

Enhancing ICANN Accountability: Outside Counsel Review and Recommendations

SIDLEY AUSTIN
SIDLEY

 **ADLER
& COLVIN**
A Law Corporation

April 14, 2015

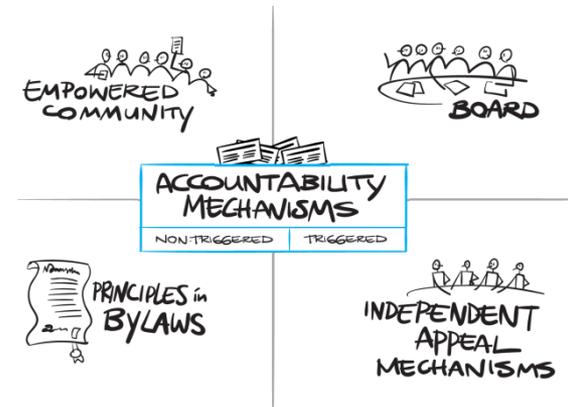
Agenda

- Qualifications, Introduction and Overview
- Current Recommendation – ICANN as a Member Organization
- Review of Member Structure & Alternatives
- Conversion to a Member Organization
- Exercise of Desired Community Powers

Qualifications

- *On April 10, 2015, Sidley Austin LLP and Adler & Colvin provided a memorandum that contained an overview of mechanisms and powers under consideration by the CCWG regarding efforts to enhance ICANN's accountability. These slides discuss those issues in summary form. For further detail, please see the referenced memorandum.*
- *This information is provided for the benefit of the CCWG to assist its consideration of enhancing ICANN's accountability and should not be relied upon by any other persons or for any other purpose.*
- *These slides reflect, in summary form, preliminary independent reactions of Sidley and Adler & Colvin, and have not been reviewed by any third parties.*

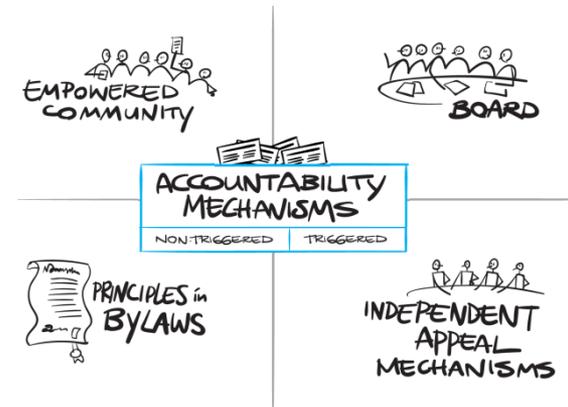
Introduction



- California corporate law and contract law provide the tools.
- Legal viability and ease of implementation depends on:
 - *who* has the power,
 - *how* they are organized,
 - *types of powers* at issue.
- ICANN community (persons, bodies or groups) need to be organized as legally cognizable persons.

On balance, “member” organization provides the clearest path for the ICANN community to exercise the mechanisms and powers under consideration.

Overview



- Corporate law – most powerful accountability powers/rights:
 - Fiduciary obligation of directors to the corporate purpose
 - Power to determine board composition through *selection* and *removal* of individual directors.
 - *Recall of entire board* possible in extreme circumstances.
 - Power to amend the bylaws, and to approve or reject efforts by the board to amend the bylaws
- Additional approval/rejection rights can be reserved to members

