5B Community Powers

30 July 2015 at 00h00 UTC

In our first Public Comment Report, the CCWG-Accountability proposed five new Community Powers that would grant the community the ability to:
- Reject / reconsider Board decisions on budgets, operating plans or strategic plans
- Reject /reconsider proposed changes to standard ICANN bylaws
- Co-approve changes to Fundamental Bylaws
- Remove individual ICANN directors
- Recall the entire ICANN Board

Feedback on these proposed powers was generally positive, both in the Public Comments received in response to our first report and in discussions with the ICANN community during ICANN 53 in Buenos Aires in June 2015.

In preparing this second Public Comment Report, the CCWG-Accountability has further refined these powers, with improvements made in response to the suggestions provided by the community in the public comments period and in Buenos Aires.

The following sub-sections explain how the powers are exercised, and then describe all of the powers in detail except for the co-decision right for changes to Fundamental Bylaws. The Fundamental Bylaws power is described in Section 3B of this report to keep all the details about Fundamental Bylaws in single section.

How are the community powers used?

The community powers are exercised when decisions to do so are made by the Community Mechanism described in Section 5A of this report. There are three steps involved in making use of one the powers:
- **Petition** – to trigger the process for considering a power's use
- **Discussion** – community discussion of whether to exercise the power
- **Decision** – SOs and ACs cast their votes to decide whether the power is used or not

The exceptions to this three-step process are for the powers to remove an ICANN director appointed by an SO/AC (where there is an initiating trigger vote in the SO/AC to start consideration of the process) or to co-approve changes to Fundamental Bylaws (where its use is automatically triggered by any proposal for changes to Fundamental Bylaws). To Recall the Entire ICANN Board requires two SOs or ACs (at least one of which is an SO) to sign a petition.

Petition
The petition step is to test whether there is enough support to start the formal discussion and decision-making about whether to exercise a community power.

A window of time to allow a petition will be built into relevant ICANN processes, but will

generally be a **maximum period of fifteen days** from the announcement[1] of the decision that might trigger the power's use.

To trigger community consideration for the use of a community power, an SO or AC has to agree by a resolution of its governing body that the power should be used. A simple majority is sufficient to support a petition for any power so it can proceed to the discussion stage[2].

Discussion
Where a petition succeeds, the whole community through its SOs and ACs discusses the proposed use of the power, including through the proposed ICANN community forum (see Section XX for the concept of the forum).

This Discussion Period lasts for **fifteen days**, starting the day after a valid petition has been received. It will include online discussion and a specific online meeting of the ICANN community forum called within the discussion window.

All SOs and ACs would be participants in the ICANN community forum, and so there will be a mixture of formal and informal discussion, advice and consideration going on – within the forum and informally within SOs and ACs during this period.

Decision
After the discussion window has closed, a specified time period for SOs and ACs that have voting rights in the Community Mechanism begins.

This Decision Period lasts for **fifteen days**, starting the day after the conclusion of the discussion window period.

The process by which SOs and ACs vote, quorum requirements, and other associated matters are described in Section 5A of this report. The threshold of votes required to exercise a power is described alongside each power in the following sub-sections.

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[1] WS1 implementation will work out processes to make sure such announcements are clearly known to the community.
[2] The exception is for exercising the power to Recall the Entire ICANN Board – see the petitioning detail for this power in subsection X below.

5B.1 Power: reconsider/reject budget or strategy/operating plans

01   The right to set budgets and strategic direction is a critical governance power for an organization. By allocating resources and defining the goals to which they are directed, strategic and operating plans and budgets have a material impact on what ICANN does and how effectively it fulfills its role. Financial commitments are made on behalf of the organization that are difficult to unwind after the fact.

