WS2 Workgroup Outcomes

Guidelines on Good Faith Conduct in Participating in Board Removal Discussions

Draft Report Version 1

January 5, 2017

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I. Executive Summary

The sub team for Guidelines on Good Faith Conduct in Participating in Board Removal Discussions was tasked with creating a framework for community members to propose removal of Directors in a manner that would allow Decisional Participants to benefit from the indemnification clause enshrined in ICANN's bylaws as amended on October 1, 2016. The goal was to find the right balance between encouraging good faith behavior from the community without discouraging exercise of the community power to remove Directors. The sub team opted for a minimalist approach that leaves discretion to the SO/AC as to what process to follow provided there is some process that can be documented and explained to other Decisional Participants. Adherence to the guidelines should be sufficient to demonstrate the good faith required to trigger the indemnity shielding Decisional Participants from the costs of responding to Director initiated actions during the escalation and enforcement process for Director removal.

II. Description of Issue

Effective October 1, 2016, ICANN's bylaws grants the multistakeholder community power through the Empowered Community (EC) mechanism to remove Board Members. Any Director designated by the EC may be removed without cause.[1] This new level of Director accountability and corresponding community responsibility are based on recommendations developed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (WS1)[2]. The EC is comprised of Decisional Participants[3] who have the right to appoint and remove individual ICANN Directors.

Decisional Participants may be any SO/AC who chooses to join the EC. In the event that a Decisional Participant endeavors to remove an individual board member, their actions are indemnified provided the Decisional Participant has acted in good faith[4]. The challenge for the sub team was to create guidelines for conduct that would be considered good faith actions on the part of Decisional Participants in order for the indemnification to apply while leaving the widest area of discretion for SO/ACs. The absence of good faith leaves the Decisional Participant vulnerable to the costs of any proceeding that a Director may initiate in connection with removal or recall according to the bylaws. The indemnification was crafted with the specific action of Director removal in mind ~~and the protecting~~ in order to protect the Decisional

[1] ICANN Bylaws Article 7, Section 7.11 Removal of a Director or Non-Voting Liaison https://www.icann.org/resources/pages/governance/bylaws-en/#article7

[2] https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf

[3] ICANN Bylaws Article 6, Section 6.1 Composition and Organization of the Empowered Community https://www.icann.org/resources/pages/governance/bylaws-en/#article6

[4] ICANN Bylaws Article 20, Section 20.2 Indemnification with Respect to Director Removal https://www.icann.org/resources/pages/governance/bylaws-en/#article20

Participant from expenses, judgements, fines, settlements and other amounts that may be incurred in any such action.

As Directors may be removed for any reason, the guidelines should be crafted in a way to avoid manufacturing cause through mandating specific conditions or circumstances that must be met in order for the process to commence. There is an inherent tension between creating a process that meets a legal threshold of good faith and avoiding the creation of a list of causes. For example, the group discussed whether SO/AC appointed directors should be notified of SO/AC expectations within a specified period of time upon taking a seat on the Board. We concluded that the any sort of requirement of that nature would, in fact, give rise to a list of causes and would run counter to the intentions of the WS1 recommendations. Good faith speaks to the intention of Decisional participant rather than the action of the Director. As long as the Decisional participant is truthful, acting for the benefit of the community and following established, transparent procedures, the good faith standard should be met.

III. Recommendations

a. Proposed Guidelines

The proposed guidelines are as follows:

1. For All Board seats, petitions for removal:

a. may be for any reason; and
b. should:

1. be truthful
2. be in writing
3. contain sufficient detail to verify facts; if verifiable facts are asserted
4. supply supporting evidence if available
5. include references to applicable by-laws and/or procedures if the assertion is that a specific by-law or procedure has been breached
6. be respectful and professional in tone

2. SO/AC's shall develop procedures for consideration of board removal notices to include:

a. reasonable time frames for investigation if the SO/AC deems that an investigation is required
b. period of review by the entire members of the SO/AC
c. consistent and transparent voting method for accepting or rejecting a petition
d. procedure for providing notice to other SO/ACs of the pending petition
e. documentation of the community process and how decisions are reached

There are two open questions for which the sub team requests feedback from the community:

- Should a standard form be used to raise the issue of Board removal to the respective body – either the specific SO/AC who appointed the member or the Decisional Participant in the case of a Nom Com appointee?