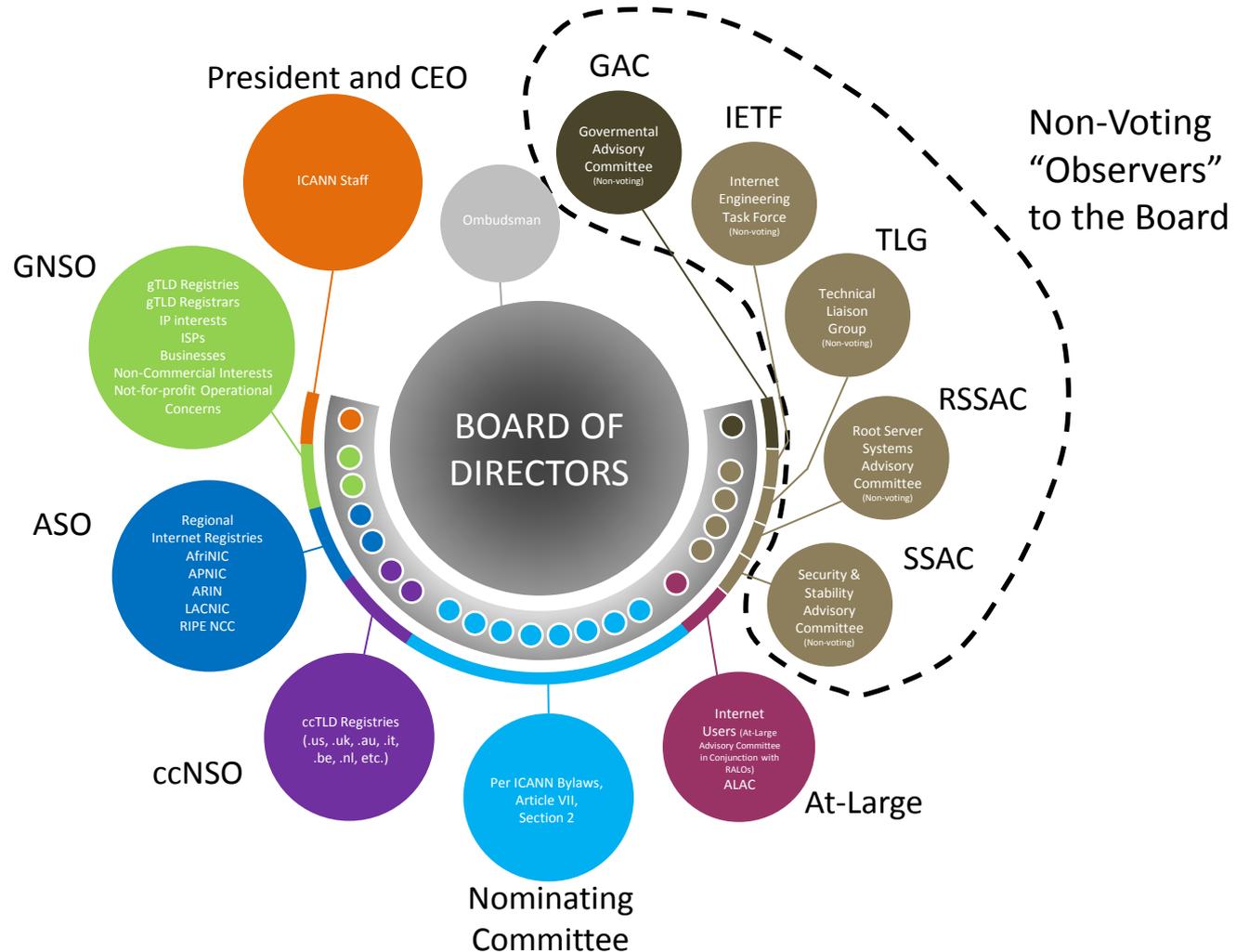
Overview Cont'd: ICANN's Corporate Purpose Statements

- ICANN was created for specific purposes stated in its articles (and supplemented in its bylaws).
- Corporate purpose statement is the *polestar* of the organization
- Affirmation of Commitments consistent with ICANN's purposes in its Articles of Incorporation may be incorporated into ICANN's governance documents.
- Changes to the purposes statement and/or the Articles of Incorporation may be structured to require the approval of members or designators.
- ICANN's assets must be used for its charitable purposes as stated in articles/bylaws, under California charitable trust law