02   Today, the ICANN Board makes final decisions on strategic and operating plans and on budgets. While ICANN consults the community in developing strategic/business plans, often these budgets and strategic plans are put to the community without sufficient detail to facilitate thoughtful consideration. For example, the CWG-Stewardship final proposal has expressed a requirement that the budget be transparent with respect to the IANA function's operating costs with clear itemization of such costs to the project level and below as needed. Under the CWG-Stewardship final proposal, an itemization of IANA costs as set forth in the IANA Budget would include "Direct Costs for the IANA department", "Direct Costs for shared resources" and "Support functions allocation". Furthermore, the CWG-Stewardship final proposal states that these costs should be itemized into more specific costs related to each specific function to the project level and below as needed. Currently, there is no mechanism defined in the Bylaws that requires ICANN to develop such budgets and plans in a way that includes a community feedback process. Even if feedback were unanimous, the Board could still opt to ignore it.

03   The IANA Budget[3], in particular, requires protection as recommended by the CWG-Stewardship's final proposal. The IANA functions budget must be managed carefully and not decreased (without public input) regardless of the status of the other portions of the budget. Therefore it is proposed that there are two distinct processes with respect to the IANA Budget and the ICANN Budget. As such, use of the community power to veto the ICANN Budget would have no impact on the IANA Budget, and a veto of the IANA Budget would have no impact on the ICANN Budget.

04   The process by which budgets, operating plans and strategic plans are developed must be enhanced to include greater transparency and community involvement earlier such that community buy-in must be an integral part of the process. Improved interaction between the staff, board and community is essential for strategic planning within a multi-stakeholder organization. The CCWG-Accountability proposes that Work Stream 2 develop improvements along these lines.

05   Accordingly, this new power would give the community the ability to consider strategic and operating plans and budgets (both ICANN general and, separately, with respect to the budget for the IANA functions) after they are approved by the Board (but before they come into effect) and reject them. The rejection could be of the proposed ICANN Budget or the IANA Budget, or of a proposed ICANN-wide strategic or operating plan. The petition would state which Budget or plan was being subject to veto. A separate petition is required for each Budget or plan being challenged.

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[3] The CWG-Stewardship set out its requirements for IANA Budget transparency at pages 31 and 32 and in Appendix P of its final report (11 June 2015). The CCWG-Accountability requires ICANN to produce at least that amount of detail regarding the IANA Budget. This will be provided for in the Bylaws in the appropriate place and will have the status of Fundamental Bylaws.

06   If the exercise of this power leads to no budget for either or both of ICANN and the IANA functions being in place at the start of a new financial year, a caretaker budget struck at the same level as the previous year's budget will apply, to allow for continued operation of ICANN and/or of the IANA functions while the budget disagreement is resolved.

07   A community decision to reject a Budget or a plan after it has been approved by the ICANN Board will be based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws, the global public interest, the needs of ICANN stakeholders, financial stability or other matters of concern to the community. The rationale for any community veto should be Consensus based. The veto could only concern issues that had been raised in the consultations conducted before the Board approved the budget or plan. New issues could not be raised for a second veto – all issues must be raised for consideration in a first veto process.

08   The petitioning, discussion and decision timelines for this power are the defaults set out in the previous sub-section.

09   To account for this timeline, 40 days minimum should be added to the budget / operating planning process. If this time cannot be added for practical reasons due to the nature of the budget approval process, the consequence as noted above is that a rejection would see ICANN and/or the IANA functions operating on the previous year's budget until the disagreement was resolved.

10   Because time pressures are less acute for strategic plans, a period of 30 days can be allowed for each stage when the veto relates to a strategic plan. On the same basis, 60 days should be added to the strategic planning process.

11   If the community exercised its veto power with respect to any budget, operating or strategic plan, the Board would have to absorb the feedback that came with the decision, make adjustments and propose an amended budget or plan. If the community does not accept the revised proposal as suitable, it can exercise a second veto (at the higher threshold noted below).

12   No limit is proposed to the number of times the community can veto a strategic plan, but the CCWG-Accountability recommends that the Board and the community enter into dialogue above and beyond established processes should a strategic plan be vetoed more than once.

13   Where a budget or operating plan has been rejected for a second time, ICANN will operate on the previous year's budget for the new fiscal year. The Board will propose a new budget for the subsequent financial year in the usual way. The Board will continue to have the ability to make out-of-budget funding decisions on the same basis as it does today.

