

DRAFT

## Annex 03 - Recommendation #3: Redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws'

### 1. Summary

- Currently ICANN only has one class of Bylaws.
  - All ICANN Bylaws can be changed by a 66% vote of the ICANN Board.
  - The Board is not required to consult the ICANN community or the wider public before changing these but has voluntarily done so up to this point.
- The CCWG-Accountability is recommending splitting the ICANN Bylaws into "Fundamental Bylaws" and "Standard Bylaws" where Fundamental Bylaws will be more difficult to change.

Specifically the CCWG-Accountability recommends that:

- Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
  - The requirement for public consultations is added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
  - Any changes to Fundamental Bylaws require approval from both the ICANN Board and community as outlined in the respective Community Power (See "Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers").
  - The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised to 66% to 75%.
- Why is the CCWG-Accountability recommending this?
    - The CCWG-Accountability felt that it was crucial to ensure that the ICANN Bylaws that embody the purpose of the organization (Mission, Commitments and Core Values) and are meant to ensure the accountability of the ICANN Board cannot be changed by the ICANN Board acting alone.

### 2. CCWG-Accountability Recommendations

Split the ICANN Bylaws into "Fundamental Bylaws" and "Standard Bylaws."

Examples of Fundamental Bylaws include:

- The Mission, Commitments and Core Values

**Comment [1]:** See below—recommend deletion.

**Comment [2]:** The language may be read by some to suggest that CCWG is suggesting dividing the bylaws into two different documents. In fact, the classification of bylaws would be accomplished by identifying certain bylaws as "Fundamental." No action would be needed to specifically identify other or "standard" bylaws; they would be such simply because they have not been designated as "Fundamental." Thus, the second bullet point might say "The CCWG-Accountability is recommending that certain ICANN Bylaws be designated as "Fundamental Bylaws" that would be more difficult to change. Remaining (or "Standard") Bylaws would also require consultation before they can be changed.

**Comment [3]:** Replace with "from two-thirds (i.e., 66.7%)".

**Comment [4]:** See above comment—suggest "Identify "Fundamental" Bylaws in the ICANN Bylaws."

- The framework for the Independent Review Process
- The process for amending Fundamental Bylaws
- The five newly proposed Community Powers
- The Community Mechanism as the Sole Designator, i.e. the “Empowered Community”
- The IANA Function Review, Special IANA Function Review and the Separation Process required by the IANA Stewardship Transition proposal
- The Post-Transition IANA Governance and Customer Standing Committee also required by the IANA Stewardship Transition proposal

**3. Detailed Explanation of Recommendations**

*What is a “Fundamental Bylaw?”*

ICANN Bylaws describe how power is exercised in ICANN, including setting out the organization’s Mission, Commitments and Core Values. Together with the Articles of Incorporation, the Bylaws are an essential part of ICANN because they set the scope of the organization’s corporate authority, determine its governance framework and define working practices.

**Comment [5]:** Annex 4 and the Summary document need to reflect this distinction as well.

Today, ICANN Bylaws can be changed by a resolution of the Board upon a 66% majority vote. The CCWG-Accountability believes that the set of key Bylaws fundamental to ICANN’s stability and operational continuity and essential for the community’s decisions-rights should be given additional protection from changes by requiring community approval of any amendments. These key Bylaws will be identified as “Fundamental Bylaws.”



As such, the CCWG-Accountability proposes to make Fundamental Bylaws harder to change than Standard Bylaws in two ways:

1. By sharing the authority to authorize changes between the ICANN Board and the ICANN community (organized through its Supporting Organizations and Advisory Committees in the “Empowered Community” outlined in

“Recommendation #1: Establishing an Empowered Community for enforcing Community Powers”)

2. By requiring a higher threshold to authorize changes to Fundamental Bylaws than for Standard Bylaws.

The establishment of Fundamental Bylaws would indirectly enhance ICANN’s accountability to the global Internet community by sharing the authority of decision-making more widely and increasing the difficulty of amending these key aspects of ICANN.

