

PRIVATIZING THE INTERNET ASSIGNED NUMBER AUTHORITY

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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¹ Ms. Plonk did not answer submitted questions for the record by the time of printing.

PRIVATIZING THE INTERNET ASSIGNED NUMBER AUTHORITY

THURSDAY, MARCH 17, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:19 a.m., in room 2123, Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Barton, Shimkus, Blackburn, Lance, Guthrie, Olson, Bilirakis, Johnson, Long, Collins, Eshoo, Clarke, DeGette, McNerney, and Pallone (ex officio).

Staff present: Ray Baum, Senior Policy Advisor, Communications and Technology; Rebecca Card, Assistant Press Secretary; David Redl, Chief Counsel, Communications and Technology; Charlotte Savercool, Professional Staff Member, Communications and Technology; Dan Schneider, Press Secretary; Greg Watson, Legislative Clerk; Christine Brennan, Democratic Press Secretary; Jeff Carroll, Democratic Staff Director; David Goldman, Democratic Chief Counsel, Communications and Technology; Jerry Leverich, Democratic Counsel; Lori Maarbjerg, Democratic FCC Detailee; and Ryan Skukowski, Democratic Policy Analyst.

Mr. WALDEN. I call to order the Subcommittee on Communications and Technology. For the witnesses' benefit, we expect to have votes on the House floor fairly soon. So our goal this morning is to start on time and try and get through the members' opening statements. And then we can get to you all. So I will try and move pretty rapidly through this.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Two years ago, NTIA made the announcement it would work to transition the stewardship of the Internet Assigned Numbers Authority to an international, multistakeholder community. This announcement ignited significant questions and concerns of the potential risks associated with a transition. "Would a new model allow for the capture by any one Government?" "What are the national security implications?" "How can ICANN be held accountable for its decisions without NTIA oversight?" These were all very serious questions that many of us had.

Since NTIA stated its intent, this subcommittee has held thoughtful discussions in an effort to get to answers. Through a series of hearings, we have asked these questions to fully understand

the existing contract, the risks that should be considered with a potential transition, and what safeguards are necessary to reduce any threat. We received input from NTIA Administrator Strickling, ICANN, and the stakeholders who participate in the global community. These discussions have proved valuable to the process. And many of the concerns and mechanisms addressed here have become an integral part of the community's work.

I have referenced the importance of the affirmations of commitments, especially the requirements that ICANN remain headquartered in the United States, and that the multistakeholder community conduct an ongoing review of ICANN's operations. We have seen the value of using stress tests to identify policies needed for an accountable governing structure. Fundamental bylaws that require a super majority to change, actionable mechanisms that empower the community, and an independent review of board decisions, these are all ideas that can hold the ICANN board accountable for its actions and resistance to capture.

I am relieved to hear that ICANN is committed to these accountability measures regardless of whether the transition progresses or not. These policies are critical to ensuring that ICANN remain a stable steward of IANA and must be part of any successful transition.

Last week marked a major milestone in the IANA transition process as the multistakeholder community transmitted its proposal to the United States Government for review. The entire community deserves recognition and appreciation for the countless, countless hours of hard work and commitment that went into crafting this plan.

Now we embark on the next stage of our work, review of the proposal. As we dive into the specifics of the transition proposal today, it is important to acknowledge the technical foundation the transition rests upon. In recent months, a country code top-level domain experienced a denial of service attack on its root infrastructure. To ameliorate the impact of this attack, the country wanted to add servers to its root, but such a change would require the approval of IANA. Due to delays in this routine procedure, the domain was inaccessible for days.

Technical functions of the Internet should move at Internet speed, not the speed of the U.S. bureaucracy. This is the challenge the transition looks to solve without introducing new vulnerabilities into Internet governance. The GAO report, initiated by leaders of this committee, gives us some guidance in our efforts, as it recommended NTIA establish an evaluation framework to guide the analysis of the proposal. So I applaud the NTIA for accepting this good-Government approach to guarantee its requirements are met.

As NTIA embarks on its work, I want to reiterate what I have been saying throughout this entire process, this transition is far too important to be rushed by any artificial deadline. Much work still remains and, if needed, NTIA should take the steps to extend the contract. It is more important to get this done right than to simply get it done.

Lastly, while we await the analysis of the proposal from NTIA, it is important to stress the important role that Congress plays

during this process. The bipartisan work reflected in the DOTCOM Act maintains our oversight authority to ensure the requirements of a transition, established by NTIA, are met by the proposal. I appreciate the commitment from NTIA Administrator Larry Strickling to provide Congress with the time and opportunity to review this proposal. It is critical to the future of the Internet that we ensure a transition will meet our Nation's and the world's needs. The stakes are simply too high.

So today, we will hear from a panel of stakeholder witnesses on their perspective of the multistakeholder process and the transition proposal. Many of you have participated directly in this process. And we congratulate you and appreciate the work that you have done. We are fortunate to have your expertise, not only there but before us today. Thank you.

So thanks for sharing your insight and being here to answer any questions that remain.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Two years ago, NTIA made the announcement it would work to transition the stewardship of the Internet Assigned Numbers Authority to an international multi-stakeholder community. This announcement ignited significant questions and concerns with the potential risks associated with a transition. Would a new model allow for the capture by any one Government? What are the national security implications? How will ICANN be held accountable for its decisions without NTIA oversight?

Since NTIA stated its intent, this subcommittee has held thoughtful discussions in an effort to get answers. Through a series of hearings, we've asked these questions to fully understand the existing contract, the risks that should be considered with a potential transition, and what safeguards are necessary to reduce any threats. We received input from NTIA Administrator Strickling, ICANN, and the stakeholders who participate in the global community. These discussions have proved valuable to the process and many of the concerns and mechanisms addressed here have become an integral part of the community's work. I've referenced the importance of the Affirmations of Commitments, especially the requirements that ICANN remain headquartered in the United States and the multi-stakeholder community conduct an ongoing review of ICANN's operations. We've seen the value of using "stress tests" to identify policies needed for an accountable governing structure. Fundamental bylaws that require a supermajority to change, actionable mechanisms that empower the community, and an independent review of board decisions are all ideas that can hold the ICANN Board accountable for its actions and resistant to capture. I am relieved to hear that ICANN has committed to these accountability measures regardless of whether the transition progresses or not. These policies are critical to ensuring that ICANN remain a stable steward of IANA and must be a part of any successful transition.

Last week marked a major milestone in the IANA transition process as the multi-stakeholder community transmitted its proposal to the U.S. Government for review. The entire community deserves recognition and appreciation for the countless hours of the hard work and commitment that went into crafting this plan. Now we embark on the next stage of our work: review of the proposal.

As we dive into the specifics of the transition proposal today, it is important to also acknowledge the technical foundation the transition rests upon. In recent months, a country code top-level domain experienced a denial of service attack on its root infrastructure. To ameliorate the impact of this attack, the country wanted to add servers to its root, but such a change would require the approval of IANA. Due to delays in this routine procedure the domain was inaccessible for days. Technical functions of the Internet should move at Internet speed, not the speed of the U.S. bureaucracy. This is the challenge the transition looks to solve without introducing new vulnerabilities into Internet governance.

The GAO report initiated by leaders of this committee gives us some guidance in our effort as it recommended NTIA establish an evaluation framework to guide the analysis of the proposal. I applaud NTIA for accepting this good-Government ap-

proach to guarantee its requirements are met. As NTIA embarks on its work, I want to reiterate what I have been saying throughout this entire process. This transition is far too important to be rushed by any artificial deadline. Much work still remains, and if needed, NTIA should take the steps to extend the contract. It is more important to get this done right, than to simply get it done. Lastly, while we await the analysis of the proposal from NTIA, it is important to stress the important role that Congress plays during this process. The bipartisan work reflected in the DOTCOM Act maintains our oversight authority to ensure the requirements of a transition established by NTIA are met by the proposal. I appreciate the commitment from NTIA Administrator Larry Strickling to provide Congress with the time and opportunity to review the proposal. It is critical to the future of the Internet that we ensure a transition will meet our Nation's—and the world's—needs. The stakes are simply too high.

Today we'll hear from a panel of stakeholder witnesses on their perspective of the multistakeholder process and the transition proposal. Many of you have participated directly in this process and we are fortunate to have your expertise. Thank you for sharing your insight and being here to answer any questions that remain.

Mr. WALDEN. At this point, they have called votes on the House floor. And given the new protocols on the House floor about 15-minute votes being 15 minutes, I am going to recess the committee. And we will return for further opening statements after votes are concluded. Thank you very much.

[Recess.]

Mr. WALDEN. We are going to reconvene the Subcommittee on Communications and Technology for purposes of taking opening statements. But we are apparently going to wait for Ms. Eshoo, who is on her way back, I know, from votes to join us. So we will go back into recess.

[Recess.]

Mr. WALDEN. We will reconvene the Subcommittee on Communications and Technology. And I will recognize the gentleman from New Jersey, the ranking member of the full committee, for his statement. And then we will go back and forth. Mr. Pallone, please go ahead.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Chairman. And also thanks to the witnesses. I know many of our witnesses were in Morocco last week for the ICANN meeting. So I appreciate your willingness to testify so quickly after your return.

The National Telecommunications and Information Administration first contracted with ICANN in 1998 to perform the technical functions that have made the Internet such a powerful platform. At the time, the Clinton administration suggested eventually privatizing these functions. And now we are on the cusp of completing the transition. But the members of this subcommittee have made clear that this transition cannot take place without measures in place to keep ICANN accountable for its actions.

I would like to congratulate the Internet's multistakeholder community on reaching an agreement on a final IANA transition and accountability proposal. I know that getting to this point took an impressive amount of work. But the work is not done. New bylaws for ICANN need to be completed to make the proposal legally binding. And now that we have a proposal, NTIA can begin officially reviewing it.

This committee crafted the bipartisan DOTCOM Act, which would have given Congress an official role in this process. And the House passed this legislation. But, unfortunately, the bill has not made it through the Senate. Nonetheless, I am pleased that NTIA Assistant Secretary Strickling is committed to comply with the ideas behind the DOTCOM Act even if it isn't signed into law.

And again, I look forward to hearing from our witnesses. Your testimony will help to inform our own understanding of the IANA transition proposal. Thank you. And I yield back, Mr. Chairman.
[The prepared statement of Mr. Pallone follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Thank you, Chairman Walden and Ranking Member Eshoo, for holding this hearing today. Thank you also to the witnesses for being here. I know many of you were in Morocco last week for the ICANN meeting, and so I appreciate your willingness to testify so quickly after your return.

The National Telecommunications and Information Administration first contracted with ICANN in 1998 to perform the technical functions that have made the Internet such a powerful platform. At the time the Clinton administration suggested eventually privatizing these functions. And now we are on the cusp of completing the transition, but the members of this subcommittee have made clear that this transition cannot take place without measures in place to keep ICANN accountable for its actions.

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I look forward to hearing from our witnesses. Your testimony will help to inform our own understanding of the IANA transition proposal.

Thank you.

Mr. WALDEN. The gentleman yields back. The Chair recognizes the vice chair of the subcommittee, Mr. Latta, for opening comments.

Mr. LATTA. Mr. Chairman, I am going to submit my testimony for the record, if I could ask unanimous consent, save a little time for our witnesses.

[The prepared statement of Mr. Latta follows:]

PREPARED STATEMENT OF HON. ROBERT E. LATTA

Thank you, Mr. Chairman, and thank you for holding today's hearing to discuss the transition of the Internet Assigned Numbers Authority stewardship.

Since the National Telecommunications and Information Administration (NTIA) announced it would transition the U.S. Government's role in the Internet's numbering function to a global multi-stakeholder community, this subcommittee has been monitoring the process and has kept the preservation of the Internet's openness a high priority. I recognize the work the Internet Corporation for Assigned Names and Numbers' (ICANN) has already accomplished and appreciate their proposals addressing the transition. However, I am pleased that Congress remains involved and engaged in Internet governance discussions to ensure enhanced accountability and transparency of ICANN.

I look forward to continuing this conversation and hearing the witnesses' thoughts on the IANA stewardship transition plan. I thank the chairman for yielding .

Mr. WALDEN. Indeed. So ordered for all of our members. The Chair recognizes the ranking member of the subcommittee from California, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, for holding this hearing. And welcome to our witnesses. It is wonderful to see you. And we look forward to your words of wisdom today.

On the heel of ICANN's 55th meeting, that is a lot of meetings. I think I go to a lot of meetings, but 55 meetings, right, which was held in Marrakesh, a nice place to have a meeting I think, interesting place, earlier this month. I think that there is light at the end of the tunnel.

My optimism comes in the form of the final proposal that, I hope, is going to ensure that the IANA transition supports and enhances the multistakeholder model of Internet governance, maintains the security, the stability, and the resiliency of the Internet Domain Name System, and does not replace the role of the NTIA with a Government-led or intergovernmental organization solution.

Now, obviously, we know that reaching this point has not been without hiccups, let's put it that way. All right? But hiccups can be painful. Those that are afflicted with it—there was a Pope, I think, Pope Pius XII suffered from it. At any rate, thankfully, through this committee's leadership last year—and kudos to the chairman, because he has really ridden hard on this and, I think, we have all benefited by it—the House passed the DOTCOM Act by a strong bipartisan vote, 378 to 25. I don't know what these 25 people were thinking. To enhance transparency and accountability without unreasonably delaying the IANA transition, the legislation provided 30 legislative days for public review of the transition proposal.

Now, while the legislation has not been enacted into law, the NTIA administrator committed to this subcommittee last year that the agency will submit to Congress a report certifying that the transition proposal meets the criteria outlined in NTIA's March 2014 announcement, and give Congress an opportunity to review the proposal before settling on any final plan—which we appreciate and, I think, is appropriate. So the ball is now in NTIA's court.

While there is still more work to be done in the 6 months leading up to the IANA contract's expiration, I think with responsible oversight, a successful transition is going to preserve the Internet's guiding principles of openness, security, stability, and resiliency. And ensure that ICANN cannot, sounds a little funny doesn't it, ICANN cannot be exposed to Government capture. And that has been the underlying concern all along. And I think that we are—I think we are moving closer to it.

So I look forward to your testimony. I thank the chairman not only for this hearing, but for all that he has contributed to this process, and the witnesses as well.

Thank you. And I yield back.

Mr. WALDEN. I thank the gentlelady for her comments and her involvement in this whole effort.

I now recognize the gentleman from Missouri, if he wants to make opening comments. No, he does not.

How about the gentleman from California? Mr. McNerney, do you have an opening statement you would like to—

Mr. MCNERNEY. No, Mr. Chairman.

Mr. WALDEN. You do not. Seeing no other members of the committee, we can move on to our witness panel today. Thank you again not only for being here and sharing your insights and wisdom, but also, for many of you, your incredible involvement in the process itself.

So we will start with Mr. Steve DelBianco, the executive director of NetChoice. Mr. DelBianco, thank you for being here. Please go ahead with your opening comments.

STATEMENTS OF STEVE DELBIANCO, EXECUTIVE DIRECTOR, NETCHOICE; ALISSA COOPER, PH.D., CHAIR, IANA STEWARDSHIP TRANSITION COORDINATION GROUP; SALLY SHIPMAN WENTWORTH, VICE PRESIDENT OF GLOBAL POLICY DEVELOPMENT, INTERNET SOCIETY; AUDREY PLONK, DIRECTOR, GLOBAL CYBERSECURITY AND INTERNET GOVERNANCE POLICY, INTEL CORPORATION; MATTHEW SHEARS, DIRECTOR OF GLOBAL INTERNET POLICY AND HUMAN RIGHTS PROJECT, CENTER FOR DEMOCRACY & TECHNOLOGY; AND DAVID A. GROSS, FORMER U.S. COORDINATOR, INTERNATIONAL COMMUNICATIONS AND INFORMATION POLICY, WILEY REIN LLP

STATEMENT OF STEVE DELBIANCO

Mr. DELBIANCO. Chairman Walden, Ranking Member Eshoo, members of the committee, again, I am Steve DelBianco, executive director of NetChoice. And I am deeply involved at ICANN as the policy chair for the business constituency there. And I also represent commercial stakeholders on the working group that developed this accountability proposal that we are talking about today.

I was before you 2 years ago when you held the very first hearing after NTIA announced the transition plan. And I would like to credit Chairman Walden, in particular, for steering us towards stress testing to figure out the way forward. I also spent many hours with GAO as they scrutinized our stress test approach pursuant to your letter request.

And then I was before this panel last May as you were refining your DOTCOM Act. And you should know that your approval of DOTCOM brought a standing ovation at the ICANN meeting in Argentina last summer. Now, a standing ovation for the U.S. Congress, put that in the record.

Mr. WALDEN. Is there video of that we could replay somewhere, please?

Mr. DELBIANCO. And the DOTCOM Act gave us the community leverage over ICANN to get these bylaws adopted and implemented before letting going of IANA. ICANN's board committed twice to do that last week.

Now, does the end of the IANA contract somehow mean that the U.S. is giving away our Internet, as I heard from a presidential candidate? Not really. In the 1980s, American engineers came up

with a recipe for Internet protocol. And they gave that recipe to the world. So Internet engineers anywhere around the planet could construct a network using that recipe and connect to other networks. The U.S. doesn't own the Internet any more than Ireland owns the recipe for Irish stew. They don't. And that is a St. Patty's Day reference.

The U.S. then created ICANN to internationalize and privatize management of the DNS. In over 18 years, the U.S. Government has helped ICANN to mature, protect it from U.N. encroachment, and to mitigate Government power. So Government power was the subject of a stress test that I presented to you 2 years ago, the infamous stress test 18, where the Government Advisory Committee and ICANN could change to majority voting for its advice, and, thereby, place ICANN in the untenable position of arbitrating among sovereign governments who don't agree with each other.

So in response to that stress test, we placed significant curbs on GAC advice. GAC's advice to the board will require full consensus, that is broad support in the absence of a single formal objection. And we raised the threshold for the board to reject that advice from 10 out of 16 votes from the 9, a small increase. And we created an independent review process to challenge ICANN's adoption of any Government advice. And we don't allow the governments to block the community's pursuit of that challenge.

So the governance, or GAC, has unquestionably lost power in this transition in our response to stress test 18. And your staff report for today's hearing describes the opposition of governments, including France, Russia, Spain, Switzerland, Argentina, and Brazil. Now, to replace the leverage historically held by NTIA, we designed an empowered community. It is a petition and escalation process to challenge any ICANN action to approve a change to fundamental bylaws, and to even spill the board of directors.

We invited all of the advisory committees and stakeholder organizations and ICANN to be part of this empowered community. We included governments there because we created a place for governments at the multistakeholder table when we set up ICANN. And had we excluded governments completely, I am afraid you would be grilling us today about how it is that Government has no role at all in the multistakeholder world. And had we excluded governments, that would be exhibit number 1 for the United Nations and ITU to show why they needed to take it over.

It might be years before we actually turn on the power for the empowered community, since its main purpose is to challenge an ICANN decision, but that power will be there when we need it. We have some serious implementation work left in the next few months.

At first, we have to ensure that the draft bylaws match our proposal. Those of us that are here in the working group will push that through for the ICANN board. They will approve it. New bylaws adopted by June, so that NTIA can hand Congress a report to give you time before the July recess to look at that. It is an aggressive timeline, but we can do it.

Let me close by extending on an analogy I suggested to you 2 years ago. I said to you to think of this transition in terms of a car and a driver, that the Domain Name System is the car, designed

and built in the U.S.A. in the 1990s. And the license plate on that car reads IANA. In 1998, we created ICANN as the designated driver. We handed ICANN the keys while watching their driving and care of the car. But all along, the U.S. retained the title to that car as leverage to hold ICANN accountable. It is not, however, sustainable or necessary for the U.S. to hold that power forever in a post-Snowden world.

So this transition signs over the title. But there is a little permanent lien on the back that says IANA customers can take it back if ICANN fails to deliver. And our accountability group, Mr. Chairman, is going to slap a little bumper sticker on the back of that ICANN car—"How is my driving? Contact 1-800-ICANN Community"—or go to the empowercommunity.org if they are not driving—

Mr. WALDEN. I see it.

Mr. DELBIANCO. Mr. Chairman, thank you for your committee, for your support for the multistakeholder community. Your backing was essential. And I look forward to your questions.

[The prepared statement of Mr. DelBianco follows:]

Statement of

Steve DelBianco,
Executive Director

NetChoice

Testimony before the

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications & Technology

March 17, 2016

Privatizing the Internet Assigned Numbers Authority

I am Executive Director of NetChoice, an association of leading online businesses.¹ At state, federal, and international fora, NetChoice promotes the integrity and availability of the Internet. We've attended 32 ICANN meetings and I'm serving a 6th term as policy chair for ICANN's Business Constituency. I've attended 9 Internet Governance Forum (IGF) meetings and testified in 7 Congressional hearings on ICANN and Internet governance, including this committee's hearings in Apr-2014 and May-2015.

NetChoice members depend upon a secure Internet address system that's resilient to cyber attacks and fraud. We need an Internet that works around the globe -- free from discriminatory regulation and taxation. And we need policies that are predictable and enforceable, allowing innovation while protecting consumers. I will focus on three points today:

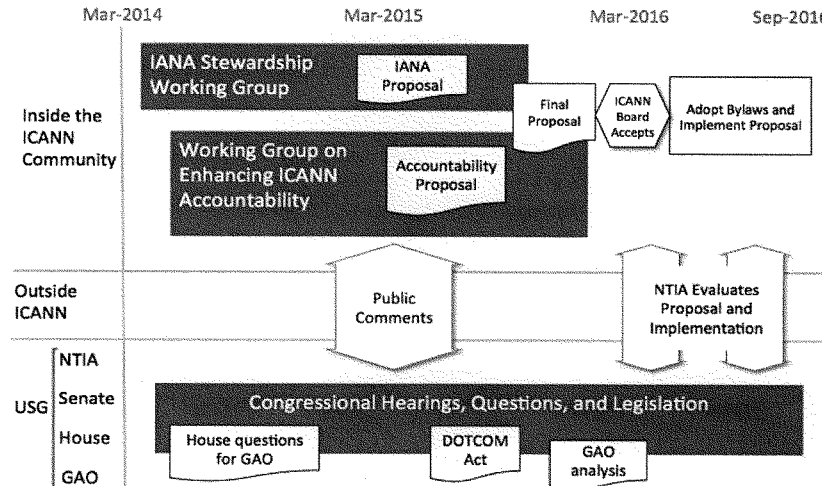
1. Over 18 years and three administrations, the US government has protected the ICANN multistakeholder model from government encroachment while exercising light-touch oversight. However, it is neither sustainable nor necessary for the US to retain its unique role forever. At NTIA's request, the Internet community prepared proposals to let ICANN loosen ties to the US government and strengthen its accountability to the global Internet user community, such that core Internet functions stay free from governmental control.
2. NTIA's requirements for this transition guided the design of new mechanisms to: manage core Internet functions; hold ICANN accountable; and prevent government capture *after* the transition. Congress' role in this transition began with questions about accountability and stress tests, such as the guidance provided by this committee in Apr-2014 and May-2015. Your committee also asked the Government Accountability Office (GAO) to analyze risks and implications of transition. Your committee then backed the community with its DOTCOM Act, insisting that NTIA require ICANN to adopt the multistakeholder proposals *as a condition of the transition*. This backing proved invaluable when ICANN's lawyers and board resisted some of the community's proposals.
3. The community's proposal meets NTIA requirements and reduces governments' ability to override community consensus with its advice to ICANN's board. There are implementation challenges in the months ahead, but this transition empowers global Internet stakeholders to challenge the ICANN board and hold it accountable -- something that has never before existed within ICANN.

¹ See <http://www.NetChoice.org>. This statement reflects the view of NetChoice and does not necessarily represent the views of any individual member company.

² Press Release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions", March 14, 2014, at

1. Where are we in this transition process for ICANN and IANA?

This committee has led Congressional oversight of NTIA's transition plan, starting at the beginning, at the mid-point, and now at the end. This timeline helps visualize the process:



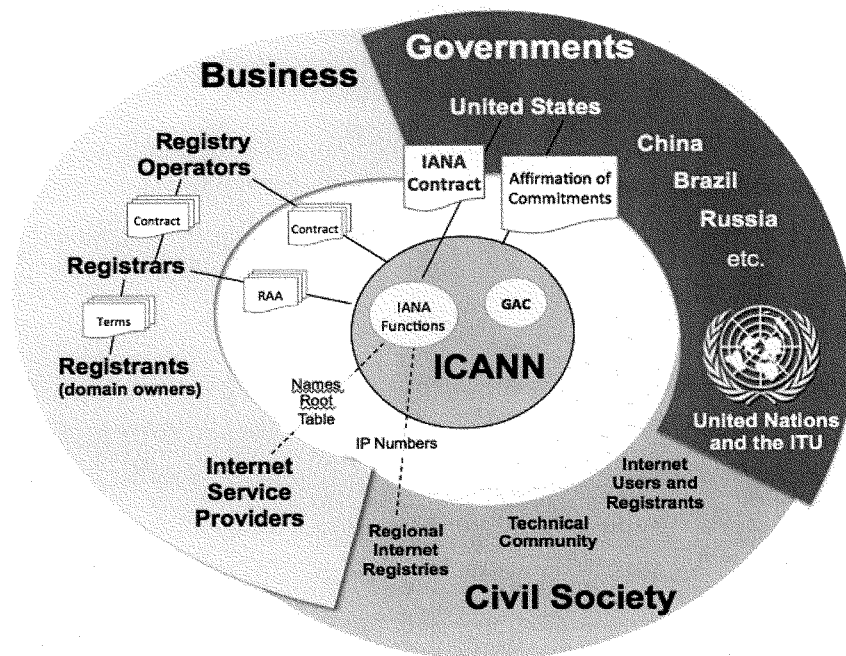
Although ICANN's board accepted our transition proposals and forwarded them to NTIA last week, the timeline leading up to the IANA contract expiration date on 30-Sep *is tight*:

- 1-Apr-2016: draft bylaws for review by community working groups.
- Mid-Apr: ICANN board approves bylaws for public comment period of 30 days.
- Late May: Evaluate public comments and ICANN board approves new bylaws.
- 15-Jun: NTIA evaluates adopted bylaws and reports to Congress in time for review before recess in mid-July.
- 15-Aug: NTIA evaluates *implementation* of community proposals because this is the last chance for NTIA to extend the IANA contract, if needed.

In parallel, the ICANN community will be designing additional accountability measures, including improvements in transparency, diversity, and a framework for human rights. The newly adopted community powers should ensure these measures can be implemented even if ICANN's board and management were to object.

2. How did we get to this point?

In the Annex to this statement we have summarized key events in the 18-year evolution of ICANN, starting with its genesis in the Clinton administration. We chronicle the escalating resentment of other governments over the unique role retained by the US, leading to the 2009 termination of US oversight agreements and replacement with the *Affirmation of Commitments*. The diagram below shows today's multiple contractual ties and connections between ICANN and its global stakeholders.



The present arrangement reflects a greatly diminished role for NTIA and growing independence for ICANN. Then, the 2013 Snowden revelations – though not unique to the US and entirely unrelated to the stewardship of the IANA functions – stoked international concerns that led to the administration's decision to relinquish the remaining tether of ICANN accountability to the US – the IANA functions contract.

3. NTIA's announced transition for IANA functions and ICANN accountability

In March 2014, the Commerce Department announced that it would transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. Positive global response was immediate, signaling that this move, at this time, might relieve some pressure from foreign governments demanding an end to the unique US role in IANA oversight and an increasing governmental role in global Internet policy.

NTIA asked ICANN to develop a transition plan to shift stewardship of IANA functions to "the global multistakeholder community," saying the transition proposal must have broad community support and satisfy four principles in replacing NTIA's role²:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of IANA services
- Maintain the openness of the Internet

NTIA also added a statement that it would not give up IANA control if the plan developed by ICANN would place other governments in the legacy role of the US. With the experience of the last 18 years, it's appropriate for the US to impose these principles and to prevent any government-led organization from replacing the former US role *after* the transition.

At the same time, NTIA and most stakeholders recognized that NTIA's existing IANA contract provides a broader accountability framework for ICANN, and that accountability enhancements should be developed and adopted in parallel with the transition. After NTIA's 2014 announcement, the Internet community and ICANN developed two tracks to respond to the challenge (as shown on the timeline on page 2):

IANA Stewardship track: Placing the global Internet community in the role historically held by NTIA in the IANA contract with ICANN.

ICANN Accountability track: Giving the global Internet community more power to hold the ICANN corporation accountable because NTIA will lose the leverage associated with the IANA contract once it expires.

² Press Release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions", March 14, 2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

On each track, the community is comprised of representatives of ICANN's recognized Advisory Committees and Stakeholder Organizations, including business; governments; and civil society.

The IANA Stewardship Track: ICANN structured the IANA track to have community groups with customers of the numbers, protocol parameters, and naming functions. They began meeting in Oct-2014 and published a final proposal in Oct-2015, with these elements:

- Create a new legal entity to contract with ICANN to operate IANA naming functions
- Establish a customer committee to monitor the performance of IANA functions
- Establish a periodic review of the IANA Functions, embedded in ICANN bylaws
- Empower the community select a new operator for the IANA Functions, if needed

Notably, the IANA naming proposal relies upon enhanced community powers in the ICANN Accountability Track to hold ICANN to its new obligations.

The ICANN Accountability Track: ICANN stakeholders named representatives to a cross-community working group (CCWG) that began meeting in Dec-2014. (I serve as the representative of Commercial Stakeholders on the CCWG). After more than 200 meetings and calls, and over 12,000 emails over 14 months, the 200 participants in CCWG published a final proposal giving the community new powers to ensure ICANN was answerable to more than just itself.³ New powers for the community include the ability to:

- Inspect ICANN's internal documents and records
- Challenge board actions via Independent Review Panels whose decisions are binding
- Veto bylaw changes proposed by the ICANN board
- Approve any changes to ICANN Fundamental Bylaws (deemed core to ICANN's governance structure) and Articles of Incorporation
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors
- Recall the entire ICANN board, as a last-resort measure

ICANN's lawyers and the community's independent legal counsel are jointly drafting the necessary changes to ICANN bylaws, with a target publication date of early April.

³ Final Accountability Proposal, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

4. Accountability enhancements suggested by stress testing

In my testimony before this committee for its Apr-2014 hearing, I described several stress tests that should be applied to a post-transition ICANN.⁴ Chairman Walden, NTIA, and many in the Internet community embraced stress testing as a way to allow community planning to proceed, while informing and evaluating proposals against potential threats. The committee report on your Apr-2014 hearing includes:⁵

The discussion with stakeholder witnesses generated significant discussion around ICANN accountability and the topic of 'stress tests'--a series of tests designed to simulate a set of 'plausible, but not necessarily probable, hypothetical scenarios' in an effort to determine the resiliency of ICANN under any proposed solution.

Beginning with 8 stress tests that NetChoice presented to your committee, the accountability and IANA stewardship groups added 29 more. I led the working group that applied these stress tests to the accountability proposal, and we concluded that new accountability measures would empower the community to challenge ICANN's actions. For some stresses caused by external events, new accountability measures could help the community challenge the board's preparation and reaction, but could not completely mitigate the impact on ICANN.

Thanks to this committee's request last June, GAO examined stress tests in their analysis.⁶ GAO completed its analysis last September, reporting:

stakeholders identified a risk that ICANN could be captured by a particular interest. To address this risk, stakeholders proposed changes that would empower the multistakeholder community to veto board decisions related to ICANN's plans and budget and to remove board members, among other things.⁷

GAO recommended that NTIA apply a framework to evaluate whether the proposal meets its requirements and to consider the accountability mechanisms in the proposal.

⁴ See Stress Tests, pages 7-10 at NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet, 2-Apr-2014

⁵ House Energy & Commerce Committee Issues Report on DOTCOM Act, 23-Jun-2015, at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt175/pdf/CRPT-114hrpt175.pdf>

⁶ Letter to GAO from House Commerce Committee Chairmen Upton and Walden, and members Blackburn, Shimkus, Kelly, and Rokita, 5-Jun-2014, at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140605GAO.pdf>

⁷ United States Government Accountability Office Report to Congressional Requestors, Aug-2015, at <http://gao.gov/assets/680/672055.pdf>

Overall, the stress test team determined that proposed new accountability measures were a significant improvement compared to existing measures, and would give the community adequate powers to challenge ICANN's actions. Two particular stress tests are worth exploring in this hearing because they identified critical risks of having ICANN quit the *Affirmation of Commitments* and avoiding expansion of governmental influence over ICANN.

4.1 Proposal to bring Affirmation commitments and reviews into ICANN bylaws

In our April 2014 testimony, the very first stress test that we proposed was where ICANN decides to quit the *Affirmation of Commitments*, which it may do with just 120 days notice.⁸ Moreover, this committee asked about making *Affirmation* obligations enforceable, as part of question #3 sent to GAO last June. The accountability group was also significantly concerned about this stress test and said in its proposal:

After the IANA agreement is terminated, the *Affirmation of Commitments* will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.⁹

Once the IANA contract is gone, the *Affirmation* stands out and would be targeted for elimination by governments who resent the US having a unique, bilateral relationship with ICANN. Against this contingency, the accountability group examined *Affirmation* items to determine if they were already part of ICANN bylaws. This resulted in a proposal to add key *Affirmation* commitments to ICANN bylaws:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability, and resiliency of the DNS.

ICANN shall adhere to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and Strategic and Operating Plans.

