

Report of Public Comment Proceeding

Proposed Fundamental Bylaws Changes to Move the Board Governance Committee's Reconsideration Process Responsibilities to Another Board Committee

Publication Date: 17 May 2017

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Public Comment Proceeding

Open Date: 31 March 2017

Close Date: 10 May 2017

Staff Report Due Date: 17 May 2017

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[View Comments Submitted](#)

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Section I: General Overview and Next Steps

General Overview:

One of ICANN's key accountability mechanisms is the Reconsideration process, where injured parties can ask the Board to reconsider ICANN staff or Board actions. Currently, the Board Governance Committee (BGC) is delegated, through Article 4, Section 4.2 of the ICANN Bylaws, the responsibility for reviewing and evaluating Reconsideration Requests. However, in the past several years, the BGC's work relating to Reconsideration Requests has increased significantly. As a result of the increased volume of Reconsideration Requests, the BGC was required to focus more of its time on Reconsideration Requests, taking away from the time the BGC had to focus on core governance duties. Under the new ICANN Bylaws (effective 1 October 2016), the Reconsideration process has been expanded and it is anticipated that the volume and complexity of accountability mechanisms filed, including Reconsideration Requests, might likely increase.

As part of its responsibilities, the BGC is tasked with "periodically review[ing] the charters of the Board Committees, including its own charter and work with the members of the Board Committees to develop recommendations to the Board for any charter adjustments deemed advisable." (BGC Charter, I.A, at <https://www.icann.org/resources/pages/charter-06-2012-02-25-en>) In this role, the BGC recommends that to enhance its own performance and focus on core governance activities, the Reconsideration responsibilities be moved to a new committee dedicated to oversight of ICANN's accountability mechanisms as deemed appropriate by the Board.

On 3 February 2017, the ICANN Board considered the BGC's recommendation and directed the initiation of the Fundamental Bylaws amendment process to allow for the ICANN community to consider these changes alongside the Board. Under the Bylaws, Article 4, Section 4.2 is part of the "Fundamental Bylaws," the group of Bylaws that can only be amended if the ICANN Board and ICANN's Empowered Community approve. Posting the proposed revisions for public comment is a key part of the Fundamental Bylaws approval process.

On 31 March 2017, ICANN published the [proposed amendments to Article 4, Section 4.2](#) of the ICANN Bylaws for public comment. The proposed amendments are limited: to move the responsibility for oversight of ICANN's Reconsideration Request process, as set out in Article 4, Section 4.2 of the Bylaws, from the BGC to a new Board committee purpose-built for oversight of ICANN's accountability mechanisms. The new Board Committee would be called the "Board Accountability Mechanisms Committee" (BAMC) and, like the BGC, would be formed solely of voting Board Directors and non-voting Liaisons. The proposed Bylaws amendments do not make any other changes to the Reconsideration Request process.

The public comment period closed on 10 May 2017.

Section II: Contributors

At the time this report was prepared, a total of five community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
At-Large Advisory Committee	ALAC Staff	ALAC
Afnic	Mathieu Weill	Afnic
DotMusic Limited	Constantine Roussos	DML
Business Constituency	Steve DelBianco	BC
Non-Commercial Stakeholder Groups	Rafik Dammak	NCSG

Individuals:

There were no submissions from individual members of the community.

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

In general, three of the five commenters were supportive of the proposed Fundamental Bylaws changes. One commenter did not express any opinion for or against the proposed Bylaws changes, and one commenter was not in support of making the Fundamental Bylaws change at this time.

Both ALAC and Afnic noted the Board's responsibility to organize its work to suit the needs of the Board. Afnic praised the effort to better organize the workload within the Board. Afnic also noted that it does not believe that the manner in which the Board organizes its workload to address various accountability mechanisms should be a "Fundamental" Bylaw":

As a consequence, for greater flexibility in the future, instead of the proposed changes in the Bylaws (consisting in replacing the name of a committee by another committee name), Afnic suggests that the reformulation enables the Board to form or designate a committee to handle these requests. Instead of “The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests.”, a formulation could be : “The Board designates a Committee to review and consider Reconsiderer Requests. For the purpose of this section, this designated Committee is referred to as “The Board Accountability Mechanism Committee”.

BC and NCSG noted general support for the Fundamental Bylaws changes as proposed.

ALAC, while not questioning the Fundamental Bylaws changes as proposed, requested a “deeper knowledge” on the scope of the BAMC.

DML expressed concerns regarding the impact of the proposed changes on the DML’s currently pending Reconsideration Request. DML stated the “shifting of accountability from the BGC to a new Accountability Committee is impractical, harmful, and will likely lead to further delays” to pending Reconsideration Requests. Moreover, DML expressed concerns that moving the BGC’s Reconsideration responsibilities to another Board committee “comprised of new members” would compromise the evidence that the commenter submitted to the BGC, particularly the oral presentation that the commenter made to the BGC regarding its Reconsideration Request. DML stated its opinion that the Fundamental Bylaws changes should not be considered until the Reconsideration Requests that are currently pending have been resolved by the BGC.

