

Power: Recalling Individual Board Members-- Analysis of public comments on 2nd draft

From CCWG 2nd Draft Proposal

The CCWG 2nd draft proposal describes the power of recalling individual board members beginning on p.58:

- 1 The Board is the governing body of ICANN, with main responsibilities that include employing the President and CEO, appointing the Officers, overseeing organizational policies, making decisions on key issues, defining the organization's strategic and operating plans and holding the staff to account for implementing them.
- 2 Of ICANN's sixteen Directors, fifteen are appointed for a fixed three-year term and generally are in office for the whole term that they are appointed for by his or her SO or AC, or by the Nominating Committee. In addition the Board appoints the President and CEO (confirmed each year at the Annual General Meeting), who serves on the Board *ex officio* (by reason of his or her position as President and CEO). The power to remove individual Directors of the ICANN Board is currently available only to the Board itself (though this will change with the Single Member Model the CCWG-Accountability is proposing¹), and can be exercised through a 75% vote of the Board. Today there is no limitation² on the Board's power to remove a director specified in the Bylaws.
- 3 This power would allow for the removal of a Director before his or her fixed term comes to an end, with no rules set as to limitations on such removal or requirements for a particular cause for such removal. It is expected that this power would only be exercised in cases of serious difficulty with a particular Director.
- 4 For the seven Directors appointed by one of the three SOs or by the At-Large Community), a process led by that organization or subdivision would decide on the Director's removal. Only the SO or AC that appointed the Director could decide on that director's removal. For the purposes of such a removal process, SO means the SO or for the case of the GNSO, the GNSO House that has the Bylaw right to appoint a director.
- 5 The following process applies for removing a Director appointed by an SO or AC:
 1. A decision to start consideration of a Director's removal requires a call to do so, approved by a simple majority in the SO or AC which originally appointed the director.
 2. Where such a call to remove a Director meets the required threshold is announced, within fifteen days a meeting of the ICANN Community Forum (see Section 6.3 for the concept) will be convened. At that meeting:
 - a) The Chair of the forum must not be associated with the petitioning SO or AC or with the Director involved;
 - b) Representatives of the appointing/removing SO or AC must explain why they seek the Director's removal;

¹ If the CCWG-Accountability's Single Member Model is implemented, the Board could only remove directors for causes specified in the California corporate code – see the memo from 23 April 2015 entitled "[Legal Assessment: Executive Summary, Summary Chart and Revised Governance Chart](#)". For further detail on legal advice provided, see Appendix G.

² Today there are escalation paths, up to and including removal from the Board, for Board member violations of the Code of Conduct and Conflict of Interest Policies, but the Bylaws do not currently require such a violation to occur prior to Board removal.

- c) The Director has the opportunity to reply and set out his or her views; and
 - d) Questions and answers can be asked of the appointing/removing SO or AC and of the Director involved by all the other participants in the forum
 - 3. Within fifteen days after the meeting of the forum, the SO or AC which originally appointed the Director makes its decision through its usual process.
 - 4. The threshold to cause the removal of the director is 75% of the votes cast in the SO or AC which originally appointed the Director.
 - 5. If the threshold is met, then, as will be set out in the bylaws, the Community Mechanism as Sole Member automatically implements this decision, and the Director is removed.
 - 6. If no decision is made within fifteen days, the process lapses and the director remains in place.
 - 7. No new call to consider the removal of that same director can be made during the term they are serving on the Board following a vote to remove them failing or no decision being made.
- 6 For directors appointed by the Nominating Committee, the SOs and ACs participating in the Community Mechanism as Sole Member would make a decision on the director's removal through the process detailed below. Any participating SO or AC would be able to petition for the removal of a Director appointed by the Nominating Committee.
- 7 The following process applies for removing a director appointed by the Nominating Committee:
- 1. A petition to start consideration of a director's removal requires a simple majority in one of the participating SOs or ACs.
 - 2. Where a petition to remove a director meets the required threshold is announced, within fifteen days a meeting of the ICANN Community Forum will be convened. At that meeting:
 - a) The Chair of the Forum must not be associated with the petitioning SO or AC or with the Director involved;
 - b) Representatives of the petitioning SO or AC must explain why they seek the Director's removal;
 - c) The Director has the opportunity to reply and set out his or her views; and
 - d) Questions and answers can be asked of the petitioning SO/s or AC/s and of the director involved by all the other participants in the Forum
 - 3. Within fifteen days after the meeting of the Forum, the Community Mechanism as Sole Member, through votes of participating SOs and ACs, makes a decision as to whether the Director is removed or not.
 - 4. The threshold to cause the removal of the Director is 75% of the votes available in the Community Mechanism.
 - 5. If the threshold is met, the Community Mechanism as Sole Member has made its decision and the Director is removed.
 - 6. If no decision is made within fifteen days, the process lapses and the Director remains in place.

