



May 28, 2014

Via Electronic Mail: comments-enhancing-accountability-06may14@icann.org

Re: Enhancing ICANN Accountability

As a global Internet company, Google depends on ICANN to perform both the Internet Assigned Number Authority (IANA) functions and its broader policy-making duties related to the global Internet in a way that preserves the underlying security, stability, interoperability, resiliency, and openness of the Internet.¹

Google also supports the National Telecommunications and Information Administration's (NTIA) proposal to transition its stewardship role over the IANA functions to the global multistakeholder community, provided that the conditions enumerated by NTIA in its March 14, 2014, announcement regarding the transition are met. These conditions include: (1) ensuring that the transition supports and enhances the multistakeholder model; (2) ensuring that the transition maintains the security, stability, and resiliency of the DNS; (3) ensuring that the transition meets the expectations of affected parties; (4) ensuring that the transition maintains the openness of the Internet; and (5) ensuring that the IANA functions are not transferred to a governmental or intergovernmental authority.

The transition process requires an evaluation of two sets of accountability mechanisms – those that pertain to ICANN's performance of the IANA functions and those that pertain to ICANN's broader role within the Internet ecosystem. While the IANA functions are limited technical functions that enable the updating and operation of the Internet, NTIA's contract with ICANN to perform these functions historically created a broader, *de facto* stewardship role for the U.S. Government. That is, the existence of the contract² has allowed NTIA to ensure that ICANN performs effectively the contracted technical functions *and* also its policy-making functions, which are not subject to the contract. While the two sets of measures should not be conflated, ensuring adequate accountability measures for both sets of responsibilities should be a prerequisite in fully transferring the oversight role over the IANA functions to the global multistakeholder community.

Below, Google offers a number of suggestions to improve ICANN's existing accountability mechanisms.

¹ The IANA functions include the administration of the IP address identifiers and the Internet protocol parameters and administration of the Domain Name System (DNS).

² Historically, ICANN maintained two agreements with the U.S. Government. The IANA functions contract pertains to the management of specific technical functions. In parallel, there was also another agreement developed to help ICANN reach organizational maturity. This agreement, originally titled a *Memorandum of Understanding*, evolved into a *Joint Project Agreement*, and finally culminated in today's *Affirmation of Commitments*. The *Affirmation of Commitments* is expected to survive the proposed transition.

Section 1: ICANN's Existing Accountability Mechanisms

ICANN's existing accountability mechanisms stem from two sources – the IANA functions contract itself and ICANN's Affirmation of Commitments (AoC), a set of mutual commitments agreed upon by ICANN and the NTIA related to ICANN's broader Internet policy duties.

Accountability measures contained within the IANA functions contract

The accountability measures enumerated in the IANA functions contract itself largely address the challenge of ensuring that ICANN performs the IANA functions effectively and transparently. For example, ICANN commits to:

- Perform the IANA functions in a stable and secure manner;
- Maintain a security plan and take other security measures for the safe and stable performance of the IANA functions;
- Carry out the IANA functions in a transparent manner, including inter alia, publishing of user instructions, technical requirements, and an explanation of the processes and procedures that are used to develop policies related to the IANA functions;
- Develop performance standards for the conduct of the IANA functions;
- Perform IANA functions within the United States;
- Collaborate with NTIA and IANA function customers to implement timely resolution of complaints following industry best practices;
- Prepare and submit to NTIA regular performance progress and standards reports;
- Generate and retain security process audit records and provide audit reports, and submit to an external, independent, specialized compliance audit; and
- Adhere to robust conflict of interest requirements.

However, a few of the measures in the IANA contract have broader reach. Critically, the contract requires functional separation between ICANN's policy-making role and its technical performance of the IANA functions.³ In other words, staff members carrying out the IANA functions cannot have a role in setting those policies, as established by interested and affected parties via the multistakeholder, private-sector-led, bottom-up policy development model that ICANN administers, which includes participation from the Internet Engineering Task Force, Internet Architecture Board, regional Internet registries, top-level domain operators and managers, national governments, and the Internet user community.⁴

Accountability measures in the Affirmation of Commitments

The AoC binds ICANN to a very broad range of accountability and transparency measures. In addition to the broad substantive commitments contained in the AoC – including the requirements to develop policy through a bottom-up, consensus-based multistakeholder model, act in the public interest, and preserve the security, stability, resiliency, and interoperability of the DNS – ICANN remains committed to a number of specific measures designed to ensure compliance with these substantive commitments.

