

May 30, 2014

Ms. Theresa Swinehart
Senior Advisor to the President on Strategy
Internet Corporation of Assigned Names and Numbers (ICANN)
Washington, D.C.

VIA ELECTRONIC TRANSMISSION

Re: Call for Public Input: Enhancing ICANN Accountability

Dear Ms. Swinehart:

The Software & Information Industry Association (SIIA) thanks ICANN for the opportunity to respond to its May 6, 2014, invitation to submit comments about improving accountability mechanisms for ICANN. SIIA is the principal trade association for the software and digital content industries. SIIA provides global services in government relations, business development, corporate education and intellectual property protection to the leading companies that are setting the pace for the digital age. The member company [list](#) is available to the public.

While SIIA's membership includes companies with divergent business models, they all have an interest in ensuring that ICANN continues to evolve into a first-class forum for inclusive and responsive Internet governance. In order to make this vision for ICANN a reality, stronger accountability systems must be created prior to the Internet Assigned Names and Numbers Authority (IANA) functions transition into multistakeholder oversight. SIIA supports the comments of the United States Council for International Business (USCIB) with respect to this consultation and offers the following reflections as a supplement. We respond to the questions posed by ICANN below.

What issues does the community identify as being core to strengthening ICANN's overall accountability in the absence of its historical contractual relationship to the U.S. government?

The analysis of ICANN's accountability challenge must encompass two basic questions. First, to whom is ICANN accountable? Second, for what is ICANN

accountable? Given the breadth of the multistakeholder community, it is not clear that it would ever have associational standing or be considered a counterparty, at least in a U.S. court. It is, therefore, critical that there are mechanisms, including an independent audit function, designed to ensure that ICANN lives up to its mission which is spelled out in the bylaws:

- 1. Coordinating the allocation and assignment of the following three sets of unique identifiers for the Internet (the IANA function):*
 - a. Domain names (used in a system referred to as "DNS").*
 - b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and*
 - c. Protocol port and parameter numbers.*
- 2. Coordinating the operation and evolution of the DNS root name server system.*
- 3. Coordinating the community's policy development reasonably and appropriately related to these technical functions.*

SIIA considers that ICANN must be accountable for fulfilling this important mission. Given the removal of U.S. Government oversight of the IANA functions, and the fact that ICANN is not responsible to shareholders, SIIA shares the view of many stakeholders that accountability mechanisms must be strengthened.

What should be the guiding principles to ensure that the notion of accountability is understood and accepted globally? What are the consequences if the ICANN Board is not being accountable to the community? Is there anything that should be added to the Working Group's mandate?

Predictability, transparency, inclusiveness, responsiveness, conflict-of-interest avoidance, independent review, redress, and public accessibility are the fundamental principles that should guide ICANN as it seeks to achieve its mission.

Should a widespread perception within the Internet community arise that the ICANN Board is not accountable, the legitimacy of Board decisions could be questioned. Ultimately, the ideal of one globally interconnected Internet could be undermined and efforts to create a "splinternet" could increase. SIIA's member companies are most directly impacted by the ability of the Generic Name Supporting Organization (GNSO) to do its work appropriately. The GNSO is composed of four stakeholder groups and seven "constituencies." It is critical to ensure that ICANN is responsive to all of the constituencies (which was why we strongly urged ICANN to increase GNSO representation on the IANA functions transition Steering Committee). If the work of GNSO and other bodies is not

effective, then the full potential for the Internet to enable economic growth, innovation and new business models will not be realized.

Do the Affirmation of Commitments and the values expressed therein need to evolve to support global acceptance of ICANN's accountability and if so, how?

The Affirmation of Commitments are substantively appropriate. The question is how to ensure that they remain enforceable when the NTIA contract expires. SIIA considers that one workable mechanism would be to include the Commitments in ICANN's bylaws, including the Commitments on reviews. Moreover, in order to provide some confidence to the multistakeholder community, it should continue to be the case that bylaws cannot be changed unless two thirds of qualified Board members vote in favor of changes. Unanimous, or at a minimum super-majority (three quarters) Board decisions may in some cases be advisable, for instance with respect to Article IV on accountability and review. SIIA also strongly urges that the reviews on Accountability and Transparency (ATRT); DNS; Competition, Consumer Trust & Consumer Choice; and, WHOIS Policy continue. ICANN should commit to meeting quantitative and qualitative improvement metrics resulting from those reviews.

What are the means by which the Community is assured that ICANN is meeting its accountability commitments?