⁸ See Stress Test 1, on page 8 at NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet, 2-Apr-2014

⁹ p.51 at draft report of Cross Community Working Group on Enhancing ICANN Accountability, 4-May-2015

Affirmation section 8b was discussed in a Senate Commerce Committee hearing in Feb-2015. 8b commits ICANN to "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." The community determined this commitment was reflected in ICANN bylaws 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 ICANN's board *could* propose a change to this bylaws provision, the empowered community could block the proposed change, using one of its new community powers. In addition, ICANN's Articles of Incorporation already state that ICANN "is organized under California Nonprofit Public Benefit Corporation Law"¹⁰. We propose amending ICANN's Articles of Incorporation such that any change would require approval by the empowered community. As part of this stress test analysis, we proposed bringing the 4 periodic community reviews from the *Affirmation* into ICANN's bylaws:

- ICANN's accountability & transparency
- Preserving security, stability and resiliency
- Promoting competition, consumer trust, and consumer choice
- The extent to which WHOIS services meet legitimate needs of law enforcement

These reviews will become part of ICANN bylaws, modified to give the community access to ICANN internal documents and control over review team composition. In addition, the IANA stewardship group proposed an IANA Functions Review be added to the bylaws. When combined with new powers to challenge ICANN board decisions, these bylaws changes would enable termination of the *Affirmation of Commitments*. We concluded that the *Affirmation* should be terminated to avoid having a side agreement slightly different from the new bylaws, and to avoid having a bilateral agreement with the US that could become the next target for elimination.¹¹

¹⁰ Section 3 of ICANN Articles of Incorporation, at <https://www.icann.org/resources/pages/governance/articles-en>

¹¹ p. 6, Annex 9 - Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

4.2 Proposal to limit ICANN obligations to follow advice from governments

In our Apr-2014 and May-2015 testimony, I described a stress test where governments could raise their influence via Government Advisory Committee (GAC) advice to ICANN.¹² This concern was echoed in this committee's question #2 to GAO, and generated keen interest since it addresses ICANN's response to government advice. In our final proposal we said:

Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the Empowered Community, some stakeholders believe this could inappropriately increase government influence over ICANN.¹³

Here's how we applied Stress Test 18 to existing and proposed accountability measures:

<p>29 Stress Test #18: Governments in ICANN's Governmental Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's Board</p>	
<p>30 Consequence(s): Under current Bylaws, ICANN must consider and respond to Governmental Advisory Committee advice, even if that advice were not supported by consensus. A majority of governments could thereby approve Governmental Advisory Committee advice.</p>	
EXISTING ACCOUNTABILITY MEASURES	PROPOSED ACCOUNTABILITY MEASURES
<p>31 Current ICANN Bylaws (Article XI) require ICANN to try to find a mutually acceptable solution for Governmental Advisory Committee advice.</p> <p>32 Today, Governmental Advisory Committee adopts formal advice according to its Operating Principle 47: "consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection."</p> <p>33 The Governmental Advisory Committee may at any time change its procedures instead of its present consensus rule.</p> <p>34 The requirement to try to find a mutually acceptable solution in the current Bylaws would then apply, not just for Governmental Advisory Committee consensus advice.</p>	<p>35 The proposed measure would amend ICANN Bylaws (Article XI, Section 2, item 1j) to require trying to find a mutually acceptable solution only where Governmental Advisory Committee advice was supported by full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</p> <p>36 The proposed accountability measure recognizes that the decision not to follow GAC consensus advice would require a 60% majority of the ICANN Board.</p> <p>37 The Governmental Advisory Committee can still give ICANN advice at any time, with or without full consensus.</p> <p>38 Recognizing the general principle that an AC should have the autonomy to refine its Operating Procedures, the Governmental Advisory Committee could specify how objections are raised and considered.</p>

¹² See Stress Tests 6 & 7, on page 9 at [NetChoice Testimony before the House Energy & Commerce Committee – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

¹³ pp. 2-3, Annex 11 - Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18), at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

Our proposal enshrines the GAC's present method of decision-making into ICANN bylaws as the only way to trigger the board's obligation to "try and find a mutually acceptable solution." Many GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. In the end, the proposal we developed increases the threshold for ICANN's board to reject GAC advice, from today's simple majority (9 votes) to 60% (10 votes). However, the GAC would not be allowed to block a community challenge of ICANN Board's implementation of GAC advice.

Another imposition on GAC advice is a requirement that all advisory committees provide a rationale for their advice to ICANN's board. And to address concerns that GAC advice is sometimes inconsistent with ICANN Bylaws, we added this clarification for legal counsel to consider when drafting Bylaws language:

ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.

Some government representatives opposed these changes to ICANN bylaws. That is not unexpected because some government representatives have previously voiced dissatisfaction with the consensus rule for GAC decisions. It is entirely plausible that the GAC could unilaterally change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. On the other hand, several governments supported the change, including a forceful statement from NTIA¹⁴:

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

I firmly believe the tradeoff of one extra vote to reject GAC advice, while reducing GAC influence through several measures, is clearly a net gain for ICANN's private sector stakeholders and meets NTIA's conditions for the transition.

¹⁴ Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

4.3 Stress Tests regarding enforcement of ICANN contracts

Stress Tests 29 and 30 examined challenges to ICANN's ability to enforce its contracts with registries and registrars. This committee's Jun-2015 report also stated an expectation regarding ICANN's enforcement of contract provisions:

The Committee therefore asks the NTIA to work with ICANN and stakeholders so that the transition proposal ensures the contractual obligations created through the multistakeholder process are fulfilled and effectively enforced.¹⁵

The community's accountability proposal addresses your request with these recommendations:

ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements.¹⁶

4.4. Enforcing the Community's new Accountability Powers

Your Jun-2015 committee report also stated an expectation that "NTIA will not certify their adoption until such time as the Internet community can avail themselves of the terms, either through ICANN's processes or through the courts."

The final proposal includes direct court enforcement for community's statutory power to remove an individual director or to recall the entire ICANN board.¹⁷ If the community wins in an independent review process (IRP) and ICANN board does not comply with the IRP decision, the community can petition a court to enforce the result of the IRP. For all other community powers, the recourse is to recall the entire ICANN board, which is also enforceable *in court*.

This historic transition creates the opportunity for the community to obtain accountability enhancements that the ICANN board would not likely approve if those enhancements were

¹⁵ House Energy & Commerce Committee Issues Report on DOTCOM Act, 23-Jun-2015, at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt175/pdf/CRPT-114hrpt175.pdf>

¹⁶ pp. 3-4, Annex 05 –Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

¹⁷ p. 9, Annex 02 –Recommendation #2: Empowering the Community through Consensus, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

proposed after the leverage of the IANA contract is gone. By the same token, the GAC would resist these bylaws changes if they were proposed at some point after the IANA transition.

This transition is the best opportunity to pursue difficult and sometimes controversial changes to ensure that ICANN is accountable to the entire community it was created to serve. This transition is the best opportunity for the US government to use its leverage to get ICANN to implement the community's proposed accountability enhancements. It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. That leads us to the final segment of our testimony, on the continuing role for Congress.

5. Congress's role in ensuring an accountable ICANN

Members of this committee raised questions and concerns about the transition, accountability mechanisms, and potential stress tests. Your work on the DOTCOM Act stimulated the questions sent to GAO last June by Chairmen Upton and Walden, and members Blackburn, Shimkus, Kelly, and Rokita. Those questions included critical matters also in DOTCOM, such as national security concerns and implications for other US agencies.

The global Internet community has devoted thousands of hours developing this proposal for the transition, and is facing additional work to implement the bylaws and plan for 'work stream 2' accountability enhancements. We are therefore grateful that this committee passed legislation insisting that NTIA require ICANN to adopt the multistakeholder community proposals *as a condition of the IANA transition*. Your strong support helped us last week in Marrakech, where ICANN's board committed to adopt bylaws changes required by the community proposal – regardless of when this proposal works its way through Washington.

To prepare ICANN for a future independent of US government contracts, the Internet community needs to hold ICANN accountable, with powers like shareholders have over corporations; voters over their elected officials; and members over their trade associations. This transition can realize the *White Paper* vision for an ICANN that is led by, and accountable to its multistakeholder communities, including the private sector; civil society; and technology experts – along with governments. Together, we can bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

Annex – United States government stewardship of ICANN and IANA

American engineers came up with a “recipe” for core Internet technologies and promptly gave that recipe to the world. Internet hosts were appearing internationally by the 1980s. The 1990’s saw the explosion of commercial uses of the Internet, based on a naming and numbering system also created in the United States. In 1998, the Clinton administration sought to privatize and internationalize the Domain Name System (DNS) with this directive in the *White Paper*:

The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management.

The US Government is committed to a transition that will allow the private sector to take leadership for DNS management.¹⁸

In the 18 years since, it’s been a long road from American invention to internationalized private-sector leadership by an entity the US established for the task: the Internet Corporation for Assigned Names and Numbers (ICANN). Three administrations and several Congresses have worked to help ICANN mature and protect the vision of private-sector leadership from growing pressure for control by governments, who saw the growth of the Internet and assumed that its governance required an inter-governmental solution.

The transition to an independent ICANN was expected to take a few years, but the National Telecommunications and Information Administration (NTIA) made several extensions of its oversight arrangements, the latest of which expired in September 2009. At the time, NetChoice was among those calling for another extension so that ICANN could develop permanent accountability mechanisms.

Instead, NTIA and ICANN unveiled a new agreement, the *Affirmation of Commitments*.¹⁹ The *Affirmation* established periodic reviews giving all stakeholders – including governments – a defined oversight role in assessing ICANN’s performance. The *Affirmation* gave the global Internet community what was promised: independence for ICANN in a framework where governments were alongside private sector stakeholders.

¹⁸ The “White Paper” on Management of Internet Names and Addresses, US Department of Commerce, Jun-1998, see http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

¹⁹ Affirmation of Commitments, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

But concerns about the US role in naming and numbering remained after the execution of the *Affirmation*, because NTIA retained its contracting role for the Internet Assigned Numbers Authority (IANA). The IANA contract is deemed essential to ICANN and therefore provided NTIA leverage to hold ICANN to its *Affirmation* obligations.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.²⁰

All of this to say that ICANN needs a persistent and powerful reminder that it serves at the pleasure of global stakeholders; that ICANN has no permanent lock on managing the Internet's name and address system. We said at the time that ICANN's role in IANA functions should disappear if it were to walk away from the *Affirmation of Commitments*.

Since the UN created the Internet Governance Forum (IGF) in 2005, IGF meetings have become increasingly productive, yet some governments still want the UN to oversee DNS tasks handled by ICANN and IANA. In its July-2010 statement to the UN, China's government asked the UN and IGF to "solve the issue of unilateral control of the Critical Internet Resources." By 'unilateral control', China means US custody of the IANA contract. And 'Critical Internet Resources' include IP addresses, root servers, and the policymaking for domain names.

China was not alone in its desire for the migration of ICANN and IANA functions to the UN's International Telecommunication Union (ITU). ITU leadership did not like a model where governments share power with industry and civil society, and warned ICANN that sooner or later governments would take greater control of the organization.

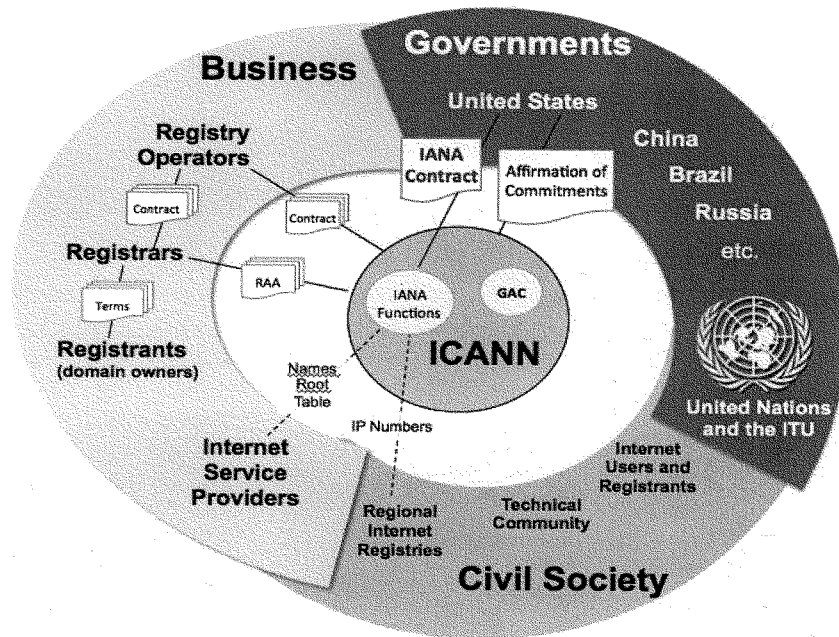
In 2011, a group of governments proposed their own replacement for US oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for "establishing a new global body" located "within the UN system" to "oversee the bodies responsible for technical and operational functioning of the Internet."²¹ In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and

²⁰ Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

²¹ Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf

unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today."²²

The diagram below shows the multiple contractual ties and connections between ICANN and its global stakeholders.



Clearly, the last 18 years of "transition" have seen significant improvements in globalizing ICANN and IANA, although there have certainly been some challenges. Along the way, some governments and intergovernmental organizations have criticized the US role and

²² H.Con.Res.127 and S.Con.Res.50 - Expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, Aug 20, 2012

openly coveted taking over that role. But throughout, the US Congress and multiple administrations have stayed with the vision of multistakeholder, private-sector leadership for Internet addressing and policymaking. And our government has used its contractual tools to improve ICANN's performance and to hold the organization to the accountability measures in the *Affirmation of Commitments*.

Still, the US continued to work towards full privatization of ICANN and IANA, at a deliberate pace and with measurable progress. Then came 2013 and Edward Snowden's revelations of US government surveillance. While not unique to the US and entirely unrelated to ICANN and the IANA functions, Snowden stoked international concerns that led to the administration's decision to relinquish the remaining tether of ICANN accountability to the US — the IANA functions contract.

Ensuring that ICANN accepts and implements the community proposals

In September 2014 all ICANN advisory committees and stakeholder groups wrote a joint letter raising questions about ICANN's proposed accountability process.²³ ICANN responded by asking whether and why the community seemed to lack trust in ICANN's board and management. The Business Constituency's reply is remarkable for its clarity on why the community needs new measures to hold ICANN accountable.²⁴

First, this discussion is not about whether the community 'trusts' the current ICANN board. It's about trusting future boards — after we no longer have the leverage/influence of the US Government to rely upon. This IANA transition is the community's chance to establish mechanisms to rein-in a future board that would put ICANN's corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging that the board is obliged to protect the corporation's interests first, as required by ICANN bylaws:

Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

²³ Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

²⁴ p. 3, Business Constituency comment on Enhancing ICANN Accountability Process, 27-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf>

Should there be any confusion about whether the bylaws refer to 'ICANN' as the corporation or the community, see ICANN's *Management Operating Principles* (2008):

"The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."²⁵

The Business Constituency had it right: ICANN's present bylaws do not hold the board accountable to the community. Before the US government lets go of the oversight leverage inherent in the IANA contract, it must ensure that ICANN accepts and implements the proposals needed to keep the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

²⁵ ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf>

Mr. WALDEN. Mr. DelBianco, thank you. I think you win the prize for most interesting props for a hearing we have had in 5 years.

I do want to take one exception, however. Your comment the Irish don't control the recipe to the Internet, that is true. They do still maintain the control over the recipe for Guinness though. And that is something you may want to——

We will now go to Dr. Alissa Cooper, who chairs the IANA Stewardship Transition Coordination Group. Dr. Cooper, we are delighted to have you before our members. Thank you for your participation. Please go ahead.

STATEMENT OF ALISSA COOPER

Dr. COOPER. Thank you, Chairman Walden and members of the subcommittee, for the opportunity to testify today. My name is Alissa Cooper. I am an engineer by training. And I am the chair of the IANA Stewardship Transition Coordination Group, otherwise known as the ICG.

The ICG was formed in July 2014 to coordinate the development of a plan to transition the stewardship of the Internet Assigned Number Authority functions to the global Internet community. The group is comprised of 32 people representing all of those who are affected by the transition. Businesses, governments, civil society, Internet users, and the technical community.

Last week, NTIA received a package of proposals, one concerning the operational aspects of the IANA stewardship transition and the other concerning enhancements to the accountability of the Internet Corporation for Assigned Names and Numbers, ICANN. The two plans are interdependent and interrelated. And NTIA is considering them jointly, as is the U.S. Government more broadly.

My testimony is focused on the operationally oriented IANA stewardship transition proposal, because that is the component that the ICG, the group that I chair, shepherded to its completion.

There are three important aspects to recognize about the stewardship transition proposal. First, support for the plan is broad, deep, diverse, and global. Hundreds of people from across sectors and geographies put in thousands of hours of work, joined conference calls in the middle of the night, spent weekends, evenings, and holidays to complete this proposal. The effort put into it is truly remarkable and unprecedented. The result is global consensus in support of a plan that is good for the Internet.

The ICG solicited public comments on the proposal last year, in a similar fashion, to the way that a Federal agency might solicit public comments. A significant majority of the 157 commentators expressed support for the plan, including U.S. businesses, trade associations, and civil society groups. Furthermore, the ICG, where all of those who are most invested in the smooth functioning of the Internet, supports the proposal unanimously.

The second critical point is that the plan provides continuity with how the Internet works today, building on the Internet's success. The strength of the plan is that it keeps in place the same operational realities that have allowed the Internet to grow and to be successful since the 1990s. It keeps the role of the IANA functions team intact and carrying out the same duties as it has now. So on

the day that the NTIA contract expires, Internet users should notice no change.

Furthermore, the Internet works because of a diverse set of organizations and individuals choose voluntarily, without any mandate, to have their networks interoperate with each other. Implementing the transition plan will be an important step in aligning the oversight of IANA with this collaborative and decentralized approach to Internet operations, rather than relying on authority derived from any single Government's contract.

The third and final critical point is that the plan meets the criteria established by NTIA at the outset of the transition. I will focus on three of these criteria for brevity. Number one, the plan supports and enhances the multistakeholder model by leveraging and extending existing multistakeholder processes and arrangements. The plan upholds a vision for multistakeholder Internet governance that all of the communities represented on the ICG share and that, I think, this Congress shares as well.

Number two, the plan maintains the security, stability, and resiliency of the Domain Name System by focusing on continuity as I just described. From an operational perspective, the plan incurs minimum change, while enhancing community oversight over IANA, providing the perfect recipe for security and stability.

And, number three, the plan does not replace NTIA's role with a Government or intergovernmental organization. Instead, it relies on the global multistakeholder community to provide oversight over IANA. This community demonstrates a suite of features that defend it against capture by any single interest, including governmental interests. Those features include open processes where anyone can participate and everyone has a say, the use of transparent public proceedings for all decisions, consensus-based decision-making that never defaults to voting or campaigning, established appeals processes, and the ability to recall or replace underperforming members of the leadership. Taken together, these form the essence of the multistakeholder model and the best defense against undue influence by any single entity.

I look forward to your questions today and welcome you to send further questions to the ICG at any point during your review of the transition plan.

Thank you for your time and interest and your thoughtful consideration of this matter of critical importance to the future of the Internet.

[The prepared statement of Dr. Cooper follows:]

Statement of Dr. Alissa Cooper
Chair, IANA Stewardship Transition Coordination Group (ICG)
Before the House Committee on Energy and Commerce,
Subcommittee on Communications and Technology
“Privatizing the Internet Assigned Number Authority”
March 17, 2016

Summary

As chair of the IANA Stewardship Transition Coordination Group (ICG), I thank you for the opportunity to testify. When the ICG was first formed we established a single goal: to deliver an IANA stewardship transition proposal to NTIA. After two years of intensive work involving hundreds of individuals and numerous entities from all over the world, we have achieved that goal. The IANA Stewardship Transition Proposal was developed in the image of the Internet itself – through bottom-up, consensus-based multistakeholder processes where anyone can participate and everyone has a say. The ultimate result is global consensus in support of a plan that is good for the Internet.

The transition proposal upholds a vision for the Internet that all of the communities represented on the ICG share, and that I believe this Congress shares as well. The proposal supports the multistakeholder model of Internet governance; maintains the security, stability, and resiliency of the Domain Name System; meets the needs of the customers and partners of IANA; maintains the openness of the Internet; and does not replace NTIA's role with a government or inter-governmental organization. In other words, it meets the criteria for the transition that NTIA established in 2014.

The key strength of the transition proposal is that it provides continuity with how the Internet has been operated for decades. The processes and structures developed and used to keep the Internet running smoothly over the past 30 years have proven their robustness, even as the Internet has grown and evolved. Approving and implementing the transition proposal will ensure that they will continue to work well going forward.

I. Introduction

Chairman Walden and members of the subcommittee:

As chair of the IANA Stewardship Transition Coordination Group (ICG), I thank you for the opportunity to testify. The ICG was formed in July 2014 to coordinate the development of a proposal to transition the stewardship of the IANA functions to the global Internet community. The group is comprised of 30 members and two liaisons representing all stakeholders affected by the transition – businesses, governments, civil society, users, and the technical community. I am an engineer by training, and I was named to the ICG as a technical community representative on behalf of the Internet Engineering Task Force (IETF). I currently serve on the IETF's 15-member Internet Engineering Steering Group, responsible for shepherding the standardization of Internet engineering efforts at the IETF. In that capacity, I interact with IANA staff on nearly a daily basis.

When the ICG was first formed we established a single goal: to deliver a transition proposal to NTIA. After two years of intensive work involving hundreds of individuals and numerous entities from all over the world, we have achieved that goal. The IANA Stewardship Transition Proposal is the result of thousands of hours of work, hundreds of calls and meetings, and tens of thousands of email exchanges. It was developed in the image of the Internet itself – through bottom-up, consensus-based multistakeholder processes where anyone can participate and everyone has a say. The ultimate result is global consensus in support of a plan that is good for the future of the Internet.

The transition proposal upholds a vision for the Internet that all of the communities represented on the ICG share, and that I believe this Congress shares as well. The proposal supports the multistakeholder model of Internet governance; maintains the security, stability, and resiliency of the Domain Name System; meets the needs of the customers and partners of IANA; maintains the openness of the Internet;

and does not replace NTIA's role with a government or inter-governmental organization. In other words, it meets the criteria for the transition that NTIA established at the outset of the process.

The key strength of the transition proposal is that it provides continuity with how the Internet has been operated for decades. It keeps the role of the IANA team intact and carrying out the same duties as it has today. The processes and structures developed and used to keep the Internet running smoothly over the past 30 years have proven their robustness, even as the Internet has grown and evolved. Approving and implementing the transition proposal will ensure that they will continue to work well going forward.

The Internet is a global resource that functions because a diverse set of organizations and individuals choose to cooperate to allow their networks to interconnect and interoperate with one another. Completing the IANA stewardship transition is an important step in aligning the oversight over IANA's operations with this collaborative approach to operating the Internet today, rather than relying on authority derived from a single government's contract.

This testimony provides a brief background about what IANA is and does (Section II), provides a summary of the IANA Stewardship Transition Proposal (Section III), explains how the proposal meets the criteria set out by NTIA (Section IV), and provides some concluding remarks (Section V).

II. Overview of the Internet Assigned Numbers Authority (IANA)

The Internet is a global network of networks. It is fundamentally a distributed system, where the operator of each local network chooses, by and large, how to run its network locally. This means that whether networks connect and allow for communications across them is fundamentally a voluntary choice. By choosing to interoperate, disparate networks and the users who connect to them experience the

benefits of the network effects derived from global interoperability and interconnection. Almost all of the technical operation of the Internet is undertaken without any centralized coordination or bookkeeping, performed by tens of thousands of independent operators.

Yet some of those involved in early Internet engineering efforts recognized that a minimal amount of bookkeeping would help the Internet run more smoothly, and that the easiest way to do this would be in a centralized fashion. The Internet Assigned Numbers Authority (IANA) provides that minimal bookkeeping. IANA is a name traditionally used to refer to the team of people who perform a small set of clerical tasks for the Internet. The set of tasks is often referred to as the "IANA functions." The IANA functions are currently performed by a small team of people employed by the Internet Corporation for Assigned Names and Numbers (ICANN). They fall into three largely distinct categories.

The first category is numbers. Data packets make use of Internet Protocol (IP) addresses in order to arrive at their appropriate destinations. To make this routing system work, networks need to be able to identify each other and they need to know which blocks of addresses are associated with each other network. On the Internet, numbers are used as unique identifiers for networks (for example, the network associated with the government of the District of Columbia is 14072). IANA maintains, at a global level, the list of which blocks of these numbers have been assigned as well as lists indicating to whom IP address blocks have been assigned. These kinds of lists are often referred to as "registries." Maintaining these registries is what comprises the numbers-related IANA functions.

The second category is known as "protocol parameters." The Internet works because the computers and devices connected to it use standardized patterns of communication known as "protocols." Many protocols rely on specific configuration settings known as protocol parameters that both parties to a communication need to use in order to communicate. It is convenient to have a single place to look up these

configuration settings. Therefore another set of functions that IANA performs is maintaining and publishing registries containing the protocol parameters.

The third category is names. While computers connected to the Internet can find each other using IP addresses, those addresses are not easy for human users to remember and use. The Domain Name System (DNS) provides a way to map human-readable names (like "energycommerce.house.gov") to IP addresses (like "23.59.123.42"), making the Internet easier to use. This map makes use of a tree structure, which like a real tree starts from a common root out of which are a variety of branches. The "root zone" is the place to start looking in order to find the IP address that corresponds to a particular domain name. It contains the names at the top level of the tree, like ".com," ".gov," and ".us". IANA maintains the root zone file – the registry of top-level domain names that are in the root zone.

Thus the IANA functions consist of maintaining and publishing registries containing numbers, protocol parameters, and names. Critically, IANA does not make decisions about which values belong in which registries. The policies used to decide which values get inserted, changed, removed, and published in each registry are developed outside of IANA, by specific interested communities. IANA simply carries out instructions based on those policies.

Over the course of the Internet's development, each of the three categories of IANA functions has developed a specific community of interest that has a direct operational or service relationship with IANA. These are sometimes referred to as the "customers" of IANA. For numbers, that community is organized around the five Regional Internet Registries (RIRs), which are not-for-profit organizations that manage and distribute numbers within each region of the world. For protocol parameters, the community of interest is organized around the Internet Engineering Task Force (IETF), the world's premier organization for the development of the technical standards that comprise the Internet. For names, the community of interest is organized around

ICANN's supporting organizations and advisory committees, including the Generic Names Supporting Organization (GNSO) and the Country Code Names Supporting Organization (ccNSO) that develop IANA registry policy for top-level domains. These are the entities that develop the policies that dictate which values belong in which registries. Within the context of the IANA stewardship transition, these three communities are known as the "operational communities." Notably, for the names functions ICANN is both the place where registry policy is developed and the administrator of the registries (via the IANA team).

The protocol parameters-related functions constitute the bulk of the registry requests that IANA receives. The IETF makes thousands of requests per year to create or update protocol parameters registries, and IETF participants have frequent interaction with IANA staff. Names-related requests may be numerous but not to the same extent as protocol parameters. There tend to be only a handful of numbers-related requests per year, as the RIRs themselves are already managing large blocks of numbers.

NTIA's role is limited to a procedural check during the process of making changes to the root zone. However, NTIA has no operational role and does not initiate changes to the root zone or the protocol parameters or numbers registries. Thus NTIA's role is largely symbolic. NTIA provides oversight by contracting with ICANN to perform the IANA functions. The ultimate consequence of failing to meet the performance standards or reporting requirements is understood to be a decision by the contracting party (NTIA) to terminate or not renew the contract with the current contractor (ICANN).

Structurally and operationally, the performance of the IANA functions has continued to evolve as the Internet has evolved. The team has grown in size since its inception and performance enhancements have been introduced to respond more quickly and accurately to community requests. IANA has also undertaken significant automation of the process used to update the root zone, streamlining the change process.

The IANA stewardship transition represents a further step in the continuing evolution of IANA.

III. IANA Stewardship Transition Proposal

On March 10, 2016, the ICANN Board transmitted to NTIA a package comprised of two proposals: the *Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community* (the "IANA Stewardship Transition Proposal") and the *CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations* (the "CCWG-Accountability Proposal"). The two proposals are interdependent and interrelated and are being jointly considered by NTIA. This testimony is focused on the IANA Stewardship Transition Proposal, as it is that proposal that the ICG shepherded to completion.

A. Process to develop the proposal

On March 14, 2014, the National Telecommunications and Information Administration (NTIA) of the United States Department of Commerce announced its intention to transition the stewardship of the IANA functions to the global Internet community. NTIA asked ICANN to convene global stakeholders to develop a proposal to transition the current role played by NTIA. As a result of community discussions, the IANA Stewardship Transition Coordination Group (ICG) was formed in July 2014 to coordinate the transition planning process. The ICG is composed of 30 individuals from around the globe appointed by and representing 13 communities, and includes both direct customers of IANA as well as indirect stakeholders. The ICG represents the full gamut of global stakeholders with an interest in IANA – businesses, individual users, civil society, governments, and the technical community.

On September 8, 2014, the ICG issued a request for proposals from the three operational communities. The request set out detailed requirements that each community addressed in its response, describing plans for transitioning each community's respective portion of the IANA functions.

In response to the ICG's request, each of the operational communities in turn created its own team to coordinate the development of a plan to submit to the ICG. The ICG received the numbers plan from the Consolidated RIR IANA Stewardship Proposal ("CRISP") Team in January 2015, the protocol parameters plan from the IANAPLAN working group of the IETF in January 2015, and the names plan from the Cross-Community Working Group to Develop an IANA Stewardship Transition Proposal ("CWG-Stewardship") in June 2015.

Hundreds of people from all across the world engaged in these operational community processes. These included people with technical, policy, business, and academic backgrounds, people in the public and private sectors and people working in civil society. They put in thousands of hours of work and joined hundreds of conference calls and meetings to produce the community plans.

Upon receiving the plans, the ICG assessed them individually and collectively in order to determine whether: (1) the community processes were open and inclusive and if consensus was achieved for the plans; (2) the plans were complete and clear; (3) the three plans together were compatible and interoperable, provided appropriate accountability mechanisms, and were workable; and (4) the plans together met the NTIA criteria. The ICG found that all of these criteria were met and proceeded to assemble the three plans into a single combined transition proposal.

On July 31, 2015, the ICG issued a call for public comments on the combined transition proposal. The call for public comments concluded on September 8, 2015 and resulted in 157 comments from a wide variety of stakeholders, including individuals,

operational communities, supporting organizations and advisory committees within the ICANN community, businesses and trade associations, civil society groups, governments, and others from all regions of the world. The ICG reviewed the comments received and sent questions for clarification to the operational communities. The final text of the transition proposal incorporates updates resulting from the public comment analysis and responses received to the ICG's questions.

After making these final updates, the ICG achieved unanimous support among its members for the transition proposal. The ICG completed its work on October 29, 2015 and finalized its proposal, with the exception of one item. The names plan was conditioned on the development of ICANN-level accountability mechanisms being developed in the CCWG-Accountability Proposal. That work was completed in February 2016, at which point the CWG-Stewardship confirmed to the ICG that its requirements had been met.

On March 10, 2016, the ICG sent the final IANA Stewardship Transition Proposal to the ICANN Board and the Board approved the proposal and transmitted it to NTIA, together with the CCWG-Accountability Proposal.

B. Transition proposal overview

Under the IANA Stewardship Transition Proposal, the global multistakeholder Internet community will replace NTIA's stewardship role. The multistakeholder community will provide oversight over the IANA functions using a collection of structures and processes, many of which have existed for years or decades, and some of which are newly proposed. Each operational community has proposed mechanisms to keep IANA accountable, review its performance, and take steps to remediate lapses in performance, including the ability for the relevant community to choose a new IANA functions operator if necessary. While each operational community will maintain its independence of process for considering or enacting a change of IANA functions

operator, all three communities have explicitly committed to coordinate with each other and ICANN to ensure the stability and smooth operation of the IANA functions in the event of such a change in the future.

The transition proposal recommends the formation of a new legal entity, the Post-Transition IANA (PTI), as an affiliate of ICANN ("affiliate" is the term used to describe the equivalent of a subsidiary in the for-profit world). The PTI will become the IANA functions operator, under contract with ICANN. The existing IANA functions, administrative staff, and related resources, processes, data, and know-how will be legally transferred to PTI from where they sit today within ICANN. PTI will perform all of the IANA functions currently covered by the NTIA contract, with the necessary staffing and resources to do so.

For the names functions, the proposal recommends that ICANN (in its role as the policy coordinating body for the names community) contract with PTI for operation of the IANA naming functions. The number and protocol parameter communities will contract with ICANN for the operation of their respective IANA functions and allow ICANN to subcontract that work to PTI. This arrangement is designed for continuity, given that the RIRs and the IETF already work directly with ICANN.

ICANN currently owns certain intellectual property associated with the provision of the IANA functions, namely, IANA-related trademarks and domain names. The transition proposal includes a requirement that this intellectual property be transferred outside of ICANN to an entity that is not the IANA functions operator. The IETF Trust, which was created in 2005 to hold intellectual property in service of the advancement of the Internet, has been identified by the three operational communities as a suitable repository.

Under the transition proposal, ICANN will remain a not-for-profit public benefit corporation formed under the laws of the State of California, in the United States.

The following sections provide more detail about the specifics of each operational community's plan.