³ *Id.* at § C.2.5.

⁴ *Id.* at § C.1.3.

- ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact of its actions on the systemic security, stability and resiliency of the DNS. This requirement essentially commits ICANN to self-auditing.
- The AoC requires ICANN to conduct responsive consultation procedures that provide detailed explanations of the basis for decisions, including how public comments have influenced the development of policy consideration. More specifically, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof, and the sources of data and information upon which ICANN relied. It also requires ICANN to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and strategic and operating plans, including transparent and accountable budgeting. Together, these requirements are intended to measure ICANN's adherence to its commitment to reasoned, consensus-based decisionmaking.
- Equally critical, the AoC requires ICANN to perform a series of periodic reviews related to accountability and transparency; security, stability and resiliency; competition, consumer trust, and consumer choice; and WHOIS service. WHOIS is a query and response service that allows users of the Internet to identify the registered users or assignees of an Internet resource, such as a domain name or an IP address block.

However, the AoC can be cancelled by either ICANN or NTIA with 120 days of written notice. In the past, the possibility that NTIA would not renew the IANA functions contract at least indirectly deterred ICANN from cancelling the AoC. That is, ICANN had an incentive to continue to honor the AoC because it needed to demonstrate those commitments in order to be competitive for the IANA functions contract. Therefore, one important question facing the ICANN community is whether and how the AoC should evolve to motivate continued adherence by ICANN to the AoC in the absence of the IANA contract. By way of specific example, on March 10, 2012, the NTIA exercised this oversight when it canceled the pending request for proposal for a new IANA functions contract “because [NTIA] received no proposals that met the requirements requested by the global community,” including “the need for structural separation of policymaking from implementation, a robust company-wide conflict of interest policy, provisions reflecting heightened respect for local country laws, and a series of consultation and reporting requirements to increase transparency and accountability to the international community.”⁵

Section 2: Proposed Accountability Enhancements

Below Google suggests a number of improvements to ICANN's existing accountability mechanisms.

Independent audit

ICANN should work to create specific performance goals and then submit to an annual independent audit of its performance in meeting those goals. This audit should include an assessment of ICANN adherence to the AoC, its Articles of Incorporation, and its Bylaws. It should also include an assessment of whether ICANN has implemented recommendations arising from the required

⁵ NTIA, Notice - Cancelled IANA Functions - Request for Proposal (RFP) SA1301-12-RP-IANA (March 10, 2012), *available at* <http://www.ntia.doc.gov/other-publication/2012/notice-internet-assigned-numbers-authority-iana-functions-request-proposal-rf>.

periodic reviews set forth in the AoC, which are outlined above. Also, it should include a complaint tool through which aggrieved parties can highlight for auditors particular circumstances under which ICANN is alleged to have deviated from the AoC, its Bylaws, of its Articles of Incorporation. Further, the auditor should seek public comment on each of the topics of its audit from a broad group of stakeholders, including but not limited to the Internet technical community organizations, the ICANN community, and other relevant organizations and stakeholders.

As such, the audit should be broader than a traditional audit of an organization's financial records. The auditor should be selected based on a competitive process and should be required to demonstrate past experience in conducting performance evaluations of large non-profit corporations. The audit and the public comments should be transmitted to the Board for final decision and implementation. Subsequent audits will examine progress against earlier audit recommendations, and the Board should be required to explain in writing any failures to comply to the ICANN community. Given the breadth of this process, ICANN should only be required to commit to it once every two years.

Addition of a clerk or parliamentarian

ICANN's processes, procedures, rules, and Bylaws are numerous and can be difficult to navigate for new and experienced participants alike. As a way to help groups, individuals, the Board, and ICANN staff more effectively navigate ICANN's different rules and procedures as well as ensure that all groups are adhering to the organization's Bylaws, Google recommends the creation of an independent new staff position whose sole responsibility would to serve as an expert advisory on ICANN procedure and provide advice to the community on the correct course of action in view of all applicable circumstances and based on ICANN's existing rules and procedures.⁶ The overarching role of the position would be to provide non-binding advice to promote consistency in procedural analysis and ensure ICANN's rules are applied uniformly and fairly across all processes. Overall, the process should offer predictability and increase transparency in decision-making. General procedural principles and advice offered should be published on the ICANN website.

Broader Board reconsideration procedures or broader scope for independent review

ICANN's Bylaws allow only limited review of Board decisions. For example, any person or entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that they have been adversely affected by: (1) actions or inactions that contradict established ICANN policy(ies); (2) actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; and (3) actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.⁷

Google suggests two modifications to the reconsideration policy. First, Board reconsideration should be granted wherever the Board or staff acts arbitrarily or capriciously. This is a common, largely deferential standard of review that is typically used in the review of administrative agency actions in

⁶ In the U.S. Government, this role is referred to as the "Parliamentarian" and in other governments, it is sometimes referred to as the "Clerk".

⁷ ICANN Bylaws, art. 4, § 2.

the United States. Under this standard, the reviewing authority considers whether the decision at issue was based on a consideration of the relevant factors and whether there has been a “*clear error of judgment*.”⁸ Under this standard, a reviewer cannot simply substitute his own judgment for that of the original deciding body; rather, the original body must have clearly erred, and disputes are usually remanded to the original decision-maker for further elaboration and reconsideration. A substantial body of case law interprets this standard, and would be available to arbitrators as they develop conclusions.

Second, a complaining party should have the option to further appeal Board reconsideration requests to a panel of independent arbitrators to be selected jointly by the complaining party and the Board. Alternatively, the panel could be selected from a set of reviewers, who would be appointed for staggered two- or three-year terms and review and assess claims during that time period (similar to a Postal Board of Governors model). Today, independent review of Board action can only be sought if the Board acted in contravention of ICANN’s Articles of Incorporation or its Bylaws.⁹ Google’s recommendation would subject a broader range of conduct to independent, third-party review. For example, under today’s rules, it would be difficult for a party to seek independent review of inconsistent resolutions of string-confusion decisions, but under this proposal, a complainant could argue that ICANN’s inconsistent decisions amounted to arbitrary action.¹⁰ To deter frivolous invocation of independent arbitrators to review Board actions, a party seeking independent review of a Board reconsideration decision should be required to bear at least fifty percent of the arbitration costs. In addition, parties seeking independent review of Board action through this process should be required to post a non-refundable \$10,000 deposit in escrow before its claims are considered. A similar approach was implemented in the gTLD objections process in order to deter frivolous claims. Independent panel review would ask whether the Board’s decision on reconsideration was arbitrary and capricious. An action that contravenes ICANN’s articles of incorporation, Bylaws, or the AoC would necessarily meet that standard.

Changes to ICANN’s Bylaws

Currently, in order for the Board to be able to amend ICANN’s Bylaws, two-thirds of the Board must vote in favor of the amendment. As a way to ensure that ICANN maintains its core mission and its commitment to accountability and transparency, Google also recommends that any changes to the Bylaws, particularly pertaining to Article I (Mission and Core), Article II (Power), and Articles III and IV (Transparency and Accountability and Review respectively) should first be proposed to the community for the maximum allowable public comment period. Further, any amendments to these sections should require the support of *more* than two-thirds of the Board, or at least 11 out of 15 Board members.

Potential changes to Affirmation of Commitments

ICANN should consider a range of changes to the current AoC.

⁸ See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (emphasis added).

⁹ See ICANN Bylaws, art. 4, § 3(4).

¹⁰ For example, a party who bid on .CAR could argue that inconsistent resolutions of whether .CAR and .CARS are confusingly similar amounted to arbitrary action.

First, the current AoC can be terminated with 120 days written notice by either party. ICANN should adopt a Board Resolution stating that it considers the AoC binding on ICANN and that it will not terminate the AoC unless more than two-thirds of the Board, or 11 out of 15 Board members vote to do so.

