He then stated:

We are in agreement on key concepts set forward in the CCWG's proposal...We have suggestions on how these could be operationalized...Let's work together on operationalizing the above principles on which we agree.

A clear-eyed reading of the intentionally soothing words of the full post reveals that at present there is not just remaining disagreement on the SMM, but significant "operational" gaps on all eight of the key concepts listed in it, with many missing details to be provided on the Board's ideas for bridging the gaps. And the devil will be in those details on such key issues as Fundamental Bylaws, IRP enhancements, Board member

removal, core mission and values – and, most importantly, the Community’s ability to enforce the accountability mechanisms in the Bylaws. (Even following the posting of its formal comments on the CCWG Proposal, many implementing and operational details of the Board’s critique and counterproposal remain indistinct.)

Going further, while the Board at that point had not yet articulated which of the critiques and counterproposals contained in the Jones Day analysis it agreed with, those 42 pages add up to a broad pushback against almost every point contained in the CCWG proposal. It now appears from its formal comments that, not surprisingly, the Board largely adopted the JD critique.

The CCWG will undoubtedly evaluate the Board’s input in objective good faith, just as it will weigh all the other input from the community in the other 87 filed comments. It can also determine whether it agrees with Crocker’s statement that "the current proposal still warrants much detail that may not be achievable", and that key elements of the CCWG proposal will lead to instability and capture.

While the Board's input must certainly be given serious consideration, the question arises as to whether its views should be accorded more or less weight than that of other stakeholders. Some may say that it is entitled to more because these are the people selected to oversee ICANN the corporation and charged with its best interests; and that as a political reality the U.S. is less likely to accept a proposal from which the Board broadly dissents. Others might reply that it is entitled to less weight because the accountability plan is all about making ICANN the corporation, including its Board, more accountable to the community -- and the Board's response, to the extent we can presently discern, is based upon the same general critique and unyielding stance that Jones Day has supplied with regularity for a decade and a half.

Given all the Board's concern about "untested" proposals, it must be keep in mind that the present ICANN model has been tested since its inception and has been found in need of significant revamping by a majority of the community acting within the CCWG. There is also broad agreement that key elements of this revamping must be agreed upon and implemented before the IANA stewardship transition can be allowed to proceed.

Further, and most importantly, it is the multistakeholder community that has produced the CCWG’s accountability plan, and this entire transition exercise is in supposed defense and perpetuation of that the much vaunted MSM. So a broad rejection or reworking of the plan would be an indictment of the MSM and cited as evidence that it just wasn’t up to the task it was given. By contrast, deference to it would constitute and embrace and validation of the MSM.

For his part, the author believes that the CCWG proposal is perhaps the highest expression of the capabilities of the MSM to date, and overall a remarkable piece of work to be produced so quickly. As for the Board's proposal, it is the product of the Board and its lawyers. It may be sincere and well-intentioned, but it is not the product of a multistakeholder process; at best it is one input to it.

Clearly, the only answer consistent with devotion to the MSM is to adopt the CCWG proposal as the baseline for further discussion and development. While individual components of the Board's submitted Comments Matrix may improve and enhance the CCWG proposal and certainly should be considered on their merits , on the central question of whether to go with the SMM or the MEM the burden of proof is on the Board and any other MEM proponents to demonstrate that it better enables the accountability desired by the community than the SMM. If it does not it should be rejected, as this is no time for the CCWG to be diverted from project completion – and the project is enhanced accountability.

All that is especially true because the MEM is just as untested as the SMM, and the Board's stated concerns about instability, capture, or analysis could just as well apply to it -- none of us know how these theories will actually play out in practice. And it is further true because there is not a single instance in which the Board has asserted that the CCWG's Proposal is in any way unlawful; much less one that will be at odds with the Global Public Interest, which under the CCWG's Charter is the standard for triggering mandatory consultation with the CCWG over the final proposal.

Turning to the repeated characterization of the Board's response call as "Orwellian", it is noteworthy that, over the past several years, ICANN has engaged in creative wordsmithing to bend its decision-making system. For example, in regard to the final rules for the new gTLD program, there has been an ongoing and sometimes heated debate within the ICANN community as to the proper dividing line between "policy" and "implementation", with many feeling that implementation was the ill-fitting label for the creation of policy outside the normal policy development process (PDP). "Implementation" has now been joined by "operationalization" as another [Newspeak](#) concept, with it seeming to stand not for moving the CCWG proposal into actual operation but, in fact, for replacing the elements of that proposal with substantially divergent measures, which are similar only in that they address the same end goals in far less adequate ways.