Overview Cont'd: Board Fiduciary Duties and Responsibilities

- Board of directors has the authority and responsibility for managing and directing the affairs of the corporation
- Directors owe express fiduciary duties to the corporation.
- *Duty of obedience* to carry out the charitable purposes stated in the articles of incorporation and bylaws, the corporate purpose.
- Each director has further duties to act:
 - prudently, on an informed basis and with reasonable care; and
 - in ICANN's best interests.
- Delegation — Delegation is permissible, but the board bears ultimate responsibility for the decisions, and oversight.
- Exercise of Judgment — Directors apply their personal subjective judgment about what action is in the best interests of the corporation. Individual directors may and should consider their knowledge of the community body (designator or member) that appointed them.

Current ICANN Structure



- Assumptions for purposes of the diagram on the following slides (but this could change in practice):
 - No change in size of board
 - No change in allocation of board seats among various interest groups

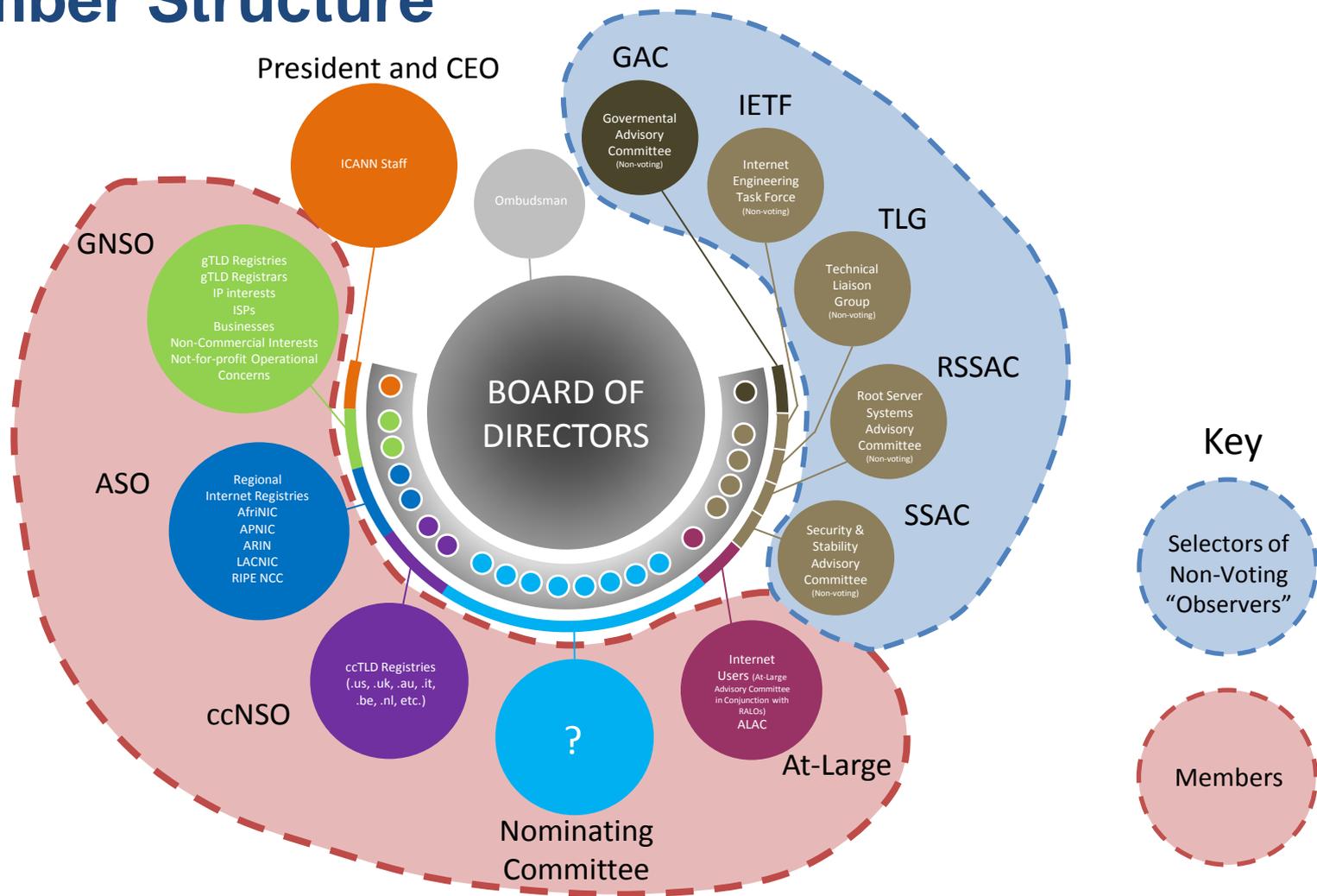
Recommendation: Organize ICANN as a Member Organization