1. *Numbers plan*

ICANN currently provides the IANA functions related to numbers. The numbers community proposes that ICANN continue to serve as the IANA functions operator for numbers-related functions and perform those services under a to-be-established contract with the five Regional Internet Registries (RIRs). The numbers community proposes a contractual Service Level Agreement between the RIRs and the IANA functions operator and a Review Committee comprising community representatives from each region to advise the RIRs on the IANA functions operator's performance and adherence to agreed service levels.

2. *Protocol parameters plan*

ICANN currently provides the IANA functions related to protocol parameters. The IETF community expressed satisfaction with its present arrangements with IANA, proposing no new organizations or structures in its transition plan.

Over the past two decades, the IETF, ICANN, and Internet Architecture Board (the IAB, a leadership body of the IETF) have together created a system of agreements, policies, and oversight mechanisms that apply to the protocol parameters-related IANA functions. A memorandum of understanding (MoU) between ICANN and the IETF community has been in place since 2000. The MoU defines the protocol parameters-related work to be carried out by the IANA functions operator for the IETF. Each year ICANN and the IETF negotiate a service level agreement that supplements the MoU.

The IAB appoints the IANA functions operator for protocol parameters (which has been and will continue to be ICANN, with the work sub-contracted to PTI) and supervises the relationship. Another leadership committee, the IETF Administrative

Oversight Committee, works with the IANA functions operator to establish annual performance metrics and operational procedures, including public audits.

Based on the IETF community's satisfaction with the current arrangements, the IETF proposed that the IANA protocol parameters registry updates continue to function day-to-day, as they have been doing for more than a decade. The protocol parameters community proposes to continue to rely on the system of agreements, policies, and oversight mechanisms created by the IETF, ICANN, and the IAB. The IETF asks for three acknowledgements to be made as part of the transition: 1) That the protocol parameters registries are in the public domain; 2) that ICANN carries out the existing obligations established under the NTIA contract related to ensuring a smooth transition to a successor IANA functions operator, should such a transition be necessary in the future, and 3) that ICANN, the IETF, and subsequent IANA functions operator(s) work together to minimize disruption in the use of the protocol parameters registries.

3. *Names plan*

As explained in Section II, the numbers and protocol parameters communities are comprised of entities distinct from ICANN that define IANA registry policy (the RIRs and the IETF, respectively). This allows those communities to enter into agreements with ICANN to perform the IANA functions and to use those agreements as the basis for holding ICANN accountable. There is at present no such separation within the names community: ICANN is both the IANA functions operator and the body where IANA registry policy is made for names. This was the genesis of the PTI concept, as it allows for contract-based accountability to be applied to the names-related functions, similar to the other functions.

The names community therefore proposes that ICANN enter into a contract with PTI to serve as the IANA functions operator for the names-related IANA functions, including service level agreements for those functions. The proposal includes the

creation of a Customer Standing Committee (CSC) responsible for monitoring the IANA functions operator's performance according to the contractual requirements and service level expectations. The CSC would be a small committee primarily comprised of organizations that operate top-level domains.

The proposal establishes a multistakeholder IANA Function Review (IFR) process to conduct periodic and special reviews of PTI. The IFR will have the ability to recommend a separation process that could result in termination or non-renewal of ICANN's contract with PTI, among other actions.

The names community proposes to discontinue the authorization of root zone changes that is currently performed by NTIA. The names plan will give authority to the ICANN Board to approve any major architectural and operational changes in the management of the root zone. This approval is to be based on the recommendations of a standing committee of stakeholders and technical experts, the Root Zone Evolution Review Committee.

The names proposal relies on ICANN-level accountability mechanisms that are described in the CCWG-Accountability Proposal. These mechanisms are:

1. ICANN Budget and IANA Budget: The ability for the multistakeholder community to approve or veto the ICANN budget after it has been approved by the ICANN Board but before it comes into effect.
2. Community empowerment mechanisms: The empowerment of the multistakeholder community to have the following rights with respect to the ICANN Board:
 - a. The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;
 - b. The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA functions) by reviewing and approving (i) ICANN Board decisions

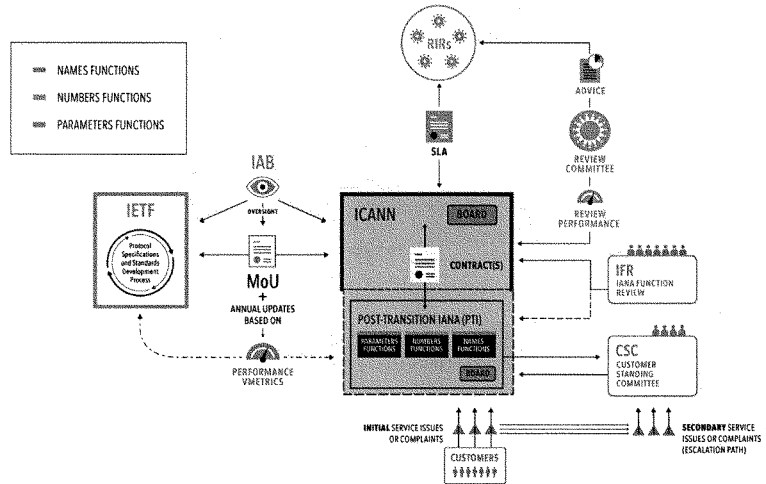
with respect to recommendations resulting from an IFR or Special IFR and (ii) the ICANN budget; and

- c. The ability to approve amendments to ICANN's "fundamental bylaws," as described below.
3. IANA Functions Review: The creation of an IFR which is empowered to conduct periodic and special reviews of the IANA functions relating to names. IFRs and Special IFRs will be incorporated into the reviews mandated by the Affirmation of Commitments as set forth in the ICANN bylaws.
4. Customer Standing Committee: The creation of a CSC which is empowered to monitor the performance of the IANA functions relating to names and escalate non-remediated issues to the ccNSO and GNSO.
5. Separation process: The empowerment of the Special IFR to determine that a separation process is necessary and, if so, to recommend that a Separation Cross-Community Working Group be established to review the identified issues and make recommendations.
6. Appeal mechanism: An appeal mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions relating to names.
7. Fundamental bylaws: All of the foregoing mechanisms are to be provided for in the ICANN bylaws as "fundamental bylaws." A "fundamental bylaw" may only be amended with the prior approval of the community and may require a higher approval threshold than typical bylaw amendments.

All of these are provided for in the CCWG-Accountability Proposal that NTIA received from the ICANN Board together with the IANA Stewardship Transition Proposal.

C. Summary

A visual summary of the IANA Stewardship Transition Proposal is provided below.



IV. Assessment of the Proposal

The Internet has been a huge success economically, socially, and technologically. The core strength of the IANA Stewardship Transition Proposal is that it provides continuity with how the Internet works today.

The transition proposal keeps in place the same operational realities that have supported the Internet's enormous growth since the 1990s. It keeps the role of the IANA functions team intact and carrying out the same duties as it has today. It ensures that the organizations and individuals involved in operating and overseeing critical Internet resources continue in their current roles, with enhanced transparency and accountability. This includes industry, technical experts, government, and Internet users around the

world. It relies in large part on time-tested, well-proven structures, processes, and bodies. On the day the NTIA contract expires, Internet users should notice no change.

When NTIA announced its intent to transition its stewardship, NTIA established that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectations of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

NTIA also explained that it would not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.

The IANA Stewardship Transition Proposal meets all of NTIA's criteria. The record as reflected by public comments received by the ICG supports this finding.

Furthermore, vesting the IANA stewardship responsibility in the operational communities and using existing multistakeholder structures both help to ensure that the NTIA criteria will continue to be met over time. The communities have been working in support of the multistakeholder model, Internet openness, and DNS security, stability, and resiliency for years if not decades. Their structures provide the appropriate checks and balances to ensure that the stewardship of IANA will continue in this vein and will be protected against capture by any single interest.

A. Broad community support

Community support for the proposal is broad and deep and has been demonstrated at every stage of the process. Each operational community ran an open and inclusive process in which any interested individual was able to participate. These plans were made available for public comment multiple times and received wide

community review. Each community produced a consensus plan and no community felt the need to invoke voting procedures because each arrived at consensus without them. Together, the openness and inclusiveness of the processes and the consensus results indicate broad community support.

When considering the transition proposal as a whole, community support has been demonstrated in a number of different ways. A significant majority of commenters who submitted comments during the ICG public comment period support the proposal. These commenters included individuals, operational communities, supporting organizations and advisory committees within the ICANN community, businesses and trade associations, civil society organizations, governments, and others from across all regions of the world. Thus community support for the transition proposal is broad both in diversity of interests and geography of origin.

Furthermore, the consensus of the ICG in support of the transition proposal provides a powerful demonstration of the breadth of community support. ICG members serve on behalf of 13 constituencies that are all intimately concerned with the outcome of the IANA stewardship transition and that each encompass a wide swath of the community. That ICG members have full consensus in support of the transition proposal is a testament to the support in each constituency.

B. Support and enhance the multistakeholder model

The transition proposal supports and enhances the multistakeholder model because it leverages existing multistakeholder arrangements, processes, and paradigms in defining the post-transition IANA oversight and accountability mechanisms. Each component of the proposal has this feature.

The names plan maintains the existing framework of ICANN for continued multistakeholder oversight of the IANA functions operation. The names plan reinforces the multistakeholder model by retaining the functional separation between policy

development processes and IANA. The ICANN policy development process remains bottom-up, transparent, and inclusive of all stakeholders. IANA remains focused on the needs of the operational communities, with transparent oversight by the CSC and IFR, both of which include non-ICANN participants and the latter of which is explicitly constituted as a multistakeholder entity.

The numbers plan is based in the existing, long-established RIR structure. The RIRs are widely regarded as healthy examples of Internet technical organizations operating within the multistakeholder model of Internet governance. Structurally they are open, transparent and accountable not-for-profit organizations, with well-established governance mechanisms and open participatory processes for policy development in their respective regions. In addition, they and their communities are active participants in and supporters of multistakeholder processes of ICANN, the Internet Governance Forum, and others. Accordingly, the numbers plan supports the existing multistakeholder mechanisms of the RIR system, and enhances them (and hence the overall multistakeholder model) by introducing improvements in transparency and accountability related to the performance of the numbers-related IANA functions.

The protocol parameters plan is based in the IETF structure. Participation in the IETF is open to all individuals regardless of which stakeholder group or sector they may be from. The protocol parameters plan supports and enhances the multistakeholder model by relying on IETF processes and voluntary agreements between the IETF and ICANN for the performance of the IANA functions related to protocol parameters. IETF processes could be used to amend governance of the protocol parameters function in the future. Anyone may propose amendments to those processes, and anyone may take part in the decision processes.

C. Maintain the security, stability, and resiliency of the Internet DNS

The transition proposal calls for the IANA functions operator to be transferred to the PTI, which will be an affiliate (subsidiary) of ICANN. Hence operational roles are maintained. The proposal envisages the names aspect of the current NTIA oversight and contracting authority being transferred to ICANN. The separation of PTI as an affiliate will ensure the independence of that oversight role from the contractor providing the service.

This arrangement introduces minimum change and keeps the current IANA functions operation team intact and carrying out the same role that it has today. Only an organizational change is proposed to ensure that the independence of oversight is maintained.

The proposal sustains and enhances procedures for identifying and rectifying any potential performance degradations that may arise in the provision of the IANA functions. A shared commitment to remedy shortfalls in performance is inherently supportive of the security, stability and resilience of the DNS.

Each of the three operational communities either has already produced or is working to produce a clear set of service level expectations for their portion of the IANA functions. Establishment and ongoing refinement of such clear expectations is fundamental to the security, stability and resilience of the operation of the DNS.

Finally, Verisign currently serves as the Root Zone Maintainer under a cooperative agreement with NTIA. Separate from the ICG transition proposal development process, there has been active work to replace this with an agreement between ICANN and VeriSign. Such an agreement that clearly defines the roles and responsibilities of both parties is essential for the secure, stable and resilient operation of the root zone of the DNS when the NTIA withdraws from the root zone management process.

D. Meet the needs and expectations of the global customers and partners of the IANA services

All three operational communities determined that the global customers and partners of the IANA services, including the generic and country code top-level domain operators and their communities of stakeholders; the RIRs; and the IETF are presently satisfied with the performance of the IANA functions by ICANN. The transition proposal is structured such that the PTI will continue to provide the IANA functions to its global customers and partners post-transition in essentially the same manner as ICANN's IANA staff does today. In the names community, IANA customers expressed support for a clearer separation between ICANN as policy developer and IANA as administrator, and the PTI separation accomplishes this. Also, the proposal makes it possible for each operational community to choose a different IANA functions operator should the need arise, a capability which does not currently exist for numbers and names. Thus the needs and expectations of the global customers and partners should continue to be satisfied after the transition just as they are currently.

E. Maintain the openness of the Internet

The transition proposal requires that the IANA services, associated policy development processes, and IANA registries remain fully open and accessible just as they are today.

F. Does not replace NTIA's role with a government or inter-governmental organization

The transition proposal does not replace NTIA's role with a government or inter-governmental organization.

The names plan replaces NTIA's roles as they relate to the names-related IANA functions with the combination of ICANN, the CSC, and the IFR, none of which are governments or inter-governmental organizations. Establishing the PTI as an affiliate of ICANN allows the community to rely on ICANN's accountability mechanisms and safeguards to prevent capture, including by governments. ICANN relies on a multistakeholder model of consensus-based decision-making that in itself minimizes the chances of capture by a single entity or special interest. By allowing for open, inclusive participation by any individual or organization, striving for consensus rather than defaulting to voting, and conducting work transparently in public view, the multistakeholder model defends against the ability of any single entity to have an outsized impact over decisions and outcomes. These safeguards will be further enhanced through the implementation of the CCWG-Accountability Proposal, which empowers the multistakeholder community with enhanced rights to engage with the ICANN Board, budget, and bylaws; to appeal decisions; and to remove Board members.

The numbers plan essentially places the RIRs in the role currently occupied by the NTIA. The RIRs are independent, non-governmental, self-funded not-for-profit organizations, accountable to their regional memberships and communities through well-developed mechanisms. On behalf of their communities they will contract with ICANN, through the proposed service level agreement, to provide the required numbers-related functions.

The protocol parameters plan relies on voluntary agreements between the IETF, ICANN, implementers and their users for the stewardship of the protocol parameters-related functions. The IETF has significant structural safeguards in place that prevent it

from capture or take-over by a government or inter-governmental entity. Every decision made in the IETF is done in full public view. Appointments to the IETF's leadership committees are time-limited and are made by a randomly selected group of volunteers. Any decision can be appealed by any IETF participant, and anyone in a leadership position can be recalled for their actions. All decisions are made by the consensus of the participants – there is no voting or campaigning. Collectively, these measures defend the IETF and the protocol parameters registries from capture by any particular entity, governmental or otherwise.

VI. Conclusion

Support for the IANA Stewardship Transition Proposal is broad and deep. Businesses, individuals, governments, civil society organizations, academics, and others from all around the world came together to deliver a proposal that is good for the Internet. All of those who are most invested in the smooth functioning of the Internet believe in this proposal.

One of the main reasons for that is that by and large the proposal maintains business as usual for the operation of the IANA functions. The proposal builds on the processes that have helped make the Internet a success. The proposal ensures that they will continue to work well going forward.

Finally, the transition proposal meets the US government's criteria. For that reason and many others, the ICG unanimously supports the transition proposal and recommends that all affected parties implement it.

The ICG will remain constituted as a body while the US government conducts its review of the proposal. We would be more than happy to respond to questions from members of Congress or anyone else about the transition proposal or the processes that led to its creation.

Thank you for your time, interest, and thoughtful consideration of this matter of great importance for the Internet.

Mr. WALDEN. Dr. Cooper, thanks again for your testimony and for your work on this very important initiative. We will now go to Sally Shipman Wentworth, Vice President of Global Policy Development, Internet Society. Ms. Wentworth, thank you for being here. Please go ahead.

STATEMENT OF SALLY SHIPMAN WENTWORTH

Ms. WENTWORTH. Thank you. Chairman Walden, Ranking Member Eshoo, and members of the subcommittee, thank you for today's opportunity to testify before you on the transition of oversight of IANA, and the impact that it will have on global Internet policy, and on the future of the open Internet.

My name is Sally Shipman Wentworth. I am the vice president of Global Policy Development for the Internet Society. The Internet Society is a global organization with more than 80,000 members and 116 chapters worldwide. It is also the organizational home for the Internet engineering task force. And in its March 2014 announcement, the NTIA identified the Internet Society as a directly affected party to this transition.

Two years ago, the NTIA announced its intent to transition the administration of the IANA functions. We now believe that we have reached a necessary and important step in ensuring the continued, uninterrupted operation of the global Internet, and in laying the best foundation for its future. We strongly support and endorse the resulting IANA stewardship transition plan and the recommendations to enhance ICANN accountability that have been delivered to the NTIA.

Taken together, this is a plan that, first, ensures the continued stability and security of key technical functions that are a core part of the smooth operation of the Internet. Second, it provides a path forward for strengthening ICANN's accountability to its community. And, third, meets the criteria set by the NTIA in its original announcements.

Through a global multistakeholder process that engaged industry, civil society, the technical community, governments, and many others, the community has reached consensus on a proposal that we believe will provide operational stability, reliability, and continuity for the global Internet.

Mr. Chairman, the Internet is a transnational, borderless, network of networks, comprised of countless individual networks that voluntarily connect around the globe. The basic architecture of the Internet that we all rely upon every day is global and distributed. No one entity, Government or otherwise, controls it. The Governance of the Internet reflects this distributed approach. This model of governance is often referred to as the multistakeholder model. In essence, this is a way of getting things done that is bottom-up, inclusive, transparent, and that ensures that the relevant expertise can be brought to the table to solve hard problems. Like the Internet architecture itself, multistakeholder Internet governance ensures that no one stakeholder captures or takes over the Internet at the expense of others.

The management of the IANA functions from the earliest days of the Internet through to the present embodies a multistakeholder model based on distributed coordinations and transparent govern-

ance. The proposal before the United States Government ensures that the multistakeholder systems that have facilitated the security and stability of the IANA functions remain strong and intact. Policy development for the IANA functions will remain distributed among three organizations. The Internet engineering task force, the regional Internet registries, and ICANN will each continue to employ multistakeholder processes to develop and manage the Internet identifiers.

The stewardship of the IANA functions will be carried out by ICANN, itself a multistakeholder entity. Importantly for this subcommittee, the transition proposal directly addresses concerns about capture or control of the IANA by any one stakeholder, including governments. Any multistakeholder process must be vigilant about preventing capture. In the transition proposal, no single party has undue control. And there are protocols in place to prevent any individual organization or Government from seizing jurisdiction or excluding others from the stewardship process.

In conclusion, I want to leave you with one key message: The Internet Society firmly believes that the transition plan that was sent to NTIA upholds the processes and principles that have served as a foundation for the Internet's growth and development to date. The communities have worked hard to ensure that the IANA functions will continue to operate in a predictable manner, consistent with the need to maintain the security, stability, resiliency, and openness of the Internet.

And finally, Mr. Chairman, I want to use this opportunity to thank this subcommittee for its steadfast support for the multistakeholder model and for your continued engagement to ensure a smooth and stable transition of the IANA functions. Thank you.

[The prepared statement of Ms. Wentworth follows:]

**Testimony of Sally Shipman Wentworth
Vice President of Global Policy Development, Internet Society**

**BEFORE THE U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
March 17, 2016**

SUMMARY

The Internet Society thanks the Subcommittee for the opportunity to testify on the transition of the IANA functions to the global multistakeholder community. After two years of work, we believe that we have reached a necessary and important step in ensuring the uninterrupted operation of the global Internet and in laying the best foundation for its future.

We strongly support and endorse the resulting IANA Stewardship Transition Plan and the Recommendations to Enhance ICANN Accountability that have been delivered to NTIA. Taken together, this is a plan that: 1) Ensures the continued stability and security of key technical functions that are a core part of the smooth operation of the Internet, 2) provides a path forward for strengthening ICANN's accountability to its community; and 3) meets the criteria set by the NTIA in its original announcement.

Through a global, multistakeholder process, the community has reached consensus on a proposal that will provide operational stability, reliability, and continuity for the global Internet. In short, given the original intent to transition the IANA functions, the maturity of the multistakeholder process by which the transition plan was developed, and the strength of the plan itself, the Internet Society believes that **now is the time** to complete the transition nearly 20 years after it was first envisioned.

**Testimony of Sally Shipman Wentworth
Vice President of Global Policy Development, Internet Society**

**BEFORE THE U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
March 17, 2016**

Introduction & Overview

Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, thank you for today's opportunity to testify before you on the transition of oversight of the Internet Assigned Numbers Authority (IANA), and the impact it will have on global Internet policy and the future of an open Internet.

My name is Sally Shipman Wentworth. I am the Vice President of Global Policy Development for the Internet Society. The Internet Society is a global organization with more than 80,000 members and 116 chapters worldwide, and is the organizational home of the Internet Engineering Task Force. The global Internet Society is dedicated to ensuring the open development, evolution, and use of the Internet for the benefit of people throughout the world. In its March 2014 announcement¹, the United States National Telecommunications and Information Administration (NTIA) identified the Internet Society as a "directly affected party" to this process. The Internet Society has two seats on the IANA Stewardship Transition Coordination Group (ICG) and has been actively participating in all IANA-related discussions in the three operational communities.

¹ <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

It has been two years since the NTIA announced² its intent to transition the legacy stewardship role played by the NTIA in the administration of the IANA functions. After two years of work, we believe that we have reached a necessary and important step in ensuring the continued uninterrupted operation of the global Internet and in laying the best foundation for its future. **We strongly support and endorse the resulting IANA Stewardship Transition Plan and the Recommendations to Enhance ICANN Accountability that have been delivered to NTIA.** Taken together, this is a plan that:

- i. Ensures the continued stability and security of key technical functions that are a core part of the smooth operation of the Internet;
- ii. Provides a path forward for strengthening ICANN's accountability to its community;
and
- iii. Meets the criteria set by the NTIA in its original announcement.

Through a global, multistakeholder process that engaged industry, civil society, the technical community, governments and many others, the community has reached consensus on a proposal that will provide operational stability, reliability, and continuity for the global Internet.

Accordingly, **we now urge the United States government to approve the final community-developed proposal before it.**

² <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

Defining IANA and its Importance

The Internet began as a research project nearly a half-century ago, and today's Internet is made up of billions of connected devices and thousands of networks. Though most of us never think about it, in order for these devices and networks to connect and communicate with each other they must use common standards, protocols, and parameters. In essence, the IANA functions ensure that Internet users successfully get to the places they want to go on the Internet in a reliable fashion.

In its earliest days, dating back to 1972, the IANA Functions were administered by one individual, Dr. Jonathan B. Postel; later, the administration of the functions was housed at the University of Southern California Information Sciences Institute (USC-ISI), where Dr. Postel began working in 1977. In 1995, the IANA functions were included as part of a research contract between the Defense Advanced Research Projects Agency (DARPA) and USC-ISI. In 2000, the Department of Commerce NTIA contracted with the Internet Corporation for Assigned Names and Numbers (ICANN) for performance of the IANA. This arrangement remains in place today.

"IANA Functions" is the name used today to refer to the coordination, and publication of three sets of Internet identifiers. Some of these identifiers are *parameters*, such as those used by Internet protocols like HTTP; some of them represent *numbering resources*, like Internet addresses; and, others represent *domain names* in the Domain Name System (DNS) root zone. Regardless of the type of identifier, the IANA functions ensure that the entries are managed for

uniqueness and made available in publicly accessible registries or tables so there can be no confusion.

For an easy-to-understand explanation of the IANA functions, the Internet Society has published “The IANA Functions: The Basics”³.

Each of the three IANA functions is associated with a particular community that has a direct operational or service relationship with the IANA functions operator—specifically, the Internet Engineering Task Force (IETF) for protocol parameters, the Regional Internet Registries (RIRs) for number allocations, and the ICANN community for names. These communities have often been referred to as the “operational communities”⁴ or “directly affected parties”⁵ and it is these communities that define the policies for the values that IANA keeps track of.

The U.S. Government’s contracting role, referenced above, in the IANA functions was always viewed as a temporary measure – a “holding pattern” – until the appropriate private sector and multistakeholder mechanisms could be put in place to address the needs and realities of the growing Internet.

This has been the policy of several Administrations as was first outlined in the 1998 Statement of Policy, *Management of Internet Names and Addresses*. The development of the 1998 policy statement was guided by consultations and public input, including over 430 written

³ The IANA Functions: The Basics, 12 August 2014, <http://www.internetsociety.org/doc/iana-functions-0>

⁴ IANA Stewardship Transition Coordination Group Issues Request for Transition Proposals and Suggested Timeline, 9 September 2014, <https://www.icann.org/news/announcement-2014-09-09-en>

⁵ The “directly affected communities” are referenced in the NTIA announcement regarding the IANA transition: <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

comments from public and private sector stakeholders from around the world. So, it is important to remember that this transition was envisioned as not just a policy of the U.S. Government, but also an expectation on the part of a diverse range of stakeholders from the United States and beyond.

Validating the IANA Stewardship Transition Proposal: Meeting NTIA Criteria

To carry out this long-standing commitment to a transition, the United States Department of Commerce called upon the global Internet community to develop a proposal to transition the current role played by NTIA in the coordination of the Internet's domain name system (DNS). In its 2014 IANA transition announcement, NTIA specified evaluation principles that this IANA transition plan must meet:

- i. Support and enhance the multistakeholder model;
- ii. Maintain the security, stability and resiliency of the Internet DNS;
- iii. Meet the needs and expectations of the global customers and partners of the IANA services; and
- iv. Maintain the openness of the Internet.

Further, NTIA specified that the transition proposal must not replace NTIA's role with a government-led or intergovernmental organization solution.

The IANA Transition Coordination Working Group (ICG) proposal provides a plan that meets the criteria set forth by the NTIA, and will ensure the continued stability of key technical functions that are a core part of the smooth operation of the Internet. The complementary

ICANN Accountability Proposal, developed by the ICANN Cross Community Working Group, is equally important because it provides a path forward for strengthening the stewardship role of the ICANN community. The accountability recommendations deepen and enhance ICANN's legitimacy and stability as the provider of the IANA functions.

The Internet Society believes that, together, the IANA Stewardship Transition Proposal and the Recommendations to Enhance ICANN Accountability meet the principles set forth by the United States Government.

As we enter the next phase of the Internet's history that will reach billions of new users and will continue to transform societies, the NTIA principles provide a clear roadmap for the future. They are rooted in the origins of the Internet, have been corroborated through international consensus, and are designed to ensure the long-term growth and stability of the Internet. Future administration of the IANA functions requires continued – and strict – adherence to these criteria.

My organization and countless others around the world are committed to working together and working diligently to ensure that these core principles are upheld in the years to come.

Let's take these principles one by one:

i. **Support and enhance the multistakeholder model**

The Subcommittee can be assured that the proposed transition upholds the multistakeholder model. The operational communities that establish policy for the identifiers in the IANA registries all rely on participatory and open processes that will remain in place post-transition. The final proposal is the outcome of discussions conducted under inclusive and participatory processes of the relevant communities. The various processes were transparent and open; mailing lists were inclusive and publicly archived; and, throughout the process, communities held open, in-person meetings and open teleconferences.

Under the proposed plan, operational communities maintain their bottom-up consensus processes with regards to the IANA functions; they also maintain the ability to make their own arrangements and agreements for the performance of the IANA functions.

Thus, we agree with the ICG's assessment that the combined proposal meets the NTIA principles: the post-transition policy processes for IANA will continue to be based in multistakeholder arrangements.

With regards to the interrelated ICANN Accountability Proposal, which was adopted by acclamation at the ICANN 55 meeting earlier this month, we believe that it directly addresses the possibility of a hostile "takeover," something of utmost importance for the future of the Internet. No single party has undue control, and there are protocols in place to prevent any individual, organization or government from seizing jurisdiction or "elbowing out" others from the stewardship process. The proposal also is crafted so that IANA remains independent of any

government or intergovernmental organization. The Internet Society is confident that the current proposal creates adequate mechanisms to prevent capture by governments or other entities ensuring the core IANA functions will continue to operate free of undue influence.

One way this is achieved is through the enhanced community powers, which now exist to ensure ICANN's accountability to its stakeholders. The engagement-escalation-enforcement approach provides several layers of opportunity for the community, the ICANN Board and ICANN staff to work together to resolve disputes through consensus instead of turning to the courts. This constructive approach keeps power where it belongs—with the multistakeholder community.

ii. Maintain the security, stability and resiliency of the Internet DNS

The Internet Society believes that the IANA Stewardship Transition will maintain the security, stability, and resiliency of the Internet Domain Name System.

A key purpose of the IANA functions is to ensure global uniqueness in the allocation of Internet names, numbers, and protocol parameters. Ensuring that the content contained in the IANA registries is accurate, available and transparently administered provides for the security, stability, and resiliency of the overall system.

Operationally, the final transition proposal maintains the appropriate separation between policy development and implementation, which is key in further ensuring the overall stability and resiliency of the Internet. With respect to the IANA department, the separation of the Post-Transition IANA (PTI) within ICANN ensures independence of policy development from the provision of service. Further, the proposal foresees the need to ensure appropriate staffing,

resourcing and know-how to run the IANA functions. The proposal also includes an important shared commitment to performance and performance metrics that are crucial for the IANA functions operation.

The United States Government has always been very explicit about the need to preserve the security, stability, and resiliency of the DNS. This requirement has been part of its various agreements⁶ and Affirmation of Commitments⁷ with ICANN. Through the proposal on ICANN Accountability, ICANN's role to ensure the security, stability and resiliency of the Domain Name System will be made explicit in revisions to ICANN's bylaws that clarify ICANN's Mission and a series of commitments in this regard. Through periodic reviews, the ICANN Board and community remain committed to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.

iii. **Meet the needs and expectations of the global customers and partners of the IANA services**

As noted above, each of the IANA functions is associated with a community that has a direct operational or service relationship with the IANA functions operator—specifically, the Internet Engineering Task Force (IETF) for protocol parameters, the Regional Internet Registries (RIRs) for number allocations, and the Internet Corporation for Assigned Names and Numbers (ICANN) communities for names.

⁶ Management of Internet Names and Addresses, <https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

⁷ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

The post-transition IANA arrangements must continue to support the performance of the IANA functions in a predictable, reliable, and responsive way, consistent with operational excellence. They should continue to be performed in a neutral and transparent manner. Like any service, they should be periodically reviewed to ensure they are being performed in line with customer needs and expectations.

The three operational communities have all confirmed that they are satisfied with the performance of the IANA functions by the IANA department of ICANN. Importantly, because each operational community will have a contractual relationship with the IANA functions operator under the proposed plan, each operational community will have the right to select a new entity for the performance of the IANA functions as a last resort. These contractual relationships provide important clarity and reflect the needs and expectations of the operational communities.

Of course, the operational communities will need to update contractual agreements with ICANN for the provision of the IANA functions in order to align with community expectations. These agreements, which are currently under negotiation, must be completed prior to the transition. In addition, by enhancing ICANN accountability the plan ensures that the “customers” of the names functions have the mechanisms in place needed to both identify and address performance issues, should they arise.

iv. Maintain the openness of the Internet

Openness is a fundamental value and characteristic of the Internet, and promotes trust and confidence. In reviewing the transition proposal, the Internet Society believes that, post-

transition, the IANA functions will remain open and will continue to contribute to the openness of the Internet itself. For example, the processes by which policies are set by the IANA operational communities will remain open to anyone wishing to contribute. Documentation and discussions related to IANA functions' policy development, such as drafting proposals and email discussion lists, are also openly available.

Furthermore, information on the identifier allocations made by the IANA function itself is freely available on the Internet – there are no membership requirements or fees associated with accessing or using it. Similarly, registries related to IANA are open and in the public domain and it is the expectation of the IANA directly affected parties that will remain so.

The principle of openness also means being open to changes and evolution in architecture and systems. On the Internet there are no permanent favorites. Ultimately, the use of the IANA functions is a choice by the global community because of the value it brings to the Internet. There will undoubtedly be advances in technology, changes to the underlying infrastructure, and the development of new ways to navigate on the Internet. These may mean that the roles of the DNS and IANA functions will change over time.

The transition proposal must not replace NTIA's role with a government-led or intergovernmental organization solution.

In the 1998 Statement of Policy, it was noted that that NTIA's stewardship of DNS functions would be temporary and phased out. It also recognized that given the growing global and commercial nature of the Internet it was neither tenable nor appropriate for the U.S. Government to continue in this role *or for any other government to assume it.*

NTIA's role as temporary steward of the IANA functions gave stakeholders the opportunity to develop and test new structures that, in the long run, would ensure the non-governmental management of the broader DNS. These structures have emerged through bottom-up, multistakeholder collaboration, consistent with the traditions of the Internet.

Upholding the multistakeholder approach requires that, post-transition, the IANA functions must not be subject to capture by a single set of stakeholders, government or otherwise. Multistakeholder collaboration is fundamentally predicated on the notion that no single set of interests automatically hold sway, but rather that all stakeholders have an opportunity to contribute to the discussion and to collaborate in finding solutions. Undue capture or influence by governments or another stakeholder group⁸ would also be an unacceptable violation of the multistakeholder principle.⁹

This basic premise is also reflected in ICANN's accountability enhancements. Under the new proposal, advice from the ICANN Governmental Advisory Committee (GAC) needs to have the full consensus of the governments before the ICANN Board is required to act on it. In this context, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Moreover, the new proposal also foresees the scenario where the broader ICANN community can hold the ICANN Board accountable for

⁸ Including, for example, ICANN by-laws changes that would mandate acceptance of advice or recommendations from any single stakeholder group.

