

This document considers different possible legal forms for the Global Council (“GC”) envisioned by the Movement Charter, and examines the Movement Charter drafts for the Global Council and Decision-Making Process. The purpose of this document is to present information that the Movement Charter Drafting Committee (“MDC”) and Wikimedia users can keep in mind as they continue the drafting, revision, and ratification process.

Summary

Forming the Global Council as a separate entity might present challenges insofar as its proposed roles and responsibilities could implicate the fiduciary duties of the Wikimedia Foundation Board of Trustees (the “Board”). The Movement Charter Drafting Committee should consider these challenges when deciding how to move forward.

Regarding the particular functions proposed for the Global Council, most of the functions listed in the current draft of the Movement Charter can be delegated to the Global Council by the Wikimedia Foundation Board of Trustees or its committees. In general, the Board of Trustees should retain power, authority, and/or oversight over such functions as are integral to the educational mission of the Wikimedia Foundation; implicate the fiduciary responsibilities of the Board of Trustees; or are difficult to segregate from the other operations of the Wikimedia Foundation. To the extent these functions are implicated by MDC Proposals, the Board should retain its authority and oversight over those functions in order to meet its legal obligations.

Finally, the decision-making process described in the current draft of the Movement Charter can more specifically describe the oversight powers held by “higher” bodies and the process by which such oversight would be exercised. In general, decision-making should be subject to review by higher bodies, including the Board of Trustees, when decisions implicate core areas of responsibility for the Wikimedia Foundation.

Global Council Structure and Proposals

Legal Form of the Movement Charter Drafting Committee

Forming a separate entity could help distinguish the GC as its own independent entity with distinctive legal roles and responsibilities. That setup, however, would require formation of a separate GC entity staffed and run as a formal independent entity. The relationship between a separate GC and the Wikimedia Foundation could also be legally complex and may give rise to disputes, as both organizations may face conflicting duties with respect to shared networks, infrastructure, and other concerns, particularly when duties of both organizations are overlapping or intermingled.

By contrast, other models of organization, such as forming a committee or advisory committee of the Board, may offer the GC a substantial role in governing Wikimedia’s projects while reducing the potential for legal liabilities that may result from disputes over responsibilities. Under models like these, the Board can retain oversight responsibilities consistent with its legal obligations and the ability to resolve disputes with the GC.

Whatever form the GC takes, the Board should maintain ultimate oversight responsibilities subject to applicable laws, the Wikimedia Foundation's Articles of Incorporation, and the Wikimedia Foundation's bylaws. The Wikimedia Foundation, organized under the laws of Florida, must abide by the requirements of the Florida Not For Profit Corporation Act (the "Act").

Board Committees and Advisory Committees - Requirements

If the GC is structured as a committee of the Board of Trustees, that structure must comply with the following requirements under the Act:

- 1) All corporate powers held by the Wikimedia Foundation must be exercised by or under the authority of the Board, subject to limitations set forth in the articles of incorporation.
- 2) The Board may delegate many of its functions to Board committees.
- 3) The majority of persons on Board committees must be Trustees.
- 4) If such a Board committee is created, they may exercise the power and authorities currently directly exercised by the Board or by existing Board committees, with the exception of the power to fill vacancies on the Board or any committee thereof, or to adopt, amend, or repeal the Foundation's bylaws.

The Wikimedia Foundation's bylaws already provide for the selection of Trustees vetted through a Community and/or Affiliate nomination process. That said, greatly expanding the Board for the purpose of providing Trustees to serve on the GC may inhibit the Board's other functions and responsibilities.

Alternatively, the GC could be structured as an advisory committee under the Board. Advisory committees are sometimes formed by nonprofit organizations to provide expertise and insight to their boards of directors while allowing their boards to retain ultimate discretion. Often, members of an advisory committee are volunteers whose experience and passion can make them valuable consultation partners, particularly when they have special insight into the population the nonprofit serves. Florida law permits the Board to create advisory committees, so long as the committee is composed of less than a majority of Trustees or entirely of non-Trustees. Advisory committees operate under the following requirements:

- 1) Advisory committees may not act on behalf of or exercise any of the powers or authority of the Board or bind the Wikimedia Foundation to any action, but may make recommendations to the Board or to officers.
- 2) Committees not composed mostly of Trustees may be delegated final authority only if said committee relates to the election, nomination, qualification, or credentials of Trustees or is involved in the process of electing Trustees.

The GC is anticipated to be responsible for a number of functions in a manner distinct from Wikimedia affiliates (chapters, thematic organizations, and user groups). In particular, the GC is anticipated to be, in various ways, able to bind the Wikimedia Foundation to various acts possibly implicating the duties of the Board. Close collaboration with the Foundation can help the Wikimedia Foundation preserve and promote its legal obligations while giving the future members of the GC a voice in shaping policy. Such collaboration looks to be anticipated by several of the Proposals: for example, the Board is anticipated to retain the ability to derecognize affiliate organizations for abuse of trademarks. Substantial retention of oversight, however, may implicate the larger Movement Charter goal of exercising democratic user control over Wikipedia and its sister projects.