For the complete record, in a supplementary September 8th [blog](#) it was promised that the Board's formal comments would include:

- *Comments on the mission and core values; and*

- *Suggested enhancements of elements of the draft report; and*
- *A matrix of the key elements proposed by the CCWG-Accountability highlighting the elements of alignment between the Board and the CCWG-Accountability as well as the elements where the Board has suggested enhancements.*

That was delivered. But it will take considerable time for the CCWG to fully assimilate, analyze, and react to.

The Board's Comment

On September 11th the Board [submitted](#) its supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal. This consisted of four separate documents:

1. Summary of Board Input (3 pages)
2. Comments Matrix and Notes on proposed Elements (81 pages)
3. Memo on Proposed Approach for Community Enforceability (3 pages)
4. Frequently Asked Questions Regarding Approach for Community Enforceability (3 pages)

By its sheer bulk it is apparent that the Board has proposed something at significant variance from the CCWG's proposal. Nonetheless, in a simultaneously posted [blog](#), Board Chairman Steve Crocker wrote:

As we have stated previously, the Board supports the improvements to ICANN's accountability contained in the CCWG-Accountability's 2nd Draft Proposal. We endorse the goal of enforceability of these accountability mechanisms, and we believe that it is possible to implement the key elements of the proposal. We want to work together to achieve the elements of the proposal within the community's timeline while meeting the NTIA requirements.

We have heard some concerns from the community regarding the Board's intent in presenting new ideas for the CCWG's consideration. The contributions by the Board are not meant to be a "counter proposal," but rather as suggestions for consideration to build upon the CCWG's impressive work.

The most salient document is the Memo on the Board's Proposed Approach, and a quick review reveals that the Multistakeholder Enforcement Mechanism (MEM) approach is quite divergent from the CCWG's.

Its opening paragraphs reveal that, in comparison to the SMM:

Through the MEM, the Supporting Organizations (SO) and Advisory Committees (AC) may:

*(i) through arbitration, challenge a decision or action of the Board that, in the consensus view of the SOs and ACs, **violates the Fundamental Bylaws**; and*

(ii) if successful in the arbitration, obtain a binding arbitration decision that may be enforced in California courts.

Establishment of the MEM is not intended to replace existing IRP procedures. The MEM provides a legally enforceable arbitration decision on violations of ICANN's Fundamental Bylaws. (Emphasis added)

As can be readily discerned, the scope of alleged violations subject to MEM is far narrower than that of the SMM. The latter would establish a mechanism by which the community could challenge any alleged violation of ICANN's Articles of Incorporation (AOI) or Bylaws -- while the former would be reserved exclusively for the Fundamental Bylaws, a minority subset of the overall Bylaws.

The FAQ document provides no satisfactory answer in justification of this very restricted scope. The matter is tangentially addressed here:

Q3: What type of conduct can be challenged through the MEM?

A3: The MEM may be used to challenge a Board decision or action that is argued to violate ICANN's Fundamental Bylaws. Consideration should be given to the point raised in the Sidley/Adler 20 April 2015 memorandum, which provides that any enforceable arbitration mechanism must "be limited to those areas that are outside of the core powers reserved to the board or members ... so that [the] Board continues to exercise its fiduciary responsibilities to manage ICANN."

With all respect, it is entirely unclear how consideration of the Board's fiduciary responsibilities in any way justifies such a narrow scope for community challenges via the proposed MEM. After all, the CCWG's SMM proposal is built on a legal foundation supplied by SA, and reflects the CCWG's determination that the community should possess enhanced accountability powers in regard to alleged violations of any element of the AOI or Bylaws.

Another fundamental difference between the CCWG's proposed approach and the Board's counterproposal is that, even in regard to Fundamental Bylaws, the CCWG envisions the SMM having a prospective review role regarding any change -- while the

Board opposes that proposed partnership and recommends an approach that is restricted to reactive mode. As detailed in part 9 of the Comments matrix:

*Through the Community Mechanism as Sole Member, the SOs and ACs would have to give positive assent to any change **before it was finalized, as part of a co-decision process between the Board and the community.** By creating this special co-decision process, authority to change fundamental aspects of ICANN's governing framework is shared more broadly than it otherwise would be.*

*ICANN Board supports the new community power to approve a change to a Fundamental Bylaw, but believes this can be achieved without having to move to a Sole Member model. For example, instead of a vote within the Community Mechanism, **the threshold could be a resolution from each of the SOs approving the Fundamental Bylaws change, and no advice against the changes received from any of the ACs.** (Emphasis added)*

Those details make clear not only that the MEM substantially restricts the community's role in regard to Fundamental Bylaws changes, but that the threshold for taking action is presently undefined and may be unduly high. At a minimum this is a critical detail that would need to be clarified.