⁹ In the context of comments to ICANN regarding proposed changes to the by-laws regarding consideration of GAC advice, we cautioned about upsetting the balance of influence of stakeholders.
<http://forum.icann.org/lists/comments-bylaws-amend-gac-advice-15aug14/pdf4dvjcTJScU.pdf>

following GAC advice that does not follow its own multistakeholder and bottom up policy development process.

The IANA stewardship transition does not replace NTIA's role with a government-led or inter-governmental solution. We believe that the transition proposal puts in place robust and enforceable procedures that will prevent any single group from becoming dominant or controlling.

The Time is Right for the IANA Stewardship Transition

Since the early days of Internet development, the United States Government has consistently supported the development of the Internet premised upon the inclusive and open participation of stakeholders. Furthermore, numerous bipartisan resolutions of the U.S. Senate and House of Representatives¹⁰ have affirmed support for the multistakeholder model of Internet governance. In particular, this Subcommittee has been deeply engaged in these issues; we thank you for your long-standing support and engagement in multistakeholder Internet governance.

The Internet Society believes that a successful IANA transition will strengthen the multistakeholder model, which has been a foundation for the Internet's success.

Multistakeholder governance processes reflect a long-standing approach to the Internet's operations and governance; indeed, they are at the heart of the Internet's global and operational growth. The underlying technical philosophy of the Internet rests on the notion of

¹⁰ S.Con.Res.50 and H.Con.Res.127

stakeholders working together within an inclusive framework that is flexible enough to meet evolving individual requirements, while also creating a system that meets the needs of the whole. From the way the technical community has historically created standards to the way public policy issues are addressed, multistakeholder participation has always been key in allowing the healthy evolution of the Internet. The IANA transition process not only reaffirms, but further strengthens this model.

Over the past two years, the community has engaged in an incredibly broad, high profile test of the multistakeholder model. Through diverse and inclusive channels of participation, a wide range of stakeholders initiated a global dialogue that led to a tangible outcome: a transition proposal that meets the NTIA criteria. The culmination of this work represents a significant milestone for both the continued operation of the Internet and for the multistakeholder model of Internet governance.

The transition plan will ensure the IANA functions remain a point of diverse partnership and collaboration and will strengthen fundamental factors that led the Internet from university laboratories to the ubiquitous worldwide network that drives economic growth and innovation today.

The plan provides continuity for the processes and principles that have served as a foundation for the Internet's growth and development to date. The communities have worked hard to ensure that, after the transition takes place, the IANA functions will continue to operate in a predictable manner, consistent with the need to maintain the security, stability, resiliency and openness of the Internet. The Internet community is clearly committed and prepared to

carry out stewardship of the IANA functions in an open, inclusive, transparent and accountable manner.

Given the original intent to transition the IANA functions, the maturity of the multistakeholder process by which the transition plan was developed, and the strength of the plan itself, **now is the time** to complete the transition nearly 20 years after it was first envisioned.

Conclusion: In Support of the Transition Plan

In conclusion, Mr. Chairman and members of the Subcommittee, we believe that by adhering to the core Internet principles outlined by NTIA in its 2014 announcement, we will help the Internet continue to evolve. If the current IANA functions are looked upon as starting points, and not artificial limits to growth, we believe that 50 years from now, the Internet will only be more robust, more inclusive and more resilient.

Collaborative governance, cooperation, and collaboration between and among stakeholders is the only viable path forward for a sustainable, global, independent, open, and empowering Internet of the future. The IANA Stewardship Transition Plan is a testament to this approach.

The consensus the Internet community has reached on the proposal transmitted to the NTIA confirms the strength of the multistakeholder process in tackling issues important to the continued growth and evolution of the Internet. For us, this is “the Internet way”. It isn’t always

pretty and it can be very complex to navigate, but this process shows that the multistakeholder model *can* deliver concrete solutions to complex problems.

Yet there is still more and careful work to be done to turn the promise of the final proposal into reality. **The community now has a responsibility to ensure that the plan, if approved by the NTIA, is faithfully and carefully implemented in a timely way.**

Congress has played an important leadership role in ensuring a smooth transition. I urge the Subcommittee to remain diligent in its oversight as the process moves forward.

Again, I would like to congratulate the Internet community for reaching this critical milestone. The Internet Society remains fully engaged in seeing this most important transition to its finish, and welcomes further collaboration with the Subcommittee and its Members as this process continues. Thank you for considering my views.

Mr. WALDEN. Thank you, Ms. Wentworth. We appreciate your involvement and your testimony. We will go to Audrey Plonk, the Director, Global Security and Internet Governance Policy, for Intel Corporation. Ms. Plonk, we are glad to have you here this morning. Please go ahead.

STATEMENT OF AUDREY PLONK

Ms. PLONK. Chairman Walden, Ranking Member Eshoo, and members of the subcommittee, thank you for the opportunity to testify today. My name is Audrey Plonk. And I am Intel's director of Global Cybersecurity and Internet Governance Policy. And I am very pleased to address the committee on the important issue before you, the transition of the IANA to the multistakeholder community.

Intel fully supports Congress' commitment to multistakeholder Internet governance. Part of that commitment is to respect and abide by the work of the multistakeholder communities in developing the IANA transition proposal. Intel believes that the proposal meets the requirements articulated by NTIA in 2014.

First, I would like to provide some background on my experience at Intel and our commitment to an open, global, interoperable, trustworthy, and stable Internet. As the director of Global Cybersecurity and Internet Governance Policy, I lead a global team of policy experts focused on Internet policy issues, like governance, privacy, and security. As the world leader in computing innovation, Intel sees technology as more than just a practical tool. We design and build the essential technologies foundational to the world's interconnected computing devices. Connectivity to a global, open, interoperable, trustworthy, and stable Internet is critical to realizing the promises of a new, and even better, connected computing era. And successful multistakeholder governance is critical to provide the stability that the market needs to continue investing in the Internet and American technology innovation.

I testified before this committee last spring on stakeholder perspectives on the IANA transition. In my testimony, I described how Intel's business plan assumes that the Internet will continue to grow at rates similar to that experienced in the last 15 years. This growth will make it possible to accommodate the Internet of Things, wearable computing, natural language recognition, nanotechnology, quantum computing, and virtual reality. Intel's views on the transition are simple, we support it, and we believe it meets the conditions outlined by NTIA in 2014, for a few reasons that I want to highlight.

One, the proposal has broad community support as evidenced by approval of the multistakeholder community last week in Marrakesh. Two, the proposal supports and enhances multistakeholder model, governance models in several important ways. It removes a single Government from any disproportionate role in oversight. It creates mechanisms to prevent capture by any single group of stakeholders. It creates additional mechanisms for the community to engage in Internet governance.

Two, the proposal meets the expectations of the constituents of the IANA services, as evidenced by the relationship documents drafted by the three IANA communities, and ICANN through their

establishment of oversight mechanisms to ensure performance levels of the IANA registries.

Three, the proposal maintains security, stability, and resilience of the Internet's Domain Name System in numerous ways. Technically, it changes little. It will be business as usual. It provides for a sole designator model that was chosen precisely to support stability of the organization, while also empowering the community. It establishes the post-transition IANA to maintain the registry of domain names, ICANN contract with this PTI to maintain the numbers and protocols registries as well. Importantly, the PTI has been structured so it can be separated from ICANN.

Numerous committees will be established to monitor performance of the IANA during implementation and throughout the transition. And, finally, a parallel testing process for the root zone is scheduled to begin in April. This testing process will ensure stability through the changes to the root zone administration process.

Number five, the proposal maintains the openness of the Internet, keeping the fundamentals of open standards, open communications, and multistakeholder governance. And six, the replacement of NTIA is not another governmental entity. Intel has been deeply engaged in the process. And we will continue to engage throughout the implementation of this plan and as the transition is completed.

Throughout the transition process, there has been little disagreement about what kind of Internet we want in the future. The challenge has really been to translate the principles upon which we all agree, global, open, interoperable, stable, and trustworthy, into an actionable plan that meets the constituent multistakeholder community's needs.

We look forward to NTIA's and Congress' review of this plan. And we are eager to implement it and complete the transition. Thank you.

[The prepared statement of Ms. Plonk follows:]



WRITTEN STATEMENT FOR THE RECORD OF
AUDREY PLONK
DIRECTOR, GLOBAL CYBERSECURITY AND INTERNET
GOVERNANCE POLICY
INTEL CORPORATION
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
ON "PRIVATIZING THE INTERNET ASSIGNED NUMBERS
AUTHORITY"

March 17, 2016

SUMMARY OF MAIN POINTS

- Last week, the Board of Directors the Internet Corporation for Assigned Names and Numbers (ICANN), approved the multistakeholder community's proposal for transitioning oversight of the Internet's addressing system from the US government to the Internet multistakeholder community.
- The proposal was delivered to NTIA; it comprises two related plans:
 - The first plan specifies how the three communities of the Internet Assigned Numbers Authority (IANA) will interoperate with ICANN.
 - The second plan includes an extensive set of reforms to ICANN's governance structure to enhance the organization's accountability to the Internet multistakeholder community.
- Intel has been deeply engaged in the development of the overall transition plan and, in our view, it meets the criteria outlined by NTIA in 2014.
- The plan translates principles upon which everyone agrees – a global, open, interoperable, stable and trustworthy Internet - into an actionable transition plan that meets the communities' needs. We look forward to the NTIA's and Congress' review of the proposal and we are eager to begin implementation to complete the transition.

WRITTEN TESTIMONY

Good morning Chairman Walden, Ranking Member Pallone and members of the Committee. Thank you for the opportunity to testify today. My name is Audrey Plonk. I am Intel's Director of Global Cybersecurity and Internet Governance Policy, and I am pleased to address the Committee on the important issue before you: the transition of the Internet Assigned Numbers Authority (IANA) contract from the U.S. government to the global multistakeholder community. Intel fully supports Congress's commitment to multistakeholder Internet governance. Part of that commitment has been to respect and abide by the work of the three constituent multistakeholder communities in developing the IANA transition proposal. It is Intel's belief that the proposal meets the requirements articulated by the NTIA in 2014.

Background

First, I would like to provide some background on my experience and Intel's commitment to a global, open, interoperable, trustworthy and stable Internet. As the Director of Global Cybersecurity and Internet Governance policy, I lead a global team of policy experts focused on Internet policy issues like governance, cybersecurity, and privacy. Our work is integrated with business units across Intel that create many forms of technology: (PCs, laptops,

tablets, phones, servers, network equipment, Internet of things sensors, software, to name just a few examples).

Prior to joining Intel in 2008, I led the Organisation for Economic Co-operation and Development's (OECD) security policy work on critical information infrastructure protection and malware. Before that, I worked with the U.S. Department of Homeland Security's National Cyber Security Division on international security policy issues.

Personal computing has entered a new era. Instead of relying on a single device, we are surrounded by many devices at home and at work—laptops, a family computer, smartphones, tablets, TVs—they all help us stay connected and be more productive.

As a world leader in computing innovation, Intel sees technology as more than just a practical tool. We design and build the essential technologies foundational to the world's interconnected computing devices. Connectivity to a global, open, interoperable, trustworthy and stable Internet is critical to realizing the promises of this new computing era. And a successful multistakeholder Internet governance system – including the effective and timely transition of the IANA functions contract to the Internet multistakeholder community and restructuring the Root Zone Management contract - is critical to

provide the stability the market needs to continue investing in the Internet and the American technology sector.

Current Status of the IANA Transition

Last week, the Board of Directors of ICANN approved the multistakeholder community's proposal for transitioning oversight of the Internet's addressing system from the US government to the Internet multistakeholder community. The Board sent the proposal to NTIA for their review, analysis and approval. These actions followed approvals from five of ICANN's six chartering organizations, and no objection from the sixth - the Government Advisory Committee, or GAC. The bottoms-up process used to create the proposals is itself testimony to the success of the multi-stakeholder model. As Assistant Secretary Strickling has pointed out, "Stakeholders spent more than 26,000 working hours on the proposal, exchanged more than 33,000 messages on mailing lists, and held more than 600 meetings and calls." I want to congratulate the community for their tireless effort in developing this proposal. |

The proposal comprises of two related plans. The first plan describes how the three constituent communities of the Internet Assigned Numbers Authority (IANA) – Names, Numbers and Protocols – will interoperate with ICANN. The second plan includes an extensive set of reforms to ICANN's governance structure to enhance the organization's accountability to the

Internet multistakeholder community. Intel has been deeply engaged in the development of the overall transition plan and, in our view, it meets the criteria outlined by NTIA in their announcement in 2014.

Intel's views on the transition

I testified before this committee last summer on "Stakeholder Perspectives on the IANA Transition". In my testimony, I described how Intel's business plan assumes that the Internet will continue to grow at rates similar to those experienced the over past fifteen years. This growth will make it possible to accommodate the Internet of Things, wearable computing, natural-language recognition, nanotechnology, quantum computing, and virtual reality.

Intel's views on the transition are simple – we support it and we believe it meets the conditions outlined by NTIA in 2014 for the following reasons:

1. The proposal has broad community support as evidenced by the approval of multistakeholder community.
2. The proposal supports and enhances the multistakeholder model in several important ways:
 - a. It removes a single government from any disproportionate role in oversight.
 - b. It creates mechanisms to prevent capture by any single group of stakeholders.

- c. It creates additional mechanisms for the community to engage in Internet governance.
- 3. The proposal meets the expectations of the constituents of the IANA services as evidenced by the relationship documents between the three IANA communities and ICANN and through their establishment of oversight mechanisms to ensure performance levels.
- 4. The proposal maintains security, stability, and resilience of the Internet's Domain Name System in numerous ways:
 - a. First, very little, is changing from a technical perspective – it will be business as usual.
 - b. The legal structure of “sole designator” was chosen precisely to support stability of the organization while also empowering the community.
 - c. A separate organization known as the Post Transition IANA (PTI) is being established to maintain the Names registry but will also be contracted by ICANN to maintain Numbers and Protocols. The PTI can be separated from ICANN.
 - d. Numerous committees will be established to monitor performance of the IANA during implementation and after the transition is complete.

- e. A parallel testing process for the root zone is scheduled to begin in April. This testing process will ensure stability through the changes to the root zone administration process.
- 5. It maintains the openness of the Internet, keeping the fundamentals of open standards, open communications, and multistakeholder governance.
- 6. The replacement for NTIA is not another governmental entity.

We have been deeply engaged in the process and will continue to engage throughout the implementation phase until the transition is complete.

Elements of the transition

There are three components of the transition that must be completed together for a successful transition to occur: restructuring of the IANA contracts; implementation of accountability measures for ICANN; and a new contract for management of the Internet's root zone.

The IANA Contract

Following ICANN's 54th meeting in Dublin last year, the IANA Stewardship Coordination Group (ICG) submitted their proposal for transition of the IANA contract from an agreement between NTIA and ICANN to a set of agreements between ICANN and its the three IANA constituent communities – Names, Numbers and Protocols. Through the multistakeholder governance process,

each of those three communities developed a transition plan and relationship documents (e.g., service level agreements (SLAs) or memorandums of understanding (MOUs)) that will govern the functioning of their IANA registries once executed. In each case, ICANN will remain the IANA Functions Operator (IFO) for the registry.

Names

The Names community will form a new, separate legal entity, Post-Transition IANA (PTI), as an affiliate that will be a “wholly owned subsidiary” of ICANN and will become the IANA Functions Operator for names, under contract with ICANN; create a Customer Standing Committee (CSC) responsible for monitoring the operator's performance according to the contractual requirements and service level expectations; and establish a multistakeholder IANA Function Review process (IFR) to conduct reviews of the performance of the naming functions.

Numbers

The numbers community will: continue to contract with ICANN as the IANA Functions Operator for number resources; execute a contractual Service Level Agreement (SLA) between the Regional Internet Registries (RIRs) and the IANA Numbering Services Operator; and establish a Review Committee (RC) comprising community representatives from

each region to advise the RIRs on the IANA Functions Operator's performance and adherence to specified service levels.

Protocols

The Protocols community will continue to rely on the system of agreements, policies, and oversight mechanisms created by the Internet Engineering Task Force (IETF), ICANN, and the Internet Architecture Board (IAB) for the provision of the protocols parameters-related IANA functions.

The execution of these agreements cannot be completed until the proposed transition has been reviewed by NTIA and Congress and final approval from the US government has been received.

ICANN Accountability

The main objectives of the ICANN Accountability proposal are to provide safeguards to maintain the security, stability, and resiliency of the Internet's Domain Name System (DNS), and to develop a corporate governance structure that would vest power in the global multi-stakeholder community (hereinafter referred to as "the Community") to replace the stewardship of the NTIA. The proposal does this several ways:

First, the Community will be granted a suite of powers including:

1. the ability to reject budgets and changes to ICANN's standard bylaws;

2. the ability to initiate a binding Independent Review Process; and,
3. the ability to remove individual board directors or the entire board.

In order for the Community to enforce these rights, a legal entity will be created and given the role of "sole designator" that will have statutory rights under California law to appoint and remove board members. The sole designator will be made up of the individual ICANN communities that choose to participate as "Decisional Participants". The proposal anticipates five Decisional Participants; all of ICANN's Supporting Organizations (GNSO, CCNSO, ASO) and the ALAC and GAC (with an important caveat called the "carve out," which I'll discuss later). The Security and Stability Advisory Council and the Root Server System Advisory Committee (RSSAC) decided not to participate as "decisional participants".

Secondly, there will be improvements to ICANN's Independent Review Process, to broaden its scope, improve consistency of outcomes, and ensure that ICANN's board acts within its scope, and acts consistently with its bylaws and articles of incorporation.

Finally, ICANN's bylaws, in addition to being modified to enact the above changes, will be amended to incorporate the Affirmation of Commitments, and a revised Mission Statement that "clarifies but does not change ICANN's historic mission" and limit its scope.

The proposal creates a set of check and balances on the Board and Community to ensure that ICANN cannot be subject to capture of any single or group of constituents. As mentioned above, all the SOs and ACs can participate in ICANN as they historically have, however the new corporate structure also allows them to be Decisional Participants in the sole designator and exercise new powers over the Board. It is important to highlight the role of the GAC in this new structure. In order maintain the multi-stakeholder model, the GAC, as an important stakeholder, needed to be able to participate in ICANN, however it was also requirement of the NTIA (and desire of many other participants like ourselves) that Governments not disproportionately increase their influence over ICANN. As a result, the discussions concerning the role of the GAC were difficult. Some participants strongly opposed letting the GAC participate in a decisional role at all, while some members of the GAC strongly opposed any constraints whatsoever on the GAC's ability to take part in ICANN deliberations. We believe the results of the discussions, in the final proposal, represent a carefully crafted outcome that, while not giving everyone exactly what they want, addresses that main concerns of all parties. There are three main elements:

1. For the Board to give full consideration to GAC advice, that advice must have been arrived at in the GAC with full consensus - no objection.
2. The Board must have a 60% majority, to reject consensus GAC advice.

3. In any Community proceeding against the Board that involves GAC advice, the GAC is recused from participating as a Decisional Partner.

We believe this package strikes the right balance of including governments in a true multi-stakeholder community, while not giving them increased influence over ICANNs decisions.

The Root Zone

The Internet's Root Zone is the top of the DNS hierarchy. Currently the management of the Internet's root includes three entities: the Root Zone Administrator (RZA) – currently the NTIA and the Root Zone Maintainer (RZM) – currently Verisign and ICANN. The transition plan eliminates the role of the RZA. The current plan is for ICANN and Verisign to establish a direct contractual relationship, disintermediating NTIA, as the current RZA, from the process. The transition plan requires a public review period in advance of execution of a new RZM contract.

Implementation and timeframe

The current IANA contract between ICANN and NTIA expires September 30th. While last week's milestones are significant, we are not finished yet. The NTIA must review the proposal to ensure it meets their criteria. New agreements between ICANN and the communities must be executed and a new contract for the management of the Internet's Root Zone must be developed, vetted by the community, and executed. The Cross-Community Working Group

responsible for developing the accountability measures must immediately begin drafting changes to ICANN's bylaws so that the measures can be implemented. And, Congress must be given an opportunity to review the proposal. These timelines are complex and overlapping.

- March 11 – June 11: NTIA assesses transition plan
- April 15: Draft revisions to ICANN bylaws released
- April 15 – May 15: Public Comment on ICANN bylaw revisions
- Mid – April: Root Zone testing begins
- April – May: Public review period on the RZM Contract*
- May 31: ICANN Board approves draft bylaw revisions
- June 15: NTIA submits plan to Congress for review
- June 16: Congressional review begins
- August – September: New agreements are executed
 - Relationship agreements for the IANA including establishment of the PTI
 - New RZM Contract
- October 1: Transition complete

It is unquestionable that this timeline is tight. But this is a remarkable community of people. I am confident that the community behind the incredible

* Exact timing TBC

work to-date will succeed in completing the transition and moving us fully into 21st century Internet governance.

Conclusion

Throughout the transition process there has been little disagreement about what kind of Internet we want in the future. The challenge has been the translation of those principles – which describe a global, open, interoperable, stable and trustworthy Internet – into an actionable transition plan that meets the constituent multistakeholder communities' needs. Fortunately, we have succeeded in developing the plan. Now we must implement it fully to complete the transition.

Mr. WALDEN. Thank you very much for your work and your comments. We go to Mr. Matthew Shears, representative and Director, Global Internet Policy and Human Rights Project. Mr. Shears, thank you for being here this morning. I look forward to your comments.

STATEMENT OF MATTHEW SHEARS

Mr. SHEARS. Thank you, Chairman Walden, Ranking Member Eshoo, members of the subcommittee. It is a pleasure to be here.

My name is Matthew Shears. I am the director of CDT's Global Internet Policy and Human Rights Project. CDT has been fully and deeply involved in the work of the IANA function transition. We have participated in the CWG stewardship working group and also in the CCWG accountability working group. We have also had the pleasure of submitting comment and testimony to this subcommittee last year. And we very much appreciate the opportunity to be here again.

Last Thursday in Marrakesh, the Internet community forwarded to NTIA the IANA transition plan. This was a significant achievement. It did so following the global Internet community's approval of a set of recommendations designed to ensure the enhanced accountability of ICANN post transition. This package, the IANA transition and the recommendations for enhancing ICANN's accountability, is quite simply a remarkable achievement for the multistakeholder community.

Of course, the work on IANA's stewardship and ICANN accountability was anything but simple. Replacing the oversight role of NTIA and changing the governance structure of an organization as unique as ICANN has been complex and, at times, I must admit, quite daunting. Yet, the multistakeholder community has risen to the challenge. That means all parts to that community, businesses, governments, the technical communities, civil society, academia, and individual users have risen to this challenge.

So has the global multistakeholder community met NTIA's all important criteria? And now you will hear some things that have been said by other witnesses, so it is good to hear that we are echoing the same things on the panel. In many ways, the IANA transition plan has been a proving ground for multistakeholders approaches to Internet governance. Critics tend to dismiss such approaches as difficult, dominated by certain interests, unrepresentative of the larger community. Multistakeholder processes have been known to fail. But these two multistakeholder processes, the IANA transition proposal and developing recommendations to enhance ICANN's accountability, have delivered thoughtful and robust proposals.

Were there difficult moments? Yes, numerous. But participants remained committed to working through them. Were there times when the process seemed to bog down and the resolve seemed to waiver? Absolutely. But these were overcome. This 2-year process has delivered two proposals that are, I think it is fair to say, the most successful expression of multistakeholder approaches to Internet governance yet. As advocates for this approach to Internet policymaking, we need strong examples such as these to point to. The successful delivery of the IANA transition accountability rec-

ommendations should encourage stakeholders to pursue multi-stakeholder approaches to policymaking with renewed interest and commitment.

The two working groups involved have also demonstrated that open, transparent, and inclusive processes work. These characteristics are essential to ensuring that the openness of the Internet is maintained.

One significant challenge was how to empower the various parts of the community while maintaining the balance of power among them. To a large degree, the community succeeded. But, of course, not everyone was happy. Some governments wanted more say. Other parts of the community thought that governments could end up having too much power. Differences of opinion are inevitable in these kinds of processes. What was important is that the community has delivered a transition plan that does not replace the role of NTIA with a government-led or intergovernmental solution. In fact, it is far from it. The community has delivered a transition plan that empowers the whole of the multistakeholder community which has been the goal of the process from the very beginning. And last Thursday, no stakeholder and no parts of the community objected to delivering the IANA transition plan to NTIA. And that says a lot right there.

The guidance for the transition must not imperil the security, stability, and resilience of the Internet has also been foremost in the community's mind. The IANA plan emphasizes continuity of operations by having ICANN be the IANA functions operator post transition. At the same time, the plan provides mechanisms for the community and particularly the global customers and partners of the IANA functions to ensure that ICANN meets agreed performance targets. Were ICANN to fail though to meet those targets, then the ultimate sanction available to the community will be to change the IANA functions operator. In other words, to seek an alternative to ICANN to undertake essential DNS-related administrative tasks.

This same commitment to the security, stability, and resiliency of the Internet guided the ICANN accountability work. The new limited powers provided to the community ensure that the community remains firmly in control when it comes to ICANN's governance. From rejecting strategic plans and budgets to, in the worst case scenario, of board overreach, removing and replacing the entire ICANN board. These accountability powers are an effective way of ensuring that the stability and continuity of the Internet remain front and center in the ICANN post transition.

There is still much work to be done. Close attention will have to be paid by the community to drafting the bylaws. Implementation of the post-transition IANA will need to be carefully monitored and implementation of the enhancements to the independent review process, among others. And there will be additional accountability-related work that will continue beyond the transition in areas such as human rights, community accountability, and ICANN transparency.

CDT believes that NTIA's criteria have been met and that the community's work on the IANA stewardship and ICANN accountability paves the way for the multistakeholder community to take

on the mantle of stewardship that the United States Government currently assumes.

We would like to thank the subcommittee for this opportunity to discuss the IANA transition, the central role that multistakeholder approaches have played in the process so far, and the importance of the transition to broader global Internet governance. Thank you.

[The prepared statement of Mr. Shears follows:]



Testimony by Matthew Shears, Director of Global Internet Policy and Human Rights, Center for Democracy & Technology, before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Communications & Technology on "Privatizing the Internet Assigned Numbers Authority"

March 17, 2016

Chairman, Ranking Member, Members of the Subcommittee, thank you for the opportunity to testify today.

CDT has been deeply involved in the Internet Assigned Numbers Authority transition since the announcement by the National Telecommunications and Information Administration two years ago. CDT has actively participated in the working groups on IANA Stewardship and ICANN Accountability and had the pleasure of speaking to this subcommittee at its hearing last May on "Stakeholder Perspectives on the IANA Transition". CDT has also been fully engaged in a range of international Internet governance discussions and processes including the World Summit on the Information Society review that culminated at the UN General Assembly this past December.

Last Thursday in Marrakech the Internet community forwarded the IANA transition plan to the NTIA. It did so following the global Internet community's approval of a set of recommendations designed to ensure the enhanced accountability of ICANN post-transition. This package, the IANA transition plan and the recommendations for enhancing ICANN's accountability post transition, is, quite simply, a remarkable achievement by the multistakeholder community.

Of course the work on IANA stewardship and ICANN accountability was anything but simple. Replacing the oversight role of the NTIA is not a simple matter, nor is changing the governance structure of any organization, let alone one as unique as ICANN. Yet the global multistakeholder community – comprising businesses, governments, the technical community, civil society, academia, and individual users – rose to the challenge. Together, the IANA transition plan and the accountability enhancements allow for the United States

government to entrust the global multistakeholder community with the IANA functions and the stewardship of the Domain Name System.

So, how did we - the global multistakeholder community - do? How does the IANA transition plan meet the NTIA's important criteria:

- Support and enhance the multistakeholder model (including not accepting a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution)
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

In many ways the IANA transition plan has been a proving ground for the multistakeholder approaches to Internet governance. Critics tend to dismiss multistakeholder approaches as difficult, dominated by certain interests, unreflective of the broader global Internet community, and often usurped by particular parts of the community that may wield greater clout than others. Multistakeholder processes have been known to fail. But these two multistakeholder processes – developing the IANA transition proposal and developing recommendations to enhance IANN's accountability – have delivered thoughtful and robust proposals.

Were there difficult moments during these processes? Yes, numerous, but participants remained committed to working through them. Were there times when the process seemed to bog down, when resolve seemed to waver? Yes, but these were overcome. When the community came together last week in Marrakech to endorse the ICANN accountability recommendations - thereby enabling the overall IANA transition plan to be delivered to NTIA - there was a very real sense of achievement. There was also a tangible sense of pride that an incredibly diverse community from across the globe came together to facilitate the transition of the US government's stewardship role in the Domain Name System.

This two-year process has delivered two proposals that are – I think it is fair to say – the most successful expression of multistakeholder approaches to Internet governance yet. The community has proven that it can work together to address highly complex challenges. As advocates for this approach to Internet policy making, we need strong examples such as these to point to. The successful delivery of the IANA and accountability proposals should encourage stakeholders both in the Internet space and elsewhere to pursue multistakeholder approaches to policy-making with renewed interest and commitment. The two Working Groups involved have also demonstrated that open, transparent, and inclusive processes work; these characteristics are essential to ensuring that the openness of the Internet is maintained.

One of the biggest challenges in enhancing ICANN's accountability was finding ways to empower the ICANN community – its Supporting Organizations and Advisory Committees – through increased oversight of ICANN processes and governance. Doing so turned out to be, in many ways, more complicated than developing the IANA transition proposal. One of the central considerations was how to empower the various parts of the community while maintaining the balance of power among them. To a large degree, the community succeeded, but of course not everyone was happy. Some governments wanted more of a say. Other parts of the community thought that governments could end up having too much power. These differences of opinion are inevitable in such processes. What is important is that the community has delivered a transition plan that does not replace the role of the NTIA with a government-led or intergovernmental solution. Far from it: the community has delivered a transition plan that empowers the whole multistakeholder community, which has been the goal of the process from the very beginning. And last Thursday, no stakeholder and no part of the community objected to the delivering the IANA transition plan to NTIA.

The guidance that the transition must not imperil the security, stability and resiliency of the Internet has been foremost in our minds. The IANA plan emphasizes continuity of operations by having ICANN continue to be the IANA functions operator post-transition. At the same time, the plan provides mechanisms for the community, and particularly the global customers and partners of the IANA functions, to ensure ICANN's actions as the IANA functions operator are carried out appropriately and meet agreed performance targets. Were ICANN to fail to meet these targets, then the ultimate sanction available to the community would be to change the IANA functions operator – in other words, to seek an alternative to ICANN to undertake essential DNS-related administrative tasks.

This same commitment to the security, stability, and resiliency of the Internet guided the ICANN accountability work. The new, limited powers provided to the community are essentially powers that the community hopes to never have to exercise. They are powers that ensure that the community remains firmly in control when it comes to ICANN's governance. From rejecting strategic plans and budgets to, in the worst case of board-overreach, removing and replacing the entire ICANN Board, these accountability powers are an effective way of ensuring that the security, stability, and resiliency of the Internet remain front and centre at ICANN post-transition.

There is, however, much work still to be done. Close attention will have to be paid by the community to the drafting of bylaws, implementation of the mechanisms and processes for the post-transition IANA, and implementation of the enhancements to the Independent Review Process, among others. And, additional accountability-related work will continue beyond the transition in areas such as human rights, community accountability and ICANN transparency, among others.

So at the end of the day what does this mean? For CDT it means NTIA's criteria have been met. It means that the IANA stewardship and ICANN accountability Working Groups have paved the way for the multistakeholder community to take on the mantle of stewardship that United States Government currently assumes. Delivering the IANA transition plan to NTIA is an important step in this process and the community can rightfully celebrate that

achievement. CDT will continue to be fully involved and we would like to thank the subcommittee for the opportunity to discuss the IANA transition, the central role that multistakeholder approaches have played in the process so far and the importance of the transition to broader global Internet governance.

Mr. WALDEN. Thank you for your testimony once again before our subcommittee.

We will now go to the Honorable David A. Gross, former U.S. Coordinator for International Communications and Information Policy, and partner, Wiley Rein.

Mr. Gross, Ambassador, good to have you back. Thank you.

STATEMENT OF DAVID A. GROSS

Mr. GROSS. Thank you very much, Mr. Chairman, ranking member, members of the subcommittee. My name is David Gross. And I have the honor of appearing before you today on behalf of the Internet Governance Coalition. I respectfully ask that my written statement be included in the record.

Mr. WALDEN. Without objection.

Mr. GROSS. As you are well aware, 2 years ago, on behalf of the American people, NTIA announced its willingness to transition its traditionally based role regarding IANA functions and ICANN to the broader Internet community if certain strict conditions were met. My fellow panelists, with their deep expertise, have been discussing many of those technical aspects of the NTIA requirements and how they relate to the Marrakesh agreements.

I would like to focus on the requirement that is of paramount importance. And that is the role of NTIA and the U.S. Government not be replaced now or in the future by a government, group of governments, or an intergovernmental entity. This issue is particularly close to my heart, as I had the great honor of leading the U.S. Government's efforts for about 8 years when virtually every other country in the world questioned the legitimacy of the U.S. Government's role regarding ICANN and sought to replace the role of our Government with the United Nations, the ITU, or some other governmental entity.