- Community would be represented by existing stakeholders groups such as SOs and ACs, who would become ICANN's members.
 - Provides most effective combination of robustness of accountability mechanisms, well-understood legal support, and ease of implementation.
 - Preserves the fiduciary duties and obligations of the board of directors
 - Community—through members—has the power to select and remove the board
 - Community can control amendments to the articles and bylaws
 - Community has standing to enforce the corporate purpose of ICANN
 - Community does not have fiduciary duties to ICANN
-
- Alternative mechanisms could include the use of board “designators” or a board-within-a-board

Members: Overview

- Primary governance role: each class of members elects/removes its directors
- Detailed statutory rights and protections
- Natural persons or legal entities
- Statutory standing to sue provides accountability (and potential disruption)
- Specified reserved powers
- No fiduciary duties to corporation
- No liability for corporate actions
- Adds a new layer of administrative complexity and cost, because of statutory rights of members
- Difficult to eliminate members once implemented

Member Structure



- Nominating Committee could be eliminated, or repurposed, and the allocation of its seats would need to be determined.
- Members would need to become unincorporated associations or other legal entities.
- Members would have contractual agreement among themselves to recall the board upon specified threshold vote.

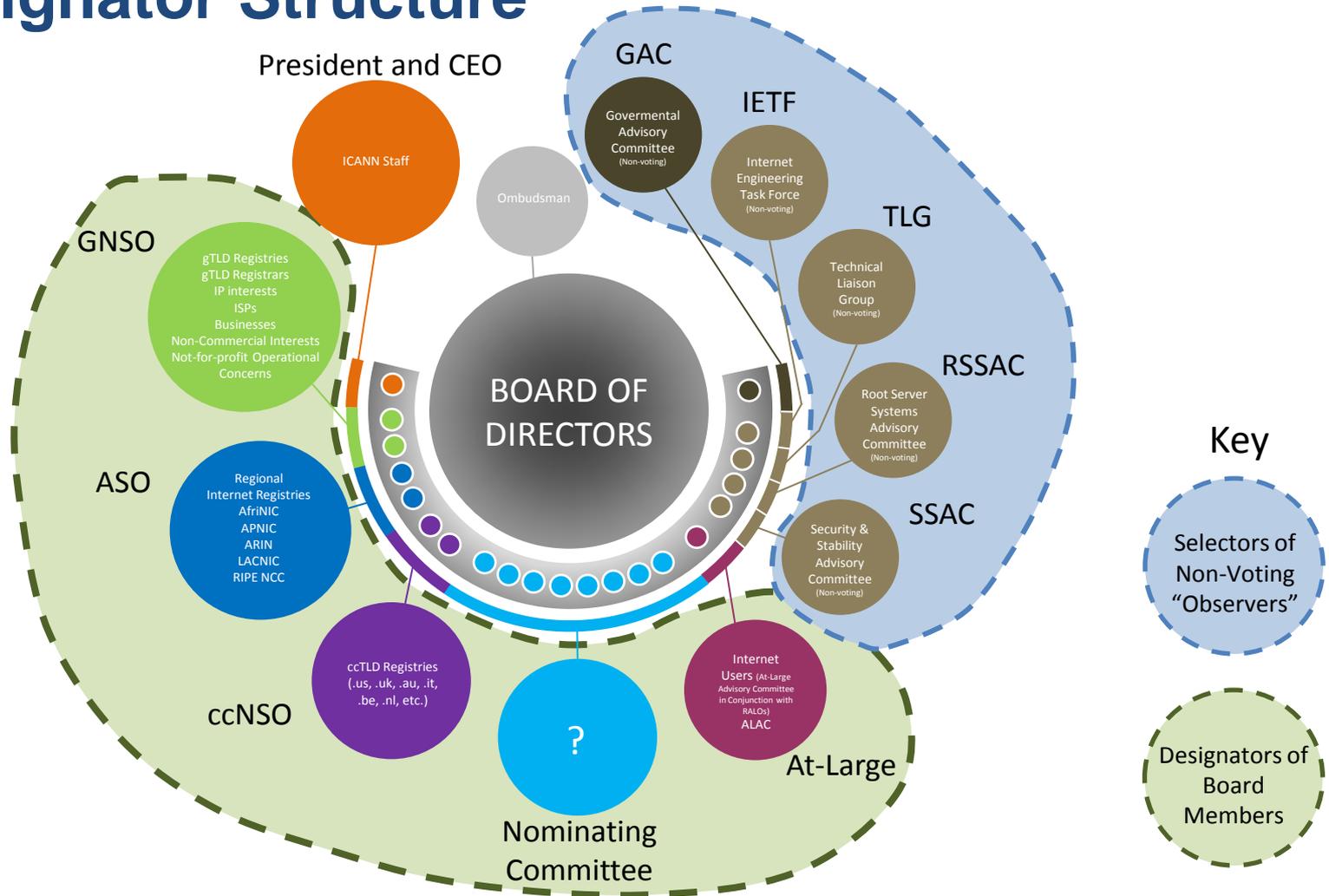
Members: Board Accountability Mechanisms

- Classes may remove/replace class directors
- Use contract among members/ICANN to recall full board (terms and conditions to be determined)
- Members can unilaterally amend bylaws
- Veto board attempts to amend articles and bylaws
- Specified board actions can be reserved to members for approval/rejection
- Can sue ICANN or directors for failures involving breach of duties or charitable trust

Designators: Overview

- Primary governance role: each designator appoints/removes its directors
- Minimal statutory framework or protected rights
- Natural persons or legal entities recommended
- Articles and bylaws may require designators' consent to board's amendments
- No statutory basis for review of board decisions
- No standing to sue on behalf of the corporation
- No fiduciary duties to corporation
- No liability for corporate actions

Designator Structure



- Nominating Committee could be eliminated, or repurposed, and the allocation of its seats would need to be determined.
- Designators of board members would need to become unincorporated associations or other legal entities.
- Designators of board members would have contractual agreement among themselves to recall the board upon specified threshold vote.

Designators: Board Accountability Mechanisms

- Designators may remove/replace their directors
- Use contract among designators/ICANN to recall full board
- Veto board attempts to amend articles or bylaws
- Can sue ICANN or other designators to enforce contractual rights