This FAQ Memo answer further illustrates the fundamental differences in approach:

_Q5: Does the MEM replace the existing IRP procedures as provided in Article IV of the Bylaws?

A5: No. The MEM is not intended to replace existing IRP procedures as provided in Article IV of the ICANN Bylaws. The MEM is separate from and in addition to the IRP procedures; **the MEM will allow the community to obtain enforceable arbitration decisions for violations of ICANN's Fundamental Bylaws. The IRP will remain in place for individual party claims that ICANN violated its Bylaws or Articles of Incorporation by taking a particular action (or inaction).** (Emphasis added)

In other words, alleged violations of the AOI, and of any non-Fundamental Bylaws, could be challenged only by an aggrieved individual party and not the community via the IRP mechanism that has been found wanting in the past on time, cost and enforceability considerations. Ultimately, enforcement of an IRP decision would be a two-step process that inserts the MEM as an intermediary step before judicial enforcement can be accessed. As explained in a September 18th CCWG email sent by Vice-Chair Bruce Tonkin:

Yes the ICANN Board also agrees that the IRP still applies to all bylaws. It can be used by individuals, companies or groups to bring actions...The independent review process (IRP) is itself a fundamental bylaw. So the two become linked in that if the IRP is used to decide whether the Board has followed the bylaws, and the board does not follow the binding decision of the IRP panel (to the extent permitted by law) - then this would be a breach of the fundamental bylaw, and the MEM could be applied.

In the author's view, requiring the entity filing an IRP to navigate the entire MEM process (with no guarantee that a supportive MEM will actually be constituted) following a Board failure to follow a "binding" IRP decision makes no sense whatsoever.

Further, even if the MEM panel decides that the Board has violated a Fundamental Bylaw, whether in the context of a MEM-initiated proceeding or an IRP appeal, that is not the end of the story, and it is altogether unclear that the Board will ultimately be required to effectively remedy it. As another portion of the Memo states:

Possible Outcomes of MEM Arbitration: *A MEM arbitration will result in a decision declaring that the challenged Board decision or action did or did not comply with ICANN's Fundamental Bylaws. The decision will be binding on the Board and **subject to any appeal to the full Standing Panel.** If the Board is found to have violated a Fundamental Bylaw, **the Board is required to remedy that violation, within the Board's discretion.** If the Board fails to remedy a violation, the MEM Issue Group may enforce the arbitration decision in the California courts. (Emphasis added)*

Parsing this, we can see that a MEM panel's decision can be appealed to the full Standing panel, and there is no description of whether that appeals review is de novo or limited to a narrow range of issues. Further, as the Board's ability to fashion a remedy "within the Board's discretion" is not strictly limited to clear legal or fiduciary constraints, the resulting remedy might be deemed insufficient by the MEM that brought it – yet could bar access to judicial enforcement on the grounds that the Board has acted "to remedy the violation".

Another significant difference between the MEM and SMM approaches is that the Single Member, once established, is a more or less permanent fixture of the ICANN landscape, ready to act at any time it perceives an AOI or Bylaws violation. Each MEM, in contrast, would be an ad hoc construction that must first be assembled prior to action. As explained in the FAQ Memo:

Q7: Who has the ability to initiate a MEM proceeding?

A7: Any single SO or AC, by consensus, may initiate a petition process to commence MEM arbitration, followed by notice to the other SOs and ACs. To initiate a MEM proceeding, the agreed number of SOs and/or ACs must each, by consensus, support the initiation of MEM arbitration. The SOs and ACs that wish to pursue MEM arbitration are collectively known as the MEM Issue Group.

In addition to the extra hurdle of needing to be assembled anew for each separate perceived violation, the MEM proposal also carries a risk of being subject to countersuit, as explained in this part of the FAQ Memo:

Q14: Does the MEM Issue Group possess the right to sue ICANN in order to enforce the MEM arbitration decision in court? If so, is there a risk that the MEM Issue Group can be sued?

A14: The capacity to sue comes along with the capacity to be sued, although it is highly unlikely that the MEM Issue Group would engage in any conduct that would be subject to litigation. In any event, ICANN will indemnify the MEM Issue Group, and will bear the fees and expenses that might be incurred in any lawsuit arising out of the enforcement of a MEM final arbitration decision.