14   If the community regards the Board's response to a second veto as unacceptable, the other Community Powers (as set out in this Section) are available for use.

15   A **2/3** level of support in the mechanism would be required in the mechanism to reject the ICANN or IANA budget or an operating/strategic plan the first time: a **3/4** level of support is required for a second rejection.

5B.2 Power: Reconsider/Reject Changes to ICANN "Standard Bylaws"

16 This Section applies to "Standard Bylaws" which are all those Bylaws that are not Fundamental Bylaws (see Section 3B)

17 ICANN's Bylaws set out the details for how power is exercised in ICANN, including by setting out the company's Mission, Commitments and Core Values. Changes to those Bylaws have been discussed in Section 3.B on Fundamental Bylaws.

18 It is possible for the Board to amend Standard Bylaws in ways that the community may not support. For example, the Board could unilaterally change the ccNSO's Policy Development Policy, or the Stakeholder Group structure of the GNSO, or the composition of the Nominating Committee.

19 Therefore, this power would give the SOs/ACs who participate in the Community Mechanism as Sole Member (with input from the larger community) the right to reject proposed changes to Standard Bylaws after they are approved by the Board (but before they come into effect). This power would be available in response to any proposed change to Standard Bylaws.

20 The timeframes and processes required for this power to be exercised (petition, discussion and decision) are the default ones set out in the introduction to this Section, with the petition window of fifteen days starting when the Board's decision to make a change to a Standard Bylaw is announced.

21 Before initiating the process to reject changes to the Standard Bylaws, we expect there will be, as there is today, a public comment period (40 days is the standard period) for the community to provide feedback to the proposed changes. Therefore, the relatively short petitioning window is acceptable.

22 To succeed, a veto would require a **2/3** level of support in the Community Mechanism. Note that for the Board to propose a Standard Bylaws amendment, two-thirds (2/3) of the Board must vote in favor of the change.

23 Where a veto was successful, the Board would have to absorb the feedback, make adjustments, and propose a new set of amendments to the Bylaws as per its usual processes

24 This power does not allow the community to re-write a Board-proposed Bylaw change: it is a rejection process where the Board gets a clear signal that the ICANN community is not supportive.

25 There is no limit to the number of times a proposed change can be rejected, but the threshold for sending one back is the high threshold set out above, which is high enough to limit any potential for abuse of this power by a small number of SOs/ACs.

26 The impact of this power is to keep ICANN operating under the existing Bylaws despite changes proposed by the Board unless the community by inaction in response to an

amendment does not object. If the petitioning period expires with no valid petition, fifteen days after a Standard Bylaws change is announced, the change goes into effect.

5B.3 Power: Removing Individual ICANN Directors

27 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.

28 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 their SO/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, and can be exercised through a 75% vote of the Board. There is no limitation[4] on the Board's power to remove a director specified in the Bylaws.

29 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.

30 For the seven directors appointed by one of the three SOs or by the At-Large Community (or by subdivisions within them, e.g. within the GNSO), 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.

31 The following process applies for removing a director appointed by an SO or AC:

   a. 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.

   b. 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 5A3 for the concept) will be convened. At that meeting:

      i. The Chair of the forum must not be associated with the petitioning SO/AC or with the director involved;

      ii. Representatives of the appointing/removing SO/AC must explain why they seek the director's removal;

      iii. The director has the opportunity to reply and set out his or her views; and

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[4] 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.

     iv. Questions and answers can be asked of the appointing/removing SO/AC and of the director involved by all the other participants in the forum

   c. Within **fifteen days** after the meeting of the forum, the SO/AC which originally appointed the director makes its decision through its usual process.

   d. The threshold to cause the removal of the director is **3/4** of the votes cast in the SO/AC which originally appointed the director.

   e. 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.

   f. If no decision is made within **fifteen days**, the process lapses and the director remains in place.

   g. No new call to consider the removal of that same director can be made for **six months** following a vote to remove them failing or no decision being made.

32   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.