Because of the hard work of many people, including the passage of unanimous resolutions by this House, we were able to defeat the efforts of those other governments. Without doubt, that was the correct decision for both the United States and for the world. Because of the additional hard work of many people, including tough negotiations during the past few months, the proposal that has been sent by the Internet community to NTIA for review, does what we, for many administrations, have sought to accomplish, to ensure that no other government or intergovernmental entity can replace the U.S. Government. This is a significant accomplishment.

In my opinion, the role of governments regarding ICANN post transition will be even less than it is today. For example, formal GAC advice will require unanimity, so any country, including the United States, can keep the ICANN board from having to even formally consider governmental advice. Similarly, the scope of ICANN's jurisdiction will be formally limited to its original purposes, so that there is no reasonable way for governments or others to expand ICANN's activities beyond its technical remit. And because of the carve-out, the GAC cannot even be involved in the formal consideration of review of its advice.

But let me be very clear: The remarkable success of this initiative does not mean that we can all rest assured that governments will not try to exercise control over important aspects of the Inter-

net. As an initial matter, we all need to focus closely on the actual implementation of the Marrakesh agreements to ensure they are done correctly and completely.

But just as importantly, I believe that, assuming these changes are made and ICANN no longer is viewed by governments as a place for them to try to exert control over Internet governance matters, those governments seeking such control will move from trying to use ICANN and its processes to look to other organizations and forums instead.

The role of governments in Internet governance is not going away. I hope that the Internet community and this Congress will remain vigilant to ensure wherever those issues are raised, we are ready to act strongly and effectively to ensure that the Internet remains a global mechanism for people to work, to play, to learn, to innovate, to express themselves freely, and to make the world a better place for everyone regardless of where they live. Thank you.

[The prepared statement of Mr. Gross follows:]

TESTIMONY OF AMB. DAVID A. GROSS
BEFORE THE U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
MARCH 17, 2016
SUMMARY

The Internet Governance Coalition is pleased to testify on the important developments in the process to transition key Internet domain name functions to the global multistakeholder community, commenced by NTIA just over two years ago. Last week, the ICANN Board voted to approve a plan for transitioning control of the IANA functions to the multistakeholder community. This step, together with approval of the associated, new accountability processes, is an important milestone for the multistakeholder model of Internet governance and for the Internet as a whole. Approval by the ICANN Board is the result of two years of hard work by many people and organizations, demonstrating that even complex and difficult Internet-related issues can be resolved successfully through a multistakeholder process.

Our review of the proposals approved by the ICANN Board is rooted in the principles laid out by NTIA at the commencement of this process. Recognizing that the U.S. government must still make its careful assessment of the proposals, our independent conclusion is that the proposals approved by the ICANN Board meet the conditions set forth by NTIA, and that these proposals will be instrumental to ensuring the ongoing stability and reliability of the Internet as it continues to help the world's people economically, socially and culturally. The Internet Governance Coalition believes that the proposals approved by the ICANN Board in Marrakesh will be good for America, good for American business, good for the Internet, and good for the world. Looking ahead, it will be important for all stakeholders to stay engaged, both in the near term, as the finalization of revisions to ICANN's bylaws and other important implementation activities continue, and thereafter.

**TESTIMONY OF AMB. DAVID A. GROSS
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Chairman, Ranking Member, Members of the Subcommittee, good morning and thank you for the opportunity to testify before you today.

My name is David A. Gross. Formerly, I had the great honor of serving in the Department of State as the United States Coordinator for International Communications and Information Policy from 2001 to 2009. During this time, I led the United States delegations to the preparatory meetings and I was the co-head of the United States delegations to both actual phases of the United Nations' World Summit on the Information Society (WSIS) in Geneva (2003) and Tunis (2005), which, among other things, focused on the role of governments regarding Internet governance and resulted in the creation of the Internet Governance Forum (IGF). Today I am appearing on behalf of the Internet Governance Coalition, an industry-led coalition with broad representation from the communications, Internet, and related industries, including AT&T, Inc., Cisco Systems, Inc., Comcast NBCUniversal, Facebook, GoDaddy, Google Inc., Juniper Networks Inc., Microsoft Corporation, Telefónica, S.A., The Walt Disney Company, Time Warner Cable Inc., Twenty-First Century Fox Inc., and Verizon Communications Inc.

I am pleased to appear again before this Subcommittee to testify on the important developments in the process to transition key Internet domain name functions to the global multistakeholder community, commenced by the National Telecommunications and Information Administration (NTIA) just over two years ago. NTIA's decision to initiate a process leading to the possible transition of the IANA functions contract to a multistakeholder entity is a critical step toward making the economic and societal benefits of the Internet available for everyone.

Last week, the ICANN Board voted to approve a robust plan for transitioning control of the IANA functions from the United States government to the multistakeholder community. This step, together with approval of the associated, new accountability processes, is an important milestone for the multistakeholder model of Internet governance and for the Internet as a whole. This is an important and significant event. Approval by the ICANN Board is the result of two years of hard work by many people and organizations, demonstrating that even complex and difficult Internet-related issues can be resolved successfully through a multistakeholder process.

The importance of the Internet economically to U.S. and global businesses, as well as socially and culturally to all the people of the world, cannot be overstated. It is essential that we preserve the stability and reliability of the Internet, both in terms of technical decision making and policy making. Changes in the processes of Internet governance—which have helped shape the historic growth of the Internet economy, and the immense benefits that it has brought—are of great interest and concern to the Internet Governance Coalition. That is why, although the Coalition itself has not been directly involved in the process of developing the stewardship transition and accountability proposals, some Coalition member companies have taken an active role and the Coalition has monitored the processes and has been diligent in its review of the outcomes.

The Coalition believes that a thriving Internet depends on a governance structure that is open, transparent, and representative of all stakeholders. The current multistakeholder model for Internet governance has facilitated the historic Internet-driven economic, social, and political development of the past two decades. The decentralized structure of the Internet has enabled individuals to access information and services, to connect and to communicate, and to share ideas and knowledge globally. By offering new possibilities for entrepreneurial creativity, the

Internet has become a powerful engine for unparalleled technological innovation, economic growth and the preservation and promotion of cultural diversity.

United States government oversight of the IANA functions has long been an issue of concern to the global community. By allowing for the careful transition of the IANA to a bottom-up multistakeholder entity, the United States is simultaneously addressing these concerns and affirming its commitment to the multistakeholder model. After the transition, it is expected that the United States will continue to participate actively in the Government Advisory Committee, one of the important stakeholder constituencies in the multistakeholder model. By ensuring that the principles NTIA identified for the transition are met—which are critical conditions for this process to work successfully—the United States will also succeed in creating an environment to maintain the freedom, openness, security, and stability of the Internet we have all enjoyed since its inception. Of course, robust accountability and transparency mechanisms are necessary to ensure future stability in the absence of NTIA’s current role, and these additional mechanisms, contained in the new accountability proposal approved by the ICANN Board, must be in place prior to or simultaneous with the transition.

Specifically, the Coalition has supported NTIA’s commitment that the transitional proposal must:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

These principles, together with NTIA's critically important, explicit commitment not to accept any proposal that could replace its role with a government-led or an inter-governmental organization, are consistent with the Coalition's own policy principles, which have been the basis of its prior testimony before this Subcommittee and its advocacy before the United Nations, the International Telecommunication Union, and elsewhere. In these various fora, the Internet Governance Coalition has stressed that we all—governments, the private sector, civil society and others—must join together to ensure a safe, secure, open, interoperable, and global Internet as the underlying foundation for sustainable economic and social development. This means promoting policies that stimulate continued investment in, deployment of, and access to Internet networks and the industries and services that create demand for those networks. It also means continuing to support capacity building and assistance on implementation of network security best practices.

Policies must support opening and maintaining international markets allowing the seamless flow of legal digital services, applications, products and information. Any actions taken should foster innovation and investment across Internet networks, services, and other sectors of the Internet ecosystem, including ensuring both the enhancement of human rights and the protection of intellectual property. These goals are best advanced through strengthened rule of law, which governments can advance greatly by establishing even-handedness and predictability in decision-making.

Finally, the Internet Governance Coalition believes in increased and appropriate transparency and openness in intergovernmental organizations and multistakeholder mechanisms, to ensure that all stakeholders can participate meaningfully in key Internet policy

discussions. The quality of Internet governance decisions increases when diverse stakeholders choose to actively and consistently participate.

Our review of the proposals approved by the ICANN Board in Marrakesh is rooted in the principles laid out by NTIA at the commencement of this process. Recognizing, of course, that the U.S. government must still make its careful assessment of the proposals, our independent conclusion is that the proposals approved by the ICANN Board meet the conditions set forth by NTIA, and that these proposals will be instrumental to ensuring the ongoing stability and reliability of the Internet as it continues to help the world's people economically, socially and culturally.

We are comfortable, especially, because we see no increased probability of the IANA functions being controlled or coopted by foreign governments or intergovernmental organizations in the proposals. Indeed, while the U.S. government review of the transition proposal may justifiably take time, the new accountability mechanisms should be put into place promptly regardless of the timing of the overall transition. The multistakeholder discourse that took place regarding the accountability processes was important, regardless of the final timing or result of the stewardship transition.

Ultimately, the Internet Governance Coalition believes that the proposals approved by the ICANN Board in Marrakesh will be good for America, good for American business, good for the Internet, and good for the world. Looking ahead, it will be important for all stakeholders to stay engaged, especially in the near term as the finalization of revisions to ICANN's bylaws continues. This process should not and does not conclude with the approval and implementation of the present stewardship transition plan and accountability mechanisms. Continuing improvements to these processes can be made, including with respect to increasing transparency

into ICANN's functions and interactions. Ongoing engagement by U.S. businesses and the U.S. government with ICANN, especially as it matures into "adulthood," is essential and evidences the significant value of the Internet and seamless flow of information to the United States and the global economy.

I would like to thank the Committee for allowing me, on behalf of the Internet Governance Coalition, to present our views on these matters of great importance for preserving the fundamental principles that have governed the Internet, and have greatly benefited not only America, but also the world.

Mr. WALDEN. Thank you, Ambassador. Once again, thanks to all the witnesses.

I would like to ask unanimous consent to submit the following documents for the record: A statement from the Heritage Foundation outlining remaining concerns, the IANA transition; a statement from the Internet Infrastructure Coalition supporting the transition of the IANA functions to the global multistakeholder community; and a paper from the International Center for Law and Economics on assuring accountable Internet governance. Without objection, those will be entered into the record.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. One of the questions I know that Heritage has asked is they don't think there is enough time here. And so to the panel: The transition proposal is currently being reviewed by NTIA, but much work remains for a transition to actually occur. Do you all think it is realistic that all the work is accomplished before the existing contract expires at the end of September, why or why not? And do you believe an extension of the contract is necessary?

And if you can be fairly brief on that because I have got a couple other questions I would like to get to if time permits. Mr. DelBianco.

Mr. DELBIANCO. Thank you, Mr. Chairman. The answer is yes. We can do it. We have finished the hard work of a report. It has been cleared by all of the multistakeholder members. We now have to match bylaws to that report. We have got high-paid lawyers both for ICANN and for the community. And they need to come together roughly a week from now with a draft that we can review. If that is done, the only other step is to implement the set-up of certain corporations that I think Alissa can talk about and creating panels. We can do that in time to get this transition completed.

Mr. WALDEN. All right. I don't know of too many low-paid attorneys. But, anyway, go ahead. Dr. Cooper.

Dr. COOPER. Yes, so I agree completely with what Mr. DelBianco said. We have sufficient time to complete this. The fundamentals are all there in the proposals. And all along this entire process, particularly from the ICG side, the group that I chair, we have driven people to meet tight deadlines. And in every instance, the community has done so. And so I expect that to happen in this case without any need for an extension.

Mr. WALDEN. Ms. Wentworth, do you agree with that?

Ms. WENTWORTH. Yes, we agree with that. We need to remain focused on the implementation but we think the community can do it.

Mr. WALDEN. All right. Ms. Plonk?

Ms. PLONK. I agree.

Mr. WALDEN. All right. Mr. Shears?

Mr. SHEARS. Yes.

Mr. WALDEN. And Ambassador Gross?

Mr. GROSS. I have every expectation that it should be done on time. We have testified before that it should happen no earlier than when it is ready to happen. But I have every expectation that it will be ready.

Mr. WALDEN. You think we will get there? Then the contract does not need to be extended beyond September. OK.

Mr. DelBianco, I will go to you. And if you want to follow up on that, you can.

Mr. DELBIANCO. Just, Mr. Chairman, a very tiny amount. I believe that Secretary Strickling has said on many occasions that come middle of August, if it is not implemented and the bylaws aren't adopted, that NTIA would extend the contract. We do have a safety valve if things are not in place.

Mr. WALDEN. Perfect. So back to you, Mr. DelBianco, at the April 2014 hearing we had, we liked the idea of the stress test. We have talked about that this morning. How does the community's proposal address the stress test where a majority of governments try to steer ICANN policies? How is that going to work?

Mr. DELBIANCO. Thank you, Mr. Chairman. That was the infamous stress test 18. And governments were very upset at the solution the community came up with. We suggested that for GAC, the Government Advisory Committee, to enjoy its privileged advice to the board, that they would need to adopt their advice through broad support in the absence of a single formal objection. And this would mean that only advice that carries that special deference would have to be approved by all governments.

The second thing we did was suggest that they had to attach rationale to their advice. And ICANN's board, should it choose to reject that advice, would only have to enter into a conversation of trying to find a mutually acceptable solution, but they wouldn't have to actually reach one.

Finally, if the board itself lacked I guess the backbone to stand up to GAC advice, the community reserves the ability to challenge the board's acceptance through an independent review that could block and undo bad advice that came from governments.

Mr. WALDEN. All right. Ambassador Gross, if I could ask you a question. There was much debate in the lead up to ICANN 55 about the so-called GAC carve-out. My understanding is that this means that when the GAC forces consideration via the ICANN board, of an issue through consensus advice the board, that it not be permitted to act as a participant in the community powers related to that advice. Is that correct?

Mr. GROSS. That is accurate. And that is consistent with what Steve discussed as well. And I think that is an important consideration going forward.

Mr. WALDEN. And so back to you, Mr. DelBianco, that means that either the GAC can exercise the privileged position it has always had at its disposal when the governments of the world are in agreement or it can be one of the votes in the empowered community but not both, correct?

Mr. DELBIANCO. That is correct, Mr. Chairman.

Mr. WALDEN. All right. So in practice this means that the governments or the world are prevented from having two bites at the apple. All right. Perfect.

I know we have got other members that have questions. So I will yield back and recognize the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman. Kudos to each one of you. I think today's testimony is not only so well thought out, but I am very optimistic after listening to you. I mean, there is a common

theme that runs through the testimony that each one of you gave. And so thank you very much.

My first question, based on listening very carefully to what you testified to, how airtight is our case? You know, there is an awful lot of talk today about backdoors in the intelligence community and the whole debate on encryption and all of that. But given the work that has been done, you have all expressed enormous confidence based on, again, the work that has been done.

And I just want to make this observation too, I think what was embedded in your testimony is like holding a mirror up to our country because what we are all working toward, what you are working toward, have worked so hard to do, is to make sure that, that the Internet is a reflection of democracy in its full bloom. That is really what this is.

So, number one, how airtight do you think our case is? Do you think that we are close to imperviousness? And if that can't be achieved, then what is it that we need to be on the look out for? Whomever would like to start.

Dr. COOPER. I can start—

Ms. ESHOO. I wasn't going to ask this question. But after listening to you, I am departing from what I was going to ask.

Dr. COOPER. To me, the best way to understand how airtight the case is is to look at the strength of the consensus and who was involved in this process. I think everyone in this room can appreciate how difficult it is to come to true consensus among parties with very diverse interests. And in the case of this proposal, it is not just a domestic issue, it is a global issue. So you have people from all different sectors, all different countries around the world.

Ms. ESHOO. Well, the United States played a key role in the Paris summit conference. And if just one country had objected, the whole thing would have collapsed. So consensus, you are right, is essential.

Dr. COOPER. Yes. But that is really the best demonstration of how good the proposal is is that you have people who truly come from very different walks of life, different places, different industries who have all gotten behind this and said we have looked at the details of this and we think it is the right path forward. And that also reflects an intense amount of scrutiny that the proposal has already enjoyed, multiple, multiple public comment periods, tens of thousands of email exchanges on mailing lists. There has been so much review of the—

Ms. ESHOO. In terms of the consensus, though, and the work that has been done and the, I described it as imperviousness, but where are the vulnerabilities? Do you see vulnerabilities? Or do you think we are rock solid and it is not, no one is going to be able to break the, you know, go down a path that is unwanted and disrespected? I guess I am being kind, in my description.

Mr. SHEARS. I think it is a very interesting question. I think for those of us who have been involved in this process over the past 2 years and in both working groups, what we have to be now is extremely vigilant so that we don't have those types of occurrences happen. And between now and over the next couple of months in terms of the bylaws and the implementation, that is the time when

we need to be as a community still fully engaged. There is no stepping back from this right now.

Ms. ESHOO. I just want to raise something that—I understand why there was language placed in the fiscal year 2016 Omnibus, it was a rider that you are all familiar with that stated that no funds could be used to relinquish NTIA's responsibilities, et cetera, et cetera. Those are all tools that the Congress uses for very specific reasons. And they are what they are. And they are warning shots. And it is important to have, you know, send a message across the bow. But if that were to continue, given where we are now, another rider, what does that do? What message does that send to all of this consensus that you have spoken to?

Ms. PLONK. It is a very good question. I think it sends a very negative message to the markets, to the international community, and I don't just mean governments, but I mean the business community, that we weren't serious about carrying forward our commitment to turn this over to the multistakeholder community. I think that is bad for investment. It is bad for business.

It will incentivize other trade barriers that we see in the tech sector being raised in many countries. It will provide a rationale. And so we would be very concerned about the impacts of that rider continuing forward.

Ms. ESHOO. Most helpful. Most helpful.

Thank you to all of you. And bravo for the work that you have done. This has not been easy. It has been a tough slog. And we are just about there. And I think it has been worth the effort.

But we wouldn't be where we are right now were it not for all of you and others that have made this journey with us. So I thank you. I really respect your work. I thank you again. I yield back.

Mr. LATTA [presiding]. Thank you very much. The gentlelady's time has expired. And the Chair recognizes himself for 5 minutes.

Mr. DelBianco, if I can ask you the first question. Can you explain the position of the Governmental Advisory Committee as a decisional participant in the empowered community? The GAC stated it would participate as a decisional participant but under conditions to be determined internally. The purpose of the empowered community seems to be to increase accountability and transparency. But the GAC statement seems to be unclear. Does this undermine the work of the working group?

Mr. DELBIANCO. Thank you, Mr. Chairman.

The answer is no. ICANN, when it was established, delineated in its bylaws seven advisory committees and stakeholder organizations that composed and represented global Internet stakeholders. Governments or the Government Advisory Committee, known as the GAC, is one of those seven. The community proposal invites all seven to participate as multi equal stakeholders in this empowered community which only fires up when we need to consider a change to a fundamental bylaw or when there is a petition to object to an override, something that the board has done, or even to spill the board of directors. And it is only in those situations where that community has to come together. And each of the advisory committees, through its own methods, will make its decision whether to proceed to spill the board, for instance, or to oppose it. We require support. And it takes more than one of them to object to that.

So that is what is meant by the word I guess decisional and that we are recognizing that stakeholders around the world actually do include governments. They represent people in the public policy that they are chartered with managing. So it would not have been even tenable to say to the governments of the world you don't count as a stakeholder in the multistakeholder environment. Imagine what that would do to the problems we have at the United Nations and the ITU today with an ICANN that is largely led by the private sector.

Mr. LATTA. Thank you.

Dr. COOPER, you described in your testimony that proposals, a recommendation to form post transition IANA PTI to operate the IANA naming functions. Can you explain how this new entity will help achieve accountability? And what will happen with the naming functions if the contract with the PTI is terminated through the IANA function review?

Dr. COOPER. Sure. Thank you for the question. So the proposal recommends the creation, as you say, of an entity called the post-transition IANA which would be an affiliate of ICANN. In the for-profit world, an affiliate is more often known as a subsidiary. But this is a not-for-profit. And the purpose of the post-transition IANA is really to create a legal separation between the entity that is performing the IANA functions, not just the naming functions, but also the ones related to numbers and protocol parameters, to create a legal separation between the not-for-profit corporation ICANN and the affiliate performing these functions. What this allows is that in the case of the names community, which is grounded within ICANN, if it comes to pass that the community is so dissatisfied with the performance of the IANA functions, they would be able to separate from the PTI, essentially take their business elsewhere. And this is actually a feature of all three components of the proposal.

Each of the three communities, numbers, names, and protocol parameters, has established an ability to create an agreement with the IANA functions operator. And if performance becomes so degraded that they are unsatisfied, they can take their business elsewhere. It is just like a customer service provider relationship. And so this creates a significant amount of accountability because if the PTI wants to retain the ability to continue performing the IANA functions, they need to meet the performance requirements that the communities have established for them. And in each case, the communities either already have or in the process of establishing service-level agreements with ICANN and the PTI to establish what performance they expect from IANA.

So that is how it enhances accountability by allowing, the communities to decide whether the performance of IANA is sufficient.

Mr. LATTA. Thank you. And in the interest of time, I am going to also yield back the balance of my time, so we can get, hopefully, all the members' questions in.

The next questions will be from the gentleman from Illinois for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman. Dr. Cooper, where would they go? I mean, you are addressing a competitive, you

know, obviously, a chance to get another service rendered. But where would they go?

Dr. COOPER. A very good question. So actually the first thing to point out is that all of the communities in the course of this process have expressed their extreme satisfaction with the performance that ICANN has brought.

Mr. SHIMKUS. Right. And I got that.

Dr. COOPER. So the likelihood of this at present is hard to imagine. But I think if you look at what the functions are, they are essentially clerical functions. They are maintaining values in databases on Web sites. There is not a lot of rocket science going on here. And so it is conceivable that any kind of entity that knows how to maintain values on Web sites would be capable of performing these functions. But, as I said, the communities have expressed their satisfaction. And, thus, as far as I know, there is no plans in the works—

Mr. SHIMKUS. I was just interested in the weaving of the story there. And I was just, I didn't know if there was a competing alternative option immediately available. But you would say soon there could be, someone could step up and do that?

Dr. COOPER. Right. And it is literally a team of 13 people who—

Mr. SHIMKUS. I got it.

Dr. COOPER [continuing]. Perform secretarial functions. You could imagine other organizations would be able to carry out the task.

Mr. SHIMKUS. Thank you. We are in a much better place than we were, obviously, 2 years ago. We appreciate your help and support. And I think had it not been for the Senate not doing their job, which I feel they should, we would have a little more clarity and a little more strength. But we are where we are. And we appreciate the testimony.

But we have got to continue to do our oversight. And I think even without a law being passed, there will continue to be oversight by, obviously, us and other interested parties until the whole relinquishing of the authority occurs. So one concern still out there is the transparency of ICANN's interaction with government officials. You are already ready for this. So, Mr. DelBianco, do you want to address that?

Mr. DELBIANCO. Congressman Shimkus, you weren't here earlier when we not only thanked the committee for the DOTCOM Act, backing the community as you did, and telling ICANN they had to adopt our bylaws or the transition wouldn't happen, but at the Argentina ICANN meeting last summer, a standing ovation for the U.S. Congress for backing the—

Mr. SHIMKUS. My primary just ended. So I guess it is OK to say that. But it may not be helpful.

Mr. DELBIANCO. So you asked about transparency. I held up earlier the bumper sticker we are going to put on the back of the ICANN car, "How is my driving?" But, Congressman, that would only work if we can see what they are doing. In truth, ICANN's management from time to time gets adventurous, outside of the guardrails we put up for that car, such as setting up and planning for the NETmundial Conference, something that was done from the

inside, top down. And we didn't even know about it until months afterwards.

So what we need is transparency about ICANN's interactions with governments and intergovernmental agencies. And that is, in fact, locked into our proposal. That is one of the work stream 2, which is things that will occur after the transition, because we have the leverage to force them through if the board and management of ICANN didn't want to take on new transparency measures.

Mr. SHIMKUS. Yes. And I am glad you mentioned that. Because my follow-up was any other outstanding issues in work stream 2 that we know of?

Mr. DELBIANCO. Congressman, the other members of the panel would love to chime in on that. We have seven different streams in work stream 2. Transparency is one of them. We have one on human rights. We have a handful that deal with accountability of the actual stakeholder organizations to the people that we represent. So we have a lot of work to do. But we have scored, through your help, the leverage to hold ICANN's board and management to whatever improvements we come up with in work stream 2.

Mr. SHIMKUS. Great. Thank you. And I am just going to end for other colleagues who seek time.

But, Ambassador Gross, just to finish up, you are obviously on the panel here, you probably were, as many of us were, very skeptical. It sounds like you are not as skeptical and you think this all can happen as intended. But you probably agree that there still needs to be oversight and, you know, watching of the process. Would that be fair to say?

Mr. GROSS. That would be more than fair to say. In fact, I would go slightly further. That is, as I think everyone has testified today, implementation is key. We have the framework. There is still a lot of hard work to be done. But the other piece and I think the piece that has animated you, and others, here for many years, is to watch these issues as they go away from ICANN and they seek to find home on Internet governance by governments trying to be active in this area in other organizations. The threat is still there. The need for involvement and oversight will be as strong as ever.

Mr. SHIMKUS. And thank you all. Great work. And I appreciate us being involved together with this. I yield back.

Mr. LATTA. Thank you very much. The gentleman yields back. And the Chair now recognizes for 5 minutes the gentleman from Kentucky.

Mr. GUTHRIE. Thank you very much. Thank you all for being here. We appreciate it. I am going to try to go quick too because of time.

But, Ambassador Gross, it was addressed at the last hearing with NTIA and ICANN the importance of the U.S. keeping dot-mil and dot-gov for our Government's exclusive, perpetual, and no-cost use. How can we ensure that happens within the timeline of the transition?

Mr. GROSS. I think others will be able to address that issue as well. But I think basically the key here is the Government will continue to be involved, that those issues will remain there. And I think there is no doubt but we will be able to keep those issues.

Mr. GUTHRIE. And if you can elaborate on a more general timeline for the transition. And as you do that, if anybody else wants to add on to my question about dot-mil, dot-gov, I would appreciate that.

Mr. GROSS. Sure. I will work backwards. The expectation, as we have all testified today, is that by September 30, which is the expiration of the current contract, that all the work should be done.

There are a number of things that have to happen in between. Not only does this Congress have an opportunity to review what is going on and decide in its wisdom whether to act or not, we will have—and, of course, nothing happens until NTIA makes its independent determination about whether or not its criteria has been met. That process is now ongoing. And, importantly, as many people have indicated, there are a number of very important and complicated implementation pieces, including bylaw changes and drafting and the like, that need to be done before anything goes forward.

Mr. GUTHRIE. All right. Anybody want to talk on the dot-mil, dot-gov?

Mr. DELBIANCO. Thank you, Congressman. I think that is an ideal question to put to NTIA's administrator when, undoubtedly, this committee will be meeting with NTIA at the conclusion of their report sometime in early June. And they are doing interagency reviews.

So you can bet that GSA and DOD and different agencies of the Government will want to secure a permanent lock on dot-mil and dot-gov. And that would be a great time to understand whether those documents have been produced to the satisfaction of the interagency review.

Mr. GUTHRIE. All right. Thank you for that. And I have one more question.

Ms. Plonk, you discussed in your testimony the root zone manager contract. When will this be developed? And what is the timeframe for implementation of testing in a new contract?

Ms. PLONK. Thank you for the question. My understanding is that, as I said, there will be a parallel testing process that will begin in April. The ICG report requires a public review time for the contract when it is drafted. So sometime between April and June, there will be a 30-day public review. And then once the transition is approved and finalized and Congress has had their 30 legislative days, all the various contracts, including the root zone management contract, will be signed. That is my understanding.

Mr. GUTHRIE. Thank you very much. And, Dr. Cooper, do you have any comments on the, anything you would like to add I guess?

Dr. COOPER. Yes. One additional detail is that the ICG proposal does require some form of written agreement between the root zone maintainer and the IANA functions operator. And it is my understanding that that agreement is in development and will be made public on very short order. So all the ducks are in a row as far as completing the necessary written agreement.

Mr. GUTHRIE. Thanks to you both. And thanks to you all. This is informative. I appreciate it. I yield back.

Mr. LATTA. Thank you. The gentleman yields back. And the Chair now recognizes the gentleman from Ohio for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Dr. Cooper, I have heard from folks in the accounting industry that they have had difficulty registering domain names for the worldwide CPA community. And we have heard a lot about the need for accountability and transparency throughout the development of the CCWG accountability proposal.

Can you describe the process of developing the plans for the operational communities? Were stress tests used to ensure the criteria of NTIA were met?

Dr. COOPER. Thank you for the question. And I am happy to describe the processes in the communities. I will say that, just to remember, there is two components of this proposal. I can speak to the operational plan. And others may want to chime in on the accountability plan.

But as far as the operational plan goes, there are three communities of interest, for names, for numbers, and for protocol parameters. And each community was tasked with a request for proposals that came from the ICG. And we essentially requested not only a description, a thorough description, of what the existing oversight arrangements are for that community's IANA functions, but also what they plan to make them be after the transition and why that community felt that the plan that they proposed would meet the NTIA criteria, provide a workable solution going forward for the IANA functions.

So each of those communities developed its own essentially working group or task force to develop that plan. In each community, they had wide review of open participation from anyone who wanted to participate. And through that process, they honed their plan, sent them to the ICG. We did a review that included looking at whether the proposals individually created sufficient accountability mechanisms for IANA, met NTIA's criteria. And then we looked at them together and said do these actually work together as a functional whole?

So having received proposals from disparate interests, we wanted to make sure that together they would be cohesive, we had some back and forth with the communities to clarify certain things about the proposals, and to ensure that they actually would form a cohesive whole.

In the end, we issued the entire proposal for public comment. And on the basis of those hundreds of comments received, had some further interaction with the communities, further refinements to the proposal, and eventually issued it as a complete plan.

The one other thing I would just note in terms of difficulty with registering domain names, and without knowing the context, it is hard to speak to it, but it is critical to understand what is actually at issue here and what is not. The IANA functions deal strictly with the top level of the Internet infrastructure. So on the domain name side, that means names like dot-com and dot-gov and dot-U.S. It does not deal with any procedure for registering domain names at any lower level, like energycommerce.gov for example. And so that is an important distinction to keep in mind, that the IANA functions are very limited in terms of what they provide to the Internet and the community. They are very important. But

they are very limited. And other issues related to other functions are——

Mr. JOHNSON. All right.

Well, you know, I know that the appeals process is part of that overall attempt to improve transparency. How will this be addressed in the proposal specifically with regard to the appeals process?

Mr. DELBIANCO. Thank you, Congressman. Stress tests 29 and 30 actually looked at the question you raised about, say, accountants, right? Because .accountant was a very popular new top level domain that was bid by several companies. And if the .accountant company had made commitments about only allowing licensed accountants to get domain names and CPAs, then the question was could ICANN hold them to that commitment? That was what these stress tests looked at.

The team came up with a recommendation, and it says, quote, "ICANN shall have the ability to negotiate, enter into, and enforce agreements, including public interest commitments, with contract parties in service of its mission." So the point there is that we looked at those stress tests and determined ICANN could enforce those contracts to ensure that it could protect public interests with respect to domains that signed up for certain criteria for people to register a second level domain.

Mr. JOHNSON. OK. Ambassador Gross, do you believe that the proposed accountability changes are sufficient? How can we be sure that these measures will be enough to guarantee accountability in the years to come? And what are the most important elements of any truly accountable transition?

Mr. GROSS. Thank you very much. I do believe that if fully implemented that the proposals that have been set forth will ensure that accountability going forward. I think that one of the key pieces of this is that the mission of ICANN has now been clarified to be quite technical in nature. And therefore, the opportunity for much of the mischief that we have all been collectively concerned about, that is the issue of going off and doing things beyond its formal remit, and being encouraged to do so by governments and by others, will be less.

And thanks to the efforts of those who worked so hard on the accountability piece, that the enforceability of ensuring that ICANN does its technical job and no more should be assured.

Mr. JOHNSON. OK. All right. Mr. Chairman, I yield back.

Mr. WALDEN [presiding]. Thank you. And now we will go to Ms. DeGette for questions.

Ms. DEGETTE. Thank you, Mr. Chairman. I really just have one question. First of all, thanks for everybody's hard work.

The final proposal provides for direct enforcement of the Internet community's ability to remove an individual director or the entire ICANN board through the courts. Can somebody talk about how that is going to work and how that would play out if the proposal was adopted?

Don't all volunteer at once.

Mr. DELBIANCO. Be happy to, Congresswoman.

Ms. DEGETTE. Thanks.

Mr. DELBIANCO. This was a very powerful discussion on the CCWG—

Ms. DEGETTE. I imagine.

Mr. DELBIANCO. Because it ended up being our ultimate nuclear option power, that if the board is continuing to ignore the community's will, the community's interpretation of its mission, then it might leave us with no recourse other than to remove one or all of the directors.

This is not uncommon in corporations and trade associations, and yet ICANN had no such mechanism. So the empowered community that I described earlier would mount a petition to remove one or all directors. Then it would go into a consultation process so that the board understood why we were so upset with them. So there is an opportunity at several increments on this decision model to potentially remedy the problem. That if we could not come to terms on it, if we had four groups, four of the advisory committees and stakeholder organizations in favor of spilling the board, they are considered to be gone.