7. No new call to consider the removal of that same Director can be made during the term they are serving on the Board following a vote to remove them failing or no decision being made.
- 8 Where a Director who had been appointed by an SO or AC is removed, that SO or AC is responsible for filling the vacancy through the usual process (as set out in Article VI, Section 12.1 of the Bylaws).
- 9 Where a Director who has been appointed by the Nominating Committee is removed, the Nominating Committee may appoint a new Director. It is expected that the Nominating Committee will amend its procedures so as to have several “reserve” candidates in place, should any or all of its Directors be removed under this power (or as part of the recall of the entire ICANN Board described in Section 7.4).
- 10 In all cases, Directors appointed to replace directors removed by this power fill the same “seat” and their term will come to an end when the term of the Director they are replacing would have done. A Director appointed in such circumstances will not have their remaining time in the role counted against any term limits, to which they would otherwise be subject.
- 11 As part of Work Stream 2, the CCWG-Accountability is recommending the development of community standards that will guide Board members, SOs, and ACs regarding expected behavior of Directors, and the expectations which if not met could be expected to lead to a petition for their removal. Such standards would help establish common expectations across the community – they would not be criteria for, nor limitations on, the exercise of this power, or give any grounds for a director subject to removal to appeal or challenge the decision. The development of such standards should be a matter of priority in Work Stream 2.

Public Comments (augmented by LA discussions)

32 public commenters raised the issue specifically.

Areas of Consensus

All³ commenters supported the basic premise. The largest block, 16, voiced unqualified support for the proposal as presented.

Consensus on documenting the rationale for removal.

Areas Needing Clarification/Refinement

1. Four commenters were supportive but wanted some mods:

Two wanted criteria for board behavior established as part of WS1.

One commenter had concerns with the provision that if a board member survived a recall, they were indemnified against future action.

One stated that if a director was within 8 months of the end of their term, they should not be replaced.

³ (IT Law Institute voiced opposition to removing the board- I believe it was the full board)

Areas of Concern/Divergence

1. SO or AC appointed Directors make decision to remove director.

- a. Six commenters voiced a serious concern with the proposal that the nominating SO/AC would be the sole remover, this could lead to more of a parliamentary like composition where board members were more parochial. This position was reinforced by several participants in the WP meetings.
- b. The CCWG proposal (supported by most commenters) also reinforced their view that Directors can be removed solely by the appointing SO/AC.

2. For cause / standards of behavior. Multiple commenters in the PC and LA meeting proposed that a standard be established for Directors to be removed.

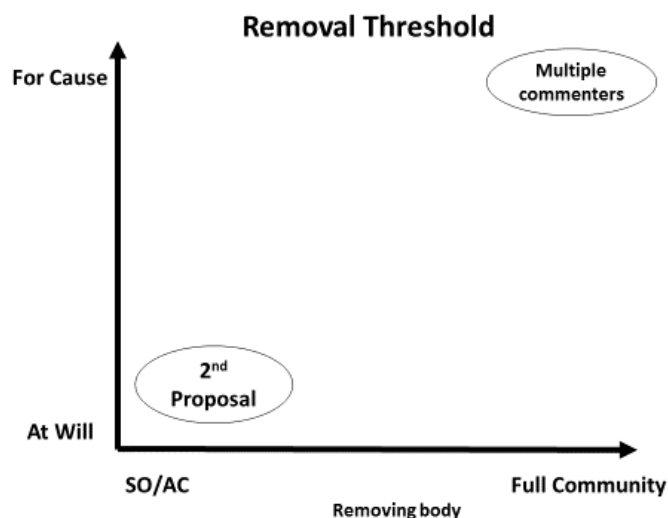
- a. Two commenters proposed that standards of behavior be adopted before the proposal is approved. One commenter proposed Pre-service letters that would document the cause for removal.
- b. The CCWG proposal of for the SO/AC to document the rationale, but not justify against a fixed standard was also vigorously defended.
- c. It was pointed out that there is an existing Code of Conduct for Directors.
<https://www.icann.org/resources/pages/code-of-conduct-2012-05-15-en>

3. Multiple removals. One commenter, and LA comments, and WP discussions pointed out that the removal of too many individual members within a short time period could have equivalent to removal of entire Board. WP also discussed “serial” dismissals.

Options

1. Explore combinations of standard vs number of decision makers. Comments appeared to be bipolar with the CCWG proposal and supporters favoring the lowest barrier to removal, and most on the opposing view supporting both full community and “for cause”.

It may be worthwhile exploring different combinations of standards for dismissal and the composition of the body making the decision.



4. Limit the number, and stagger time periods for individual board removal to mitigate “batching”.