33   The following process applies for removing a director appointed by the Nominating Committee:

   a. A petition to start consideration of a director's removal requires a **simple majority** in one of the participating SO or ACs.

   b. 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:

     i. The Chair of the forum must not be associated with the petitioning SO/AC or with the director involved;

     ii. Representatives of the petitioning SO/AC must explain why they seek the director's removal;

     iii. The director has the opportunity to reply and set out his or her views; and

     iv. Questions and answers can be asked of the petitioning SO/AC and of the director involved by all the other participants in the forum

   c. 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.

   d. The threshold to cause the removal of the director is **3/4** of the votes available in the Community Mechanism.

   e. If the threshold is met, the Community Mechanism as Sole Member has made its decision and the director is removed.

   f. If no decision is made within **fifteen days**, the process lapses and the director remains in place.

g. <mark>No new call to consider the removal of that same director can be made for **six months** following a vote to remove them failing or no decision being made.</mark>

34 Where a director who had been appointed by an SO/AC is removed, that SO/AC is responsible for filling the vacancy through the usual process (as set out in Article VI, Section 12.1 of the Bylaws).

35 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 <mark>5B4</mark>).

36 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 which they would otherwise be subject to.

37 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.

5B.4 Power: Recalling the entire ICANN Board

There may be situations where removing individual ICANN directors is not viewed as a sufficient accountability remedy for the community: where a set of problems have become so entrenched that the community wishes to signal its lack of confidence in the Board by considering a recall of the entire ICANN Board in one decision.

Beyond the power set out above in Section <mark>5.5</mark> to remove individual directors, this power would allow the community to consider and cause the recall of the entire ICANN Board (with the exception of the President of ICANN, who serves on the Board ex officio). The community would initiate use of this power on the petition of two-thirds of the SOs and ACs participating in the Community Mechanism as Sole Member of ICANN, with at least two SOs or ACs petitioning. Implementation of this community power would be set out in Bylaws requiring petition and notice procedures along the following general lines:

- A petition of at least <mark>two of the SOs or ACs</mark>, at least one of which must be an SO, (indicated by signature following the decision of a simple majority of that SO or AC's governing body) (a "Valid Petition") is received.

- Upon receipt of the Valid Petition, within a time that will be defined in the Bylaws (probably 7 days) the responsible person will:

o   Provide notice to the SOs and ACs of any issue identified with respect to the validity of the Valid Petition, with an unlimited period to cure; or

o   Provide notice to all SOs and ACs participating in the Community Mechanism as Sole Member that (a) a Valid Petition has been received, including a copy of the Valid Petition, (b) setting forth a Discussion Period of 15 days and a Decision Period of 15 days thereafter, and (c) calling for all SOs and ACs that have the right to appoint directors to select one (or two, depending on their allocation) directors to notify by the close of the Discussion Period of the person[s] it has selected to serve on an Interim Board (for only so long as necessary until a replacement election could be held) should a vote in favor of recall of the entire Board occur, such notice to include a signed statement from the candidate(s) of their willingness to serve and any other information that the Bylaws require Board candidates to provide prior to election. SOs and ACs must nominate at least one such prospective director.

▪   A director that is a member of the Board subject to the recall vote is not eligible to serve on the Interim Board.

After a Valid Petition is raised, the Discussion Period would provide fifteen days for SOs / ACs to individually and collectively deliberate and discuss whether the recall of the entire ICANN Board is warranted under the circumstances – including through a meeting of the proposed ICANN community forum.

At the end of the Discussion Period, each SO and AC would then have the fifteen calendar days of the Decision Period to follow its own internal processes to decide how to vote on the matter, with its vote certified in writing by the Chair of the SO/AC.

It would be preferable for a decision of this sort to be the result of cross-community consensus. Therefore, a suitably high threshold for the exercise of this power, **[75%]** of all the votes available within the CMSM (see Section 5A) would have to be cast in favor of recall for the recall to be effective.

This threshold was chosen to stop any particular SO or AC from being able to prevent the recall of the Board, based on initial voting participation by four SOs/ACs in the Community Mechanism, but to be as high as possible without allowing that to occur.