Review of Movement Charter Global Council Proposals

This section considers whether the roles and responsibilities envisioned by the Proposals can be implemented consistent with the rules detailed above regarding the Board's legal obligations. In general, the Board of Trustees should retain power, authority, and/or oversight over functions that are: integral to the educational mission of the Wikimedia Foundation; implicate the fiduciary responsibilities of the Board; or are difficult to segregate from the other operations of the Wikimedia Foundation. The GC may assume such responsibilities as may assist the Board by providing expert opinion and community insight, or which do not directly implicate the Wikimedia Foundation's mission or the Board's responsibilities.

a. Background, Definition, and Purpose

This Proposal defines the anticipated nature and function of the GC. The Proposal envisions that the GC will play an advisory role in fundraising and fund dissemination workflows, produce an annual report on global strategic priorities, create or modify committees for the overall governance of affiliates and hubs, simplify access to resources, and set up standards and objectives to ensure accountability and promote coordination of the Wikimedia movement.

This Proposal describes a reasonable expectation of the GC's future nature. The Proposal envisions that the GC will create standards and objectives, provide oversight, and be able to take limited executive action. Although specific implementations of these roles are more fully explored below, the Proposal overall accounts for Board responsibilities by limiting the GC primarily to advisory and consultative functions.

b. Approving New Language Projects – Standards Setting

Under this Proposal, the GC would be responsible for determining the structure and membership of the Language Committee, which would report to the GC. The GC would be empowered to set additional standards to determine if a new language project would be recognized. The GC may also delegate responsibility for updating the process to the Language Committee while retaining the authority to approve or reject proposals.

This Proposal takes on distinct and quasi-isolated functions that are not very reliant on mass coordination and which are not likely to implicate the fundamental fiduciary duties of the Board. Functions like the approval of language projects, which are both specific and isolable from other responsibilities of the Wikimedia Foundation, more naturally lend themselves to delegation.

c. Approving New Sister Projects – Veto Rights & Viability Partner

Under this Proposal, the GC must approve, and has the ability to veto, any new sister projects.

The approval of new sister projects is likely an appropriate responsibility for the GC to share in, alongside other relevant entities. While, as mentioned throughout this review, more research is required into the ability of the Movement Charter to bind relevant actors, the approval of sister projects is likely a sufficiently specific and isolable function as to make delegation easier. The form of this Proposal helps avoid the possibility of the Board being bound to act in ways contrary to its fiduciary obligations.

Proposals such as this one, where GC approval is required but insufficient to take action, allow Trustees to refrain from making decisions they believe to be counter to their fiduciary duties while granting the GC authority that it may exercise such decisions.

d. Closure of Projects

Under this Proposal, the GC may veto decisions made by the Language Committee to close sister projects. The GC may also, under some circumstances, delegate that veto authority to the Language Committee.

The ability to veto decisions to close lingual projects is likely an appropriate responsibility for the GC. This evaluative power is likely a sufficiently specific and isolable function as to facilitate delegation, and is unlikely to implicate the fiduciary obligations of the Board.

e. Technology Decisions – Partial Standards Setting & Signoff

Under this Proposal, the GC would work with the Wikimedia Foundation’s Product & Technology team to form a “Technology Council” which would draft priorities related to technology development and updates as well as development plans for how to achieve those priorities. The GC would determine the Technology Council’s structure and membership, and would have the power to approve or reject proposals of the Technology Council.

This Proposal can only be partly assessed, as the Technology Council envisioned by the Proposal does not exist nor is it clearly defined.

Technological decision-making is a clear area in which shared rather than divided responsibility can facilitate the overall coordination of the Wikimedia community, as proper decision-making can implicate the interests and duties of all involved parties and is difficult to exercise independently. In general, fiduciary obligations of the Board may

require it to retain substantial oversight over Wikimedia’s technical infrastructure, as it is of fundamental importance to the Wikimedia Foundation’s non-profit mission to “create and freely distribute a free encyclopedia in all the languages of the world.” The degree to which that responsibility can be safely delegated may vary depending on the ultimate scope of the proposed Technology Council, but the Board should probably retain oversight over and the ability to coordinate the growth, maintenance, and overall functionality of Wikimedia’s technological structure.