Despite ICANN's reassurances that such a countersuit would be rare, and that it would indemnify the MEM, that potential litigation exposure may inhibit MEM establishment and subsequent action exactly when it is most needed, in a highly charged dispute between the community and Board. In this regard, it also must be noted that ICANN's monetary support for MEM action is hardly unlimited; as stated in the Proposed Approach Memo, the commitment is to "reasonable attorneys' fees (with caps) to support the MEM Issue Group" -- and that cap could well be reached long before a countersuit is decided.

It is beyond the scope of this article to explore all the differences between the CCWG's proposal and the Board's counteroffer (and we note here for the record that there quite a number of elements within the CCWG's proposal to which the Board has signaled agreement). In any event, many elements of what the Board has put on the table are unclear and further discussion on the CCWG list have made apparent that all have not been fully thought through.

Yet an initial review of the Comments Matrix document indicates that such key elements requiring clarification include:

- Whether the revamped IRP is to be binding, and at what point in time that will occur (especially since the Board expressly advocates a delay in creating its Standing Panel of arbitration experts)

- Why the Board has proposed to reduce the Community's role on the strategic and operating plans, and ICANN budget, from the right of approval (or rejection) proposed by the CCWG to a mere right to be consulted
- Whether a community objection to a proposed Bylaws change would have any substantial effect
- The precise decision process and mechanism for removal of a single Board member, as well as for "spilling" of the entire Board

Finally, one of the most important and inadequately explained aspects of the Board's proposal is its apparent rejection of the Workstream 2 process created by the CCWG to assure that necessary accountability measures deemed not so critical as to require development and implementation prior to the IANA transition will be addressed within a reasonable post-transition timeframe, and by the very same CCWG that had identified and developed them. Instead, the Board states in Matrix point 47 that it:

supports the utilization of existing mechanisms, such as future ATRT reviews, as the "home" for topics where appropriate, or identify other mechanisms for continuous improvement. For example, the IRP enhancements should likely have their own work group kicked off; the AoC review standardization should be its own community staff effort; Enhancements to the DIDP could fall neatly under the next ATRT work, etc.

This very different approach would disperse the WS 2 accountability measures to a disparate group of processes in which they may be addressed slowly, or not at all. This would clearly squander the CCWG's momentum and eliminate its cohesion and commitment to near-term action inherent in the WS2 proposal. The adoption of this diluted commitment might well require the CCWG to reexamine the elements of WS1 and decide to include additional pre-transition requirements to it – which would almost certainly delay the transition further.

As to the possibility of delay, the Board engages in some brinksmanship in its Summary document, stating:

*We believe that if the Sole Membership Model is the only proposed path forward, **it may be prudent to delay the transition** until the Sole Membership Model is in place and ICANN has demonstrated its experience operating the model and ensuring that the model works in a stable manner.*

There is every reason the Board wants the transition to occur as soon as possible (indeed, that it would have preferred to have achieved it already, without the necessity of NTIA's one year extension of the IANA contract). Therefore, this language may be intended to stir concern within the Numbers and Protocols communities, as well as within the Governmental Advisory Committee (GAC) and some other parts of the ICANN community, where there is substantial concern that any delay that moves the transition into the administration of the next U.S. President would doom it. The author finds this Board pronouncement to be rather outrageous given that the SMM has been proposed via the workings of the MSM operating at its highest level of detail and responsibility.

While it is now being tested, the center of gravity within the CCWG probably gives the achievement of enhanced accountability significantly greater weight than a speedy transition. In any event, the first order of business for the CCWG should be to determine whether the MEM proposal can provide the same enhancement of accountability, including scope of community empowerment and assured access to judicial redress against a recalcitrant Board, as the SMM. If it does not, then there is little point to expending time on a greater understanding of all the details associated with the MEM. The CCWG has proposed the SMM because its own legal advisers have stated that a membership approach is required to gain enforceable community powers under California law. If the MEM proposal cannot provide the same assurance it should be put aside. And if adoption of the SMM causes the Board to advocate transition delay, so be it.

Agenda for the LA F2F

The first online meeting of the CCWG after its collision with the Board took place on Tuesday, September 8th. There was a general consensus that it was incumbent on the Board to identify perceived problems it had with the Proposal with specificity, rather than to push an alternate, substitute proposal.

There was also substantial discussion of whether a meeting should be held in LA, as first suggested by the Board, in late September. There was a consensus that a broadly inclusive F2F meeting with adequate preparation could be valuable for preparing for the mid-October ICANN meeting in Dublin, but that it should not focus solely on the Board's formal comment -- and absolutely should not become a negotiating session with the Board.