Predictability: There should only be an ability to change bylaws as discussed above. In addition, if the Board wishes to incorporate outside of the State of California, it should first issue a report explaining why a move is warranted and the legal consequences of the move. It should also conduct a consultation with the multistakeholder community on such a proposal. Finally, the Board should not move forward unless a super-majority, at a minimum, of the Board supports the change. There should also be strong support from all the multistakeholder sectors.

Transparency: Board documents and minutes should always be available. ICANN should make it clear to readers when policy questions are implicated in the often technically challenging documents it produces. ICANN should allow stakeholders to make even fuller use of the Document Information Disclosure Policy ([DDIP](#)) to further transparency. Specifically, ICANN should keep public statistics on how many requests are made and how many are denied. We also encourage ICANN to conduct a review on whether the "Defined Conditions for Nondisclosure" could be modified to make more information available to stakeholders without needlessly constraining operations. This review should include the possibility of disclosing

intra-ICANN communications. ICANN should consider conducting a public consultation on stakeholder experiences with the DDIP policy. Notice and Comment procedures are very important – ICANN should consider changing deadlines and other aspects of the procedures if a majority of stakeholder groups, for instance a majority of the GNSO’s constituency groups, requests changes. This is essential if multistakeholder governance is to be strengthened because process often has a great influence on substantive outcomes.

Inclusiveness: This is an admittedly difficult principle to establish objective metrics for. Nonetheless, it is important for ICANN to reach out to non-traditional ICANN stakeholders. As representatives of the business community, SIIA reiterates the need, for instance, for the full spectrum of GNSO stakeholders to be represented in ICANN deliberations.

Responsiveness: This principle really speaks to the quality and timeliness of ICANN responses to stakeholders. For example, ICANN should analyze inputs from stakeholders, not just list them, and describe why stakeholder recommendations were or were not adopted.

Conflict-of-interest avoidance: The highest standards must be maintained in this regard. This challenge will increase in coming years as ICANN revenue continues to increase. Potential revenue implications stemming from ICANN proposals should be routinely disclosed.

Independent review: ICANN should establish an independent “Inspector General (IG) function with a dedicated separate funding mechanism. The IG should, at a minimum, have the authority to investigate and ensure compliance with the bylaws, procedures for decision-making, and potential conflicts of interest. Professional auditing of ICANN should continue.

Redress: An independent review should be conducted regarding the efficacy of the Independent Review Process (IRP Panel) function. The review should include the question of how the cost of Panels in the event of losing can be made financially feasible for stakeholders with different financial means while at the same time designing a financial structure to ensure that frivolous claims against ICANN are kept to a minimum. Moreover, in order to strengthen multistakeholder use of this function, IRP panels should be obliged to, not “strive to” issue written declarations within six months of after the filing for a request of an independent review. (Note: ICANN bylaw Article IV, Section 3 provides for the IRP option. Pursuant to Article IV, Section 3, stakeholders can request convocation of an IRP

Panel if there is an allegation that Board actions are inconsistent with ICANN's Articles of Incorporation or bylaws. ICANN has designated the International Centre for Dispute Resolution to manage the independent review process. The review should ask stakeholders what their experiences have been with this mechanism and what suggestions they might have for strengthening this function. For instance, should the Panel have the authority to issue recommendations that are binding on the Board? Another question that should be posed is whether the composition of the panels is appropriate.)

Public Accessibility: There should be some means for the public to engage in questions and answers with the ICANN Board. SIIA suggests that the Board convene annually at the Internet Governance Forum (IGF) and engage with IGF participants in a dialogue.

Are there other mechanisms that would better ensure that ICANN lives up to its commitments?

ICANN should report regularly on compliance with the accountability function. The reports should, at a minimum, describe compliance with the mechanisms discussed above.

What additional comments would you like to share that could be of use to the ICANN Accountability Working Group?

SIIA considers it essential that agreement on new consensus ICANN accountability mechanisms should be reached prior to making a decision on the IANA functions stewardship transfer. No proposal can be adequately evaluated without knowing what ICANN's overall accountability structure will be.

SIIA appreciates the opportunity to provide this input. We do so in the spirit of sincerely wishing to help make ICANN an even better organization than it already is. ICANN has an excellent reputation among Internet users, and we wish to preserve and enhance that reputation.

Regards,



Carl Schonander
Senior Director, International Public Policy

Software & Information Industry Association

Cc: Ken Wasch, President and CEO
Mark MacCarthy, Vice President for Public Policy