

4. Fundamental Bylaws

4.1 What is a “Fundamental Bylaw”

ICANN’s Bylaws can generally be changed by resolution of the Board upon a 66% majority 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.

Therefore, the CCWG proposes to make some Bylaw provisions harder to change than others, 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 6), and by requiring higher thresholds to authorize changes than is the case for Standard Bylaws (all the other ICANN Bylaws, discussed in Section 7.2).

Such Bylaws will be identified as “Fundamental Bylaws”. A specified list of Bylaws would attain status as Fundamental Bylaws. The following sub-sections explain how Bylaws become Fundamental, how the list of Fundamental Bylaws is changed, and which 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 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.

4.2 Establishing Fundamental Bylaws

Parts of ICANN’s Bylaws will become Fundamental Bylaws by identifying them as such in the Bylaws, and by defining a different process to change them than the process used for 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).
2. How new Fundamental Bylaws can be defined and how existing Fundamental Bylaws can be changed or removed.

4.3 Adding New or Changing Existing Fundamental Bylaws

The purpose of these accountability reforms would not be served if ICANN could not change in response to the changing Internet environment, 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 a 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 approve the addition or amendment by a 75% vote of all directors then in office (higher than the usual threshold of 66%).
3. Alongside the Board, the community through the Community Mechanism would also need to approve the change. The threshold to approve any changes to Fundamental Bylaws would be set at the same high bar (75% of all votes in the community mechanism cast in favor). Further details in Section 4.5 below.
4. If the change were agreed, then the new/revised Fundamental Bylaw would appear in the Bylaws, 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 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.

The CCWG-Accountability does not propose that the community gain the power to directly propose changes to the Bylaws. While this is a statutory power of the Community Mechanism as Single Member model, its use would be subject to very high thresholds – explained in Section 6.

4.4 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 all changes to Bylaws face the same thresholds as are proposed for Fundamental Bylaws.

In the CCWG-Accountability's view, "critical matters" are 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 following would be made 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 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.

The first CCWG-Accountability draft proposal included an explanation and question about whether existing ICANN bylaws requirement regarding location of headquarters should be a Fundamental Bylaw.

To summarize the explanation, we described 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 both Board and Members:

"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.

The "headquartered" commitment in 8b is already in 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 Community Mechanism as Sole Member could block the proposed change with a 75% voting threshold.

In its Initial Draft Report, the CCWG-Accountability asked commenters whether Bylaws Article XVIII Section 1 should keep its current status as a regular Bylaw, or be designated as a “Fundamental Bylaw”. In the latter case, any Bylaws change would require approval by 75% vote of the Community Mechanism as Sole Member.

Three considerations suggest that CCWG not propose Article XVIII be designated as a Fundamental Bylaw:

First, public comment on the first 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 Community Mechanism as Sole Member must approve with 2/3 vote any change to ICANN’s Articles of Incorporation, which now state that ICANN is a California Nonprofit Public Benefit Corporation.

Third, the Community Mechanism as Sole Member 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.”

4.5 Power: Approve Changes to “Fundamental Bylaws”

The intention of Fundamental Bylaws is to make sure 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 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 as Sole Member, the SOs and 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-Accountability 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-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. The Board and the community must both approve any change by a 75% vote of all available votes as applicable.

For further information about the four other community powers recommended by the CCWG-Accountability, see Section 7 of this proposal.