It is expected that recall of the entire ICANN Board would rarely, if ever, occur. Should it occur, however, there must be a Board immediately in place to serve as a fiduciary caretaker for ICANN until an election can be held for Replacement Board Directors.

As previewed above, in the event that the threshold is met for a recall of the entire Board, simultaneous with that vote, directors to serve on the Interim Board will be selected automatically. The Interim Board will consist of the group of candidates that each SO and AC was required to provide by the end of the Discussion Period, and it would replace the ICANN Board upon the threshold being met.

In addition, the NomCom will amend its processes so as to be able to supply two candidates to serve on such an Interim Board if required (such candidates to be confirmed by the NomCom each year at the time of ICANN's Annual General Meeting, and to be available for service on an Interim Board or if required due to community recall of an individual director, until the date of the

next Annual General Meeting). The NomCom would only name such directors to serve on the Interim Board should a vote to recall the Board succeed.

Due to its short term, this Interim Board is not subject to the diversity requirements that apply to the ICANN Board generally.

Since the President serves on the Board by virtue of his or her executive position and is not subject to the usual election/selection processes, recall of the entire Board would not affect the President's position either as President or as a director serving on the ICANN Board.

- The Bylaws shall provide that the Interim Board will be in place only so long as required for the selection/election process for the Replacement Board and in no event longer than [120 days].

    o In selecting a Replacement Board, SOs and ACs and the NomCom may, if they so choose, select directors who were recalled and/or directors serving on the Interim Board. In other words, service on the recalled Board or the Interim Board does not disqualify service on the Replacement Board.

    o The directors selected for the Interim Board, and later those selected for the Replacement Board, will step into the terms that were vacated by the recalled directors. Each SO and AC and the NomCom shall determine which of the terms the interim and replacement directors shall fill. In this way there will be no disruption to the staggered terms of the ICANN Board.

- The Interim Board will have the same powers and duties as the Board it replaces because it is critical to the stability of ICANN (and required by law) that at all times there is a fiduciary in place. However, the Bylaws will provide that absent compelling circumstances it is the expectation that the Interim Board will consult with the community (at least through the SO/AC leadership and including where practicable through the ICANN community forum) before taking any action that would be a material change in strategy, policies or management, including without limitation, replacement of the President.

- Under the Community Mechanism as Sole Member Model, the collective results of the vote of the SOs and ACs becomes the action of the CMSM without any further Board action; the Interim Board would be in place as of the time that it is determined that the community vote satisfied the threshold for recall, and both the CMSM and the Interim Board would have the power to enforce their rights in relation to that vote.

Finally, the CCWG-Accountability acknowledges the dependency between Community Power 5.6 and the CWG-Stewardship reference as follows:

1. **Community Empowerment Mechanisms.** The empowerment of the multistakeholder community to have the following rights with respect to the ICANN Board, the exercise of which should be ensured by the related creation of a stakeholder community / member group:
       (a) The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;

[Note: There was one minority statement filed regarding this chapter 5B.4.[5]]

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[5] The majority view within CCWG was that the threshold for the use of this power should be set very high, requiring achievement of a ¾ voting threshold to be exercised. As the majority view states: "This threshold was chosen to stop any particular SO or AC being able to prevent the recall of the Board, but to be as high as possible without allowing that to occur."

This reflects the view of the majority that recalling the entire Board would be highly destabilising to the organisation, and should only occur as a last resort.

However, this procedure does raise the possibility that recall of the entire Board could be requested by one or more SOs and still not attract sufficient support to take effect. The minority viewpoint is that such an outcome would be even more destabilising to ICANN than Board recall. If an entire operational community, as established within an SO, had formally stated that it had lost confidence in the Board, and yet the Board remained in office nonetheless, that would cause a crisis of confidence in ICANN as an institution. Confidence in ICANN can only be maintained if the operational communities it serves each have confidence in the Board.

The proposal of the minority for addressing this problem is that each of the three SOs should be able to exercise the power to recall the entire Board individually. A high threshold should be set for reaching consensus _within the SO_ for using this power, rather than between SOs and ACs should advise on the use of this power rather than take part in the decision.