

CCWG-Accountability: Draft Content for Second Public Comment Report

Fundamental Bylaws (3.2 and 5.4)

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3.2 Fundamental Bylaws

3.2.1 What is a “Fundamental Bylaw”

ICANN’s Bylaws can generally be changed by resolution of the Board. With a 2/3 majority, the Board can change the rules of the game within ICANN. The CCWG-Accountability believes that some aspects of ICANN’s Bylaws are integral to the scope and nature of the organization, and that the authority to change such requirements should be vested more broadly than within the ICANN Board.

Specifically, the CCWG proposes to make some bylaws provisions **harder to change** than others. Harder to change in two ways: by sharing the authority to authorize changes between the ICANN Board and the ICANN community organized through its SOs and ACs, and by requiring higher thresholds to authorize changes than is the case for ordinary or standard bylaws.

Such bylaws would be identified as “**Fundamental Bylaws**”. A specified list of bylaws would attain this status, and the following sub-sections explain how bylaws become Fundamental, how the list of Fundamental bylaws is changed, and which bylaws the CCWG proposes should become Fundamental.

Fundamental Bylaws would indirectly contribute to ICANN’s accountability to the global Internet community by making decisions to change its role within the community more widely shared, and more difficult than is currently the case through ICANN processes.

This is important in the context of the IANA Stewardship transition, where the historic contractual relationship with the U.S. Government provided some assurance that the fundamental nature of ICANN was unlikely to be changed without widespread agreement. Without that relationship, procedural protections and more widely shared decision rights on core components of ICANN should help maintain and build the community’s confidence in ICANN.

3.2.2 Establishing Fundamental Bylaws

The CCWG-Accountability therefore proposes the creation of Fundamental Bylaws. They become fundamental by identifying them as such, and by defining a different process to change them than the process used for standard Bylaws changes.

To implement this, a new provision would be added to the Bylaws that sets out:

1. Which sections of the Bylaws are Fundamental Bylaws (i.e. a list of the articles / sections / subsections that are Fundamental – which would include this new deeming provision)
2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed

Legal advice has confirmed this proposition is feasible.

3.2.3 Adding new or changing existing Fundamental Bylaws

It is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones, as the purpose of these accountability reforms would not be served if ICANN could not change in response to the changing Internet environment. On the other hand, there appears to be consensus that ICANN should be able to expand its Mission only under very limited circumstances.

To establish a new Fundamental Bylaw or to change or remove an existing one, the following steps would be followed where the Board (or the staff through the Board) is proposing the addition:

1. The Board would propose the new Fundamental Bylaw or a change to / removal of an existing one through the usual process, but would need to identify it as a Fundamental Bylaw Proposal throughout the process.
2. The Board would need to cast 3/4 of votes in favor of the change (higher than the usual threshold of 2/3).
3. The new community power set out in 5.4 to approve changes to Fundamental Bylaws would apply. The threshold to approve the change would be set at a high bar, at the same level of support that needs to be shown by the Board (3/4 of votes in the community mechanism cast in favor).
4. If the change were agreed, then the new Fundamental Bylaw would appear in the Bylaws wherever it had to, and reference to the text as a Fundamental Bylaw would be added to the part of the Bylaws that lists them. In the case of an amendment, the text would be amended. In the case of a removal, the text would be removed and the reference to that part would be removed.

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3.2.4 Which of the current Bylaws would become Fundamental Bylaws?

The general approach should be to have only critical matters defined in the Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN's structures. It would harm, not help, accountability to make changes to Bylaws in general face the same thresholds as are proposed for Fundamental Bylaws.

In the CCWG-Accountability's view, "critical matters" are those that define the corporation's scope and Mission, the requirements of the IANA stewardship transition, and the core accountability tools the community requires. Accordingly, the following would be Fundamental Bylaws in the first instance:

1. The Mission / Commitments / Core Values;
2. The framework for the Independent Review process;
3. The manner in which Fundamental Bylaws can be amended;
4. The powers set out in Section 5 of this report;
5. The IANA Function Review ~~required by~~ the CWG-Stewardship's proposal;
6. The Customer Standing Committee structures ~~required by~~ the CWG-Stewardship's proposal.

Some commenters suggested the inclusion of requirements regarding ICANN's headquarters location as Fundamental Bylaws. Others suggested that such bylaws should definitely not become Fundamental.

The CCWG-Accountability believes that such provisions in the bylaws do not require Fundamental status at this stage. There is no current intention to move ICANN's HQ, and matters of jurisdiction will be considered in the CCWG-Accountability's Work Stream 2 efforts. We further note that the availability of a new community power to block changes to standard bylaws increases the barrier to any change to the location of ICANN's HQ.

5.4 Power: approve changes to "Fundamental" Bylaws

As outlined in Section 3.2, the CCWG-Accountability is proposing that some core elements of the Bylaws be defined as "fundamental". Fundamental Bylaws will be harder to amend or replace, and through a different process, than the rest of the Bylaws. The intention is to make sure that matters like critical aspects of the powers

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and processes required to maintain ICANN's accountability to the community, and the organization's purpose and core values, are highly unlikely to change.

This power would form part of the process set out for agreeing to any changes of the Fundamental Bylaws. Through the community mechanism, the SOs/ACs would have to give positive *assent* to any change *before* it was finalized, as part of a co-decision process between the Board and the community. By creating this special co-decision process, authority to change fundamental aspects of ICANN's governing framework is shared more broadly than it otherwise would be.

Fundamental Bylaws are unlikely to be changed frequently. Where changes are made, they are unlikely to arise with short notice or to be needed to deal with short-term operational situations. The CCWG therefore does not believe that this community power poses any challenges to ICANN's ongoing operational viability or efficiency.

Such changes require a high degree of community assent, as the purpose of this power is to make changing items in such Bylaws possible only with very wide support from the community. Both Board and the community must cast 3/4 of votes in favor to approve a change.

For further information, see section **3.2.3** of this report, where we set out what the Fundamental Bylaws are alongside the process for their creation and amendment.

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