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

#### *Establishing Fundamental Bylaws*

To implement the establishment of Fundamental Bylaws, 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).
2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be amended or removed.

#### *Adding New or Amending Existing Fundamental Bylaws*

While the CCWG-Accountability recommends fortifying certain aspects of the ICANN Bylaws, the global public interest would not be served if ICANN could not fundamentally evolve in response to the changing Internet environment. Therefore, the CCWG-Accountability recognizes the importance of the ability to define new Fundamental Bylaws over time, or to amend or remove existing ones.



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

- The Board proposes a new Fundamental Bylaw, amendment of a Fundamental Bylaw or removal of a Fundamental Bylaw.
- The Board approves the addition, amendment or removal of the Fundamental Bylaw with a 75% vote of all standing Directors.
- The community approves the addition, amendment or removal of the Fundamental Bylaw by deciding to use its power as an Empowered Community to approve the change (See “Recommendation #4: Ensuring community involvement in ICANN decision-making: five new Community Powers”).

If the addition, amendment or removal of the Fundamental Bylaw is agreed upon by both the ICANN Board and the community:

- The new/revised Fundamental Bylaw would appear in the Bylaws, and an 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 to existing Bylaws text, the text would be updated.
- In the case of a removal, the text would be removed.

The CCWG-Accountability does not propose that the community gain the power to directly propose changes to the Bylaws.

#### *Which of the Current Bylaws Would Become Fundamental Bylaws?*

The CCWG-Accountability suggests that only critical aspects of the ICANN Bylaws be defined in the Fundamental Bylaws to avoid introducing unnecessary rigidity into ICANN’s structures.

The CCWG-Accountability concluded that suggesting that all changes to ICANN Bylaws should face the same thresholds that are proposed for Fundamental Bylaws would harm, not help, ICANN’s overall accountability.

The CCWG-Accountability views “critical aspects” as those that define ICANN’s Mission, Commitments and Core Values, the requirements of the IANA Stewardship Transition, and the core accountability tools the community requires.

Accordingly, the CCWG-Accountability recommends that the following aspects be made Fundamental Bylaws as a part of Work Stream 1:

1. The Mission, Commitments and Core Values
2. The framework for the Independent Review Process
3. The process for amending Fundamental Bylaws
4. The powers set out in Section 7 of this report
5. The Community Mechanism as the Sole Member Model
6. The IANA Function Review and the Separation Process required by the CWG-Stewardship’s proposal
7. The Post-Transition IANA governance and Customer Standing Committee structures, also required by the CWG-Stewardship’s proposal

**Comment [ 6 ]:** Change to “The Community Powers”.

**Comment [ 7 ]:** Replace with “Designator, i.e., the “Empowered Community”.

**Comment [ 8 ]:** Add “Special IANA Function Review.”

The ‘First Draft Proposal on Work Stream 1 Recommendations’ of the CCWG-Accountability included an explanation and question about whether the ICANN Bylaw regarding location of ICANN’s headquarters should be a Fundamental Bylaw.

To summarize the explanation, we used the Affirmation of Commitments paragraph 8(b), where “ICANN affirms its commitments to: (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community...”

ICANN’s present Articles of Incorporation already state that ICANN is a nonprofit public benefit corporation organized under California law:

*“3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.”*

Any change to ICANN’s Articles of Incorporation would require approval by the Board:

*“9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment*

*must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.”*

Under the proposal for the Community Mechanism as Sole Member, the Member would need to approve any change to ICANN’s present status as a California nonprofit public benefit corporation.

**Comment [9]:** Clarify that it is proposed that the Articles be amended to authorize the Empowered Community to approve Articles amendments and remove reference to the Sole Member.  
  
In addition, the Sole Designator/Empowered Community generally needs to have the power to approve changes to the Articles. Otherwise, the Board could use its amendment power over the Articles to override the community powers in the Bylaws. Thus, in general, it would be desirable for amendments to the Articles of Incorporation to require the same sorts of procedures as changes to Fundamental Bylaws.

The “headquartered” commitment in 8b is already in the current ICANN Bylaws, at Article XVIII Section 1:

*“OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”*

While the Board could propose a change to this Bylaws provision, the Empowered Community mechanism could block the proposed change.

