
Public Comment Summary Report

Proposed Bylaws Updates to Limit Access to Accountability Mechanisms

Open for Submissions Date:

Tuesday, 27 February 2024

Closed for Submissions Date:

Monday, 15 April 2024

Summary Report Due Date:

Tuesday, 02 July 2024

Category: Governance

Requester: ICANN Board

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Open Proceeding Link: <https://www.icann.org/en/public-comment/proceeding/proposed-bylaws-updates-to-limit-access-to-accountability-mechanisms-27-02-2024>

Outcome:

ICANN organization (org) received eight submissions addressing the proposed amendment to Section 4.1 of the ICANN Bylaws. Two of the eight commenters expressed support for the proposed Bylaws changes.

The remaining six commenters expressed opposition for the proposed Bylaws changes, expressing their concern that the proposed amendments to Section 4.1 of the ICANN Bylaws creates an alternate path to amending a Fundamental Bylaw without requiring the Empowered Community's approval.

ICANN org will review the input received and will in turn inform the ICANN Board on the conclusions of this Public Comment and will address any necessary updates to the proposed Bylaws amendments.

Section 1: What We Received Input On

ICANN org sought Public Comment on the proposed amendments to Section 4.1 of the ICANN Bylaws which outlines thresholds for broad community consensus and procedural protections for use.

The Board proposed the Fundamental Bylaws Amendment which sets out the process through which the ICANN community can limit access to ICANN's Reconsideration Request and Independent Review Processes (collectively, "Accountability Mechanisms") in specific circumstances, and in a streamlined manner.

Specifically:

- The amendment creates a procedure for the ICANN community to limit or make unavailable the Reconsideration Request process or the Independent Review Process (IRP) set forth at Article 4, Sections 4.2 and 4.3 of the ICANN Bylaws.
- If a community recommendation is made through the proposed process, and the Board approves that recommendation, the implementation of any limitation can then occur without requiring a specific Fundamental Bylaws Amendment process to embed that change within the ICANN Bylaws.
- The proposed threshold for establishing broad community support is that all three of the following conditions be met:
 - The recommendation for use of the amendment stems from a Cross-Community Working Group (CCWG) chartered by at least five of the seven Supporting Organizations and Advisory Committees (SO/ACs).
 - At least four of the CCWG's chartering SO/ACs are Decisional Participants within the Empowered Community.
 - Each of the chartering SO/ACs approves the CCWG's recommendation to limit or restrict access to one or more of the Accountability Mechanisms.

Article 4, Section 4.1 of the ICANN Bylaws is not subject to the Fundamental Bylaws Amendment process under Article 25, Section 25.2 of the ICANN Bylaws. However, the ICANN Board is treating this proposal as a Fundamental Bylaws Amendment because, if approved, changes would apply to the use of the ICANN Accountability Mechanisms which are each identified as Fundamental Bylaws.

Section 2: Submissions

Organizations and Groups:		
Name	Submitted by	Initials
Generic Names Supporting Organization (GNSO)	ICANN Policy Staff	GNSO
Registrar Stakeholder Group (RrSG)	Gregory DiBiase	RrSG
Registries Stakeholder Group (RySG)	RySG	RySG
ICANN Business Constituency (BC)	Margie Milam, Lawrence Olawale-Roberts	BC
Internet Infrastructure Coalition (i2Coalition)	Christian Dawson	i2Coalition
Intellectual Property Constituency (IPC)	Susan Payne	IPC
At-Large Advisory Committee (ALAC)	ICANN Policy Staff	ALAC

Individuals:		
Name	Affiliation (if provided)	Initials
James Kunle Olorundare	Not-for-Profit Operational Concerns (NPOC), Noncommercial Stakeholder Group (NCSG), African Regional At-Large Organization (AFRALO), Root Sever System Advisory Committee (RSSAC)	JKO

Section 3: Summary of Submissions

The submissions revealed that a majority of the commenters do not support the proposed Bylaws amendments, citing several broad concerns.

A. Support for Bylaws Amendments as Presented

The ALAC and JKO stated their support for the Bylaws amendments as presented. ALAC noted that the three conditions proposed in the proposed Bylaws amendments would only allow such limitations to be imposed in situations where a more specific Bylaw limitation would also be approved by ICANN's Empowered Community. JKO highlighted the pros and cons of the potential implications of the proposed Bylaws amendments for a balanced view.

