

WS2 Workgroup Outcomes

**Guidelines on Good Faith Conduct in Participating in Board Removal Discussions**

**Report – For Initial Read**

**February 1, 2017**

Table of Contents

I.	Executive Summary	2
II.	Description of Issue	3
III.	Recommendations	
	a. Proposed Guidelines	3
	b. Stand-alone Recommendations	3
	c. Requirements for Recommendations	4
	d. Rationale for Recommendations	4
	e. Legal Review of Recommendations	5
IV.	Assessment of Recommendations	
	a. How do Recommendations Meet the NTIA Criteria?	6
	b. Are the Recommendations compliant with WS1 Recommendations?	6
	Table of References	7

# Guidelines on Good Faith Conduct in Participating in Board Removal Discussions

## Report – For Initial Read

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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 individuals acting on behalf of their supporting organization or advisory committee 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 SO/ACs who are acting in the capacity of Decisional Participants within the Empowered Community as defined in ICANN's Bylaws.<sup>1</sup> Adherence to the guidelines should be sufficient to demonstrate the good faith required to trigger the indemnity. The result is that individuals who are representing their communities in a Director removal process are shielded from the costs of responding to Director initiated actions during or after 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.<sup>2</sup> 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)<sup>3</sup>.

Decisional Participants may be any SO/AC which is a member of the EC. In the event that a Decisional Participant endeavors to remove an individual board member, the actions of persons who are members of the leadership council (or equivalent body) of the Decisional Participant or a representative of a Decisional Participant in the EC Administration who is a party or threatened to be a party to any proceeding in connection with a Board member's removal or recall pursuant to the Bylaws are indemnified against costs associated with the proceeding.<sup>4</sup>

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<sup>1</sup> ICANN Bylaws Article 6, Section 6.1 Composition and Organization of the Empowered Community  
<https://www.icann.org/resources/pages/governance/bylaws-en/#article6>

<sup>2</sup> 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>

<sup>3</sup> See <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

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

These persons are referred to as the “Indemnified Party” throughout the remainder of this report. The indemnification is conditioned on the fact that the Indemnified Party has acted in good faith<sup>5</sup>. The challenge for the sub team was to create guidelines for conduct that would be considered good faith actions on the part of the Indemnified Party in order for the indemnification to apply while leaving the widest area of discretion for the SO/ACs. The absence of good faith leaves the Indemnified Party 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. Indemnified Parties are protected 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 were 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 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 Indemnified Party rather than the action of the Director. As long as the Indemnified Party 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 apply to all Board seats whether the Director is appointed by the SO/AC or the ICANN Nominating Committee and are as follows:

##### **1. Petitions for removal:**

- a. may be for any reason; and
- b. must:
  1. be believed by the Indemnified Party to be true
  2. be in writing
  3. contain sufficient detail to verify facts; if verifiable facts are asserted
  4. supply supporting evidence if available/applicable
  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 have procedures for consideration of board removal notices to include:**

- a. reasonable time frames for investigation by SO/AC counsels or the equivalent if the SO/AC deems that an investigation is required

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<sup>5</sup> ICANN Bylaws Article 20, Section 20.2 Indemnification with Respect to Director Removal  
<https://www.icann.org/resources/pages/governance/bylaws-en/#article20>

- b. period of review by the entire membership of the SO/AC
- c. consistent and transparent <sup>6</sup> voting method for accepting or rejecting a petition
- d. documentation of the community process and how decisions are reached

b. Stand-alone Recommendations

In addition to the proposed guidelines which are intended to trigger the indemnity under ICANN Bylaws Article 20, Section 20.2, the sub team developed two other recommendations that may be helpful to the community as stand-alone items as follows:

1. A standard framework be developed and 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. The framework would be in the context of developing a broader framework for implementing community powers and entering into the discussions contemplated by WS1. This framework could be developed by a new group specifically formed for that purpose.

2. Implement the guidelines as a community best practice to apply to all discussions even if not covered by the indemnities contemplated under Article 20. There may be discussions around rejecting a budget or rejecting a proposed standard by-law that would benefit from a good faith process. The guidelines for engaging discussions around board removal could be adopted as a universal standard given that they are broad enough to encompass any discussion.

c. Requirements for Recommendations

In terms of the proposed guidelines, there are no special requirements for the implementation of the recommendations. However, should our first stand-alone recommendation be accepted, then we would most likely require a new group to consider what a notification form may look like and, to the extent that a broader framework is developed, how it fits in.

d. 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. This 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 that 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 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.

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<sup>6</sup> For clarity, “transparency” does not exclude use of a secret ballot. Transparency as contemplated by this section means disclosure of the process. As long as the SO/AC discloses that voting method that is sufficient to meet the threshold of transparency.

e. Legal Review of Recommendations

The sub team submitted the recommendations to ICANN Legal for review. We asked two questions: 1) Whether there is any conflict of interest were ICANN's internal legal team to review the recommendations rather than independent counsel and 2) Whether the proposed recommendations would meet the threshold of "good faith" that may be required under California law? Samantha Eisner, Deputy General Counsel for ICANN responded to question 1 on November 15, 2016 as follows:

*There has not been any conflict assessment of this issue, and indeed no conflict arises.*

*The ICANN legal team does not report to the Board. The ICANN legal team's obligation is to the organization and to uphold the Bylaws. The ICANN Bylaws now include a right of the community to directly remove Board members, and also allow for, at Section 20.2, the indemnification of community members who participate in good faith in those removal proceedings. It is ICANN's obligation to uphold that Bylaw.*

*Providing guidelines to the community on what "good faith" could mean in these circumstances was recommended by ICANN. It is of benefit to all - the ICANN community, board and organization, to understand and agree upon what conduct is appropriate in these circumstances. This is a collective - and not an adverse - effort. The guidelines developed by the community are not expected to be overly burdensome or restrictive, but to provide some path of "if you do x while participating in the conversation, that tends to demonstrate good faith".*

*There could be concerns, of course, depending on how the guidelines are drafted, as to whether they meet the requirements of law. For example, a guideline that suggests that "good faith" participation allows willful avoidance of facts (which, of course, is not part of the group's deliberations to date) should not be acceptable to any attorney reviewing the document, whether they are with ICANN's legal department or external. It will also be very important to understand if the ICANN legal department identifies any potential legal issues with the text as drafted, as that could impact whether the Board is in a position to accept the recommendation based on issues of legality.*

*We recommend, as a starting point, that the guidelines be presented to the ICANN legal department for review. If it were to occur that the ICANN legal department raises a challenge to any of the guidelines, and it is believed by those participating in the discussion that there would be a benefit to obtain additional advice or a different viewpoint, that might be an appropriate point for reference to external counsel.<sup>7</sup>*

With regard to question 2, ICANN Legal has advised that they *don't see any concerns or conflicts between the recommendations of the report and understand practices of "good faith" conduct.*<sup>8</sup>

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<sup>7</sup> Email response from ICANN Deputy Counsel, Samantha Eisner to Karen Mulberry and CCWG WS2 Legal Committee forwarded to Lori Schulman on November 15, 2016.

<sup>8</sup> Email response from ICANN Deputy Counsel, Samantha Eisner to Lori Schulman with a copy to CCWG WS2 Legal Committee, ACCT-Staff and Karen Mulberry on January 23, 2017.

#### 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.<sup>9</sup> 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<sup>10</sup>

###### 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

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<sup>9</sup> 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-supproposals-work-stream-1-recs-23feb16-en.pdf>

<sup>10</sup> 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-supproposals-work-stream-1-recs-23feb16-en.pdf>

## 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>