California law allows a designator, which is the structure we are using, to have statutory power to remove the board. And I believe we will also require pre-letters filed by each board of directors member such that if this power is exercised in accordance with the bylaw, their resignation becomes immediate. This is to save us the trouble of having to go to court to exercise the power that the California law gives us.

Ms. DEGETTE. And was there pretty much consensus around this after the debate and discussion?

Mr. DELBIANCO. It was the consensus that was earned by persistence of the community. You can bet that the board of directors and their lawyers were none too happy with this, and wanted to impose conditions, preordained reasons that you could take the directors down. But the community insisted that we might just have a difference of opinion on what ICANN's mission is interpreted to be. We didn't need to have preordained conditions to take the board down. So we were able to prevail, but there was resistance.

Ms. DEGETTE. Thank you. Thank you very much, Mr. Chairman. I yield back.

Mr. WALDEN. I thank the gentlelady for her questions.

And to our panelists, thank you for the great work you have done to get us to this point. I feel like it has been a really solid partnership to make sure that the Internet governance, that we get that right, because it matters for the whole world, not just the United States. But it certainly matters to us.

And so with that, I want to thank you all for participating. Members of our subcommittee who may have had other commitments today in other hearings may have some questions. So we hope we can submit those to you for the record and that you can get back to us, as you always have, in a timely manner.

And with that, I thank you again for your testimony, and our subcommittee stands adjourned.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



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Statement for the Record

Privatizing the Internet Assigned Number Authority

**Statement for the Record for the
Subcommittee on Communications and Technology**

**Energy and Commerce Committee
United States House of Representatives**

March 17, 2016

Brett D. Schaefer and Paul Rosenzweig

The Heritage Foundation

Our names are Brett D. Schaefer and Paul Rosenzweig. We are, respectively, the Jay Kingham Fellow in International Regulatory Affairs and a Visiting Fellow at The Heritage Foundation. The views we express in this statement for the record are our own and should not be construed as representing any official position of The Heritage Foundation.

A critical change in Internet governance is imminent. It has been two years since the U.S. National Telecommunications and Information Administration (NTIA), an arm of the Commerce Department, announced that it intended to end its current contract with the Internet Corporation for Assigned Names and Numbers (ICANN) and “transition key Internet domain name functions to the global multi-stakeholder community.”¹ The U.S. government is now on the verge of giving up its historical role in overseeing changes to the Domain Name System (DNS)—the policy apparatus and technological method that assigns names and numbers on the Internet. It is the system that ensures that “Heritage.org” refers to The Heritage Foundation and not some hypothetical ancestry and heritage group. If things proceed as proposed, the DNS system will be run independently under ICANN with oversight performed by a new international multi-stakeholder entity. As the Administration and Congress consider the transition, projected to be completed before the end of the fiscal year, they should proceed with great caution.

In its 2014 announcement, before the transition could occur, NTIA required ICANN to develop a formal proposal that would assure the U.S. that the termination of its historical contractual relationship would not threaten the security and openness of the Internet, undermine the bottom-up multi-stakeholder process, or replace the current role of the NTIA with a government-led or intergovernmental organization solution. That proposal has now been drafted and approved by the relevant groups in ICANN (known as supporting organizations and advisory committees or SO/ACs) and the ICANN board.² There are a number of positive aspects to the proposal that, if implemented as outlined, would create mechanisms for the ICANN community to hold the board and staff accountable and reverse imprudent decisions. To the extent it does so, the proposal is to be welcomed as a step in the right direction.

Important details, however, remain to be resolved in the implementation stage. Although the proposal outlines greatly improved accountability measures, it is important that these mechanisms be implemented in a robust, easily useable manner in order to help protect the newly reconfigured ICANN from capture by those seeking to advance a narrow business or political agenda and allow the community to block policies that could threaten the stability, security, or openness of the Internet. Another concern is that the proposal, while not replacing the NTIA with a governmental or intergovernmental solution, would greatly enhance the power of governments within ICANN relative to the status quo.

Fundamentally, however, the uncertainties of how this new ICANN structure would operate should lead the U.S. to retain some oversight until there is confidence that it will work smoothly as envisioned. To that end, we recommend a “soft extension” of the existing contractual relationship—one that allows ICANN two years to demonstrate that the new procedures it is

¹News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” National Telecommunications and Information Administration, March 14, 2014, <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> (accessed March 15, 2016).

²ICANN, “Plan to Transition Stewardship of Key Internet Functions Sent to the U.S. Government,” March 10, 2016, <https://www.icann.org/news/announcement-2016-03-10-en> (accessed March 15, 2016).

putting in place actually work to hold the corporation accountable. The transition to a multi-stakeholder, global system is too important to get wrong and too important to rush.

A Long, Difficult Process

In March 2014, the NTIA announced that it intended “to transition key Internet domain name functions to the global multistakeholder community” and asked ICANN to convene a group of global stakeholders to develop a proposal on a new process to replace the NTIA’s “procedural role of administering changes to the authoritative root zone file—the database containing the lists of names and addresses of all top-level domains.”³ In that announcement, however, NTIA stated:

NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives (S.Con.Res.50 and H.Con.Res.127), which affirmed the United States support for the multistakeholder model of Internet governance, NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.⁴

After NTIA made its announcement, ICANN quickly convened the IANA Stewardship Transition Coordination Group (ICG), comprised of three sub-groups on Domain Names: the Cross Community Working Group on Stewardship (CWG-Stewardship), Numbering Resources (CRISP Team), and Protocol Parameters (IANAPLAN Working Group).⁵ This effort focused on the technical questions raised by the transition and how the gaps in process resulting from the withdrawal of the NTIA would be filled. The narrow focus of this effort, combined with the earlier start, led to the ICG being largely complete by January 2015.

To their credit, however, many in the ICANN community made clear that they would not be satisfied with a narrow technical proposal that would only address the gaps arising from the end of the U.S. contractual relationship with ICANN. They insisted that long-standing concerns

³News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions.”

⁴News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions.”

⁵A descriptive chronology and the ICG proposal are available at: IANA Stewardship Transition Coordination Group (ICG), “Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community,” March 2016, <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> (accessed March 15, 2016).

about insufficient transparency and accountability within ICANN and its decision-making process needed to be addressed before the transition occurred.

An initial attempt by the ICANN board to lead this process raised strong objections from the ICANN community which was concerned that the board would not develop or support robust accountability measures that would allow the community to block objectionable board decisions or recall the board. An unprecedented unanimous statement from all the stakeholder groups and constituencies that make up ICANN's Generic Names Supporting Organization (gNSO)⁶ rebuked the board for trying to control this process and called for "creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed upon compact with the community."⁷

After several months of negotiation, the Board and the community agreed to establish the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) which held its first meeting in December 2014. Over the past 14 months, the 28 members and 203 participants of the CCWG-Accountability—including the authors of this paper—dedicated enormous effort to developing a robust accountability proposal. As of March 2016, the group had held 209 meetings and calls consuming 404 total hours and had exchanged 12,430 e-mails on the proposal.⁸

The final draft of their proposal was approved by the chartering organizations and the ICANN board at a meeting in early March and the board has now transmitted both the ICG and the CCWG-Accountability proposals to the NTIA. The NTIA, in turn, has announced that it will review the combined proposal to determine if it meets the criteria set forth and consult with Congress as the transition moves forward.⁹

Board Interference and Procedural Irregularities. A number of challenges arose in this process beyond the normal differences of opinion and approach inherent in negotiating an important document between groups with different equities. High among these challenges was the tendency of the ICANN board to act as a participant in the process rather than as a recipient of the proposal as devised by the multi-stakeholder community. When queried, ICANN Chief Executive Officer Fadi Chehade assured Congress that the board would allow the multi-stakeholder community to independently develop the accountability plan and would transfer it

⁶The gNSO is one of three "supporting organizations" in ICANN. It is by far the largest and provides ICANN with policy advice relating to generic names—most domain names on the Internet in the .org, .edu, .com, and other top-level domains (TLDs), including all of the relatively new gTLDs, like .biz and .net. The country code name supporting organization (ccNSO) provides advice relating to country code domains (for example, the .uk that signifies the United Kingdom). The address supporting organization (ASO) provides advice regarding IP addresses—the unique number given to every computer connected to the Internet.

⁷Brett Schaefer and Paul Rosenzweig, "Fireworks Erupt at ICANN's London Meeting," Daily Signal, June 29, 2014, <http://dailysignal.com/2014/06/29/fireworks-erupt-icanns-london-meeting/> (accessed March 15, 2016).

⁸ICANN, "IANA Stewardship Transition and Enhancing ICANN Accountability Engagement and Participation Statistics," March 2014 through March 2016, <https://www.icann.org/resources/pages/iana-accountability-participation-statistics-2015-11-04-en> (accessed March 15, 2016).

⁹Assistant Secretary for Communications and Information and NTIA Administrator Lawrence E. Strickling, "Reviewing the IANA Transition Proposal," National Telecommunications and Information Administration, March 11, 2016, <https://www.ntia.doc.gov/blog/2016/reviewing-iana-transition-proposal> (accessed March 15, 2016).

forward to the NTIA even if it contained provisions that the board opposed.¹⁰ Yet, the board did not adhere to this promise and, instead, intervened to shape the proposal in fundamental ways and to block provisions that it opposed.

Most notable was the board's opposition to the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1) because it recommended making ICANN into a member-based nonprofit corporation with the SO/ACs jointly comprising a single member called the "Sole Member Model."¹¹ Under California law, which is the relevant law because ICANN is incorporated in California, this model would have given the community significant authority over the Board in much the same way that shareholders have control over for-profit corporations.

The board objected to membership for several reasons that the board thought could be potentially destabilizing, but prominent among them was the board's concern that the "Sole Member Model" would bring with it statutory rights that could impact ICANN and its operations, without any fiduciary duty to ICANN.¹² In other words, the board objected to membership even though it was a standard California method of governance in nonprofit organizations because, in its view, the model gave the membership too much power over ICANN operations.

In the face of the board's opposition, the CCWG-Accountability backed down and did not insist that the board transfer the proposal to the NTIA as promised to Congress. Instead, the CCWG-Accountability dramatically altered the proposal, wasting weeks, perhaps months, of work. A new proposal titled "CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations" was submitted to public comment on November 30.¹³ This proposal abandoned the membership model and suggested a "Sole Designator Model" that would consolidate the SO/ACs as a group into a "designator" (later called the Empowered Community or EC). Under California law, a designator has far more limited powers than a member. To try and address these gaps, the proposal would grant specified powers to the EC through new or amended bylaws. However, this shift is notable because it weakened the legal standing and independence of the ICANN community as compared to a member organization. Specifically,

¹⁰ICANN CEO Fadi Chehade promised the Senate that "if the stakeholders present [ICANN] with [such] a proposal [we] will give it to NTIA, and we committed already that we will not change the proposal." Hearing, *Preserving the Multistakeholder Model of Internet Governance*, Committee on Commerce, Science and Transportation, U.S. Senate, February 25, 2015, <http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance> (accessed March 15, 2016).

¹¹ICANN, "Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)," Public Comment, August 3, 2015, <https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en> (accessed March 15, 2015).

¹²Quoted from ICANN Board, "Frequently Asked Questions Regarding Approach for Community Enforceability," September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html> (accessed March 15, 2016). For the entire comment see ICANN Board, "ICANN Board submission of supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal Public Comment forum," September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html> (accessed March 15, 2016).

¹³ICANN Public Comment, "CCWG-Accountability - Draft Proposal on Work Stream 1 Recommendations," November 30, 2015, <https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en> (accessed March 15, 2016).

many powers would be subject to change via bylaw amendment and would lack the guarantees of statute in California law, i.e., an authority external to ICANN.¹⁴

Other significant board interventions occurred during the process and even after the report was supposed to be final. As noted by ICANN's Intellectual Property Constituency (IPC) in its comment to the gNSO:

[A] last minute, Board-initiated change was made less than two weeks before the commencement of ICANN 55 and the deadline for CCWG Chartering Organization decisions whether to approve or reject the Final Proposal. The Board-initiated change did not involve a fringe issue; rather it went to the heart of the proposal, and in particular the balance of government interests and private sector interests.¹⁵

The Board's comment led to changes in the proposal even though that stage of the process had officially closed and only copyedits and corrections were being accepted. This procedural irregularity was not unique. Again as noted by the IPC:

While the effort of the CCWG has spanned 14 months, many of the details ultimately provided in the Proposal were not completely articulated until the Third Draft Proposal circulated in late Fall 2015.... Review of the final proposal between publication and the Marrakech meeting, as well as the earlier truncated comment period for the Third Draft Proposal, which fell during the Winter holidays, required herculean efforts to review, digest and (when called for) draft responsive comments. Given their importance, it is unfortunate that the proposed changes to ICANN governance and accountability mechanisms were fast tracked.¹⁶

Despite the fact that the NTIA and ICANN repeatedly assured Congress that it was more important to get this right than to get it done on time, these procedural compromises were deemed necessary because of a perceived need to meet political deadlines. The NTIA has the ability to extend the U.S. oversight role through September 2019, but there is a keen desire in ICANN, the NTIA, and among many in the community to get the transition done prior to the 2016 U.S. presidential election out of concern that a new Administration might not support the timeline. It is uncertain if the report contains unknown or unnoticed problems or oversights that could impair ICANN operations or governance, but if they do surface after the transition occurs this politically driven haste would be partially to blame for the failure to diligently vet this proposal.

¹⁴This is by no means the only such board intervention. In fact, the very start of this process began poorly with the ICANN Board authorizing the CEO to "explore ways to accelerate [an] end of U.S. stewardship" without consulting the ICANN community or making the decision public. For a detailed chronology, see Jordan Carter, "Chronology of Recent ICANN Accountability milestones," <https://internetnz.nz/sites/default/files/2015-10-09-ICANN-accty-chronology.pdf> (accessed March 15, 2016).

¹⁵GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," March 9, 2016, p. 5, <http://mm.icann.org/pipermail/accountability-cross-community/attachments/20160309/f1b5ee45/CCWG-Accountabilitytransmittalofresults-9March2016-0001.pdf> (accessed March 15, 2016).

¹⁶*Ibid.*, pp. 5–6.

Final Report: Good and Bad

The CCWG-Accountability proposal, titled the “Supplemental Final Proposal on Work Stream 1 Recommendations,” was finalized on February 23 and was supported by all seven SO/ACs¹⁷ and the ICANN Board at the ICANN 55 public meeting in Marrakech March 4–10. The document is incredibly detailed and totals 346 pages, including 15 annexes and another 11 appendices.¹⁸ The length of the report and the need to be familiar with ICANN’s structure and processes makes it very difficult to comprehend for those who have not been intimately involved in the CCWG-Accountability process.

This will prove to be a barrier to efforts in Congress to practice due diligence in their scrutiny of the report. In an attempt to assist congressional scrutiny, this paper will highlight significant positive and negative elements of the proposal.

Positive Elements. Overall, the proposal has a number of positive accountability measures and establishes necessary limits to ICANN’s area of responsibility.

- **Limiting ICANN’s mission.** One major concern is that ICANN will see its role as broader than the technical management of the DNS system and the Internet Assigned Number Authority (IANA) function, which has the responsibility for assigning names and numbers to websites. Without the backstop provided by the NTIA contract, some in the ICANN community were concerned that ICANN could fall victim to mission creep that could distract the organization from its primary purpose or drain resources through support of tangential activities. Under the CCWG-Accountability proposal, ICANN’s mission would be “limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.” The proposal also clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN.¹⁹ If this mission statement is both adopted and adhered to, that would go a long way to assuring that ICANN did not seek to become a “global guardian of the Internet” or take on responsibilities beyond its narrow remit.
- **Creating fundamental bylaws.** Certain bylaws, including those establishing new accountability mechanisms and clarifying the mission of ICANN, were deemed too important to be changed by board action alone. Under the proposal they will also require approval by the ICANN community as represented in the Empowered Community. This useful change prevents the Board from unilaterally acting on critical matters without broader support and entrenches limits on ICANN in the form of quasi-constitutional restrictions.

¹⁷In addition to the supporting organizations, ICANN also has four advisory committees, or ACs, that are intended to advise the ICANN community and the ICANN board on specific policy issues or to represent the views and opinions of parts of the ICANN community that are not integrated into the Supporting Organizations. The four ACs are: the At-Large Advisory Committee (ALAC); the Root Server System Advisory Committee (RSSAC); the Governmental Advisory Committee (GAC); and the Security and Stability Advisory Committee (SSAC).

¹⁸CCWG-Accountability, “Supplemental Final Proposal on Work Stream 1 Recommendations,” February 23, 2016, <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal> (accessed March 15, 2016).

¹⁹*Ibid.*, p. 26.

- **Establishing the Empowered Community.** The CCWG-Accountability proposal would establish a new unincorporated association within ICANN called the Empowered Community (EC) populated by five of ICANN's SO/ACs: the Address Supporting Organization (ASO); the At Large Advisory Committee (ALAC); the Country Code Names Supporting Organization (ccNSO); the Generic Names Supporting Organization (gNSO); and the Government Advisory Committee (GAC).²⁰ The EC would have the statutory power to appoint and remove ICANN board directors, either individually or as a group. In addition to the power to appoint and remove directors, new bylaws will be drafted or existing bylaws amended to also grant the EC the power to: (1) reject an operating plan, strategic plan, and budget proposed by the board; (2) approve changes to fundamental bylaws; (3) reject changes to standard bylaws; (4) initiate a binding Independent Review Process; and (5) reject board decisions related to reviews of the IANA functions, including triggering of any Post Transition IANA (PTI) separation. In addition, the bylaws are to be amended to grant the EC the right to inspect ICANN accounting books and records, the right to investigate ICANN via a third-party audit, and mandate board engagement and consultation with the EC before approving an annual or five-year strategic plan, an annual or five-year operating plan, the ICANN annual budget, the IANA functions budget, any bylaw changes, and any decisions regarding the PTI separation process. Taken together, these changes provide significant power to the EC to involve itself in ICANN decisions, scrutinize ICANN activities, block undesired actions, and hold the board to account.
- **Improving the Independent Review Process (IRP) and Request for Reconsideration (RFR) mechanisms.** The IRP is an independent external arbitration review mechanism to ensure that ICANN does not go beyond its limited scope and mission through its actions or decisions or violate its bylaws. Under the CCWG-Accountability proposal, the IRP process would be slightly broadened in scope, be made accessible to any materially affected person or party (including the EC) and less costly, and more systematic through the establishment of a standing panel of independent experts in ICANN-related fields. The RFR, which is means for any individual to appeal for a review of any ICANN action or inaction, would be improved by expanding the range of permissible requests, lengthening the time for filing a request, establishing firm deadlines for RFR procedures and responses, adding transparency requirements, narrowing the grounds for dismissal, and requiring the board to handle all requests directly.

These accountability changes are a significant improvement over the status quo and are unambiguously good outcomes. Happily, their implementation is not dependent on NTIA and/or congressional approval of the CCWG-Accountability proposal. When asked, the board confirmed at ICANN 55 in Marrakech that the accountability improvements in the proposal would be adopted and implemented regardless of the whether the transition proceeds or not.²¹

²⁰The other to advisory committees, the Security and Stability Advisory Committee (SSAC) and Root Server System Advisory Committee (RSSAC), informed the CCWG-Accountability at the ICANN Public Meeting in October 2015 (ICANN 54) that they did not want to participate as decisional participants in the Empowered Community. It is unclear under the current proposal whether this decision is permanent or can be reversed.

²¹A member of the Commercial Stakeholder Group asked the board to confirm, "Even in the event that there were some political problem with the transition, it is your intention that we will have implemented the bylaws changes. That the accountability reforms are done and that we will have implemented the other aspects and that political

Remaining Issues of Concern. While the CCWG-Accountability proposal has many good provisions, it is far from perfect. Among the concerns:

- **An undefined commitment to human rights.** The CCWG-Accountability proposal includes a recommendation to incorporate into the ICANN bylaws an undefined commitment to internationally recognized human rights. Implementation of this recommendation is deferred to the future under “Work Stream 2,” but the inclusion of this commitment into the bylaws and strong support in some parts of the ICANN community means that implementation is very likely to happen. “Internationally recognized human rights” is a very broad, imprecisely defined term and there is no clear delineation of where internationally recognized human rights start or end. Indeed, it is a fundamental tenet in the United Nations and among the majority of human rights advocates that human rights are all interrelated, interdependent, and indivisible. There are over three dozen rights recognized in the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The OHCHR identifies over 50 human rights issues.²² New rights—the so-called third-generation human rights like the right to development and the right to peace—are being promulgated and seriously considered even if they currently lack the acceptance of more established human rights.²³

Moreover, there are often differing understandings of these rights. For instance, under the U.S. constitution, freedom of speech is an extremely broad right, but in many other countries there are significant constraints on freedom of speech in the interests of preventing, for instance, hate speech. If ICANN adopts the more common and limited interpretation of free speech in its human rights commitment, it could create means for governments or businesses to use ICANN to moderate content.

In short, there is a legitimate concern that a broad commitment to “internationally recognized fundamental human rights” would, even if circumscribed by the caveat that the commitment be within the mission and scope of ICANN as is the case in the CCWG-Accountability proposal, be an invitation for various civil society groups, ICANN constituencies, and governments to petition the organization to commit to and involve itself in human rights

impediment to the transition will not prevent the implementation of those bylaws reforms.” Bruce Tonkin answered on behalf of the Board, “So the only caveat in that case,...is if the NTIA wished to continue its agreement, we would just need to make sure that any changes were not in conflict with that agreement, which really doesn’t involve much in the way of any of the accountability work that you’ve been involved in.” ICANN board member Cherine Chalaby added, “So I’d like to add to what Bruce is saying. Basically on the accountability reforms, I think the train has left the station and the reasons for that is the community has come to an agreement. I mean, if the community did not come to an agreement, it would be a different thing. So I think they are good accountability measures and we’re committed to go forward with it, even if there are political positions and such. So subject to some of the caveats that Bruce has done, we’re all in support of that.” Video and initial transcript available at ICANN Public Meetings, “Joint Meeting of the ICANN Board & the Commercial Stakeholders | Adobe Connect: Full [EN],” March 8, 2016, <https://meetings.icann.org/en/marrakech55/schedule/tue-board-csg/ac-board-csg-08mar16-en> (accessed March 15, 2016).

²²Office of the High Commissioner for Human Rights, “List of Human Rights Issues,” <http://www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx> (accessed March 15, 2016).

²³The first generation is civil and political rights like freedom of expression and the right to due process. The second generation is economic, social, and cultural rights like the right to education and the right to housing.

activities or actions not directly related to its mission or observe human rights in a manner that could be in tension with a truly free and open Internet.²⁴

- **Enhanced power for governments.** The CCWG-Accountability proposal would see governments significantly increase their power in ICANN versus the status quo. Currently, governments are represented in ICANN through the Government Advisory Committee (GAC), which is an advisory body unable to appoint board directors. The GAC has a power that other advisory bodies do not—an ability to convey advice to the board that the board must implement unless opposed by majority vote. But, even if GAC advice is rejected, the board is obligated to try and find a mutually acceptable solution with the GAC. This special advisory role has frustrated the community because it allows the GAC to intervene at late hours and upend community-led policy development processes.²⁵

Under the CCWG-Accountability proposal, the GAC would retain this special advisory power, but with slightly different details. The threshold for board rejection actually increases from 50 percent to 60 percent, but in return only GAC advice that is truly adopted by consensus (without any formal objection) can trigger the board's obligation to find a mutually acceptable solution.

In addition to retaining its privileged advisory power, the GAC also will now be a decisional participant in the EC with a direct say in the exercise of all of the community powers including board dismissal, bylaw changes, etc.²⁶ This is somewhat moderated by the “GAC carve-out,” which prohibits the GAC from being a decisional participant when the matter involves a board decision based on consensus GAC advice. This restriction is to prevent the GAC from getting two bites at the apple, i.e., being able to providing consensus advice to the board and using its new authority in the EC to impede efforts by the community to block implementation of that advice if the board approves it.

²⁴Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Human Rights Commitment in the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1), <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00037.html> (accessed March 15, 2016).

²⁵A good example of the pernicious potential that arises from GAC intervention is the controversy that continues to plague ICANN over the question of the delegation of the .africa domain name. Initially, the board accepted the GAC's advice to favor one applicant over another—a decision it adopted in apparent violation of its own internal procedures. The losing applicant, DotConnectAfrica, was compelled to seek redress through the Independent Review Process—an adjudication that led, in the end, to a declaration that the board had acted improperly. See *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers* (July 9, 2015), <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (accessed March 15, 2016). More recently, when the board sought to restart the .africa delegation (again awarding the domain to another applicant), DotConnectAfrica sought, and received, a temporary restraining order from a California court. See *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, No. CV 16-00862 (C.D. Calif., Mar. 2, 2016), <https://www.icann.org/en/system/files/files/litigation-dca-minute-order-plaintiff-ex-parte-application-04mar16-en.pdf> (accessed March 15, 2016). The case remains pending and a final adjudication on the merits has yet to be made, but it should trouble all observers that the Board's apparent deference to the GAC has embroiled ICANN in such a long-running and contentious piece of litigation.

²⁶Because the GAC often is unable to arrive at clear consensus positions, it is uncertain how often or under what circumstance or procedures the GAC will be able to agree to exercise this decisional authority.

Objectively, the CCWG-Accountability proposal would unquestionably grant the GAC powers that it did not previously have and increase government authority in ICANN versus the status quo. These changes were recommended even though some Members of Congress have explicitly opposed this outcome. Specifically, a 2014 letter from Senator John Thune (R-SD) and Senator Marco Rubio (R-FL) made clear that, from their perspective, government influence should not be expanded in the transition:

First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that “[r]eplacing NTIA’s role with another governmental organization would be disastrous and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN’s Board, limiting government participation to advisory roles, such as through the Government Advisory Committee (GAC), and amending ICANN’s bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. The IANA transition should not provide an opportunity for governments to increase their influence.”²⁷

A number of CCWG members and participants shared this concern about government increasing its power in ICANN post-transition as did some representatives from ICANN stakeholder and constituency groups.²⁸ Yet, this is precisely what would occur if the proposal is enacted as recommended.

- **An immature organization.** One of the hallmarks of an institution ready for additional responsibility is the facility with which it handles its existing obligations. Over the past year it has become somewhat concerning that ICANN is not apparently ready to deal with controversial matters. An instance of note was the decision to open up a new gTLD—the .sucks domain. For obvious reasons many intellectual property rights holders objected to the creation of the domain—nobody at The Heritage Foundation, for example, is overjoyed at the prospect of a “heritagefoundation.sucks” domain.²⁹

When, however, intellectual property rights holders complained to ICANN, rather than address the issue directly, ICANN ducked. It referred the question of whether .sucks was lawful to regulatory authorities in the United States (where ICANN is incorporated) and Canada (where the domain name owner of .sucks is incorporated) and asked them to adjudicate the matter. Both countries, quite reasonably, declined to offer their opinion on the

²⁷Senator John Thune and Senator Marco Rubio, letter to Dr. Stephen Crocker, Chairman ICANN Board of Directors, July 31, 2014, <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf> (accessed March 15, 2016).

²⁸See comments of individual Non-Commercial Stakeholders Group (NCSG) counselors and the Intellectual Property Constituency (IPC). GNSO, “Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal,” March 9, 2016, <http://mm.icann.org/pipermail/accountability-cross-community/2016-March/011694.html> (accessed March 15, 2016).

²⁹To be clear, though we are not overjoyed at the prospect, our support for the freedom of expression means that we, generically, do not oppose the creation of the domain. The discomfort we feel is the price of free speech.

matter.³⁰ It does not engender great confidence in ICANN that, at the same time it is seeking greater independence from governmental authorities, it turns to those same authorities for assistance in resolving controversial matters within its remit. As the transition moves forward, ICANN will need to develop the institutional maturity to deal with controversies of this sort independently.

- **Many details yet to be finalized.** The CCWG-Accountability proposal is, in essence, a very detailed blueprint, not a finished product. Some basic issues remain unclear. For instance, are the decisions of the Security and Stability Advisory Committee (SSAC) and the Root Server System Advisory Committee (RSSAC) to be non-decisional participants permanent or could they change their minds? Questions were also raised by several NCSG counselors on the gNSO Council who, in their support for the CCWG-Accountability proposal submitted statements on how they thought the text should be implemented.³¹ One particularly important problem that has yet to be resolved is precisely how the EC will operate—especially in the future when new SOs and ACs join (or drop out) of the community. There is a real prospect that the Empowered Community—which is at the core of fundamental accountability for ICANN—may be hamstrung by unanticipated unintended consequences of the current structural proposals. Rather than address this problem, however, in a politically motivated rush to judgment, the CCWG-Accountability and the board left the resolution of this difficult question ambiguous in the proposal, which if it is to be clarified will be done in the bylaws drafting or implementing language.³²

The actual bylaws and implementing rules and procedures to execute the proposal have yet to be completed. As noted by the IPC:

These recommendations [in the CCWG-Accountability proposal] will affect overarching ICANN governance concerns. However, it is not entirely clear how they will affect ICANN's day-to-day operations or whether unintended consequences may arise, particularly given the timeframes for review that were provided to the community.... As the revised bylaws themselves have yet to be produced, and the new paradigm for ICANN accountability remains practically

³⁰Chris Burt, "Canada Responds to ICANN on Controversial .SUCKS New gTLD," The Whir, June 17, 2015, <http://www.thewhir.com/web-hosting-news/canada-responds-to-icann-on-controversial-sucks-new-gtld> (accessed March 15, 2016).

³¹GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," March 9, 2016, pp. 8-10, <http://mm.icann.org/pipermail/accountability-cross-community/attachments/20160309/f1b5ce45/CCWG-Accountabilitytransmittalofresults-9March2016-0001.pdf> (accessed March 15, 2016).

³²For instance, a group of NCSG councilors on the gNSO Council felt the need to address this ambiguity in their acceptance of the CCWG-Accountability proposal, "The aforementioned NCSG representatives in the GNSO council support Recommendation 2 with the understanding that bylaws will reflect the CCWG's requirement that the exercise of community powers should not require unanimity of participating AC/SOs, and that no single AC/SO could block exercise of any power." GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," p. 9.

untested, the IPC is deeply concerned that the voices of the businesses and individuals who own intellectual property may be unfairly marginalized.³³

This concern involves questions that will apply across the ICANN community and they should share the IPC's concerns about implementation. There was and will be ample opportunity during this compressed implementation period for errors or deviation, deliberate or otherwise, from the intent of the CCWG-Accountability participants. Indeed, the ICANN lawyers will be side by side with the independent CCWG-Accountability lawyers drafting new bylaw text. Considering the sometimes opposing views between the board and the CCWG-Accountability, it would hardly be surprising if the board again tried to influence details of the implementation to its preference.

A Community Rarely Able or Willing to Unite

While there are serious concerns with the report, there is an even more fundamental concern about whether the community can actually be decisive and united enough to utilize the accountability measures provided to the EC in the CCWG-Accountability proposal. Indeed, the entire premise of the transition is that the multi-stakeholder ICANN community has sufficient maturity and cohesiveness to serve as a counter-weight to the board and the enhanced influence of the GAC. Unfortunately, the CCWG-Accountability development process leaves doubts about the foundational suitability of the community as bedrock for accountability.

To exercise most powers requires the support of three or four of the five decisional participants. This will be very difficult to achieve even in the face of substantial cause. The SO/ACs each have differing equities and perspectives that could lead them to be indifferent even when the ICANN board and staff are acting in a very objectionable manner. This is compounded by the GAC being a decisional participant because the GAC is unlikely to be able to arrive at a common position in a timely manner if at all.

Issues like this contributed to the calls for mandating accountability improvements in tandem with the transition and, if the accountability measures are implemented properly, there will be avenues for righting ICANN missteps and forcing compliance with agreed procedures and rules. However, the most powerful accountability measures are restricted to the Empowered Community and are premised on it being able to act in a decisive and dependable manner. Unfortunately, the practical challenges of exercising the powers and experience casts doubt on the community's ability or willingness to fulfill such a role.

Recommendations

The NTIA and Congress will be considering the CCWG-Accountability proposal in the coming months. The Internet is too important to act in haste or imprudence. There are numerous questions and uncertainties that should lead the U.S. to:

- **Vet the proposal thoroughly.** The IANA Transition Coordination Working Group (ICG) has had its proposal complete since early 2015 and work has been ongoing in assessing the

³³GNSO, "Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal," p. 6.

changes necessary to complete the technical aspects of the transition proposal and drafting bylaws and language to implement those recommendations. The CCWG-Accountability proposal has only recently been adopted and is much less developed. New and amended bylaws will be drafted in the coming weeks that will be reviewed by the CCWG-Accountability, the ICANN board, and the broader ICANN community through a public comment period. If warranted, the draft bylaws will be tweaked before being approved by the ICANN board in May and the entire package will then be considered by the NTIA and Congress. During this consideration, ICANN will need to flesh out details for implementation of the proposal, which will not be complete until later in the summer. The NTIA has insisted that it requires a “comprehensive and complete”³⁴ product for consideration that includes both the ICG and the CCWG-Accountability proposals and implementation details, particularly bylaw changes.³⁵ This is the correct approach—the proposal cannot be properly assessed unless all the details are fleshed out and finalized. Neither the NTIA nor Congress should feel compelled to hasten their consideration if they feel more time is necessary to vet the proposal. It is better to do this right than to get it done according to an artificial deadline.