In its Initial Draft Report, the CCWG-Accountability asked commenters whether Bylaws Article XVIII Section 1 should keep its current status as a Standard Bylaw, or be designated as a “Fundamental Bylaw.”

Two considerations suggest that the CCWG-Accountability should not propose that Article XVIII be designated as a Fundamental Bylaw:

- Public comment on the first and second draft was evenly split on the question of whether to designate Article XVIII a Fundamental Bylaw. Supporting this designation were several commenters from the Commercial Stakeholders Group of GNSO. Governments were among those expressing strong opposition.
- Second, the Empowered community could block any proposed change to ICANN Bylaws Article XVIII, which states, “The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California.”

**Comment [10]:** Suggest adding: “even if it remains a Standard Bylaw”.

**Community Power: Approve Changes to “Fundamental Bylaws”**

**Comment [11]:** In accordance with the above comment, “and the Articles of Incorporation” might be added here.

Establishing Fundamental Bylaws would ensure that critical aspects of the powers and processes required to maintain ICANN’s accountability to the community, and the organization’s purpose and Core Values, can only be changed as a result of broad consensus of both the ICANN Board and the community.

Through the Empowered Community, Supporting Organizations and Advisory Committees would have to give positive assent to any change proposed by the ICANN Board before the change was finalized, as part of a joint decision process between the ICANN Board and the community. By creating this special joint decision process, authority to change fundamental aspects of ICANN’s governing framework is shared more broadly than it is today.

**Comment [12]:** Add: “to a Fundamental Bylaw proposed”.

The CCWG-Accountability is working under the assumption that the Bylaws provisions that are recommended to become Fundamental Bylaws are not likely to change frequently. Where changes are made, they are unlikely to arise on short notice or will be needed to deal with short-term operational 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 Fundamental Bylaws possible only with very wide support from the community.

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

**Comment [13]:** Consider adding paragraph describing authorizing the Empowered Community to approve Articles amendments as these are separate to Fundamental Bylaws.

#### 4. Changes from the ‘Second Draft Proposal on Work Stream 1 Recommendations’

This is a list of key changes from the second draft proposal, which affect this section:

- Change from Sole Member to Sole Designator/Empowered Community (see section XXX)
- Change from 75% voting support in the second draft to four in favor and not more than one objecting in the third draft for the community to approve changes to Fundamental Bylaws.

**Comment [14]:** Clarify that referring to voting support of the Empowered Community.

#### 5. Stress Tests Related to this Recommendation

#### 6. How does this meet the CWG-Stewardship Requirements?

These recommendations meet the CWG-Stewardship requirement that the CCWG-Accountability recommend the creation of Fundamental Bylaws and that these include the following:

- ICANN Budget: Community rights regarding the development and consideration of the ICANN Budget
- ICANN Board: Community rights regarding the ability to appoint/remove Directors of the ICANN Board, and recall the entire Board
- ICANN Bylaws: Incorporation of the following into ICANN’s Bylaws: IANA Function Review, Customer Standing Committee and the Separation Process
- Independent Review Panel: Should be made applicable to IANA Functions and accessible by managers of top-level domains

**Comment [15]:** Add “Special IANA Function Review” and “Post-Transition IANA governance”.

**7. How does this address NTIA Criteria?**

<b>Support and enhance the multistakeholder model</b> <ul style="list-style-type: none"><li>•</li><li>•</li></ul>
<b>Maintain the security, stability, and resiliency of the Internet DNS</b> <ul style="list-style-type: none"><li>•</li><li>•</li><li>•</li></ul>
<b>Meet the needs and expectation of the global customers and partners of the IANA services</b> <ul style="list-style-type: none"><li>•</li><li>•</li><li>•</li></ul>
<b>Maintain the openness of the Internet</b> <ul style="list-style-type: none"><li>•</li><li>•</li><li>•</li></ul>
<b>NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution</b> <ul style="list-style-type: none"><li>•</li><li>•</li></ul>