

3B) Fundamental Bylaws

V4 – 22 July 2015 (now merging 3.2 and 5.4)

3B.1 What is a “Fundamental Bylaw”?

ICANN's Bylaws can generally be changed by resolution of the Board ~~With upon~~ a 2/3 majority, ~~the Board can change the rules of the game within ICANN vote~~. 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~~Therefore, the CCWG proposes to make some ~~bylaws~~Bylaw 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, ~~in the Community Mechanism as Sole Member discussed in Section 5A~~), and by requiring higher thresholds to authorize changes than is the case for ordinary or ~~standard bylaws~~Standard Bylaws, ~~discussed in Section 5B.2~~.

Such ~~bylaws~~Bylaws would be identified as “**Fundamental Bylaws**”. A specified list of ~~bylaws~~Bylaws would attain ~~this status, and the~~ ~~as Fundamental Bylaws~~. The following sub-sections explain how ~~bylaws~~Bylaws become Fundamental, how the list of Fundamental ~~bylaws~~Bylaws is changed, and which ~~bylaws~~Bylaws the CCWG-Accountability 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~~ ~~fundamental aspects of ICANN~~ more widely shared, ~~with the community~~ and more difficult ~~to adopt~~ 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.

3B.2 Establishing Fundamental Bylaws

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

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~~fundamental).

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.~~

3B.3 Adding new or changing existing Amending Fundamental Bylaws

~~It is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones, as the~~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, once a high threshold of agreement in the community exists. Therefore it is important to be able to define new Fundamental Bylaws over time, or to change or remove existing ones.~~

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: or amendment:

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 ~~east~~approve the addition or amendment by a 3/4 vote of ~~votes~~all directors then in favor of the change~~office~~ (higher than the usual threshold of 2/3).
3. This is a new community power (described further below), an addition to ~~the~~those set forth set in Section 5B, and would apply as such. The threshold to approve ~~the change~~any changes to Fundamental Bylaws would be set at a high bar, at the same level of support that needs to be shown by the Board (3/4 of all votes in the community mechanism cast in favor).
4. If the change were agreed, then the new/revised Fundamental Bylaw would appear in the Bylaws ~~wherever it had to~~, and appropriate reference to the text as a Fundamental Bylaw would be added (if needed) to the part of the Bylaws that lists them. In the case of ~~an amendment~~a revision to existing Bylaws text, 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.

3B.4 Which ~~of the current~~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 all changes to Bylaws ~~in general~~ face the same thresholds as are proposed for Fundamental Bylaws.

Comment [1]: Since some degree of legal review will have been provided for the entire document, pointing this out in particular sections seems to be unnecessary.

Comment [2]: Note that the Sole Member would have the statutory authority to amend Bylaws under California law, without Board approval. The Bylaws could impose an extremely high threshold, up to requiring unanimity among the votes of the SOs and ACs, for exercise of this power.

Comment [3]: Confirm this is correct.

In the CCWG-Accountability's view, "critical matters" are those that define ~~the corporation's scope and ICANN's~~ Mission, Commitments and Core Values, 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.B of this report;
5. The IANA Function Review and the Separation Process required by the CWG-Stewardship's proposal;
6. The Post-Transition IANA governance and Customer Standing Committee structures, also required by the CWG-Stewardship's proposal.

Comment [4]: It will be important to confine the IRP rules that are "fundamental" to the overall framework of the process, so that the IRP specific procedural rules can evolve without having to amend the bylaws.

Some commenters suggested ~~the inclusion of that~~ requirements regarding ICANN's headquarters location be designated as Fundamental Bylaws. Others suggested that such ~~bylaws~~ Bylaw provisions should ~~definitely not become Fundamental~~ be defined as fundamental.

The CCWG-Accountability believes that such provisions in the ~~bylaws~~ 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~~ Standard Bylaws increases the barrier to any change to the location of ICANN's headquarters.

3B.5 Fundamental Bylaws as a Community Power

The intention of Fundamental Bylaws is to make sure that ~~matters like~~ critical aspects of the powers and processes required to maintain ICANN's accountability to the community, and the organization's purpose and core values, ~~are highly unlikely to change~~ can be changed only as a result of a broad consensus that such change is necessary and appropriate.

As such, the power to approve changes to the Fundamental Bylaws would form part of the process set out for agreeing to any changes of the Fundamental Bylaws.

Through the ~~community mechanism~~ Community Mechanism as Sole Member, 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.

The Bylaws provisions recommended above for inclusion as Fundamental Bylaws by the CCWG 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

Comment [5]: The greater degree of process required for fundamental bylaws is not to render change impossible/highly unlikely, but to require a sufficient deliberative process to assure that any change results from broad consensus.

situations. The CCWG-Accountability therefore does not believe that this community power, as proposed, 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~~ Fundamental 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 ~~any~~ change by a 3/4 vote of all available votes as applicable.

Comment [6]: Confirm this is correct.

For further information about the four other community powers recommended by the CCWG-Accountability, see Section 5.B of this proposal.