That said, as currently written, this Proposal seems to limit the function of the Technology Council to proposing plans and priorities for upward review by the GC and Board. As technical experts, Council members could reasonably make recommendations to the GC without the power to implement those recommendations unilaterally. In other words, the GC may approve or reject recommendations from the Technology Council, but approval simply signifies that the proposal merits the attention of the Board, rather than itself binding the Wikimedia Foundation to act according to the recommendation. As the Wikimedia Foundation’s technical infrastructure is both so central to its mission and difficult to segregate from its other responsibilities, the Board retains ultimate decision-making power and oversight.

f. Recognition & Derecognition of Affiliates – Standards Setting & Limited Direct Decision-Making

Under this Proposal, the GC would have final authority with regards to the form and structure of the Affiliations Committee. The GC may set standards for affiliates to be recognized, derecognized, and receive grants. The Wikimedia Foundation would retain authority to derecognize affiliates for misuse of trademarks or legally necessary actions, though outside of emergencies, the Wikimedia Foundation would seek concurrence with the GC.

The ability to set standards for the recognition and derecognition of affiliates may be reasonable, though there are potential risks associated with allowing the GC to have final authority over such decisions. The Board, as owner of Wikimedia’s trademarks, carries obligations to oversee the use of those trademarks, and it may therefore want to retain authority over at least the derecognition of affiliates (if, for example, those affiliates misuse trademarks).

If affiliates are to answer and be responsible to the GC, their obligations towards the GC should comply with obligations they would also have towards the Wikimedia Foundation with regards to, for example, the proper use of trademarks. Such coordination and compliance may more easily flow from a close arrangement between the GC and the Wikimedia Foundation such that affiliates have but one set of obligations, though multi-party arrangements can be formed.

g. Recognition & Derecognition of Hubs: Standards Setting & Direct Decision-Making

Under this Proposal, the GC may set standards for Hubs to be recognized, derecognized, and receive grants. The GC is also directly responsible for deciding whether to recognize or derecognize a Hub. The Wikimedia Foundation would retain authority to derecognize Hubs for misuse of trademarks or legally necessary actions, though outside of emergencies, the Wikimedia Foundation would seek concurrence with the GC.

In general, the degree to which the GC may assume these proposed powers with respect to Hubs is dependent on what Hubs end up being, what forms they take, and what powers, responsibilities, and advisory functions they are granted. If Hubs act as spaces to coordinate users rather than themselves exercising notable power over Wikimedia's responsibilities as a whole, then it becomes less necessary for the Board to retain formal oversight (though in no case should the Board lack the ability to de-recognize a Hub for misuse of trademarks or when legally necessary). Establishing a norm of consultation would facilitate the GC's advisory and consultative role, while still allowing the Board to exercise its judgment in recognizing and responding to emergencies.

h. Affiliate & Hubs Advancement

Under this Proposal, the GC would monitor and coordinate the actions of Affiliates and Hubs, and would receive reports produced by Hubs regarding community or affiliate needs within designated themes and regions. Hubs would be responsible for networking, capacity development, and mentorship, while the Affiliates Committee would be responsible for guiding organizational development and ensuring good governance.

This Proposal can only be partly assessed, as it is in its current state rather unclear.

The general "themes" of responsibilities for Hubs and for the Affiliates Committee ("AffCom") appear to be reasonable ways for the Wikimedia community to empower itself without directly implicating Board responsibilities. However, the Proposal is unclear in the following respects:

- 1) The Proposal does not define the GC's ability to "monitor" the work of movement advancement.
- 2) The Proposal does not sufficiently explain the responsibility of Hubs to "design processes analyse community or affiliate needs," nor does it explain the nature of the report to be sent to the GC. Do Hubs simply report on process, or do they themselves report on community needs? What does the GC do with this report when received – are they empowered to act on it, or do they bring it to the attention of the Board (which of these would be preferable will depend on the nature of the report)?
- 3) The Proposal does not explain AffCom's power to "ensur[e] adherence to good governance principles." Is this the same as the proposed power to set requirements to receive grants, or is this something else?

i. Fundraising

Under this Proposal, the GC will not be responsible for raising funds in any way. The GC will collaborate with the Wikimedia Foundation to develop and coordinate fundraising policy.

This Proposal can only be partly assessed, as the GC's responsibility with regards to fundraising is largely undefined.

Fundraising and distribution are core functions of any nonprofit, and the Board has an obligation to ensure that it raises funds appropriately. The Proposal should specify that the Board keeps decision-making power over fundraising as required to ensure compliance with fundraising rules. That said, the Proposal as written suggests that the GC will have a largely advisory/consultative function with regards to policy development, which is likely reasonable and appropriate as it gives the Board discretion over one of its most important functions.

Regardless of the final Proposal, any fundraising activity or policy development regarding the same ought to include extensive documentation and reporting.

j. Fund Distribution

Under this Proposal, the GC will decide the criteria for assigning the share of total central revenue to community general funds, regional fund committees, and cross-regional grant dissemination. Regional fund committees will report to the GC to demonstrate effective, equitable, and accountable activities.