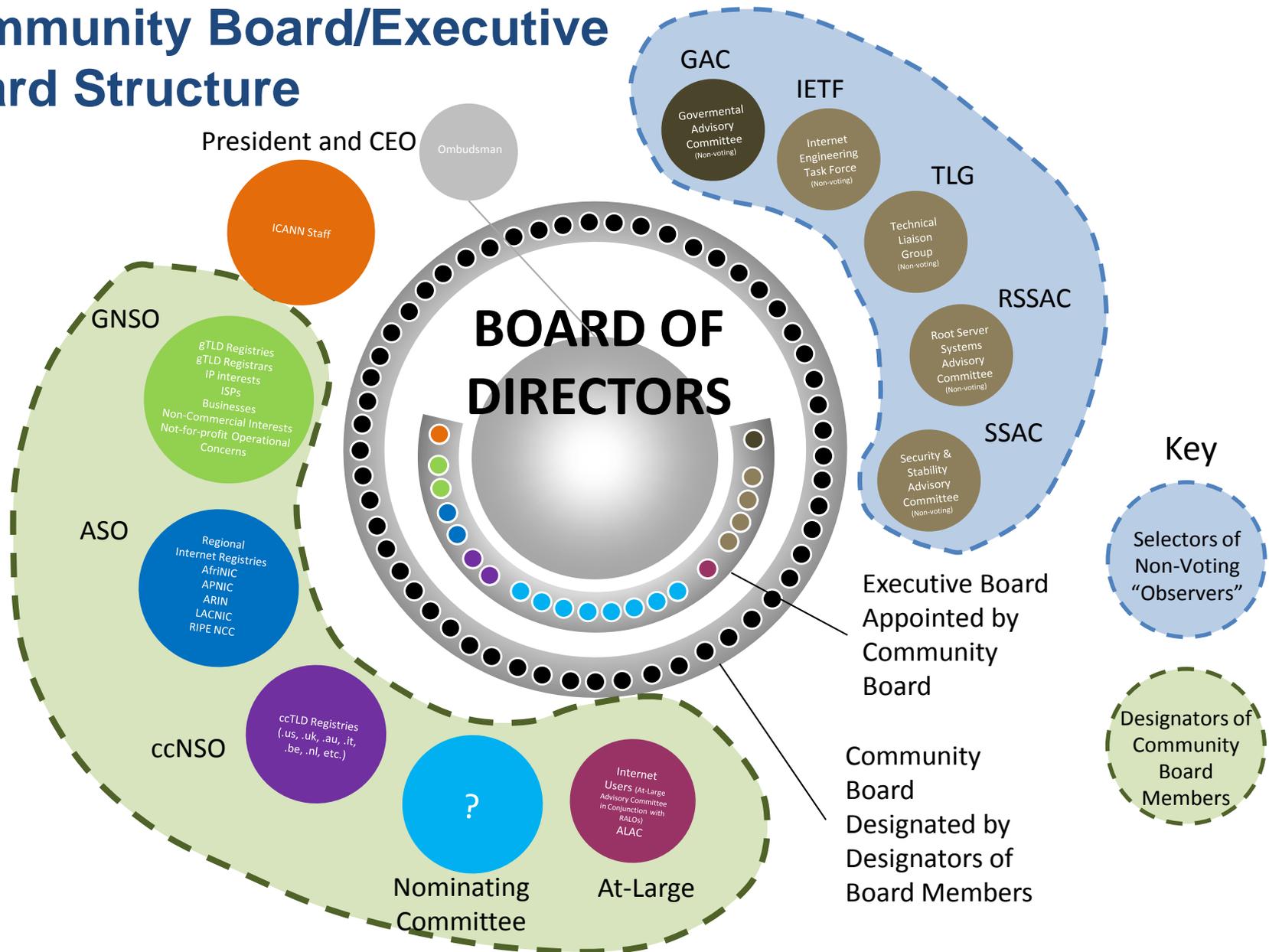
Members Versus Designators

| | Members | Designators |
|---|---|--|
| Select directors and remove them? | YES | YES |
| Must consent to board removal of selected directors? | YES | YES |
| Approve board amendments to articles? | YES | YES, if provided in articles |
| Approve amendments to bylaws? | YES, if adverse effect on members, or if provided in bylaws | YES, if provided in bylaws |
| Recall the full board? | PROBABLY, w/contract among members/ICANN | YES w/contract among designators/ICANN |
| Amend bylaws on own initiative? | YES | NO |
| Power to approve/veto specified board actions? | YES | NO |
| Fiduciary duties owed to corporation? | NO | NO |
| Liability for actions as members/designators, or for corporate actions? | NO | NO |
| Statutory standing to sue for breach of duty or charitable trust? | YES | NO |