- **Draft a new two-year contract allowing for a resumption of the NTIA’s historical relationship with ICANN.** Even if the NTIA and Congress are satisfied with the proposal, it would be wise to provide a transition to the transition. The proposed changes to ICANN’s structure and governance model are significant and untested. It would be prudent to allow ICANN to operate under the new structure for a period of time to verify that unforeseen complications and problems do not arise while retaining the ability to reassert the historical NTIA relationship if unforeseen complications arise. In fact, the ICANN Board suggested such an approach in its public comment to the first CCWG report:

We believe the Sole Membership Model as proposed has the potential for changes in the balance of powers between stakeholder groups in ICANN’s multistakeholder model. At any time, the balance of power and influence among any of the “groups” within ICANN can change based upon the willingness or ability to participate in the Sole Member, changing for example the balance between governments and the private sector and civil society. We believe that if the Sole Membership Model is the only proposed path forward, it may be prudent to delay the transition until the Sole Membership Model is in place and ICANN has demonstrated its experience operating the model and ensuring that the model works in a stable manner.

³⁴Remarks by Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling, “ICANN, IANA Transition, Larry Strickling, NTIA, State of the Net Conference,” State of the Net Conference, Washington, DC, January 27, 2015, <http://www.expvc.com/2015/01/icann-iana-transition-larry-strickling.html> (accessed March 15, 2016).

³⁵As stated by Assistant Secretary Lawrence E. Strickling, “The other critical path element that emerges from the legislative language is the need to work out the specific language of bylaw changes as quickly as possible. We want to avoid a lengthy delay after we get the plan while language is being written and reviewed by the community as that will delay when we can provide our certification to Congress.” Remarks of Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling, ICANN Meeting, Buenos Aires, Argentina, June 21, 2015, <https://www.ntia.doc.gov/speechtestimony/2015/remarks-lawrence-e-strickling-assistant-secretary-commerce-communications-and-i> (accessed March 15, 2016).

While the current proposal is not based on membership, it does propose radical changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN and thus it would be prudent to maintain the current arrangement, or at least a means for reasserting NTIA oversight, for the next two years until the new structure proves itself.

- **Urge those implementing the CCWG-Accountability proposal to apply the strictest interpretations on the CCWG-Accountability proposal for GAC participation.** Ideally, the NTIA and Congress would send the transition proposal back to ICANN with instructions to reverse the expansion in government authority in the CCWG-Accountability proposal. However, even if the NTIA or Congress do not mandate specific changes to the CCWG-Accountability proposal as a condition for approval, there is room for interpretation within the proposal to increase the bar for the GAC to utilize its authority under the proposal. For instance, the consensus requirement for GAC advice to the board should be clear and require the GAC to affirm that no government opposed the advice. The GAC must not be allowed to circumvent this requirement through creative alterations in its decision-making procedures. Also, prior to the vote to exercise the EC powers, each of the five decisional participants should be required to inform the EC whether they wish to participate or not in a timely manner. If the GAC or any other decisional SO/AC cannot make such a declaration, it should be excluded and the thresholds for exercising EC powers lowered to observe the understanding throughout the CCWG-Accountability process that “the exercise of community powers should not require unanimity of participating AC/SOs, and that no single AC/SO could block exercise of any power.”³⁶
- **Require enumeration of human rights to protect ICANN’s narrow scope and mission.** The NTIA and the ICANN Community were correct to insist that strict limits on ICANN’s mission and scope be incorporated into the bylaws. They should ensure that the human rights bylaw does not undermine this central priority by asking ICANN to specifically enumerate the human rights commitments in a manner that is consistent with the NTIA criteria and directly related to ICANN’s core purpose and operations to avoid mission creep. Clear linkages to ICANN’s mission and operation include the fundamental human rights of freedom of expression and opinion (as interpreted in the U.S. under the First Amendment to the Constitution), freedom of association, the right to due process, the right to privacy, the right to own property, including intellectual property, and the “right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”³⁷ If future circumstances dictate that an additional human right be added to ICANN’s commitment, this can be done through a bylaw amendment. In the current unexplored situation, however, caution should prevail.

³⁶GNSO, “Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal,” p. 9.

³⁷Universal Declaration of Human Rights, Articles 9, 10, 11, 12, 17, 19, 20, and 27, <http://www.un.org/en/universal-declaration-human-rights/index.html> (accessed March 15, 2016).

Conclusion

Nearly half of the world's population, including almost everyone in the United States, uses the Internet for business or personal purposes and pursuits and it has become a critical vehicle for research, discourse, and commerce. ICANN plays an important role in maintaining the safety, security, reliability, and openness of the Internet and it is necessary that ICANN remain accountable and transparent. The CCWG-Accountability proposal provides numerous improvements and tools that can be used to achieve this after the U.S. contractual relationship expires, but there are many uncertainties.

The CCWG-Accountability proposal is a blueprint for an accountable institution, but it is unclear if the result will be sound or if the ICANN community can or will act responsibly and in a timely manner to hold ICANN accountable. Prudence dictates caution. The U.S. should take the time to make sure everything is working properly before executing to an irreversible decision.

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**i2Coalition Statement on the IANA Transition
March 13, 2016**

The Internet Infrastructure Coalition (i2Coalition) is composed of a diverse group of Internet infrastructure companies that help enable key technology solutions. The i2Coalition supports these businesses that ingeniously facilitate the operation of the Internet between transmission and delivery of content layers, including web hosting, cloud infrastructure, and data centers. These Internet infrastructure providers are a vital economic engine in the U.S. as they build the framework of the Internet on top of which the entire digital economy rests. We are made up of enterprises that are dedicated to the idea that an open and free Internet drives economic growth and enhances the lives of people across the U.S. and around the globe.

The i2Coalition supports the transition of stewardship over the IANA functions to the global multistakeholder community and the comprehensive package agreed to by the global Internet community last week on the closing day of the ICANN public meeting in Marrakech.

The i2Coalition members rely on the continued security, stability, resiliency, and openness of the Internet. We support the National Telecommunications and Information Administration's (NTIA) proposed transition of its stewardship over the IANA functions to the global multistakeholder community. This bottom-up, private-sector led model of governance has served the Internet well to date, and we believe it is the most effective model for keeping the Internet open, stable, secure, and resilient in the future.

The multistakeholder model of Internet governance is the best way to ensure that private sector-friendly, pro-growth policies continue to enable the open Internet's growth. Removing U.S. Government control over IANA functions and creating a truly multistakeholder model removes perceptions that governmental or nongovernmental stakeholders are excluded from key decisions surrounding the IANA functions. A successful transition is the best way to ensure that pro-growth, private sector-friendly policies continue to enable the growth of the open Internet.

The global Internet community has seen to it that the world can enjoy a stronger ICANN and a stronger Internet through the transition of IANA. Anyone who believes in freedom of expression and the power of the connected world owes this group of heroes a huge debt of gratitude. Through their hard work they have ensured that no one entity controls the Internet and have set the stage for this global resource to continue to be governed by the stakeholders it serves. It is now up to the U.S. Government to ensure the completion of this process by approving the package once



the NTIA has certified that it meets the criteria established by it two years ago in anticipation of the transition.



IN ICANN WE TRUST: ASSURING ACCOUNTABLE INTERNET GOVERNANCE

Kristian Stout, Geoffrey A. Manne & R. Ben Sperry

ICLE Innovation Policy Research Program
White Paper 2016-1

This white paper is an abbreviated excerpt of a forthcoming scholarly article.
It is available online at: http://laweconcenter.org/images/articles/icle-icann_accountability_short_final.pdf



IN ICANN WE TRUST: ASSURING ACCOUNTABLE INTERNET GOVERNANCE

Kristian Stout, Geoffrey A. Manne & R. Ben Sperry

It's no surprise to anyone that illegal activity happens online. What may be surprising, however, is that one of the central figures in administering core Internet functions is deeply ambivalent (at best) about its role in preventing illicit online activity.

Since 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) has been the organization tasked by the U.S. government with overseeing the Domain Name System (DNS). The DNS is the system that enables domain names to resolve — meaning that when you type “google.com” in a browser address window you will reliably receive Google's search engine each time. That reliability is a boon for Internet users, most of the time. But much mischief can be conducted through web sites, as well, and a system that reliably serves up *these* sites imposes costs on its users.

Take one recent example. In July 2015, a Bloomberg News piece from “bloomberg.market” indicated that Twitter was in talks over a \$31B USD buyout. Naturally, the value of Twitter stock shot up before returning to normal. The problem, however, was that it was a totally fabricated event, one that the currently lax accountability regime underlying the DNS only makes easier.¹

One would think that ICANN would have effective procedures in place for removing (or otherwise sanctioning) domain names created or used for illegal purposes. However, even though it possesses contractual control over its registries and registrars (the entities responsible for managing and registering top level domains and domain names), the practical reality is that illegal conduct is rarely ever deterred by ICANN.

The consequences of ICANN's non-action are evident. ICANN has refused to effectively deter content piracy on the Internet, and pirated content currently constitutes something on the order of 25% of Internet traffic.² It has also overseen an inexorable increase in websites

¹ Matt Egan and Frank Pallotta, *Twitter shares soar on phony Bloomberg story*, CNN (Jul. 14, 2015), available at <http://money.cnn.com/2015/07/14/investing/twitter-fake-story-bloomberg/>.

² Aaron Sankin, *24 percent of Internet traffic is devoted to piracy, study says*, THE DAILY DOT (Sep. 23, 2013), available at <http://www.dailydot.com/business/nbcuniversal-comcast-piracy-study/>.

dedicated to phishing scams. As of December 2014, phishing occurred in 19% of the new gTLDs — and nearly two-thirds of the phishing occurred in just one gTLD (.XYZ).³ To date ICANN has steadfastly refused to take action despite the significant cost that its refusal — ostensibly rooted in its desire not to regulate Internet content — imposes on community members.

ICANN has an accountability problem.

The ICANN community, represented by the IANA Stewardship Transition Coordination Group (ICG), recently submitted its final report⁴ to Congress and the NTIA outlining its proposal for an independent (and accountable) ICANN. This transition period offers an ideal opportunity to assess and to correct the deficiencies in the structure of the organization.

A few central issues emerge:

1. ICANN cannot serve in a purely “technical” capacity because stewardship of the DNS necessarily requires choosing among competing policies.
2. An accountable ICANN can be optimally secured by realigning the organization along a constitutional model that “bakes in” due process procedures and suitably responds to the policy preferences of the multistakeholder community.
3. To the extent that policy choices are selected by the multistakeholder community, those choices should be systematically respected by proper enforcement of contractual obligations.

IF YOU CHOOSE NOT TO DECIDE, YOU STILL HAVE MADE A CHOICE⁵

As legal scholar John Hart Ely has observed, “an insistence on ‘neutral principles’ does not by itself tell us anything useful about the appropriate content of those principles.”⁶ A “neutral” stance that purports not to adopt any particular policy position is not actually neutral; rather it effectively adopts whatever policy predominates by default.

³ Greg Aaron, *Phishing in the New gTLDs*, CIRCLEID (May 27, 2015), available at http://www.circleid.com/posts/20150527_phishing_in_the_new_gtlds/.

⁴ See IANA STEWARDSHIP TRANSITION COORDINATION GROUP (ICG), PROPOSAL TO TRANSITION THE STEWARDSHIP OF THE INTERNET ASSIGNED NUMBERS AUTHORITY (IANA) FUNCTIONS FROM THE U.S. COMMERCE DEPARTMENT’S NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA) TO THE GLOBAL MULTISTAKEHOLDER COMMUNITY (Mar. 2016), available at <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>.

⁵ Rush (Neal Peart, Geddy Lee & Alex Lifeson), Freewill (Mercury Records 1980).

⁶ JOHN HART ELY, DEMOCRACY AND DISTRUST 55 (1980).

ICANN has consistently claimed that its role in Internet governance is merely a technical one, and that it is not the “regulator of Internet content.”⁷ It has made this declaration largely in response to calls from a range of interests for the organization to enforce language in its contracts that prohibits the use of web sites for illicit conduct. But despite its claims, by refusing to enforce this language, ICANN is not staking out a neutral position. Instead, it is very much adhering to a social policy, in this case one that prioritizes avoidance of censorship over the array of other priorities that *could* be incorporated into ICANN’s governance of the DNS. But regulation guided by a default set of priorities is still regulation.

While management of the DNS itself is a technical operation,⁸ the impending transfer of IANA stewardship entails imbuing ICANN with an overtly government-like function that demands more than mere technical acuity:

DNS policy questions... are difficult, because while they all have a “technical” dimension, they do not have *only* a technical dimension; they invoke some important and deeply-held values far removed from the “merely” technical. How they are resolved will have an impact... on trade and commerce and competition, on intellectual property rights, on privacy, and on free expression.⁹

Whatever ICANN’s *historical* role has been, following the transition ICANN will have a dual role — one that includes the obligation to properly “steward” the DNS, as well as to run it.¹⁰ It is clear that the U.S. government expects ICANN to take a more assertive role following the transition, and Congress has made plain that ICANN’s accountability to the parties it regulates is a paramount condition of its approval of the IANA transition.¹¹

⁷ Allen R. Grogan, *ICANN Is Not the Internet Content Police*, ICANN (Jun. 12, 2015), available at <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>

⁸ See, e.g., NATIONAL ACADEMY OF SCIENCES COMMITTEE ON INTERNET NAVIGATION AND THE DOMAIN NAME SYSTEM: TECHNICAL ALTERNATIVES AND POLICY IMPLICATIONS, SIGNPOSTS IN CYBERSPACE: THE DOMAIN NAME SYSTEM AND INTERNET NAVIGATION (2005), available at <http://www.nap.edu/read/11258/chapter/1>.

⁹ DAVID G. POST & DANIELLE KEHL, CONTROLLING INTERNET INFRASTRUCTURE: THE “IANA TRANSITION” AND ICANN ACCOUNTABILITY, PART II, at 20 (Open Technology Institute, Sept. 2015), available at https://static.newamerica.org/attachments/9764-controlling-internet-infrastructure-2/IANA_Paper_2_final.8594b4de27dd4ecf9be46d348f848cf1.pdf.

¹⁰ *NTIA Announces Intent to Transition Key Internet Domain Name Functions*, NTIA (Mar. 14, 2014), available at <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

¹¹ See, e.g., S. Con. Res. 50, 112th Cong. (Dec. 5, 2012), available at <https://www.congress.gov/bills/112th-congress/senate-concurrent-resolution/50/text> (“[I]t is the sense of Congress that the Secretary of State, in consultation with the Secretary of Commerce, should continue working to implement the position of the United States on Internet governance that clearly articulates the consistent and unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today.”) (Emphasis added).

An adherence to “social policy neutrality” is thus insufficient for ICANN’s expanded mandate. The DNS is a public good upon which a critical function of the Internet depends, and it is incumbent upon ICANN to administer it justly. To allow ICANN to don a cloak of policy neutrality is, in effect, to allow it to pollute with impunity — and to foist onto society all the costs associated with illicit use of the DNS (or its interdiction).

The multistakeholder community seems to agree. The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) recently presented its Accountability Final Proposal, intended to govern ICANN following the IANA stewardship transition.¹² Among its suggestions is the creation of an “Empowered Community” to represent the interests of ICANN stakeholders directly, endowed with the authority to appoint and remove directors (or the entire board), and vote on amendments to ICANN’s bylaws.¹³ Notably, among the core values that the CCWG-Accountability group recognizes are respect for internationally recognized “human rights”¹⁴ (presumably including the rights to property and contract¹⁵), as well as the ability to include public interest commitments (PICs) in registry and registrar contracts.¹⁶

It is incumbent upon the architects of the IANA transition, and Congress as the final authority overseeing the transition, to make sure that ICANN’s governance structure is capable of incorporating stakeholder values in a predictable, just and inclusive manner, and ensuring that the multistakeholder community retains the ability to guide the inclusion of these values and their operationalization in ICANN’s activities. ICANN’s legitimacy depends upon reliable process.

¹² See CCWG-ACCOUNTABILITY SUPPLEMENTAL FINAL PROPOSAL ON WORK STREAM 1 RECOMMENDATIONS (Feb. 23, 2016), available at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>.

¹³ *Id.* at Recommendation 13, ¶¶ 46 and 47.

¹⁴ *Id.* at 32, ¶ 170.

¹⁵ Although not all expressions of international human rights have as strongly incorporated a firm commitment to property rights, many have. The Universal Declaration of Human Rights holds that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” *Universal Declaration of Human Rights*, art. 27(b). Among many other examples, the European Court of Human Rights has upheld such a right on numerous occasions and interpreted it to include, among other things, “contractual rights with economic value.” The Inter-American Court on Human Rights has similarly identified a human right to property, including “corporeal and incorporeal elements and any other intangible object capable of having value.” Christophe Golay & Ioana Cismas, *The Right to Property from a Human Rights Perspective*, INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT LEGAL OPINION 12-13. The Opinion concludes that “[t]he right to property has been enshrined as a human right in international law — both conventional and customary — through universal and regional treaties and national constitutions.” *Id.* at 28.

¹⁶ CCWG-ACCOUNTABILITY, *supra* note 12, at 29, ¶146.

GUARANTEEING ACCOUNTABILITY THROUGH DUE PROCESS CONSTITUTIONALISM

It is important to note that NTIA is not transitioning its authority *to ICANN*. Rather, in good constitutional fashion, it is transitioning “key Internet domain name functions *to the global multistakeholder community*.”¹⁷ ICANN and its current technical functions are distinct from both the full set of functions that NTIA is now fully privatizing, as well as the intended recipient of the authority: the global multistakeholder community. It is for this reason that accountability — to the global multistakeholder community — is so essential to an acceptable transition.

Some scholars have suggested that ICANN’s new accountability regime be secured through application of constitutional principles¹⁸ — which presents an excellent framing for the issues involved. These scholars tend to echo ICANN’s own preference for neutral governance, however, ostensibly rejecting *any* social policy governance role in order to constrain ICANN’s discretion.

The proper question when considering ICANN’s constitutional order is not which set of interests should be enshrined in the organization (or should be imported through a “neutral” administrative scheme), but how the balance of interests among ICANN’s stakeholders and ICANN itself should be allocated, and how conflicts among those interest should be resolved.¹⁹ As we have noted, it is only through a careful specification of, and dedication to, due process that the substantive values of the multi-stakeholder community can be recognized and upheld.

Get the process “right” and an organization will be equipped to handle (more or less) whatever the world may throw at it. Establishing expectations, clearly allocating decision-making and other powers within the community, and delineating legitimate and unacceptable interests, would empower various constituencies with the incentive and ability to police and constrain ICANN from within. Rather than shunning the messy internal conflicts around the community’s non-technical preferences, an optimal governance structure will embrace them and use them as a bulwark against abuse by ICANN’s

¹⁷ *Id.* at Annex 14, ¶ 1 (Emphasis added).

¹⁸ POST & KEHL, *supra* note 9, at 2 (“We believe that designing effective and trustworthy accountability mechanisms for a post-transition ICANN is a problem of constitutional design, and that the tools of constitutional analysis can be usefully employed in order to come up with an effective accountability structure.”).

¹⁹ “In every society, conflicts of interest among the members of that society must be resolved. The process by which that resolution... occurs is known as competition. Since, by definition, there is no way to eliminate competition, the relevant question is what kind of competition shall be used in the resolution of conflicts of interest.” Armen A. Alchian, *Some Economics of Property Rights*, in ARMEN A. ALCHIAN, *ECONOMIC FORCES AT WORK* 127 (1977).

management, much as the United States government's "system of checks and balances" does.

David Post and Daniel Kehl have identified four salutary principles that should guide the formulation of a constitution for ICANN:

1. A clear and precise delineation between the powers that the corporation may, and those that it may not, exercise.
2. A division of the institution's powers so that they are not concentrated in one set of hands.
3. Internal, institutional mechanism(s) to enforce the constraints of (1); and
4. Transparency and simplicity.²⁰

In order to establish and to preserve limited control over social aspects of the Internet, it is necessary to affirmatively incorporate these into ICANN's mission. But there is nothing contradictory about having a constitution that both enforces structural principles — separation of power, independent judicial review — as well as one that confers power on the global stakeholder community by establishing mechanisms for it to establish and enforce basic legal and moral principles.

Quite the opposite in fact: It is only the board's "unchecked autonomy" that is defective and that leads to procedural unfairness.²¹ Structures like the CCWG-Accountability's "Empowered Community" proposal address this problem.²²

Difficult questions and complex situations will inevitably emerge for any organization, and without suitably accounting for these (as opposed to pretending that a purely technical mandate avoids them), ICANN will be set up for failure. In order to maintain its legitimacy, the organization will need to provide a well-specified mechanism to deal with unanticipated (and anticipated) social and legal challenges.

ENFORCING CONTRACTS: I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS

In the end, ICANN's governance structure should facilitate the adoption of whatever principles the ICANN stakeholder community deems appropriate as part of the stewardship of the DNS. Very likely, much of this space will be found through voluntary, private arrangements between registries, registrars, and third parties. An overarching commitment to enforcing legitimate contracts, therefore, even ones that espouse particular policy objectives, will be a core attribute of a well-organized ICANN.

²⁰ See *id.* at iv.

²¹ *Id.* (internal citations omitted).

²² See CCWG-ACCOUNTABILITY *supra* note 12.

In fact, far and away ICANN's most significant failing has been the abdication of its responsibility to enforce the terms of its own contracts, particularly the Registrar Accreditation Agreement (RAA).²³ The effect of this obstinance is that ICANN has failed to exercise its obligation to maintain a "secure, stable, [and] resilient... Internet"²⁴ free of costly "pollutants" like piracy, illegal prescription drugs, and phishing sites that impose significant costs on others with relative impunity.

As a result, Congress has opposed moving forward with the transition of the IANA stewardship functions outside of the U.S. government's control.²⁵ To an important degree, this resistance is rooted in Congress' concerns about ICANN's ability and willingness to enforce the law — including fairly uncontroversial protections of public health and property rights.²⁶

The absence of effective enforcement by ICANN is not for lack of an available remedy. In fact, the RAA provides that domain name cancellation — effectively, banishment from the Internet — is available for errant registered name holders.²⁷ It appears to be the case, rather, that ICANN is simply unwilling to enforce the terms of its own contracts.²⁸

Under the terms of the RAA, domain name registrars have a broad obligation to respond to reports of abuse — defined essentially as illegal conduct²⁹ — on sites within their domains.³⁰ Registrars are also required to use "commercially reasonable efforts" to prevent registered name holders from using a registered name in a way that infringes on the legal rights of

²³ 2013 Registrar Accreditation Agreement, at § 1.1.13, ICANN (Sept. 17, 2013), available at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en> (hereinafter "RAA").

²⁴ S. Res. 71, 114th Cong. § 1(3)(B) (Feb. 5, 2015), available at <https://www.congress.gov/114/bills/sres/71/BILLS-114sres71ats.pdf>.

²⁵ Philip S. Corwin, *FY16 Appropriations Act Extends IANA Transition Freeze without DOTCOM Act*, CIRCLEID (Dec. 16, 2015), available at http://www.circleid.com/posts/20151216_fy16_approp_act_extends_iana_transition_freeze_without_dotcom_act/.

²⁶ See generally *Stakeholder Perspectives On ICANN: The .SUCKS Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 114th Cong. 7 (May 13, 2015), available at https://judiciary.house.gov/wp-content/uploads/2016/02/114-23_94603.pdf. ("ICANN and other stakeholders must abide by their contractual provisions to prohibit the use of domain names for the pirating of copyrighted material and other illegal activity.... It is critical that ICANN help prevent piracy and other unlawful conduct by registrars and registrants.")

²⁷ RAA § 3.7.7.11.

²⁸ It of course also bears noting that frequently the registrars terms of service also provide for suspension of domains used for illicit purposes. See *GoDaddy Domain Name Registration Agreement*, at § 8, available at https://www.godaddy.com/agreements/showdoc.aspx?pageid=REG_SA&isc=gofdh026 (last revised Feb. 19, 2016).

²⁹ RAA § 1.1.13.

³⁰ RAA § 3.18.1

third parties.³¹ At the same time registry operators are obligated to require registrars to prohibit name holders “from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.”³²

Together, these provisions (and others) ostensibly create a backstop that should safeguard against the DNS being co-opted for a variety of illegal activities including fraud, sales of dangerous goods or contraband, and intellectual property infringement. Unfortunately, theory does not always work out in practice.

It was not until public pressure became overwhelming that the illegal sales of pharmaceuticals was addressed by the registrars, and, even to this day, infringement of intellectual property continues on a massive scale.³³ Although it is certainly true that no practical amount of vigilance will ever *completely* deter illicit use of the DNS, the current minimal to non-existent level of enforcement arguably allows far more illegal conduct to proliferate than is necessary or desirable.

Absent direct enforcement by ICANN, the registries, or the registrars, self-help (including through the courts) by injured parties amounts to a frustrating game of whack-a-mole in which offending sites are thwarted, at best, by a particular website hosting service, only to crop up in short order on one of the nearly innumerable other such services. This costly and ineffective dynamic is essentially a repudiation of ICANN’s contractual obligations and an abdication of the organization’s accountability to the Internet community.

It may seem easy to dismiss a LegitScript complaining about illegal pharmaceuticals,³⁴ or the RIAA complaining about piracy, as merely self-interested entities trying to outsource some of their costs of doing business. But, while it’s true that these organizations are the entities engaging in direct enforcement in these cases, it is crucial to remember that they are *not* the sole beneficiaries of such efforts. Behind the actions of these organizations are a web of legal rights and contractual relationships that protect the public health and support the creation of tremendously important industries. Consumers are relieved from the need to

³¹ RAA §§ 3.7.7, 3.7.9.

³² ICANN, *Registry Agreement, Specification 11*, at 90, available at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf> (last updated Jan. 9, 2014).

³³ See, e.g., DAVID PRICE, NETNAMES POLICY ANALYSIS: SIZING THE PIRACY UNIVERSE (Sept. 2013), available at <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>; Alexandra Gibbs, *And 2015’s most pirated TV shows and films are...*, CNBC (Dec. 28, 2015), available at <http://www.cnn.com/2015/12/28/game-of-thrones-and-interstellar-named-2015s-most-pirated-tv-show-and-film.html>.

³⁴ See *Stakeholder Perspectives On ICANN*, *supra* note 26, at 31-34 (statement of John C. Horton, President and CEO of LegitScript).

worry about the technical details of who infringes what and how those infringements are remedied because, from their rationally ignorant vantage point, “it all takes care of itself.”

Except it doesn’t. For the system to work, and for consumers to benefit from the legal and contractual relationships that undergird the Internet economy, there needs to be a party on the other side of industry-led efforts that provides a meaningful enforcement mechanism. When ICANN repudiates its obligation to respect public health concerns and property rights, it is in fact exporting a harm directly onto consumers. And it forces consumers to bear the costs of its own desire to avoid complicated legal questions — despite its commitments to the contrary.

CONCLUSION

Allegedly neutral, purely technical administration is another way of describing an order in which any behavior — no matter how dangerous, costly or patently illegal — is permitted. Although this *may* be a bulwark against censorship, such a regime goes beyond even the United States’ relative free speech maximalism and imposes significant costs on the community.

For ICANN to meet its stakeholders’ — and Congress’ — accountability expectations, it will need to implement a governance structure that establishes and preserves procedural fairness and a “rule of law,” including respect for voluntary ordering of rights by contract. The impetus to equate “procedural fairness” with “policy neutrality” is understandable, but an aspiration for a value-free DNS administration will not make it so in reality. “DNS policy questions... have a “technical” dimension, [but] they do not have *only* a technical dimension; they invoke some important and deeply-held values far removed from the ‘merely’ technical.”³⁵

Instead, it is the establishment and protection of settled expectations through well-defined and responsive organizational structures, facilitation of private ordering, and a system of checks and balances that disciplines abusers of process and abuses of power that will enable ICANN to properly steward the DNS post-transition.

³⁵ POST & KEHL, *supra* note 9, at 20.



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April 22, 2016

Mr. Steve DelBianco
Executive Director
NetChoice
1401 K Street, N.W.
Washington, DC 20005

Dear Mr. DelBianco:

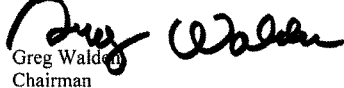
Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Friday, May 6, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Questions for the Record from The Honorable Renee Ellmers

March 17, 2016 hearing before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology.

"Privatizing the Internet Assigned Number Authority"

Questions for Mr. DelBianco:

Question 1: ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models, such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.

Answer to Q1:

First, it's important to remember that ICANN coordinates only the *Internet addressing system* that we use to reach websites and route emails. Some cyber attacks might attempt to corrupt internet addressing systems, in which case ICANN would have a role in assessing, correcting, and preventing that kind of attack.

While cyber attacks could use domain names and address numbers, please understand that ICANN has no role in monitoring or stopping internet traffic or conduct that uses the addressing system.

Nor does ICANN have any role or power to prevent governments or others from impairing open access to internet websites or content when internet traffic crosses their own borders.

Nor does ICANN leadership make policy *decisions*, since that is the work that we do within the ICANN community of Advisory Committees and Supporting Organizations (ACs and SOs). But you're right to be asking about ICANN board and management, since they have significant influence in *implementing* and *interpreting* the policies the community develops.

The cross-community working group for this transition (CCWG) published a final proposal in Feb-2016 giving the community new powers to ensure ICANN was answerable to more than just itself.¹ New powers for the community include the ability to challenge ICANN board and management on how the implement and enforce consensus policies:

- Challenge board actions via Independent Review Process (IRP), where decisions are binding
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*

¹ Final Accountability Proposal, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

With these new powers, the community of business, technologists, and civil society can challenge the way ICANN implements policies and contracts. Any aggrieved party can bring their own IRP against ICANN. And if there is sufficient consensus among the newly-created Empowered Community to bring an IRP challenge, ICANN must bear the legal costs of the IRP.

IRP decisions can be enforced in California courts, or in any court that recognizes international arbitration proceedings. If the ICANN board were to ignore IRP decisions, the Empowered Community could recall one or all of the board of directors – and this power would be enforceable in California courts.

Your question also touches on how to hold ICANN staff accountable for their decisions and actions. The CCWG is now turning to several tasks as part of Work Stream 2 – accountability measures that can be developed after the new ICANN bylaws are adopted. One of the Work Stream 2 projects is to explore this very question.

Staff Accountability is described in the CCWG's final proposal (Annex 12):

In general, management and staff work for the benefit of the community and in line with ICANN's purpose and Mission. While it is obvious that they report to and are held accountable by the ICANN Board and the President and CEO, the purpose of their accountability is the same as that of the organization:

- Complying with ICANN's rules and processes.
- Complying with applicable Bylaws.
- Achieving certain levels of performance, as well as security.
- Making their decisions for the benefit of the community and not in the interest of a particular stakeholder or set of stakeholders or ICANN the organization alone.

Having reviewed and inventoried the existing mechanisms related to staff accountability, areas for improvement include clarifying expectations from staff, as well as establishing appropriate redress mechanisms. The CCWG-Accountability recommends as part of its Work Stream 2:

- The CCWG-Accountability work with ICANN to develop a document that clearly describes the role of ICANN staff vis-à-vis the ICANN Board and the ICANN community. This document should include a general description of the powers vested in ICANN staff by the ICANN Board of Directors that need, and do not need, approval of the ICANN Board of Directors.
- The CCWG-Accountability work with ICANN to consider a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by staff in relation to their interactions with all stakeholders, establish regular independent (internal and community) surveys and audits to track progress and identify areas that need improvement, and establish appropriate processes to escalate issues that enable both community and staff members to raise issues. This work should be linked closely with the Ombudsman enhancement item of Work Stream 2.

It is through these community powers and increased staff accountability that US companies and individuals can take actions to prevent or reverse policies that negatively impact Americans who rely upon ICANN's address coordination to reach websites and deliver communications.

Question 2: The transition plan asks for the US government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision-making and approach to developing policy for everyone. When the internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to ensure fair decisions for all?

Answer to Q2:

The organizations that comprise ICANN's volunteer community of stakeholders -- known as Advisory Committees and Supporting Organizations (ACs and SOs) -- have been part of ICANN since the US government helped establish the organization. So the US government has placed its trust in these ACs and SOs since 1998, while holding leverage in its ability to withhold the IANA functions contract if ICANN failed to meet its responsibilities.

After this transition, the US government will no longer hold contractual leverage over the IANA functions. Instead, the existing community of ACs and SOs will gain new powers to hold ICANN accountable if it failed to serve IANA customers and the global internet community. (I described some of those powers in my response to the first question above.)

As your question indicates, it is therefore essential that these community organizations are *themselves* transparent and accountable to the stakeholders they were designed to represent.

The CCWG is now turning to several tasks as part of Work Stream 2 -- accountability measures that can be developed after the new ICANN bylaws are adopted. One of the Work Stream 2 projects is to explore this very question of "Who watches the watchers?"

Supporting Organizations and Advisory Committee Accountability is described in the CCWG's final proposal (Annex 12):

As the community's power is enhanced, legitimate concerns have arisen regarding the accountability of the community (organized as SOs and ACs) in using new Community Powers, i.e., "who watches the watcher."

The CCWG-Accountability reviewed existing accountability mechanisms for SOs and ACs as well as governance documents (see above). Analysis revealed that mechanisms are limited in quantity and scope. Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that current mechanisms need to be enhanced in light of the new responsibilities associated with the Empowered Community.

The CCWG-Accountability recommends the following.