A decision was subsequently made, just before the comment period closed, to proceed, when the sheer number of comments became apparent and travel scheduling concerns

were considered. While originally scheduled to take place in Santa Monica, the site of the CCWG F2F was subsequently relocated to nearby ICANN headquarters, where the Board will be simultaneously holding a previously scheduled workshop.

The author's view – expressed several times during CCWG calls – is that a pre-Dublin meeting in LA that includes substantial Board participation presents substantial dangers. Any meeting which places the CCWG and Board in the same room for an extended time may well be perceived as a “Summit”. In the political sphere, successful Summits are those held to shake hands on agreements that have already been worked out through extended back room negotiations, while Summits perceived as failures are those that involve public dialogue perceived as negotiation that fail to produce a final agreement. Further, if a three hour dysfunctional call was painful for participants, an extended F2F dialogue of disagreement could both be excruciating and corrosive of shared goals.

In a September 7th response to another CCWG participant, Tonkin conceded that an LA F2F could not resolve all the issues in disagreement – and most especially not the central question of the Sole Member Model -- stating:

I see there is some value on some discussions in Los Angeles - but maybe we need to break it into pieces. Ie not attempt to cover everything, but perhaps focus on some of the areas where we are close to agreement and where both sides are sufficiently prepared for a discussion to make sense. E.g a part 1 in LA and a part 2 in Dublin.

I tend to think the sole member model versus ICANN legal proposal will not be ready for discussion in LA. (Emphasis added)

Tonkin elaborated on the time he thought would be required to work out Board concerns regarding the CCWG proposal, and especially the details of a revamped IRP, in another September 7th email:

Yes - We are working on a set of comments that addresses each section of the CCWG proposal to make our position clear. There is still quite a wide range of views amongst the Board and staff on some items in the CCWG proposal - so some of the vagueness in replies is because there is not clarity yet within the Board on some items. Hopefully that will emerge in a day or so.

Speaking personally - my perspective is most of what is in the CCWG proposal for workstream 1 is fine by me with respect to the IRP. I think the exact rules of procedure need some refinement - so our statement that we can at least roll back the most recent change was simply to gain some time to work on those rules - I am thinking a 3 months for a focussed group not years. (Emphasis added)

On September 18th the CCWG-Accountability Co-Chairs posted their own [blog](#), “Building Momentum: An Update from the CCWG-Accountability co-Chairs”. It provides their collective view of the current status of the CCWG’s work and their goals for LA:

At 23:59 UTC on 12 September, the public comment period on the CCWG-Accountability 2nd Draft Proposal closed. Stakeholders from all around the world studied our proposal and provided feedback for our consideration -- we received a substantial [88 comments](#) on the proposal. For a draft overview of the major trends seen in the comments received see [here](#) [PDF, 3.6 MB].

Overall our assessment at this stage finds that there is significant support and appreciation for the CCWG's requirements and work to date. There was general agreement that elements proposed in the 2nd Draft Proposal enhance ICANN's accountability, and we believe that our group should take this as a sincere recognition of the quality of work done in preparing the proposal. That said, there are still areas of the proposal that many felt need further details or clarification. This reconsideration deserves careful assessment, and it will be important for the group to discuss these details in full to see where and if we can reach consensus before moving into the next phase of our proposal development.

Over the next week, our team will be finalizing an assessment of the feedback received and we will begin to allocate out suggestions to sub-groups of the CCWG for evaluation. We sense that some suggestions will be relatively straightforward to incorporate, and for those suggestions which will prove to be more challenging to find consensus on, we will deliberate at the important face-to-face meeting next week in Los Angeles on 25-26 September. We should expect that a large portion of our time in Los Angeles will be reserved to answering the tough questions, and it's important that we come out of the meeting with an idea of how to move forward together.

The CCWG has accomplished extraordinary work in a relatively short time, and no doubt will use its time in LA productively. Nonetheless, it now seems apparent that a final accountability proposal for community and Board consideration will not likely be delivered for consideration at ICANN’s mid-October public meeting in Dublin. That was reflected in the [notes](#) of the CCWG’s September 15th meeting as follows, “Delivering by Dublin is unrealistic given the comments we have received.” The difficulties of the remaining task were noted in the Co-Chair’s blog thusly, “We’ve accomplished an extraordinary amount of work since our first meeting in December, but as with so many other things in life, the final stretch may prove to be the most demanding.”

The additional time required to analyze and selectively assimilate the 88 comments, and to deal with the MEM proposal, is also affecting the parallel work of the IANA Stewardship Transition Coordination Group (ICG) dealing with the IANA Functions stewardship transition. In a September 22nd [blog](#) post, its leaders wrote:

The ICG's decision to adhere to its planned timeline as much as possible without sacrificing quality for speed is notable in light of indications that the work in Work Stream 1 of the Cross-Community Working Group on Enhancing ICANN's Accountability (CCWG) is likely to be delayed. The ICG is closely following the work of the CCWG and expects to have more clarity about the trajectory of the CCWG's work after that group meets at the end of this week.