B. Opposition for Bylaws Amendments as Presented

The GNSO, RrSG, RySG, BC, i2Coalition, and the IPC do not support the proposed Bylaws amendments as presented. The commenters provided a range of concerns, including that the proposed Bylaws amendments are too broad and give undue power to CCWGs; the mechanisms for CCWGs are not defined within the Bylaws and are therefore subject to change;

that there are no other records of a group seeking to limit access to the Reconsideration Request Process or Independent Review Process in the years since the IANA Stewardship Transition, therefore defining a future process within the Bylaws does not appear necessary;; and reflecting that a limited, Grant Program-specific fundamental Bylaws change could suffice in this situation.

The RySG raised questions as to whether the proposed Bylaws amendments gives undue power to CCWGs by allowing them to bypass the Bylaws amendment procedures and restrict access to the Accountability Mechanisms. The RySG stated that the Accountability Mechanisms are foundational to ICANN's legitimacy and limitation to accessing such mechanisms should happen only with the clear support of the Empowered Community.

The BC observed that there is no evidence or facts to support the risk that the Accountability Mechanisms will be misused with frivolous filings in connection with ICANN's Grant Program. The BC further commented that the Fundamental Bylaws emerged from the IANA transition and include many specific requirements negotiated over several years to ensure the accountability of ICANN and protect the unique oversight role assigned to the Empowered Community. Therefore, any proposed Bylaws amendments must be narrowly tailored to address the specific concern.

The RrSG and the IPC commented that while some effort has been made to build in some community safeguards (such as setting criteria for such CCWG decisions), the rules around CCWGs are not well-defined, and CCWGs are not a formal ICANN structure (meaning that their status under the Bylaws are unclear and they do not have a formal, standardized operating procedures. Thus, CCWGs should not have the power to disallow the Accountability Mechanisms.

The i2Coalition expressed similar concerns regarding the proposed Bylaws amendments – “codifying a new mechanism for limiting access to [Accountability Mechanisms] that would bypass the Bylaws amendment procedures in circumstances to be defined in the future.” It stated that if the intent is to limit access to Accountability Mechanisms in relation to ICANN's Grant Program, then such an exemption should be limited to this only, provided there is community support for such an exemption.

C. Requests for Additional Changes

While strongly supporting the proposed Bylaws amendments, for purposes of clarity, the ALAC recommended that additional transparency should be added to the Bylaws by including a link to a maintained record of all CCWG recommendations that result in the limitation of access to the Accountability Mechanisms.

D. Requests for Clarification

The commenters who oppose the proposed Bylaws amendments noted that further clarification is required to address their concerns, e.g., clarification as to whether a Bylaws change in 2024 as per the proposed Bylaws amendments can be considered to apply retroactively to a recommendation made by a CCWG four years ago; and given that the CCWG on New gTLD Auction Proceeds (CCWG-AP) Recommendation 7 is the first instance in ICANN history in which the community has recommended disallowing an Accountability Mechanism, to consider whether the proposed Bylaws amendments may be potentially premature, as it will not necessarily save future time and effort.

Section 4: Analysis of Submissions

Out of the total eight submissions, seven were from organizations or groups and one was from an individual. Of the seven submissions from organizations, one was from an Advisory Committee, one from a Supporting Organization, three from Stakeholder Groups of the GNSO, one from a GNSO Constituency, and one from i2Coalition.

The submissions revealed a significant opposition of the suggested amendments to the ICANN Bylaws, with many commenters stating their preference for a more narrowly tailored Bylaws amendment limited to restricting access to the Accountability Mechanisms for decisions made as part of the ICANN's Grant Program. The GNSO-related comments confirmed that that GNSO, as a decisional participant in ICANN's Empowered Community, intends to object to the Fundamental Bylaws Amendment if the ICANN Board were to approve them as presented for Public Comment. Notably, however, the commenters are not opposed to the idea of supporting any Fundamental Bylaws Amendment, instead requesting that a more limited, Grant Program-specific Amendment be presented for community consideration.

While there were commenters supportive of moving the Bylaws amendment forward as drafted, opportunity remains to see if a proposal can be drafted that is more satisfactory to the broader community.

Section 5: Next Steps

ICANN org will provide this Public Comment summary report of submissions to the Board for consideration, to identify whether any modifications are needed to the proposal and whether the Board is in a position to approve the Fundamental Bylaws Amendment. If the Board approves the Fundamental Bylaws Amendment, the, the Empowered Community's approval action process will be initiated as required under Article 25, Section 25.2 of the ICANN Bylaws. However, the Board is likely to consider a different proposal within a new Fundamental Bylaws Amendment process and not further pursue the proposal as posted for Public Comment.