

July 16, 2015



# OPTIONS FOR BOARD REPLACEMENT IN THE EVENT OF FULL BOARD RECALL

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# Overview

**GOAL: Ensure that in the event of a Board Recall, there is a process for replacing the board with no period in which ICANN is without a board of directors.**

- This presentation describes four options for processes to ensure against discontinuity in the event of a Board Recall. The options focus on the immediate aftermath of a recall vote and assume that an Interim Board will be needed to serve while preparations can be made for a special election to be held to select the new Replacement Board.
- **Option 1 – Holdover Model:** The members of the recalled Board “holdover”: they continue to serve in the interim until a special election can be held to select the Replacement Board.
- **Option 2 – Appointed Alternates Model:** Each group that has the right to select directors would name an alternate for each director at the same time that it selects directors; these alternates will become the Interim Board in the event of a Board Recall.
- **Option 3 – Ex Officio Model:** The Bylaws could establish that the persons filling certain positions in ICANN and/or the ICANN community would constitute the Interim Board in the event of a Board Recall.
- **Option 4 – Interim Appointment at Time of Recall Model:** At the same time as the recall vote, each group that has the right to select directors would be required to select persons for each of that group’s board positions to serve on an Interim Board in the event that the vote requirement is met and the Board is recalled.

## Background

- Section 5 of CCWG's Accountability Initial Draft Proposal for Public Comment (4 May 2015) provides for a community power of full Board Recall (5.6 Power: Recalling the entire ICANN Board). This is also one of the dependencies set forth in the CWG-Stewardship Final Proposal (11 June 2015).
  - Recalling the Board removes all directors in one decision, as opposed to removal of directors on an individual basis.
- ICANN is required by law to have at all times a board of directors comprised of at least one person (or such greater number as set forth in the Bylaws).
  - Currently the Board has 16 members who (with the exception of the President/CEO) serve for staggered three-year terms.
- Directors have a statutory right to resign at any time.
  - Note, however, that in the highly unusual circumstance in which the full Board is resigning, the last director to resign is required by law to provide notice to the California Attorney General.

## Common Issues

### **Each model assumes that:**

- There is a trigger for community consideration of full Board recall.
- There are mechanisms in place to ensure that the full Board is recalled upon a vote in the community mechanism to approve a recall.
  - For example, Bylaws provisions, contractual obligations and/or pre-executed “springing” resignations of directors and interim directors, backed by enforcement rights of replacement directors if sitting directors refuse to vacate.
- Note that the President/CEO serves as a director by reason of the office that he or she holds and therefore a recall would not apply to the President/CEO; however, a new Board (or interim Board) would have power to remove the President/CEO.

### **Each model is part of a larger set of processes regarding the recall vote:**

- The vote threshold for Board Recall and whether a certain percentage of participating groups should be reflected in that vote needs to be determined in light of the voting power and number of participants in the community vote mechanism.
  - While the Initial Proposal suggested vote thresholds of 75% and 80%, depending on the distribution of voting power this could result in one group having a veto right regarding recall.

## Common Issues

### Under each model:

- The Interim Board would have the same powers and fiduciary duties as the regular ICANN Board but would serve for only the time it takes to select a Replacement Board.
  - A Board's duty to provide oversight cannot be constrained on a situational basis; however, the Bylaws would underscore that the Interim Board is expected to serve as a caretaker while a Replacement Board can be selected and to use all efforts to support that process while not undertaking any material changes to ICANN's strategy, policies or management unless compelled to by fiduciary obligations.
- Board Recall would constitute a highly unusual circumstance and would signal significant concerns by the community: Strict Bylaw provisions about the timeframe for an expedited director selection process in the event of a recall would help address concerns about an Interim Board that is overly active
  - Note that the Bylaws currently require six months' written notice of SO/AC director selections, and two months' written notice of NomCom director selections. Consideration should be given to an expedited process for selecting a Replacement Board.
- The Bylaws would provide that interim directors would serve for a very short portion of the terms of the recalled directors -- just long enough for the selection of a Replacement Board on an expedited basis. Those new directors would serve out the terms of the recalled directors so that staggered terms remain in effect.
- It is an open question for CCWG to consider whether the composition of the interim Board would need to mirror the current requirements in the Bylaws in relation to geographic diversity and other qualifications, in addition to legal requirements.