Commented [U1]: It might be helpful for the community if the sub team makes its own recommendations in this area with a rationale that the community can support or reject.

- Should the guidelines apply to all discussions and not just be limited to circumstances around Director removal?

b. Requirements for Recommendations

The requirements for the recommendation include formulating guidelines that have positive benefits for the community while taking care that they are not drafted to discourage community participants from taking action.[5] Further, that the guidelines do not create "cause" as board members may be removed for any reason. The purpose is to encourage positive behavior from the community and avoid chilling effects on escalation and enforcement actions under ICANN's bylaws.

c. Rationale for Recommendations

The sub team proposes a "minimalist" set of guidelines that will put the responsibility of putting specific processes in place by each SO/AC. The will avoid interference in the decision making process of any particular SO/AC. The SO/ACs may have different expectations and standards for Directors who are chosen to represent them. The guidelines note each SO/AC should have a decision making process and the process must include a means to document the decision made, including verification and the steps taken to reach the decision. Our thought is not to be too prescriptive but establish principles for fair and reasonable conduct for the community even if different internal standards apply for different interests. Per the guidance from the WS1 discussions, we will not be listing specific causes of action. Each SO/AC could have a different ~~standard for what constitutes a cause of action~~ reason for board removal but all SO/ACs must follow the same guidelines in order to elevate their concerns to an action for removal in good faith. The proposed action may be subjective but should be able to be explained and accepted by others.

IV. Assessment of Recommendations

a. How do the recommendations meet the NTIA criteria?

The guidelines assist the community with the implementation of Recommendation #2, they are consistent with rationale in support of NTIA requirements as more specifically described in Annex 02. [6] With regard to the fifth articulated criterion, the NTIA did not play a role in Director removal. There is no specific role to replace.

b. Are the recommendations compliant with WS1 recommendations?
   i. Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement[7]

[5] Guidelines Issue Paper prepared by ICANN staff. https://community.icann.org/display/WEIA/Guidelines+for+Good+Faith+Conduct?preview=/59643294/59649262/GuidelinesIssuePaper.pdf

[6] WS1 Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement, page 24 https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf

[7] WS1 Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement, page 11 https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf

1. Engagement

The recommendations are focused on the escalation phase when engagement has failed to produce a desired outcome for the community.

2. Escalation

The recommendations focus on the escalation portion of the report. They provide a frame work for formulating a rational approach to raising the discussion of Board removal while providing the SO/AC's latitude for their own internal decision making. It will be up to each Decisional Participant to convince other DP's that escalation and, ultimately enforcement, are necessary. In the case of an individual SO/AC, the guidelines will assist the voting process that requires a majority in order for the escalation to move to the Community Forum phase.

3. Enforcement

As per the WS1 report, escalation is a prerequisite for enforcement. If the guidelines are followed, then the Decisional Participants will have the tools to enforce provided that the escalation has not resulted in a satisfactory resolution. In that case, the preparation will have been done in "good faith" and the indemnification will apply.

Respectfully submitted,

Lori S. Schulman, Esq.

Rapporteur

Table of References

1. Guidelines Issue Paper prepared by ICANN staff

https://community.icann.org/display/WEIA/Guidelines+for+Good+Faith+Conduct?preview=/59643294/59649262/GuidelinesIssuePaper.pdf

2. ICANN Bylaws as Amended October 1, 2016

https://www.icann.org/resources/pages/governance/bylaws-en

3. CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations

https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf