

Network Solutions does not believe that ICANN has developed fully the accountability and transparency measures necessary to ensure its effective self-governance. While ICANN has achieved some transparency gains, there is still significant work to be done. We believe that ICANN should focus its institution building efforts on adopting more effective oversight mechanisms and decision-making procedures for its Board of Directors. ICANN also should improve its financial disclosures, and require public review of important contracts.

Board Review Mechanisms Must Be Strengthened

ICANN's most fundamental and persistent shortcoming is that its Board of Directors is really only accountable to itself. If eight out of the fifteen voting Board members should act in a manner inconsistent with ICANN's mandate and/or the will of the community, there are few mechanisms to rectify the situation. None of the existing recourses – the Reconsideration process, an Independent Review Panel (“IRP”), or the Ombudsman – provides meaningful checks against the Board's potential abuse of its authority.

The Reconsideration process fails the community on several levels. Complaints only go before the Board Governance Committee – a subset of the same group that made the original decision. This raises fundamental impartiality concerns. Reconsideration is further limited in that it can only be applied to alleged violations of ICANN policies or decisions made without consideration of material information – the definitions of which are determined by the Board subgroup with Staff support.¹ Finally, and perhaps most importantly, any recommendations that may come out of the process are merely advisory and not binding on the full Board. Thus, while the Reconsideration process might be helpful if/when important information was not considered by the Board, it is not an effective accountability measure.

Under an IRP, a person who is materially affected by an ICANN act or decision may seek an outside third-party review only if it is shown that a Board decision was inconsistent with ICANN's Articles of Incorporation or Bylaws. Even if a challenge survives this hurdle, the IRP arbitrator(s) can only issue a non-binding recommendation—to the very same Board that made the challenged decision in the first place. Thus, this method suffers from the same impartiality defect as the Reconsideration process. While the IRP review might be independent, the decision-making power to act on the review is not.

Appeal to the ICANN Ombudsman is also an insufficient approach for challenging a Board decision. Even if he accepts a challenge, the Ombudsman merely provides advice to the same Board that acted in the first place. As with the Reconsideration and IRP processes, the Ombudsman is not empowered to order any change.

Some options that have been discussed to address the lack of sufficient oversight over the ICANN Board include: adding additional requirements for super majority voting, providing for the potential to veto a Board decision, and amending the mechanisms to remove a Board member. We believe that ICANN should seriously consider such recommendations and amend its Bylaws to create new procedures for challenging a Board decision. We look forward to working with ICANN in achieving the appropriate level of Board accountability.

¹ Bylaws, Article IV, Section 2.2, available at <http://www.icann.org/general/bylaws.htm#IV>.

Board Decision Making Needs to be More Accountable and Transparent

The Board should be subject to a high standard to protect its integrity and to encourage confidence in its decisions. Although its Bylaws require ICANN to be “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,”² the organization has yet to adopt internal measures that ensure that its Board members are accountable for their actions and decisions. Considering the magnitude and importance of a Board decision, the current mechanisms for understanding the rationale behind a decision do not foster the level of accountability appropriate for ICANN.

ICANN Board decisions should be based on methodical decision-making processes subject to meaningful community review. The Board also should provide an analytical component of its decisions that clearly explains how stakeholders, staff, and experts’ comments were taken into consideration, and how and why such inputs were or were not followed in a final decision. By utilizing mechanisms that are more accountable and transparent, a predictable system, which generates consistent results, could be realized. This type of approach also will promote a sense of due process and fairness in Board actions.

ICANN’s Financial Accountability and Transparency Measures Still Need Improvement

ICANN has improved its financial transparency over the years, as evidenced by its commitment to performing independent external audits, publishing an annual report, and refining its online dashboard. We believe, however, that additional measures are still necessary. ICANN’s 2010-2011 budget anticipates revenues of over \$65.5 million.³ Between 1999 and 2009, ICANN’s revenue rose from \$5.9 million to \$60.7 million;⁴ in the past five years alone ICANN’s budget has more than tripled. These vastly expanded resources require adequate changes in oversight and accountability to ensure that the funds are used in furthering ICANN’s mission.

ICANN should adopt regular reporting standards and additional budget-setting processes. Currently, there are no reporting standards or transparent budget-tracking systems in place. While the Finance Committee, in consultation with the President, *may* establish such standards and benchmarks,⁵ they are not required under the current rules. We believe that they should be mandatory.

The ICANN budget process also should involve relevant stakeholders at more meaningful levels. We believe that by including stakeholders on an expanded Finance Committee or Budget Advisory Committee, ICANN would promote community input in a more significant manner.

² Bylaws for Internet Corporation for Assigned Names and Numbers, Article I, Sections 2, 10.

³ See FY11 Operating Plan and Budget (Adopted 25 June 2010), available at <http://www.icann.org/en/financials/adopted-opplan-budget-fy11-10jul10-en.pdf>.

⁴ See ICANN Financial Information, available at <http://www.icann.org/general/financial.html>.

⁵ See ICANN Accountability & Transparency Framework and Principles, at 14, January 2008, available at <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf> (last visited January 23, 2008); see also Finance Committee of the Board, Art. III(3), available at <http://www.icann.org/committees/finance/> adopting Resolution 00.96, Preliminary Report, Special Meeting of the Board (December 18, 2000), available at <http://www.icann.org/minutes/prelim-report-13dec00.htm#00.96/>.

By including more stakeholders, ICANN could permit the community to directly impact budgeting issues, thereby improving financial transparency and accountability.

ICANN Should Require Community Review of Important Contracts

ICANN's contract approval methods still lack a consistent review process. For example, important changes to the .net Registry Agreement were never published for public comment prior to ICANN executing the agreement. Since then ICANN has published most important contracts for review, but it has never amended its Bylaws to make it clear that all material contracts must be published for public review and comment. Without requiring the consideration of stakeholder comments in contract formation, ICANN does not honor its commitment to transparency and the bottom-up, multi-stakeholder approach.

ICANN should modify its Bylaws to clearly require that all material contracts be published for review by stakeholders. As noted above, the Board also must demonstrate through transparent mechanisms that the comments on draft agreements were considered and set forth the reason why the information was or was not used or followed prior to execution of the agreement. Such an approach will honor ICANN's obligation to the Internet community and provide legitimacy to Board decisions related to contract formation.