The author is dubious that, notwithstanding its grueling schedule and high level of commitment, the members of the CCWG can complete its work of evaluating and incorporating worthwhile input from the 88 filed comments, and complete the assembly of a final Proposal capable of gaining community consensus approval in Dublin. Better to take the time to work out final proposal for post-Dublin consideration than risk a rejection there that could constitute a major setback.

Legal Analysis of the Board's MEM Proposal

On September 22nd the CCWG's legal advisers furnished it with three documents intended to inform its LA discussions. These were:

- A 9-page memo from Sidley and Adler with our high level observations regarding comparison between the Board Proposal and the CCWG Proposal
- A 6-page Summary Comparison of Key Characteristics of CMSM Model and Board Proposal
- A 39-page Comparison of CCWG 2nd Draft Proposal (Community Mechanism as Sole Member) and ICANN Board Proposal

[Note: While these documents had only been circulated on the CCWG email list as of this article's finalization, they should be [publicly posted](#) soon.]

Review of the Key Characteristics documents reveals rather significant differences between the CCWG and Board proposals that belie the Board's assertion that they are mainly different routes to operationalizing the same results:

- On budget and operating plan matters, there is no clear legal recourse for the community if the Board determines that Bylaws requirements are inconsistent with Board's fiduciary duties.
- On the ability to reconsider or reject changes to "standard" Bylaws, it is unclear what if any legal recourse community has if the Board determines that community rejection is inconsistent with Board's fiduciary duties.
- On the approval of changes to "Fundamental" Bylaws, it is unclear what if any legal recourse the community has if the Board determines that a community failure to approve a Fundamental Bylaws amendment is inconsistent with Board's fiduciary duties.
- On the ability to appoint and remove individual directors, the Board's approach is more convoluted and difficult to enforce.
- On "spilling" the entire Board simultaneously, the Board Proposal does not provide for direct, coordinated action by the community to recall the entire ICANN Board.
- On reconsideration or rejection of Board decisions relating to IANA functions reviews, it is unclear what if any legal recourse the community has if the Board determines that Bylaws requirements are inconsistent with Board's fiduciary duties.
- On statutory powers, the SMM possesses broad statutory rights, limited by the high voting threshold required for their exercise – while the MEM has none!
- On legal personality, the Sole Member is a legal person under California law per ICANN Bylaws provisions, while under the Board proposal each supporting organization (SO) or advisory committee (AC) that wished to possess direct legal enforceability would first have to organize as a legal person.
- On enforceability of community powers and susceptibility to lawsuits, the Sole Member and each SO and AC could invoke an IRP, with authority to seek enforcement of its results in court, and the Sole Member would have clear rights to enforce results in California court and most other international courts. Under the Board proposal, the scope of permissible MEM arbitration is unclear, and SO/AC enforcement of a MEM award might require pre-establishment of legal personhood.

- On certainty of enforcement, the Sole Member will have clear right to enforce its powers, while enforceability under the Board's proposal is subject to multiple uncertainties under California law.
- The likelihood of capture by a single stakeholder group, a constant theme in the JD analysis and Board pushback, is extremely low under both proposals.
- Both proposals would require significant amendments to ICANN Bylaws, although their specifics would differ.

As can be seen from this high-level comparison, the CCWG's SMM stands on firmer and more certain legal ground than the Board's MEM and is significantly simpler in structure and operation. In addition, the MEM proposal reserves to the Board the ultimate power to define the scope of its fiduciary duty and to readily invoke that standard against any arbitration decision it declines to comply with.

Moving on to the high-level comparisons memo, these passages sum up the fundamental differences between the two proposals, and the glaring deficiencies of the Board's:

Due to the lack of a member body and other aspects of the Board Proposal, ICANN's multistakeholder community as represented by its ACs and SOs would participate in a more limited set of community powers, enforceable through less robust and certain means than contemplated by the CCWG Proposal. Thus, the Board Proposal presents a different outcome to the debate -- thought to have been resolved with the selection of the Community Mechanism as Sole Member model -- regarding where on the trust-versus-enforcement continuum enhanced accountability mechanisms should be positioned so as to hold the ICANN Board accountable after the NTIA transitions out of its traditional and historic role.

