

Power: Recalling the Entire Board -- Analysis of public comments on 2nd draft

From CCWG 2nd Draft Proposal

The CCWG 2nd draft proposal describes the power of recalling the entire ICANN board beginning on p.72:

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 7.3 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 by petition of SOs or ACs as set out below. Implementation of this community power would be set out in Bylaws as below, which incorporates the general petition and notice procedures set out in the introduction to this Section.

- A petition of at least two of the SOs or ACs, 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:
 - 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
 - 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 and 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 or 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 Community Mechanism as Sole Member Model (see Section 6) 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 and/or 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].
 - 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.
 - 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 and 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 Community Mechanism as Sole Member Model 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 this Community Power in Section 7.4 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;

There was one minority view filed regarding this Section 7.4, as follows:

The majority view within CCWG-Accountability was that the threshold for the use of this power should be set very high, requiring achievement of a $\frac{3}{4}$ 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 destabilizing to the organization, 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 destabilizing 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.

Public Comments

We had 21 public commenters on the power to recall the entire board.

Areas of Consensus

Fourteen commenters expressly supported the power to recall the entire board. Three commenters¹ did not state support or opposition.

Areas Needing Clarification/Refinement

1. General. One commenter² suggested that refinements are needed to the powers, but did not make any specific suggestions.

2. Community Standards for Board Members. One commenter expressed specific support for the intention to develop community standards for Board members in WS2.

¹ AFRALO (African Regional At-Large Association), i2Coalition (Internet Infrastructure Coalition), Linda Bruecker.

² Afnic.

3. Standards for Selection of Interim Board. Three commenters focused on the need to create standards for the selection of the Interim Board. One commenter³ suggested that an enhanced set of director selection standards could “be developed to assist in guiding the selection of interim Directors in the case of Board recall.” This commenter noted that normal standards for diversity should be suspended for this purpose, since it was “critical to select Directors with the deepest technical and governance abilities above all other criteria.” Another commenter⁴ asked what requirements would need to be met by the Interim Board, but did not offer suggestions.

The Board, in its comment, stated that there should be key criteria, such as a high level of independence and professionalism among the Interim Board, and the insistence on operational core competencies such as in finance, risk, audit and governance. There should also be an important role for those familiar with the work of ICANN, but that should not predominate. At no time should the Board not meet the regulatory aspirations of a predominance of independent Directors.

4. Unclear Consequences for Failure of Community to Meet Process Requirement. One commenter⁵ noted that “We have extensive and detailed goals, principles, and deadlines but we not have clear consequences for failure to meet them.”

Areas of Concern/Divergence

1. General Opposition. Four commenters⁶ clearly did not support the power to recall the entire Board. One stated that such a power “goes beyond purpose.” Another stated that the report is not clear what justifications or grounds related to accountability would trigger such an action, and noted that removal of the entire board is a risky and disruptive process. This commenter expressed concern that the power could be invoked because of a “view disagreement” between the board and the community unrelated to accountability and could lead to the “hijack” of ICANN as an organization.

2. Time Period for Selection of Interim Board. One commenter⁷ expressed concern that the 120 day period for selection of an interim board would not be sufficient, and suggested that this be a target rather than a deadline.

3. Tight Deadlines could Invite Capture. One commenter⁸ expressed concern that the tight timelines for discussion could open the process to capture and suggests that time limits could be set based on prior discussions within the community and that the Community Forum could also be invoked.

4. Need for Widespread Community Support. Several commenters, some of whom supported the power and some who opposed it, stated the importance of widespread community support for any recall.

5. Potential for Failure to Agree on Interim Directors. One commenter expressed concern that the SOs and ACs may not be able to agree on Interim Directors.

³ CyberInvasion Ltd.

⁴ Linda Bruecker

⁵ Nell Minow.

⁶ Erman Oncel – Partnership Istanbul; Google; Government of Kuwait; IT Law Institute – Istanbul;

⁷ ALAC.

⁸ Nominet (.uk ccTLD)

6. Complexity of Process. One commenter⁹ called the process “labyrinthine and cumbersome.”

7. Establish an Outline of Minimum Standards for Board Removal in WS1. One commenter¹⁰ suggested that the CCWG should establish “a basic outline of minimum standards for Board removal” as part of WS1, while supporting the intention to develop such standards more fully in WS2.

8. Higher Threshold for Board Recall. One commenter¹¹ suggested an even higher threshold of 80%.

Comments on Minority View

There were seven comments on the minority view that the entire Board could be removed by a single SO. Six comments clearly rejected the idea. One¹² stated this would be “profoundly destabilizing” and “needlessly risky.”

Only one commenter¹³ supported the minority view, stating that it would be “destabilizing” to have a Board remain in place after an attempt to unseat it by an entire SO.

Options for Consideration by full CCWG

1. Create Standards for Selection of Interim Board. Suggestions include:

- Deepest technical and governance abilities above all other criteria,
- High level of independence and professionalism
- Operational core competencies such as in finance, risk, audit and governance.
- Familiarity with the work of ICANN is important, but such directors should not predominate.
- Interim Board must include a predominance of independent Directors.

The Second Draft is silent on selection standards for the Interim Board, except to note that the geographic diversity requirement will be waived. CCWG may wish to consider revising its Proposal to state that standards for the Interim Board will be the same as those set out in the Bylaws for the ICANN Board (other than the requirements relating to geographic diversity).

2. Clarify Consequences for Failure of Community to Meet Process Requirement. The CCWG should consider and make clear the consequences if the community does not satisfy the goals, principles, and deadlines in the process.

The CCWG should consider what consequences if any, would attach if particular goals, principles or deadlines are not met. The CCWG may wish to note the difference between deadlines, which are part of the process, and goals and principles, which inform the process.

3. Make Time Periods Less Rigid. One commenter expressed concern that the 120 day period for selection of the replacement board, while reasonable, might not be sufficient, and suggested that this be a target rather than a deadline. Another commenter expressed a more general concern that the tight timelines for discussion could open the process to capture.

⁹ Nell Minow.

¹⁰ Public Knowledge.

¹¹ USCIB.

¹² USCIB ((US Council on International Business).

¹³ LINX (London Internet Exchange).

This is related to the previous item. The CCWG may wish to make some or all of the time periods less rigid, including the replacement director deadline, or make other adjustments to limit possibilities for “capture” based on unequal ability to respond to tight timelines. At the same time, the CCWG should consider how to avoid opening the door to unreasonable delays.

4. Eliminate Potential for Failure to Agree on Interim Directors. The CCWG may wish to review the interim director process to ensure that it will not result in a failure to agree on Interim Directors.

5. Simplify Process. One commenter called the process “labyrinthine and cumbersome.”

While this may be partly intentional, in order to make sure that total recall is not too easy, the CCWG should review the process to see if it can be clarified and simplified, without actually making it easier to recall the Board.

6. Establish a Basic Outline of Minimum Standards in WS1.

The CCWG should strongly consider whether to establish at least a basic outline of minimum standards for Board removal as part of WS1, rather than leaving this entirely to WS2.

7. Higher Threshold for Board Recall. The CCWG should consider the suggestion that Board recall should have an even higher threshold of 80%.