This Proposal can only be partly assessed, as a number of open questions remain regarding the GC's role with regards to fund dissemination and the top-level Wikimedia Foundation budget.

As described, raising and disseminating funds is a core function of any nonprofit organization. Delegations of any aspect of this function should let the Board maintain enough oversight that it can ensure that all funds are spent in pursuit of its nonprofit mission and not for any impermissible purpose. To ensure that the Wikimedia Foundation remains compliant with nonprofit rules, the MCDC should take care that the GC's proposed role allows the Board both full information regarding all fund distribution and the ability to prevent misuse of funds. As written, the Proposal seems to envision that kind of arrangement – the GC may decide standards for distribution, while the Wikimedia Foundation will be in charge of actually distributing funds according to those standards.

Further development of this Proposal should likely continue along those lines, while reserving for the Board the ability to ensure that the final standards and distribution rules will allow it to comply with all relevant obligations.

k. User Safety

Under this Proposal, the GC maintains a purely advisory role in assisting user safety, such as through aiding training and collaboration.

While the Proposal as written remains purely advisory, and such a function may be permissibly assumed, user safety is a core concern of the Wikimedia Foundation, its nonprofit mission, and applicable laws. Insofar as the Board may wish to consult with the Wikimedia community with regards to user safety, it is advisable that the Board retain authority and power with respect to user safety. Further, additional legislation regarding user safety is reasonably likely to be implemented, adding weight to the idea that the Board should retain power and flexibility necessary to comply with whatever law might soon arise.

l. Access to Confidential or Sensitive Information

Under this Proposal, GC members may be granted access to confidential or sensitive information depending on their particular role. Such access would be predicated on compliance with relevant agreements, including non-disclosure agreements, breaches of which would be grounds for removal from the GC.

Access to some confidential or sensitive information is likely necessary for the GC to fulfil its proposed functions (the language of “privileged” should probably be changed, as “privilege” is a legal term of art that seems inappropriate here). Its advisory/consultative functions in particular likely require access to private information. However, an important component of the Board’s fiduciary duty is an obligation to keep confidential information confidential. The confidentiality policy envisioned by the Proposal can help ensure that the GC is able to access necessary information while being both responsible for that information and preventing the disclosure of information not necessary for GC functions. For example, information about identifiable individuals may present more risks in light of an ever-changing legal landscape regarding data privacy. The GC should operate under appropriate non-disclosure agreements to protect confidential information.

m. Structure

This Proposal outlines several potential structures for the exact composition of the GC. The primary question at issue is the degree to which the GC ought to exist as a purely executive body or whether it ought to exist as an executive party with an advisory board.

Specific details regarding the structure of the GC are likely best left to the users themselves, who are better suited to determine, for example, how many members the GC should have. The question regarding the *advisory* structure, however, is suitable for review.

The presence of an advisory body as distinct from the executive body may help resolve the tension between the Board’s need to act in line with its fiduciary obligations and the needs of the Wikimedia community for self-government and representation in the decision-making process.

An advisory body would allow members of the Wikimedia community to have a dedicated voice. Dedicated Wikimedia users would, by one of the potential processes described in the document, have the ability to both internally form consensus views on the various

matters that affect them and then to present that consensus to the relevant decision-makers. On the reverse side, the advisory body would be able to hear and discuss the views of those decision-makers and present them back to the Wikimedia community, facilitating dialogue and communication necessary to the overall functioning of the movement. Within those matters which may be safely delegated from the Board, an executive body of the GC would be able to democratically act in the best interests of the Wikimedia community and, more importantly, to enact the community's perspectives and preferences.

Decision-Making Process

In this document, the MCDC has outlined the principles by which Movement entities will make decisions. The MCDC has emphasized the following principles: Transparency; Subsidiarity; Self-governance; Legitimacy & Equity; Fairness; and Ownership & Accountability.

Generally, this document outlines at a high level of abstraction:

- 1) What parties must be involved in deciding a particular matter;*
- 2) The methodology used to make decisions;*
- 3) Categories outlining types of decisions that may be made;*
- 4) The level of agreement required for a particular matter to be decided; and*
- 5) Steps to be taken following the conclusion of a decision-making process.*

Several anticipated portions of this Proposal, including the process by which decisions are appealed and arbitrated, are not yet complete.

This Proposal is currently incomplete, and therefore can only be partly assessed.

The Proposal operates at a very high level of abstraction, describing principles to guide a decision-making process more than it describes the process itself. The principles described are appropriate and reasonable, clearly serving the idea of democratic self-governance that animates the charter. The abstraction, however, can give rise to concerns over implementation. As an example, the requirement that parties to a decision be free from "conflicts of interest" leaves undefined what would qualify as such a conflict or, in the absence of a definition, whose judgment would be final when making a determination. Future drafts of this Proposal should take care to define more precisely how such processes are to be assessed as well as who is to do the assessing.

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