

The Center for Democracy & Technology's comments on the proposed Enhancing ICANN Accountability Process

The Center for Democracy & Technology (CDT) welcomes this opportunity to comment on the proposed “Enhancing ICANN Accountability Process”. We thank ICANN for responding to the community's request for an opportunity for further input, and for responding to the questions posed by the SO/AC/SG/C leadership in their letter dated 4 September. It is important that ICANN undertake the process towards enhanced accountability in a fully transparent, inclusive and open manner, otherwise the credibility and legitimacy of the process will be undermined.

Purpose and scope of the process

The purpose of the Enhancing ICANN Accountability Process is “to look at ICANN remaining accountable in the absence of its historical contractual relationship to the U.S. Government (USG) and the perceived backstop with regard to ICANN's organization-wide accountability provided by that role, such as the renewal process of the IANA Functions Contract. This second process will examine from an organizational perspective how ICANN's broader accountability mechanisms should be strengthened to address the absence of its historical contractual relationship to the USG. This includes looking at strengthening existing accountability mechanisms like the Affirmation of Commitments (AoC). This process is additive, not a duplication of any of the reviews called for under the Affirmation of Commitments.”ⁱ CDT agrees with this purpose and scope, and would suggest that the AoC should be a part of the Enhancing ICANN Accountability process discussions, while recognizing that the process should not replace or duplicate existing accountability processes such as the ATRT.

The IANA Transition and the Enhanced ICANN Accountability Processes

CDT believes it is important that the Enhancing ICANN Accountability Process runs in parallel with the IANA Transition Process and that progress on strengthened accountability for ICANN overall should be made before the IANA transition occurs. The two processes are necessarily intertwined, as ICANN's CEO Fadi Chehadé has recognized, most recently at the IGF in Istanbul,ⁱⁱ and as Assistant Secretary of Commerce for Communications and Information Larry Strickling indicated in his speechⁱⁱⁱ to the American Enterprise Institute when he said that enhancing ICANN's accountability should “examine how ICANN can strengthen its accountability mechanisms to address the absence of its historical contractual relationship with NTIA” and “this important accountability issue will and should be addressed before any transition takes place.”

In practice this means that the proposed accountability process must work closely with the transition process in addressing accountability issues related to the award and performance of the IANA functions. The two tracks should progress in sync in this regard; there should be regular meetings to understand

the direction of both and to ensure that they are convergent in key areas. It means that both tracks must look more broadly and holistically at the transition, and particularly at accountability issues and how the criteria raised in the NTIA transition announcement would be met. Any transition proposal presented to the NTIA must fully address accountability issues related to the execution (and contracting) of the IANA functions. We note in this regard that the proposed Coordination Group (CG) liaison may not provide sufficient linkage between the two processes; as the work of both evolves, there will likely be a need for much greater coordination on issues specific to the IANA functions. There must also be sufficient time to pursue this coordination; the two processes should not be rushed. As we have said elsewhere,^{iv} getting the NTIA transition right is essential to the future governance of the Internet ecosystem.

Additional points:

In addition to the above, CDT would like to draw attention to the following:

- CDT welcomes the openness of the Cross Community Group (CCG) to “others”. It is essential that discussions related to ICANN accountability involve interested parties from the global multistakeholder community, both inside and outside ICANN. How ICANN remains appropriately accountable once the USG steps back from its DNS-related role is an issue of global concern. While the results of the accountability process will impact ICANN specifically, their relevance to the global multistakeholder community, and the evolution of the Internet governance ecosystem, is without question.

We note that many within the ICANN community have called for a Cross-Community Working Group (CCWG) model rather than the proposed CCG and CG model. The CCWG is an existing mechanism within ICANN and it might be an appropriate model if it can accommodate the important category of “other” in a suitably weighted manner. This would be essential given the broader global interest in ICANN accountability and the IANA transition process.

- It remains unclear as to how the “other” category of interested parties can participate in the work of the Coordination Group (CG). There should be a process for ensuring that the global multistakeholder community outside ICANN can contribute to the work of the CG, either directly or through regular meetings with the CCG where input should be solicited.
- We remain concerned about ability of the Board to refuse accountability proposals that are put forward from the community. We agree with the concerns raised by the SO/AC/SG/C Leadership letter of 4 September relating to the possibility of the Board's institutional interest potentially being at odds with that of the community. In their letter dated 18 September, CEO Chehadé and Board Chair Steve Crocker acknowledge that safeguards against improper rejection should be explored, and we would like to see concrete steps taken in this regard, with the input of the community. Such steps could include assessments of conflict by independent experts and processes for the community to address concerns raised by the Board with regard to specific

recommendations. CDT also believes that the Board and ICANN staff – and their liaisons – must allow the CCG and CG to explore accountability options at their discretion. Flagging implementation or scope “concerns” should not be used as tool for impeding discussion and debate.

- We welcome the recognition of the importance of the CCG and CG defining their own charters and scope of work. We would prefer to see that final decisions on charters remain with the CCG and CG, taking into account advice from the Board. We trust that the Board will review the charters of the two groups in a manner that will not constrain the scope of accountability issues the groups could consider. As suggested above, it would be inappropriate for the Board or ICANN staff to place limitations on the work of the CCG and the CG from the outset.
- We welcome the recognition in the Chehadé/Crocker letter that the CCG “could be valuable in recommending proposals for solutions to the Coordination Group.” As we have mentioned, there must be mechanisms in place to allow for and encourage inputs from interested parties outside the ICANN community, including in both the identification of issues and the proposal of possible solutions. Further, mechanisms should be put in place to allow for the CCG to contribute to the work of the CG; the suggestion that the CG should consult the CCG “from time to time” is far from sufficient.
- It remains unclear what the role of the Expert Advisers is in terms of “decision-making” in the development of proposals in the CG. In CDT's view they should remain advisers and not have a role in determining whether a particular proposal is agreed or not. An explicit clarification of the scope of the Expert Advisers' duties would minimize the possibility of their important advisory role being compromised.

CDT trusts that these comments will prove useful to the further evolution of the Enhancing ICANN Accountability Process, and we look forward to contributing to the strengthening of ICANN's accountability mechanisms.

- i <https://www.icann.org/public-comments/enhancing-accountability-2014-05-06-en>
- ii ICANN town hall meeting at IGF <http://www.intgovforum.org/cms/174-igf-2014/transcripts/1986-2014-09-04-open-forum-icann-room-4>
- iii <http://www.ntia.doc.gov/speechtestimony/2014/keynote-address-assistant-secretary-strickling-american-enterprise-institute>
- iv <https://cdt.org/blog/beyond-netmundial-why-getting-the-iana-transition-right-is-essential/>