As discussed at length leading up to the CCWG's decision to propose the Community Mechanism as Sole Member Model, a Sole Designator Model would provide an alternative that provides fairly robust community powers and enforceability though less than the Sole Member Model. We are preparing at the request of the CCWG a PowerPoint comparison of the Community Mechanism as Sole Member Model, the Sole Designator Model and the Board Proposal. Our initial assessment is that the Board Proposal -- due to lack of the legal rights that can attach to a member and a designator -- is closest to the current status quo and would deliver the least robust and enforceable community powers of the three models.

Summing up, the Board's proposal is of more limited scope and with less robust and reliable enforcement mechanisms, and its adoption would leave ICANN closer to the

status quo. The CCWG's proposal, by contrast, gives effect to the community's consensus that bold and paradigm-shifting action is required to replace the NTIA's stewardship role, and would result in a quite significant transformation of the status quo and empowerment of the MSM by giving the ICANN community the statutory and Bylaws-based powers to fully participate in the designing and executing the organization's future course.

Having put in the time and effort to develop its aspirations to this stage, the author can think of no reason why the CCWG would now decide to retreat from those efforts and settle for an alternate proposal that merely tweaks a status quo that has been found wanting too many times.

The Question of Timing

On August 17th the NTIA [announced](#) a one year extension of the IANA contract with ICANN, until September 30, 2016, stating:

This one-year extension will provide the community with the time it needs to finish its work. The groups are already far along in planning the IANA transition and are currently taking comments on their IANA transition proposals. As we indicated in a recent [Federal Register notice](#), we encourage all interested stakeholders to engage and weigh in on the proposals.

However, given the Board's pushback against many elements of the CCWG Proposal, will that time extension be sufficient?

The most recent ICANN timeline for implementation of the stewardship and accountability proposals envisioned the CCWG delivering a final Accountability and WS 1 proposal to the ICANN Board at the October meeting in Dublin, with transmission to the NTIA just after that meeting's conclusion. It then envisioned implementation and operationalization of its elements being completed by early July 2016, three months prior to the now-scheduled termination of the IANA contract.

The [DOTCOM Act](#), which passed the House in June and awaits Senate action, would, if enacted, prohibit the termination, lapse or cancelation of "NTIA's role in the performance of the Internet Assigned Numbers Authority functions" until 30 legislative days after Congressional receipt of an NTIA report certifying that the transition plan meets NTIA's stated criteria, as well as that "the required changes to ICANN's bylaws contained in the final report of ICANN's Cross Community Working Group on Enhancing ICANN Accountability and the changes to ICANN's bylaws required by ICANN's IANA Stewardship Transition Coordination Group have been adopted".

Two things are noteworthy about this legislative text. First, 30 legislative days could translate into close to 90 calendar days for an NTIA report received in early July 2016, given that it encompasses only days that Congress is in session, and that Congress generally takes a five-to six week recess in mid-summer, potentially bringing the transition date very close to the present IANA contract termination date. Second, the transition is explicitly dependent upon adoption of changes to ICANN's Bylaws contained in the final report of the CCWG.

That latter requirement gives the CCWG substantial leverage in any forthcoming discussions with the Board. It should also be recognized that even where there is agreement on the accountability principles to be adopted, converting that aspirational language into specific Bylaws amendments may itself be a subject of dispute and extended discussion between the Board, CCWG, and all the involved outside law firms, as always happens when agreement on the general must be converted into precise and specific language that will have long-standing legal effect.

Now it's possible that the DOTCOM Act may not pass the Senate, given its general institutional dysfunction as well as the fact that Sen. Ted Cruz currently has a procedural "hold" on the bill. But, speaking of dysfunction, DOTCOM may be irrelevant if Congress is unable to agree by September 30th on separate FY 16 appropriations bills for the Department of Commerce (DOC) and other agencies and, either on the brink of or just after a governmental shutdown, enacts an "omnibus" appropriations bill to keep the government running. Such omnibus spending bills almost always leave in place any restrictions contained in the spending authority being extended, and the FY 15 DOC appropriations bill prohibits NTIA from terminating the IANA contract while it is in effect. This situation might, depending on the length of the omnibus bill, bar the transition through its current term and thereby require an additional extension of the IANA contract by NTIA.

As for the current Board-CCWG disagreement, any significant delay in concurring on a final accountability report could effectively push the date by which a transition can be finalized past September 30, 2016 and likewise require an additional IANA contract extension by NTIA. That would push the transition into the final weeks of the 2016 U.S. Presidential and Congressional elections and might effectively delay its consummation until the next President takes office. Who that will be, and whether their Administration will support the transition, is of course unknown at this time.

