

Work Stream 2 Topic:

Guidelines on Good Faith Conduct in Participating in Board Removal Discussions

Scope

In Recommendation #4 of the CCWG-Accountability Work Stream 1 report, the group describes the powers to remove the Board (Paragraph 54, Page 10, in “The Power to Remove Individual ICANN Board Directors”). As part of this new power, the group created a project to the Work Stream 2 effort:

- *Guidelines for standards of conduct that will be presumed to be in good faith (for example, conducting reasonable due diligence as to the truthfulness of a statement) will be developed in Work Stream 2.*

This item is currently listed in the new Bylaws at item (b) (viii) “Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors” (Page 135).

This item originated in February 2016 in connection with the discussion of providing indemnification to community members that are participating in the removal process for individual Board members.

Background for Discussion

In finalizing the recommendations on Board removal, the issue was raised as to whether the Board members would waive any claims against community members for conduct or statements made in the individual Board removal process. While the ICANN Board did not support the requirement that any incoming Board member waive future claims of that type, the Board supported the development of an indemnification process through which community members, participating in the individual Board removal processes in good faith and in due diligence, would be entitled to be indemnified by ICANN if their conduct was challenged.

When ICANN provided its first draft of indemnification language on 3 February 2016, ICANN also provided a draft document entitled “Sample Guidelines for Due Diligence in Board Removal Discussions”. Sidley and Adler, on 8 February 2016, stated “We note that providing Guidelines for expected behavior of community participants may have positive benefits but care must be taken that they are not drafted to discourage community participants from taking action in a specific area. To avoid any potential chill on efforts to seek removal of directors or recall the full

Board – and in the interests of encouraging positive behavior from community participants generally – consider whether it would be beneficial to have the Guidelines (as may be revised by CCWG-Accountability after due consideration) apply to *all* discussions within ICANN, not just a carved-out set of circumstances where the community is participating in the director removal or Board recall processes.”

As a result of this exchange of ideas, on 9 February 2016, Rosemary Fei reported to the CCWG the following:

Rosemary Fei: In order to encourage and promote healthy discussions in the director removal and Board recall process:

- *If a director initiates a lawsuit in connection with their removal or recall, ICANN will provide indemnification (e.g., a director claims that they were libeled in the written rationale calling for his or her removal).*
- *Indemnification will be available (i) to a member of a Supporting Organization, Advisory Committee, the Nominating Committee or the Empowered Community (ii) who is acting as a representative of such applicable organization or committee (iii) for actions taken by such representative in such capacity pursuant to the Bylaws (e.g., a chair of a Supporting Organization submitting a written rationale for the removal of the director).*
- *As required by California law and consistent with ICANN's current Bylaws, indemnification will only be available if the actions were taken in good faith and in a manner that the indemnified person reasonably believed to be in the best interests of ICANN. I guess it exceeded max chat size.*
- *ICANN will develop guidelines to provide guidance as to standards of conduct that will be deemed to have been in good faith (e.g., conducting due diligence as to the truthfulness of a statement).*

The development of standards of behavior ultimately became an issue for development along with the CCWG-Accountability in WS2.

Recent discussion ([here](#)) on the CCWG-Accountability list indicate some concern over how the scope of the project could be an attempt to limit the community's right to remove individual directors. Clarification provided on list ([here](#)) as follows: “The issue isn't the conduct of the directors, but rather the conduct of those seeking to remove a director; so as to provide some sort of safe harbor against a discrimination claim by a director being removed.” This discussion and further clarification also took place during the [CCWG-ACCT meeting on 21 June](#). Holly Gregory provided follow-up ([here](#)).

Resources

The Sample Guidelines document circulated on 3 February is copied in full below:

[Sample Guidelines for Due Diligence in Board Removal Discussions](#)
3 February 2016

To support the community in having open discussions on board removal, and to facilitate those conversations proceeding in an accountable manner, guidelines must be developed during the implementation phase. Following guidelines will facilitate participation in a positive manner, and aligns well with the diligence requirement that is described in the proposal on indemnification. The outline below is offered to begin sharing some thoughts on how this could be achieved.

Some potential guidelines, for example, could identify items that should be considered prior to making assertions about Board members, such as:

1. Do I have some facts or pieces of information that should be evaluated before they are asserted?
2. Do I have information, declarations or other documents or evidence that the facts asserted are true?
3. Have I received any information or facts that are inconsistent with the facts I am asserting?
4. Have I documented the facts and counterstatements appropriately in the rationale or supporting attachments and documentation?
5. Does any new information that I have obtained change the veracity or truthfulness of the documents? Accordingly, do I need to withdraw any statements or information in light of the changed or new information?

The guidelines also could set out a process, such as requiring the list of considerations and expected standards of behavior to be posted during every Community Forum discussion.

Providing standardized processes, coupled with expectations on behavior, lays the groundwork for a fair, open discussion that minimizes from the outset the potential for statements to be made that might be seen as actionable by Board members.

The development of the indemnification scheme for Board member removal processes, coupled with companion guidelines, represent protections that we are building into the system to provide further assurances to community members that they can exercise their new powers. It is important to recall that while the ICANN community has never been shy in their criticism of Board members, there has never been, in the history of ICANN, a suit brought by a Board member against a community member based on their participation in ICANN.