Community Board/Executive Board Structure: Overview

| Community Board | Executive Board |
|---|---|
| <ul style="list-style-type: none">•Directors elected/removed by community (members or designators)•Larger board designed to allow desired stakeholders/constituencies to be represented•Elects Executive Board directors•Responsible for ultimate oversight of Executive Board•Can veto any Executive Board decision (subject to third-party rights)•Can take any decision away from Executive Board•Meets relatively infrequently•Directors have fiduciary duties for oversight of Executive Board, and any decision overruling Executive Board or taken away from Executive Board•D&O Insurance will be required for larger board | <ul style="list-style-type: none">•Selected/removed by Community Board•Delegated full Community Board authority except for statutorily-protected actions•Same day-to-day functions as existing ICANN Board for managing corporation•Bylaws may reserve to Community Board authority to take listed actions•All decisions subject to review/reversal by Community Board•Meets relatively frequently, as needed•Executive Board members are directors on Community Board•Executive Board members have fiduciary duties for all decisions |

Community Board/Executive Board Structure



•Nominating Committee could be eliminated, or repurposed, and the allocation of its seats would need to be determined.

Converting ICANN to a Member Organization

- Bylaws would need to be amended to identify the desired members—likely the existing SO and AC groups, which should take the minimal steps necessary to qualify as unincorporated associations under California law.
- Required provisions in the bylaws would include the following:
 - Member voting rights and weighting
 - Specification of procedures for amending the articles/bylaws, including limitations on board powers with respect to certain amendments and detailing member participation in the process
 - Enumeration of reserved powers
- No changes to ICANN tax status would be required, other than informing IRS of the changes on the ICANN annual tax filing with the IRS
- Contractual arrangements to effectuate recalling the full board would need to be established among the members

Summary of Desired Powers

- Removal of directors
 - Primary accountability mechanism in corporations, including nonprofits
 - Power can be exercised
 - by members
 - by designators
- Approval of changes to bylaws or articles (including “fundamental bylaws”)
 - Power can be exercised
 - by members
 - by designators

Summary of Desired Powers (cont.)

- Ability to block board actions that conflict with bylaws or articles
 - Power can be exercised
 - by members
 - by designators? More challenging. Designators do not have standing to sue in the same way as members.
 - Members can sue to block board action taken without member approval, if articles or bylaws required the board decision for member approval.
 - Members also have standing to bring action in the name of the corporation for a director's breach of fiduciary duties that harms the corporation.

Summary of Desired Powers (cont.)

- Periodic review and recommendations to board
 - Overlaps with CWG work on transition of IANA functions
 - Could subject recommendations to member approval if rejected by board. Requires specificity in bylaws if a reserved power.
 - This power can be exercised
 - by members
 - by designators? Problematic.

Summary of Desired Powers (cont.)

- Approval of or ability to block strategic plan or budget
 - This power can be exercised
 - by members
 - by designators? Problematic.
 - May be difficult to administer in practice, risks over-meddling.
- Accountability contract
 - Relies mostly on principles of contract law in combination with approval rights
 - This power can be exercised
 - by members
 - by designators? As long as designators are legal entities with power to contract, and appropriate contracts are in place.

Summary of Desired Powers (cont.)

- Community “veto” power on certain board decisions
 - This power can be exercised
 - by members If the decisions are specifically reserved to the members and enumerated in the governance documents.
 - by designators? No.
- Specification of consensus threshold for ICANN’s consideration of GAC advice
 - Can be implemented with bylaw amendment
 - Needs to respect board’s fiduciary duties