Second, before ICANN determines the appropriate path forward with regard to designing additional global accountability mechanisms, ICANN should commission a study by an international law and governance expert to examine the following questions.

- A. Should additional entities, whether governmental or non-governmental, be invited to become parties to additional AoCs?
- B. Should ICANN enter into specific or different AoCs or Memoranda of Understanding (MOU) with other Internet technical organizations, such as the Regional Internet Registries, the Internet Engineering Task Force, and the Internet Society separately from the agreements that are already in place? Are such agreements necessary? How would they contribute to the stability, security, and resiliency of the DNS?
- C. How would such additional agreements impact ICANN's existing agreements between ccTLD operators, registry operators, and registrars?
- D. How can aggrieved individuals or entities, whether or not they are parties to the AoC, seek redress if ICANN or another counterparty fails to adhere to the agreement? For example, should ICANN consider establishing judicial or accountability panels, similar to the standing Independent Review Panel to adjudicate claimed violations of the agreement? If so, how would standing to bring a complaint be determined? What standard of review would be used to review compliance with the Affirmation? How would a review panel be selected? What sort of remedies would a review panel be able to compel?

After reviewing this study and inviting public comment on it, the Board should consider whether adding counterparties or specific enforcement mechanisms to the AoC could be beneficial to the public interest, whether by strengthening the stability, security, and resiliency of the DNS or strengthening and improving ICANN's multistakeholder model of governance.

Section 3: Possible scenarios to guide the path forward and evaluate the sufficiency of accountability mechanisms

Since ICANN's inception, U.S. Government stewardship has served as a backstop both supporting ICANN's organizational growth and ensuring that ICANN remains accountable to the global Internet community. As such, the U.S. Government's transfer of the stewardship role signals not only an evolution of the technical management of the IANA functions but also a change in organizational support and *de facto* checks and balances on ICANN's decision-making processes.

Below, we examine how existing and new accountability mechanisms would address a number of challenging but realistic scenarios. A number of the scenarios are based on actual events, but we can only assume that ICANN will face other contentious issues in the future. How ICANN handles these or similar scenarios will be key to its continued ability to perform its duties in a way that serves the public interest.

Delegation and redelegation of country code top-level domains

As the organization principally responsible for delegation and redelegation issues, ICANN may be faced with highly political decisions which could have larger geopolitical ramifications especially when it comes to the delegation and/or redelegation of ccTLDs. In general, ICANN uses the ISO 3166 list to determine ccTLD delegation, but it is conceivable that without direct U.S. Government involvement via a binding contract that countries could begin exerting undue pressure on ICANN to delegate or redelegate specific gTLDs and ccTLDs. For example, in Country XY, a dispute arises between two parties, one of whom claims that authority over the administration of the .xy ccTLD should be delegated to it. IANA should follow its standard procedures for handling such a redelegation request. However, if either party is dissatisfied with the decision of IANA and the Board, either could escalate and request review of the actions of IANA and the Board of ICANN by a panel of independent arbitrators as we propose above. In addition, such an incident would likely be addressed, along with similar requests, by an independent audit.

Role of governments in policy-making

Within ICANN today, governments participate in the policy-development process in ICANN through the Government Advisory Committee (GAC). However, there is a growing desire by some governments to increase the GAC's role within ICANN by granting the GAC a *de facto* veto over policy decisions. One could imagine a scenario where the GAC releases consensus advice opposing the delegation of .CORRUPT after the string application has gone through the full application review process and adhered to the rules and procedures of the program. In another hypothetical scenario, a group of governments within the GAC could voice major concerns regarding a string; however, they might be unable to achieve official GAC consensus advice on that specific string. If so, they might pivot and lobby the Board to block the string's delegation into the root zone.¹¹ Here, again, the mechanisms we propose would ideally make it more difficult for ICANN to act in a non-transparent way that disregards its own Bylaws (which set forth the role of the GAC) and its own policies (which set forth the criteria for delegating a new generic top-level domain). We recognize the importance of the role played by governments in the ICANN ecosystem, and we support the current organizational structure of the GAC. However, in order to ensure that governments are properly recognized as participants in the process but not final decision-makers, ICANN may wish to consider including one or more government representatives on the accountability and board reconsideration panels we propose. Moreover, an audit should include an analysis of how the Board has treated GAC advice over the course of the review period.