## Option 1: Holdover Model

- In the event of a recall of the entire Board and for the period until new directors comprising an actual Board are selected, the then-existing Board would remain in place (“hold over”) and serve as the Interim Board only so long as necessary for a Replacement Board to be selected.

### CONCERNS AND CONSIDERATIONS

- See “Common Issues” described above.
- Recalled directors who continue to serve on the Board could have an opportunity to cause ICANN to take actions to frustrate the actions of the community and/or may lack incentives to devote their best efforts to interim Board service.
- There is a risk that some/all holdover directors may resign instead of serving as interim directors.

## Option 2: Alternates Model

- To prepare for a potential recall of the entire Board, each group that has the right to select directors would also nominate alternates; such nominations would be made at the same time as each such group selects directors to serve on the Board. In the event of a recall of the entire Board, the alternates would serve on an Interim Board only so long as necessary for a Replacement Board to be selected.

### CONCERNS AND CONSIDERATIONS

- See “Common Issues” described above.
- It is unclear whether selecting alternates at the same time as the regular Board may create a destabilizing dynamic with a group on the sidelines that may have incentives for recall to be considered and that may make it more likely to be pursued.
- List of alternates would need to be kept current (by selection at the same time as directors) to ensure that each alternate is a viable candidate (qualified, willing and able to serve).
- Could result in pressure for alternates to attend Board meetings so that they are “ready” for interim Board service if and when called upon.
- Would require a determination as to the size of the interim Board and mechanisms to ensure that a smaller interim Board cannot fill Board vacancies.

## Option 3: Ex Officio Model

- The Bylaws would specify that in the event of a recall of the entire Board, persons occupying certain specified positions would be automatically appointed as interim directors (recommend 3-5 directors but could be as few as one) to serve on an Interim Board only so long as necessary for a Replacement Board to be selected
  - For example (illustrative purposes only), the ex officio positions for service on the Interim Board could be:
    - The Chair of each SO/AC.
    - The NomCom members.
    - Immediate past members of the Board or.
    - Some other pre-defined subset of the community that could be identified by position.
  - Note that the Bylaws currently provide that any person serving in any capacity on any SO Council or on the NomCom cannot be a director.
  - Note also that while several ICANN executive officers could serve on the Interim Board, executive officers who receive compensation from ICANN may not constitute more than 49% of the Board.

### CONCERNS AND CONSIDERATIONS

- See “Common Issues” described above.
- Would require a determination as to which offices should give rise to an ex officio interim directorship.
- If past members of the Board are specified to serve as ex officio interim directors, would need to ensure that each person is contactable and a viable candidate (qualified, willing and able to serve).
- Would require a determination as to the size of the interim Board and mechanisms to ensure that a smaller interim Board cannot fill Board vacancies.

## Option 4: Interim Appointment at Time of Recall Model

- Upon announcement that a recall consideration has been triggered, each group that has the right to select directors would identify, and at the time of the recall vote be required to put forward, its nominations of persons to serve as interim directors in the slots the group has rights to select. These persons would become interim directors immediately upon the recall vote if the vote threshold for recall was met, to serve on an Interim Board only so long as necessary for a Replacement Board to be selected.
  - Interim directors could be considered for positions on the Replacement Board ; there would be no prohibition of such service.

### CONCERNS AND CONSIDERATIONS

- See “Common Issues” described above.
- If some groups have selected interim directors at the time of the recall vote but others have not, this could increase the risk of capture.
- It may be challenging to select suitable interim directors close in time to the recall vote.
- Would require a determination as to the size of the interim Board and mechanisms to ensure that a smaller interim Board cannot fill Board vacancies.

# Overview of Board Recall Process