As part of Work Stream 1:

- Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis. These reviews should include consideration of the

mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, and Regional At-Large Organizations, etc.

- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently states: "The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (1) whether that organization has a continuing purpose in the ICANN structure, and (2) if so, whether any change in structure or operations is desirable to improve its effectiveness."

As part of Work Stream 2:

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
- Evaluate the proposed "Mutual Accountability Roundtable" to assess viability and, if viable, undertake the necessary actions to implement it.
- Propose a detailed working plan on enhancing SO and AC accountability
- Assess whether the IRP would also be applicable to SO and AC activities.

Another response to your question is to examine whether ICANN's new accountability structure will adequately contain the power that governments might seek to exercise as part of the Empowered Community.

Governments have influence on ICANN policy development and contract compliance via their collective participation in the Governmental Advisory Committee (GAC). The GAC was established when the US Commerce Department and American private sector interests first created ICANN in 1998.²

The Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements.

The GAC has gradually grown in its effectiveness to and its advice to ICANN has grown in importance, as seen with policies adopted for the latest expansion of new top-level domains.

In our previous Congressional testimony, I described a stress test where governments could significantly raise their influence via GAC formal advice:³

Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board. Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the

² 6-Nov-1998, Bylaws for ICANN, at <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-06-en>

³ See Stress Tests 6 & 7, on p. 9 at [NetChoice Testimony before the House Energy & Commerce Committee – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

Empowered Community, some stakeholders believe this could inappropriately increase government influence over ICANN.⁴

Several governments had previously voiced dissatisfaction with the present consensus rule for GAC decisions, so it is plausible that the GAC could change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. Early on, NTIA said that addressing Stress Test 18 was required for the transition.⁵

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

In response, the new bylaws would enshrine the GAC's present full-consensus rule as the *only* way to trigger the board's obligation to "try and find a mutually acceptable solution." Several GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. To overcome some of that resistance, we raised the threshold for ICANN's board to reject GAC's full-consensus advice, from today's simple majority (9 votes) to 60% (10 votes).

This brings to mind the Feb-2015 hearing I the US Senate, where ICANN CEO Fadi Chehade was asked about a proposal to raise the rejection threshold to 2/3 of board votes. Chehade replied, "The Board has looked at that matter and has pushed it back, so it is off the table." It's true that a standalone proposal to raise the GAC rejection threshold was broadly opposed and set aside in late 2014. However, the proposed bylaw to increase the rejection threshold to 60% (1 additional vote) is an entirely different arrangement, since it reserves the higher threshold *only* for GAC advice adopted "by general agreement in the absence of any formal objection". This requirement prevents the GAC from generating privileged advice based on anything less than consensus, and more than justifies the addition of 1 more vote to reject that advice.

If the board rejects GAC advice, it must still follow existing bylaws to "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution." This is an obligation to "try" and does not oblige ICANN to find a solution that is acceptable to the GAC.

⁴ pp. 2-3, Annex 11 - Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18), at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

⁵ Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

Another imposition on GAC advice is a requirement that advice “is communicated in a clear and unambiguous written statement, including the rationale for such advice.”⁶ And if ICANN’s board accepted GAC advice that is inconsistent with ICANN Bylaws, the community can invoke the independent review process (IRP) to “ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.”⁷

As one of the 7 Advisory Committees and Supporting Organizations that comprise the ICANN community, GAC was also invited to participate as a decisional participant of the Empowered Community. A few critics say that we should have excluded GAC from the community, but I cannot imagine that Congress or the Administration would accept an accountability structure where governments – including the US – have no seat at the table. National, state, and local governments maintain websites and services as domain name registrants, and many government employees are Internet users. Moreover, governments have a role among all stakeholders in developing public policy and enforcing laws that are relevant to the Internet.

While GAC is rightfully an equal among ICANN stakeholders, the new bylaws ensure that governments could not block a community challenge of ICANN Board’s implementation of GAC advice. In what is known as the “GAC Carve-out”, the bylaws exclude the GAC from the community decision whether to challenge a board action based on GAC consensus advice.

Several governments vigorously oppose these bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar-2016, France’s minister for digital economy complained about ICANN’s new bylaws:⁸

“Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize States in the decision-making processes of ICANN, especially compared to the role of the private sector.”

Unnamed French foreign ministry officials also told *Le Monde* they were unhappy with the end result, saying: “This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN.”

The French official is right – the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and fully meets NTIA’s conditions for the transition.

⁶ 20-Apr-2016, Section 12.3 of Draft New ICANN Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

⁷ *Ibid*, Section 4.3 a

⁸ 24-Mar-2016, “French scream sacré bleu! as US govt gives up the internet to ICANN”, at http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/

Question 3: Why the need to transition from the United States before the Accountability work stream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the internet ranging from the North Koreans, Chinese, Russians, and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?

Answer to Q3:

As noted in my response to your first question, it's important to understand that ICANN coordinates only the Internet addressing system that we use to reach websites and route emails. Some cyber attacks might attempt to corrupt internet addressing systems, in which case ICANN would have a role in assessing, correcting, and preventing that kind of attack. While cyber attacks could use the addressing system, ICANN has no role in monitoring or intercepting internet traffic.

In my response to your second question, I describe how the CCWG has cabined the power of governments to bring censorship or content control into the ICANN sphere of coordination.

Over 18 years and three administrations, the US government has used light-touch oversight over ICANN. However, it is neither sustainable nor necessary for the US to retain its unique role forever. In fact, retaining this unique role increases the risk of Internet fragmentation and government overreach. At NTIA's request, the Internet community created proposals to let ICANN loosen ties to the US government and strengthen its accountability to the global Internet user community and keeping core Internet functions free from governmental control.

At this point, a significant delay in this transition could create far more risks than rewards for the interests of US government, businesses, and citizens.

Your third question suggests delaying the transition beyond the IANA contract expiration on 30-Sep-2016, until Work Stream 2 tasks are all completed. We acknowledge that a modest delay could give more time to complete remaining implementation tasks and verify promised implementation by the ICANN Board. But an extended delay would create more risks and no significant benefits from the perspective of the US government, businesses, and citizens.

One Work Stream 2 task has generated questions about whether ICANN might be pulled into potentially troubling enforcement obligations for human rights. NetChoice shared this concern with the first draft of Bylaws regarding the *Work Stream 2* framework on human rights, so we support this amended Bylaw text:

(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. **This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.**

This proposed bylaws text would make it clear that ICANN will not become embroiled in enforcement of claims related to human rights, and should address this concern.

Actually, there are several additional tasks in Work Stream 2, which will take the CCWG well into mid-2017 to complete.

However, the whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be very little leverage to force accountability measures that would be resisted by ICANN's board. Work Stream 1 includes new powers to block the board's budget, overturn a board decision, and to recall board directors. Those powers are deemed sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed through community consensus.

In other words, ICANN's new bylaws give the Empowered Community new powers to implement further reforms *at any time*. So the only way to evaluate all changes the community might pursue in the future is to delay the transition *indefinitely*.

A long-term delay of transition would re-kindle the fire at the United Nations, where many governments have cited the US government role as the sole supervisor of ICANN and the IANA functions as an excuse to gain more control over the Internet *for themselves*.

With this transition we are eliminating the role where one government holds ICANN accountable, by moving to a structure where ICANN is accountable to a broad community of Internet stakeholders. After transition, the UN and ITU can no longer point to the US government role and say they should step into those shoes.

An extended delay of transition would signal that the US government does not actually trust the multi-stakeholder model that we are encouraging China and other governments to trust. China's government would surely note our hypocrisy for criticizing them for failing to embrace domain registration policies developed by ICANN's multi-stakeholder community.

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Thank you for these questions. I am at your service to elaborate on these responses and address other questions and concerns you might have.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

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April 8, 2016

Dr. Alissa Cooper
Chair
IANA Stewardship Transition Coordination Group
801 Church Street
Mountain View, CA 94041

Dear Dr. Cooper:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Answers to Questions for the Record

Dr. Alissa Cooper
Chair, IANA Stewardship Transition Coordination Group (ICG)

The Honorable Greg Walden

1. The GAC neither approved nor objected to the transition proposal. Which governments had reservations about the transition plan?

The transition package is comprised of two plans, one concerning the operational aspects of the IANA stewardship transition ("the IANA Stewardship Transition Proposal"), and the other concerning enhancements to the accountability of the Internet Corporation for Assigned Names and Numbers (ICANN). As chair of the IANA Stewardship Transition Coordination Group (ICG), my answer is in the context of the IANA Stewardship Transition Proposal.

The transition proposal achieved broad community support as demonstrated in multiple public comment periods, including the ICG's own solicitation of public comments. The ICG did not seek specific approval from individual supporting organizations or advisory committees such as the GAC, relying instead on those groups' ICG representatives to reflect the groups' views back to the ICG. There were five GAC members appointed to the ICG and the transition proposal was unanimously supported by ICG members, including the GAC members.

During its public comment period, the ICG received comments on the proposal from a number of governments and government representatives, including Turkey, Brazil, the United Kingdom, India, Japan, Colombia, Mexico, New Zealand, Sweden, the European Commission, Denmark, and Korea. The full archive of public comments received is available at: <https://www.ianacg.org/calls-for-input/iana-stewardship-transition-proposal-public-archive-of-submitted-comments/>.

The Honorable Renee Ellmers

1. ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.

This question primarily concerns the component of the transition package concerning enhancements to ICANN accountability. As chair of the IANA Stewardship Transition

Coordination Group (ICG), my answer refers to the other component, the IANA Stewardship Transition Proposal.

The transition proposal includes appropriate and properly supported independent accountability mechanisms for running the IANA functions. It relies primarily on the right of each operational community to change operators for the performance of the IANA functions within their purview. This means that if the communities that rely on IANA are unsatisfied with the performance of the IANA functions, they can choose to take their business elsewhere. This provides a strong check against any behavior that IANA may consider undertaking that would have a negative impact on the communities that rely on the IANA functions, including U.S. companies and individuals.

The operational communities are composed of individuals, businesses, non-profit organizations and technical experts to whom Internet security and stability are vitally important. These communities, not ICANN staff, are empowered to make the basic policy decisions that the IANA functions operator is charged with implementing. By enhancing existing accountability mechanisms and introducing new ones, the transition proposal actually gives interested parties a greater ability to hold IANA to established performance standards than they have today.

2. The transition plan asks for the U.S. government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision making and approach to developing policy for everyone. When the internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to insure fair decisions for all?

It is not the case that the IANA transition or the transition plan have created a new requirement for anyone, including the U.S. government, to trust groups of volunteers to ensure the smooth functioning of the Internet. In fact, this is how the Internet has been operating for decades. The Internet works because of voluntary cooperation among engineers, network operators, equipment manufacturers and users. The U.S. government and all other Internet users have already been relying on the voluntary cooperation of individuals and companies all over the world whose joint work has helped the Internet to thrive. This is the work of experienced professionals, many of whose businesses and livelihoods depend on the proper functioning of IANA.

The key strength of the transition proposal is that it provides continuity with how the Internet already operates. The processes and structures developed and used to keep the Internet running smoothly over the past 30 years have proven their robustness, even as the Internet has grown and evolved. The transition plan merely takes the safeguards that have existed for years – the use of transparent, public proceedings for all decisions; consensus-based decision-making that never defaults to voting or campaigning; established appeals processes; and the ability to recall or replace under-performing members of the leadership – and strengthens them.

3. Why the need to transition from the United States before the Accountability workstream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the internet ranging from the North Koreans, Chinese, Russians and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?

The ICANN Accountability Work Stream 1 includes the provisions that the global multistakeholder community deemed necessary to complete the IANA stewardship transition. By its very definition, Work Stream 2 was created to consider work that did not need to be concluded before the transition took place. The Internet and the organizations involved in ensuring its smooth operation are always evolving, and Work Stream 2 provides one path to continue that evolution at ICANN after the transition completes. Gradual introduction of enhancements will reduce any tendency to create instability from making too many changes at a single point in time.

Those involved in the global Internet community are, in fact, accountable. Indeed, the main goal of the transition proposal development process was to specify how all interested parties, including the U.S. government, would be able to hold IANA and ICANN accountable going forward. The ICG believes that the proposal meets that goal.

Security was a particular focus during the proposal development process. The transition proposal maintains the security of the domain name system by introducing minimum change and by keeping the current IANA functions operation team intact and carrying out the same role that it has today. The proposal sustains and enhances procedures for identifying and rectifying any potential performance degradations that may arise in the provision of the IANA functions. Broadening oversight over IANA means that there will be more attention devoted to the impact of the IANA functions on Internet security going forward, not less. Finally, removing the manual procedural checks that NTIA currently performs simplifies the change process for the root zone of the DNS, creating a more streamlined and stable process.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

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April 8, 2016

Ms. Sally Shipman Wentworth
Vice President, Global Policy Development
Internet Society
1775 Wiehle Avenue
Reston, VA 20190

Dear Ms. Shipman Wentworth:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Attachment – Additional Questions for the Record

**Internet Society's Response to the Questions of
The Honorable Renee Ellmers**

1. **ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the Internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.**

While this question is specific to ICANN, I think it is important to respond first to the broader question as relates to the IANA transition.

Each of the three IANA functions is associated with a particular community that has a direct operational or service relationship with the IANA functions operator—specifically, the Internet Engineering Task Force (IETF) for protocol parameters, the Regional Internet Registries (RIRs) for number allocations, and the Internet Corporation for Assigned Names and Numbers (ICANN) community for names. These communities have often been referred to as the “operational communities” or “directly affected parties” and it is these communities that define the policies for the values that IANA keeps track of. As part of the IANA transition process, each community has reviewed its own processes to ensure that they are open, transparent, accountable and not subject to capture by any one stakeholder or stakeholder group.

ICANN, specifically, has two different but inter-related roles for which it is responsible in the current operations of IANA. The first relates to policy development for Internet domain names and the second is the performance of the IANA functions by the IANA Department within ICANN.

Policy development for domain names - both for gTLDs and ccTLDs - is not done by ICANN staff, by its leadership or its Board of Directors. Rather the policies are formed by ICANN's multistakeholder global community, which includes governments, businesses, civil society advocates and the technical community all participating through ICANN's Supporting Organizations and Advisory

Committees. The transition proposal related to ICANN accountability strengthens the role of the community and helps ensure that ICANN remains fully accountable to its community.

Similarly, policy development related to protocol parameters and IP addresses are set by the relevant operational communities - the Internet Engineering Task Force (IETF) and the Regional Internet Registries (RIRs). The implementation of those policies is carried out by the IANA Department of ICANN. Importantly, under the proposed plan, each operational community will have a contractual relationship with the IANA functions operator; therefore, each operational community will have the right to select a new entity for the performance of the IANA functions as a last resort.

Thus, from an operational perspective, the final transition proposal maintains an important separation between policy development and implementation for the IANA functions, which is key in ensuring the overall stability and resiliency of the Internet and to avoiding capture.

2. **The transition plan asks for the U.S. government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision making and approach to developing policy for everyone. When the internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to insure fair decisions for all?**

The Internet is an open ecosystem of individuals and organizations that fulfill their missions through a framework of mutual trust and collaboration. The IANA transition proposal does not change the way the Internet has been operating for the past 30 years – in fact, voluntary, bottom up decision making has been the hallmark of the Internet since its earliest days.

The Internet's original design and the processes that were put in place by the various communities to support this design have proven their resiliency and robustness. Simply put, the transition plan takes these well-documented practices and safeguards – the communities' accountability mechanisms, the consensus-based decision-making model, the transparency of discussions and the collaboration and coordination between Internet institutions – and enhances them.

3. **Why the need to transition from the United States before the Accountability workstream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the internet ranging from North Koreans, Chinese, Russians and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?**

NTIA's original intent to transition key domain name system (DNS) and technical coordination functions – the IANA functions – away from the U.S. Government was outlined in the 1998 Statement of Policy "*Management of Internet Names and Addresses*". The development of this policy statement was guided by consultations and public input, including over 430 written comments (amounting to some 1,500 pages) from public and private sector stakeholders around the world.

As part of the transition of the IANA functions, the NTIA requested that issues of ICANN's accountability be addressed. For the past two years, the global multistakeholder community has been working towards an accountability framework that would ensure the IANA functions continue to operate under a predictable, stable and secure way. This process was characterized as Work Stream 1 and its recommendations were submitted to the NTIA last month along with the IANA Transition proposal. In short, this process has always been about transitioning the IANA functions and not simply about ICANN.

Regarding Work Stream 2, it is a process that is not related directly to IANA or its operations. It rather relates directly to ICANN as a corporation. It is a longer process and it is meant to deal with issues of corporate governance and the potential restructuring of the way a corporation operates. Notwithstanding its significance for ICANN and its community, it is not directly related to the operation of IANA or the Internet in general. Given that the Internet will continue to grow and evolve over time, it is important that all organizations, including ICANN, continue to evolve in order to ensure that they meet the needs and expectations of their communities.

FRED UPTON, MICHIGAN
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April 8, 2016

Ms. Audrey Plonk
Director
Global Security and Internet Governance Policy
Intel Corporation
2200 Mission College Boulevard
Santa Clara, CA 95054

Dear Ms. Plonk:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

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Sincerely,


Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

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FRED UPTON, MICHIGAN
CHAIRMAN

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April 8, 2016

Mr. Matthew Shears
Representative and Director
Global Internet Policy and Human Rights Project
Center for Democracy and Technology
1634 I Street, N.W.
Washington, DC 20006

Dear Mr. Shears:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

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Greg Walden
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Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

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Additional questions for the record

March 17, 2016, Subcommittee on Communications and Technology hearing "Privatizing the Internet Assigned Number Authority"

Responses of Matthew Shears, Director Global Internet Policy and Human Rights, Center for Democracy & Technology (CDT)

The Honorable Renee Ellmers

1. **ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the Internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.**

From the very beginning of the work on developing the accountability mechanisms, NTIA's criteria have guided the work of the multistakeholder community. It is worth noting that the criteria of both supporting and enhancing the multistakeholder model, and meeting the needs and expectations of the global customers and partners of the IANA services, have provided essential guidance. The accountability measures that have been put in place reinforce the role of the multistakeholder community and the customers of the IANA functions, and place important checks on the organization's mission and the powers of the ICANN Board. The accountability measures are also designed to ensure that no one party can take actions that are outside ICANN's mission or that could impact ICANN, the IANA functions or the DNS. Post-transition accountability will reside with the empowered ICANN multistakeholder community in which the significant US interests in the DNS and its continued stability and security are very capably represented across all stakeholder groupings.

2. **The transition plan asks for the U.S. government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision making and approach to developing policy for everyone. When the Internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to insure fair decisions for all?**

The ICANN community has been developing policies for the Domain Name System (DNS) since 1998. It is comprised of experienced and professional individuals from across the stakeholder groupings all of whom are committed to the stability, security and resiliency of the Internet. The United States Government's role has been effectively hands off, entrusting the Internet to this community. This community operates through a multistakeholder model that is a powerful construct for ensuring that decisions do not merely reflect the views of one particular stakeholder. The changes to the bylaws that will be implemented as a result of the work to enhance ICANN's accountability will ensure that the views of the community are heard and that ICANN is accountable to the global multistakeholder community.

3. **Why the need to transition from the United States before the Accountability workstream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the Internet ranging from the North Koreans, Chinese, Russians and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?**

Post transition, ICANN will be accountable to its community and the broader multistakeholder community. Within ICANN, the United States Government will continue to play a prominent role in the Government Advisory Committee, just as representatives of US businesses, technical bodies and civil society organizations will continue to play prominent roles in their respective parts of the community. When work on the transition was initiated it was decided that measures to enhance ICANN's accountability, empower its community and strengthen the multistakeholder model needed to be put in place before the United States Government could step back from its role in the DNS. These measures were, rightly, determined to be essential to the transition. The accountability measures in Work Stream 2 were not considered essential to be in place prior to the transition but were deemed important enough to ICANN's future to have work carry on post-transition.

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
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April 8, 2016

The Honorable David A. Gross
Former U.S. Coordinator
International Communications and Information Policy
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006

Dear Ambassador Gross:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, March 17, 2016, to testify at the hearing entitled "Privatizing the Internet Assigned Number Authority."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Friday, April 22, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

March 17, 2016, Subcommittee on Communications and Technology hearing “Privatizing the Internet Assigned Number Authority”

Responses of David A. Gross to Questions for the Record

The Honorable Greg Walden

1. What were the concerns expressed by the governments in the GAC meetings in Marrakech?

At the ICANN meeting in Marrakech, some governments did express concerns regarding the accountability proposal put forth by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). Among the issues discussed by governments were the appropriate role of governments regarding the ICANN multistakeholder community, as well as certain mechanisms proposed by the CCWG-Accountability that were perceived by some governments as limiting the GAC’s ability to participate in the ICANN community on equal terms with other stakeholders. Appendix A to the CCWG-Accountability report included a Minority Statement by Olga Cavalli, Argentina’s representative on the GAC, who also represented the GAC on the CCWG-Accountability. Her statement was supported by the governments of Argentina, Benin, Brazil, Chile, Commonwealth of Dominica, France, Guinea, Mali, Nigeria, Paraguay, Peru, Portugal, Russian Federation, The Democratic Republic of Congo, Uruguay, and Venezuela. Some of the concerns raised by governments at Marrakech echo the themes of this statement. For ease of access, her minority statement that was included with the CCWG-Accountability report is appended.

To provide a more complete answer to the question regarding the concerns expressed by governments in the GAC meetings in Marrakech, it is helpful to review the transcripts of each of the GAC meetings from ICANN 55 in Marrakech that are available on ICANN’s website. In particular, on the morning of Sunday, March 5, 2016, the GAC discussed in detail Recommendation 11 of the CCWG-Accountability report, which addresses how the ICANN Board should respond to GAC Recommendations. The transcript of that particular discussion is available at: <https://meetings.icann.org/en/marrakech55/schedule/sun-gac-morning/transcript-gac-morning-06mar16-en>.

In addition, there also were extensive discussions about the IANA Stewardship Transition and the Enhancing ICANN Accountability proposals at a GAC High Level Government Meeting held on Monday, March 7, 2016. The transcript of that meeting can be found at: <https://meetings.icann.org/en/marrakech55/schedule/mon-gac-hlgm/transcript-gac-hlgm-07mar16-en>.

On the afternoon of Tuesday, March 8, the GAC further discussed the Accountability report. The transcript of that meeting can be found at: <https://meetings.icann.org/en/marrakech55/schedule/tue-gac-afternoon/transcript-gac-afternoon-08mar16-en>.

Members of the GAC discussed the IANA Stewardship Transition and the proposal for Enhancing ICANN Accountability at various other GAC meetings as well. Links to the transcripts for each meeting, as well as audio recordings of their proceedings, are available via

the schedule of events from ICANN 55. See:
<https://meetings.icann.org/en/marrakech55/schedule-full>

2. What would have to occur for the governments involved in ICANN to effectuate major changes such as the ICANN mission or the location of its principle place of business?

Under the framework proposed in the CCWG-Accountability report, it would be extraordinarily difficult for governments to force these major changes without the consent and agreement of a substantial portion of ICANN's multistakeholder community. The CCWG-Accountability proposal necessitates multiple layers of approval, and various checks and balances will be added to prevent one stakeholder group, including governments, from engineering major changes to ICANN's mission and core activities.

In general, governments can influence Board decisions through the GAC, which can issue "advice" that in some instances is binding on the Board. Should the GAC issue advice to the ICANN Board by consensus (understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection by any government, including by the United States), the advice only can be rejected by a 60 percent vote of the Board. Put differently, in order for governments to dictate Board action, first they would need to obtain consensus (unanimous agreement) through the GAC, an organization in which the United States and other like-minded countries take an active role. Thereafter, any advisory decision still could be rejected by a 60 percent vote of the Board.

After the CCWG-Accountability proposal is implemented, changes to the ICANN mission, and some other major actions, would require alteration to Fundamental Bylaws, which could be accomplished only through cooperation between the ICANN Board and the "Empowered Community." Here, the threshold of Board approval required is even greater: 75 percent of the Board must approve the change. Moreover, Board activity alone would not be sufficient—changes to Fundamental Bylaws also require approval by the Empowered Community, and a public consultation process. The GAC can participate as one Decisional Participant among many in the Empowered Community. Importantly, however, the GAC is barred from participating in an Empowered Community decision challenging ICANN Board action performed pursuant to a GAC advisory decision.

The Honorable Renee Ellmers

1. **ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the Internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.**

The CCWG-Accountability process took account of such concerns. In essence, the framework established by the CCWG-Accountability is intended to prevent any stakeholder group or individual from taking unilateral action that could compromise the security, stability, and reliability of the Internet. Even after the IANA Stewardship Transition, the United States government is expected to participate actively in the GAC. Moreover, the interests of U.S. businesses, the technical community, civil society, and others are well-represented through various organizations and committees making up ICANN's Empowered Community, which retains the ability to challenge ICANN Board decisions and even demand the recall of the entire Board.

2. **The transition plan asks for the U.S. government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision making and approach to developing policy for everyone. When the Internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to insure fair decisions for all?**

Probably the best safeguard is robust participation in and support for the multistakeholder community. The framework established in the CCWG-Accountability report provides various mechanisms to ensure that the decisions of ICANN's leadership should reflect the will of the ICANN community and are consistent with ICANN's bylaws and mission.

3. **Why the need to transition from the United States before the Accountability workstream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the Internet ranging from the North Koreans, Chinese, Russians and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?**

The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) divided its recommendations into two categories. Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanisms necessary to enhance ICANN's accountability

within the timeframe of the IANA Stewardship Transition would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity. Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition. Some of the enhancements considered for Work Stream 2 are of the nature of continuing improvements that may be worked on iteratively (*e.g.*, improving ICANN's standards for diversity at all levels), and therefore it would be impractical to wait until they are "completed" to perform the IANA stewardship transition. Others, while important, may not be essential to an orderly, secure, and stable IANA transition (*e.g.*, considering enhancements to the Ombudsman's role and function).

Work Stream 1 is comprised of those items that were deemed by the CCWG-Accountability as essential to be resolved prior to the IANA stewardship transition. This includes enhancements to the community's ability to review ICANN's activities, to reject unfavorable changes to ICANN's bylaws, and to remove Board members or reject certain Board decisions. Changes of this sort were necessary in order for the community to feel confident in ICANN's continued ability to perform its critical role in an independent and representative way. By comparison, the remaining Work Stream 2 items were not seen by the CCWG as essential to a successful IANA transition, but rather as further improvements to ICANN's processes.

19 Minority Statement by Olga Cavalli**20 CCWG-Accountability Member, GAC****21** Dear co-chairs,**22** After many months of hard work, CCWG has delivered a final proposal to be accepted by the community and then submitted to the ICANN board and NTIA. The negotiations leading to the delivery of this proposal have been very intense, and sometimes disappointing. More specifically, the attempts of some stakeholders to take advantage of the IANA transition in order to reduce the ability of governments to be part of the – to be enhanced – community, have jeopardized the success of the overall process, and more broadly, have put at risk our trust in what has brought us all here in the first place: the multi-stakeholder approach.**23** The role of governments in the multi-stakeholder community**24** The idea that governments threaten the multi-stakeholder community or benefit from a "special status" in the current ICANN structure is a misconception:

- Governments only have an advisory role in ICANN, through the Governmental Advisory Committee (GAC), whereas other constituencies exercise a decisional role, for instance through the drafting of policy recommendations.
- Governments do not participate in the ICANN Nominating Committee (NomCom) for the selection of ICANN's leadership positions in the Board, ccNSO, GNSO and ALAC, unlike other AC/SOs within ICANN.
- Governments do not participate to the ICANN board, whereas all other AC/SOs can elect members of the board, directly and through the Nominating Committee. GAC can only appoint a non-voting liaison to the board.
- The ICANN board can easily reject GAC advice, even if the advice was approved without any formal objection. If "the ICANN board determines to take an action that is not consistent with the Governmental Advisory Committee advice" and fails to "find a mutually acceptable solution" (an obligation which does not only apply to GAC advice⁶), then the only obligation of the board is to "state in its final decision the reasons why the Governmental Advisory Committee advice was not followed"⁷. On the other hand, a PDP approved by 66% of GNSO can only be rejected by a 2/3 majority of the board⁸.

25 On the contrary, we believe that governments are an essential part of the community:

- GAC is the most geographically diverse entity in the community. This element should not be underestimated, given that the internationalization of ICANN has been a recurring issue since its inception in 1998.
- Governments bring a unique perspective on public policy issues and remain the most legitimate stakeholders when it comes to protecting public interest.

⁶ *ICANN Bylaws, Annex B, Section 15.b*: "The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN. (...) The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution."

⁷ *ICANN Bylaws, Article XI, Section 2*.

⁸ *ICANN Bylaws, Annex A, Section 9*: "Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN."

- An ICANN with no or very little governmental involvement would be even more subject to a risk of capture by special interests or narrow corporate interests.
- 26 Proposed solutions to the so-called Stress-Test 18 leading to changes in Recommendation 1, 2 and 11
- 27 In particular, we are extremely disappointed by and object to the latest "compromise" solution regarding Stress Test 18-related issues, which led to changes in Recommendations 1, 2 and 11.
- 28 According to the "CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations", Stress Test 18 "considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board". In this scenario, GAC would therefore align its decision-making process to what is already the rule for ALAC, GNSO and CCNSO. However, some CCWG participants seem to believe that preventing GAC from adopting the decision making process used by other stakeholders is necessary to make ICANN more accountable.
- 29 Many rationales were circulated to justify Stress Test 18-related measures, including ones that involved NTIA. However, the proposed solutions to the issues raised by Stress Test 18 were never part of the initial conditions required for the acceptance of the IANA transition by NTIA. In March 2014, when NTIA announced the transition, four principles were singled out:
- Support and enhance the multi-stakeholder model;
 - Maintain the security, stability, and resiliency of the Internet DNS;
 - Meet the needs and expectation of the global customers and partners of the IANA services;
 - Maintain the openness of the Internet.
- 30 In its press release, NTIA also stated it would "not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution". To our knowledge, the current ICANN structure does not qualify as a government-led organization, especially since the governments only have an advisory role, through the Governmental Advisory Committee. Therefore, status quo would meet the NTIA requirements.
- 31 Despite the strong concerns of many governments regarding the proposed solutions to Stress Test 18, and their doubts about the impact of such solutions on ICANN's accountability, **GAC has agreed to a consensus package** during the Dublin meeting, as reflected in the Dublin GAC Communiqué, **showing its willingness to reach a compromise** in order to achieve the IANA transition. This compromise was based, inter alia, on a 2/3 threshold for the ICANN board to reject GAC advice and on the preservation of GAC's autonomy in defining consensus.
- 32 Recommendation 11 of the 3rd CCWG report proposed a very narrow definition of consensus, as "general agreement in the absence of any formal objection", which represented a major shift from the principles agreed in the GAC Dublin communiqué, therefore triggering the rejection of Recommendation 11 by some GAC members. However, the 3rd draft report proposed a 2/3 threshold for the board to reject GAC consensus advice, aligned with the GAC Dublin Communiqué.
- 33 The "compromise" solution proposed in the "CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations" published in February is as follows:
- Maintain a very narrow definition of consensus as "the absence of any formal objection";
 - Set the threshold for board rejection of GAC full consensus advice at 60% instead of 2/3;

- Limit the ability of GAC to participate in the empowered community mechanisms if they aim at challenging the board's implementation of GAC advice – this proposal has never been discussed in CCWG before, and hardly relates to the initial issues raised by Stress Test 18.
- 34 We fail to understand how these new proposals address the concerns expressed by many GAC members in the public comment period, for instance relatively to the ability of one government to block a draft advice approved by an overwhelming majority of governments. Even though consensus should remain the GAC's ultimate objective, the requirement to reach full consensus for each and every issue considered might lead, in some cases, to paralysis. Any hypothetical advice reflecting less than full consensus (including 100% minus one - which in our view would be basically as representative as full consensus) could indeed be dismissed by a simple majority vote of the board. As a result, the ability of GAC to participate to a discussion considered as relevant by most of its members would be very limited and decisions could theoretically be made without any significant GAC input. To prevent this, we believe governments shall not be bound by one single rule of decision-making, particularly if potentially controversial topics are to be considered
- 35 We note that GAC is once again asked to lower its ability to be involved in the post-IANA transition ICANN. Regarding the ability of GAC to participate in the empowered community mechanisms, we believe such a decision should be carefully reviewed and should not be imposed under pressure in a very short timeframe. More specifically:
- We do not understand why the "two bites at the apple" problem should only apply to GAC, and not to all SO/ACs which could participate in a community power challenging the board's implementation of their advice or policy recommendation.
 - It is GAC's sole responsibility to determine if it wishes to participate in a decisional capacity to the community mechanisms.
 - It would be contradictory to limit GAC's ability to participate to the community powers only to those cases involving public policy / legal aspects, while preventing GAC to participate to community powers involving the board's implementation of its advice.
- 36 Governments have shown impressive flexibility and tried to reach a compromise in many ways, as reflected in the Dublin GAC communiqué. However, only the demands of part of the community representatives were met, at the expense of GAC; therefore, rather than "compromise", "winner takes all" would actually be a more accurate description of what is proposed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations.
- 37 Olga Cavalli
- 38 This statement is supported by the governments of Argentina, Benin, Brazil, Chile, Commonwealth of Dominica, France, Guinea, Mali, Nigeria, Paraguay, Peru, Portugal, Russian Federation, The Democratic Republic of Congo, Uruguay, Venezuela