¹¹ A similar series of events played out when ICANN considered the addition of .XXX as a generic top-level domain (TLD). ICM registry applied for .XXX during an earlier TLD expansion round. ICANN granted the TLD after much debate spanning many years. This debate also included consideration by an Independent Review Panel. No consensus GAC advice was issued against the string. After the TLD was approved and it moved toward delegation into the global root zone, Neelie Kroes, Vice-President of the European Union sent a letter to U.S. Department of Commerce Secretary Gary Locke asking the United States to consider the views of other governments before allowing .XXX to be entered in the root zone. The letter was issued outside of the normal ICANN processes and sought to circumvent that process by appealing to the U.S. government directly. Assistant Secretary Larry Strickling responded to Ms. Kroes indicating that NTIA could not intervene to override ICANN's decision, and the .XXX TLD was subsequently delegated.

Adding new goals and activities to ICANN's mission

ICANN receives funds through one principal revenue stream: fees associated with domain name registrations. With only a few narrow exceptions, these fees are currently unregulated. Second, ICANN is a non-profit entity meaning that all “revenue” must be redistributed for its operation or in some fashion for the benefit of its chartered goals. Given these circumstances, ICANN should be prevented from spending its revenue in ways that stray from its core mission. Indeed, because ICANN collects fees from top-level domain applicants, registry operators, registrars, and registrants, its revenues may seem like an attractive source of funding for any Internet-related cause seeking funding sources. As a result, ICANN staff might decide to expand their remit beyond a limited technical mission by using domain registration fees to fund grants for developing nations or other worthy causes. In this situation, ICANN's actions would be evaluated through the lens of whether they had exceeded the mandate set forth in the Bylaws. In addition, to avoid mission creep in the first place, we recommend above that any change Article 1 of the Bylaws, which sets forth ICANN's mission, to be supported by more than two-thirds of the Board, or 11 out of 15 Board members.

Jurisdictional and choice of law issues

ICANN is established as a California non-profit corporation. Under the terms of the IANA contract, NTIA stipulated that ICANN maintain a presence in the United States and carry out the IANA functions on U.S. soil.¹² The AoC also requires ICANN to maintain a corporate headquarters in the United States. As such, ICANN remains obligated to follow the laws of the State of California, and remains subject to jurisdiction in the Central District of California. This is beneficial in providing certainty for contracted parties as to jurisdiction and applicable laws. However, ICANN one day may desire the freedom to become more internationalized or be provided a modicum of immunity, which it determines could be achieved – by moving its headquarters abroad. As such, ICANN's new accountability mechanisms should address situations where this change in jurisdiction could impact both its current contracts and its operations. For example, suppose two strings, a singular and its plural, passed all application hurdles and both were approved to proceed toward delegation. However, at the last moment, a U.S. court granted an injunction against the delegation of the singular form of the string (e.g., .HOTEL) whose plural version (e.g., .HOTELS) of the same string has already been delegated. Currently, ICANN would be required to comply with an injunction issued by a U.S. court. While not specifically addressed in our proposed accountability measures, which address improvements within the ICANN ecosystem, ICANN should develop procedures that give parties an ability to participate in discussions over larger governance issues regarding where they will be able to seek legal remedies and which laws will apply.

Conclusion

Google recognizes the importance of the stability and security of the IANA functions as well as the need for continued improvements to ICANN's organizational accountability and transparency. As a result, we support the transition of NTIA's stewardship role over the IANA functions to the multistakeholder community. We believe that ICANN's accountability mechanisms would benefit from strengthening as NTIA steps out of its historical stewardship role. Google suggests that while improvements to ICANN's overall accountability should not be conflated with ensuring accountability

¹² See IANA Functions Contract § C.2.1 (July 2, 2012), available at http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf.

for effective and transparent performance of the IANA functions, a review of both sets of accountability measures and implementation of any new processes should be take place before the IANA transition is completed. We look forward to working with all stakeholders toward these ends.

Sincerely,



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