Now what is the process that is supposed to be followed when the Board and CCWG have significant disagreement over the proposed measures? That is laid out in the [Charter](#) of the CCWG, which states:

Resolved (2014.10.16.17), **the Board commits to following the following principles** when considering the Cross Community Working Group Recommendations on Enhancing ICANN Accountability and Governance:

1. *These principles apply to consensus-based recommendations from the Cross Community Working Group on Enhancing ICANN Accountability and Governance.*
2. ***If the Board believes it is not in the global public interest to implement a recommendation from the Cross Community Working Group on Enhancing ICANN Accountability and Governance (CCWG Recommendation), it must initiate a dialogue with the CCWG.*** A determination that it is not in the global public interest to implement a CCWG Recommendation requires a 2/3 majority of the Board.
3. ***The Board must provide detailed rationale to accompany the initiation of dialogue.*** The Board shall agree with the CCWG the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. ***The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.***
4. *The CCWG will have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.*
5. ***If a recommendation is modified through the CCWG, it is returned back to the Board for further consideration. The CCWG is to provide detailed rationale on how the modification addresses the concerns raised by the Board.***
6. ***If, after modification, the Board still believes the CCWG Recommendation is not in the global public interest to implement the CCWG Recommendation, the Board may send the item back to the CCWG for further consideration, again requiring a 2/3 vote of the Board for that action. Detailed rationale for the Board's action is again required. In the event the Board determines not to accept a modification, then the Board shall not be entitled to set a solution on the issue addressed by the recommendation until such time as CCWG and the Board reach agreement. (Emphasis added)***

The Charter also envisions that, before submitting a modified recommendation to the ICANN Board of Directors, as envisioned under point 5, the CCWG-Accountability will submit a Draft Supplemental Board Report to the chartering organizations.

So the CCWG Charter does establish a procedure for resolving disagreements when a Board supermajority believes that a proposed accountability measure is not in “the global public interest”. But, especially if the disagreement is on multiple and fundamental issues, the discussions and modifications could consume a substantial amount of time. It is especially noteworthy that if the Board rejects a proposed CCWG modification resulting from their dialogue, it is not entitled to impose its own solution.

Will the Board transmit an accountability proposal with which it has substantial disagreements? ICANN’s CEO seems to have made a commitment to that effect in his February 25th [appearance](#) before the Senate Commerce Committee:

The Chairman: Will the ICANN Board send a proposal to NTIA that lessens the Board’s power or authority?

*Mr. Chehade: We will if the community and the stakeholders present us with a proposal. We will give it to NTIA, and **we committed already that we will not change the proposal, that if we have views on that proposal, we should participate with the community. Once that proposal comes from our stakeholders, we will pass it on to NTIA as is.*** (Emphasis added)

However, that is a statement from senior management, not the Board, and may not be binding on it. Further, its literal language does not preclude the Board from transmitting a final CCWG proposal accompanied by a letter in which the Board states its multiple fundamental disagreements with and reservations about key portions of the proposal. What NTIA and Congress would do in such a situation is unknown, but this scenario would be unlikely to grease the path to IANA transition sign off by the U.S. government. It would more likely throw sand in the gears.

Conclusion: Which Fork in the Road Will Be Taken?

How the gap between the Board and CCWG shall be bridged may come down to a question of who blinks first. Not every disagreement is subject to compromise, and the central questions of the SMM and an IRP enforced by assured judicial access seem to fall in that category.

Certainly there will be pressures and divisions on all sides.

The transition of IANA stewardship has already seen some considerable gap between the Numbers and Protocols technical communities – which are impatient for a change they already believe way overdue – and a Names community for which proceeding ahead is highly dependent on an acceptable accountability framework.

While the CCWG has strong internal consensus on its draft Proposal, there remains some internal dissent – especially on the SMM and an IRP that uses court access as ultimate backstop – and the Board may hope to exploit such divisions.

That brings us to the Board, which appears very reluctant to see the Proposal adopted in its present form – but which also must realize that any significant time devoted to reaching a mutually acceptable resolution of outstanding divisions could throw the Bylaws adoption completion date beyond the September 30, 2016 terminus of the current IANA contract term and squarely into the midst of a heated U.S. election.

Ultimately, while the Board and CCWG share many objectives, it is the CCWG as embodiment of the MSM that both are striving to save which gives it superior leverage in this accountability end game, so long as it retains cohesion behind the SMM its careful and informed deliberations have produced. For those who profess to support the MSM, the best means of demonstrating that commitment is to support the stakeholders comprising the CCWG as they move toward finalizing their SMM proposal.

We have reached a fundamental fork in the road. And now we must take it.