Three of the commenters provided inputs on the scope of the draft BGC and BAMC charters that were provided for informational purposes to illustrate how the Fundamental Bylaws changes could be implemented. The charters as posted represented the minimum changes required to implement the Fundamental Bylaws amendments if approved, and are not in final form. Afnic indicated that the responsibility of considering the Ombudsman’s proposals for “own motion” investigations should be transferred to the BAMC “because the Ombudsman is one of the Accountability mechanisms in place at ICANN.” ALAC requested a more complete draft of the BAMC charter “in order to better understand how this would impact ICANN’s overall activity and the impact it could have on end users.” BC suggested that the scope of any additional Committee work should be minimized for the BAMC so that it can focus on Reconsideration Requests. BC also provided suggestions on the composition of the BAMC.

ALAC and NCSG also noted their support for the respect of the new processes to achieve Fundamental Bylaws revisions. NCSG noted that having a non-controversial item about the Board’s organization of its work is a good “test case” for the accountability reforms and the new Empowered Community process.

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

ICANN appreciates all the comments and suggestions added to the public comment forum for the proposed Fundamental Bylaws changes to move the BGC's Reconsideration process responsibilities to another Board committee.

With respect to the concerns expressed about the potential delay on pending Reconsideration Requests because of the proposed Fundamental Bylaws changes, imposing a bar that the Fundamental Bylaws changes should not be considered if Reconsideration Requests are pending in front of the BGC could be hard to manage. Some of DML's concerns actually highlight the reasons that the change was proposed so that a group formed for the purpose of overseeing accountability mechanisms could have a more singular focus on those mechanisms.

With respect to DML's concern regarding the evidence that the commenter has already submitted to the BGC in support of its Reconsideration, the written evidence submitted relating to the commenter's Reconsideration Request has been publicly posted on the Reconsideration Request page, including the commenter's PowerPoint presentation to the BGC, and will be available to the BAMC if this change is approved. (See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.) DML's concern, however, does raise the need for close coordination between the BGC and the BAMC over any still pending Reconsideration Requests at the time of transfer, including whether there is anything that can be built into the implementation of the BAMC that would mitigate any potential delay and prejudice to requestors solely because of the transfer.

The Bylaws in place at the time that the DML's Reconsideration Request imposes time requirements by which Reconsideration Requests must be considered by the BGC and/or Board unless impracticable. Where the BGC and/or Board is unable to consider the Reconsideration Request within the prescribed time frame, the circumstances of that delay the BGC and/or Board must be identified and posted on ICANN's website. (See Article IV, Section 2, ICANN Bylaws (effective 11 Feb. 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV>.) The new Bylaws also impose time limits under which Reconsideration Requests must be evaluated by the BGC and Board. Under the new Bylaws, the Board must consider all Reconsideration Requests within 135 days from the initial receipt of the requests. DML's general concerns about delay in the Reconsideration process have therefore been addressed by the interim changes in the Bylaws.

With respect to the concerns expressed regarding the scope of the BAMC and the BGC once the proposed Fundamental Bylaws changes have been implemented, [Article 14](#) of the Bylaws specifies that the ICANN Board has the power to organize and establish Board Committees and to delegate to the Committees all legal authority of the Board except as set forth in Article 4, Section 14.2 of the Bylaws. In its resolution authorizing the initiation of the process to amend Article 4, Section 4.2 of the Bylaws to redesignate the BGC's Reconsideration responsibilities to another Board committee, the Board stated that "if the proposed amendment to the Fundamental Bylaws is approved in accordance with Article 25.2 of the Bylaws, the Board will constitute the Board Accountability Mechanisms Committee (BAMC)." (See [Resolutions 2017.02.03.18-2017.02.03.19](#).) Accordingly, once the proposed amendments are approved, the Board will constitute the BAMC with oversight of ICANN's Accountability Mechanisms as the Board deems appropriate, approve the charter, and establish the BAMC and the BGC membership. The Board will also approve a revision of the BGC charter to delete the Reconsideration process responsibilities from the BGC, and move other responsibilities as

appropriate from the BGC to the BAMC. In addition, the BAMC may be vested with new responsibilities related to more general oversight of ICANN's accountability mechanisms outside of the Reconsideration process.

The BGC will be provided with all of the inputs provided by the commenters on the informational draft charters and composition of the BAMC that were provided alongside the proposed Fundamental Bylaws amendments. For example, Afnic's suggestion of moving BGC responsibilities that relate to the Ombudsman to the BAMC might be appropriate given the BAMC's expected scope of general accountability mechanism oversight. The BGC will have to present the ICANN Board with revised charters for the BGC and BAMC and once approved, the charters will be publicly posted and regularly reviewed as part of the Board's regular processes. ALAC's call for transparency on the scope of the BAMC's responsibilities seems well taken.

With respect to the comments regarding the proposed draft revised BGC charter and draft BAMC charter, ICANN notes that the draft charters were provided for informational purposes to illustrate the impact of the proposed Fundamental Bylaws changes on the respective committees' charters. As discussed above, the Board has the power to establish Board Committees and to approve the charters of those Committees as it deems appropriate.

Next Steps: ICANN will submit the comments and the Report of Public Comments to the Board for consideration along with a recommendation that the Board initiates the next step of the Fundamental Bylaws approval process.