December 26, 2006

On behalf of Network Solutions, LLC, I am writing in response to ICANN's request for input on the development of Transparency and Accountability Management Operating Principles. As accountability and transparency are core values to ICANN, it should take the following steps as soon as practicable to improve its performance regarding these bedrock principles.

Board Accountability

1) Provide sufficient checks and balances on the Board through a mechanism to override Board decisions.

2) Redefine and simplify ICANN's Reconsideration Request process.

3) Strengthen the Independent Review process and allow it to work.

Financial Accountability

4) Develop a budgetary oversight function.

5) Audit and publish, on a timely basis, ICANN's financial reports.

Contractual Accountability

6) Ensure that all material contracts and contract revisions are published for review and comment prior to Board approval.

7) Enforce compliance with registry and registrar agreements by de-accrediting bad actors and making public examples of those that do not fully comply with contractual requirements.

Transparency

8) Publish Board agendas and minutes of meetings on a timely basis.

9) Comply with basic decision-making procedures, which include providing an analytical component of decisions.

10) Engage in periodic reviews of ICANN's performance and procedures regarding transparency and accountability.

Board Accountability

Organizations derive their legitimacy from being responsible and answerable to their stakeholders. Because unchecked authority may lead to misuse of power and constituent disservice, checks and balances are essential to a successful organization.

Checks and balances can be seen in most successful governing frameworks. In most democratic governments, each branch of government provides a check and balance on the other branches. In the United States, for example, the legislative, executive, and judicial branches each provide a check and balance on the others. In the private sector, shareholders provide a check on boards by

having the ability to override a Board's decision. This is also true in other not-for-profit organizations. For instance, the American Cancer Society provides for both a National Assembly and a Board of Directors, each of which provides an appropriate level of checks and balances on the other and the organization.

Unfortunately, such checks and balances currently are lacking in ICANN's case. There are no sufficient checks on the Board. The Reconsideration Request process only applies in limited circumstances, requires a complicated filing, and is considered by a subset of the Board that made the decision in the first place. Similarly, the Independent Review process applies in even more limited circumstances, and again only is a recommendation to and is not binding on the very Board that made the original decision.

Therefore, we recommend that the following reforms be instituted in order to provide an appropriate level of checks and balances on the ICANN Board.

- In order to provide the sort of check on power that already exists in the public and private sectors, the ICANN Bylaws should be amended to permit a veto of Board decisions. This could be accomplished, for example, by a super-majority vote of the Supporting Organizations.

- ICANN needs to revise the Reconsideration Request process and make it a meaningful, user-friendly venue for challenging Board decisions.

- ICANN also needs to strengthen and fully implement the Independent Review process. There is a reason why this process has never been used and currently is not a realistic method of accountability – its application is too limited, its procedures are unknown, and its outcome is merely advisory.

Financial Accountability

ICANN must develop a stronger budgetary oversight function. In the past three years alone, ICANN's budget has increased from $8 million to over $33 million, without adequate changes in oversight and accountability that reflect these vastly expanded resources. Budgetary oversight should be increasing, not decreasing.

Historically, budgetary oversight has been limited to public review of a proposed budget and registrar approval of fees that they pay to ICANN. With the approval of the new .net, .com, .biz, .info, and .org registry agreements, however, ICANN's funding has become more predictable and less discretionary. Therefore, the level of budgetary oversight has been reduced dramatically. While registrars have always approved the fees that they pay to ICANN, the fact that they have the right to vote on the fees has been a safeguard against overzealous budgeting and spending. The new registry agreements reduce such safeguards.

Similarly, while ICANN established a Budget Advisory Group comprised of various stakeholders, it was never given the tools or the level of authority to succeed and has been disbanded by ICANN staff. Greater financial accountability could be achieved by reforming and empowering the Budget Advisory Group to provide meaningful input to ICANN on its budget. The Budget Advisory Group should work closely with both the ICANN staff and the Board's Finance Committee. Such budgetary accountability is a critical component to ICANN's self-governance capabilities.

Finally, in the interest of both transparency and accountability, ICANN must conduct and release the results of its audited financial reports in a timely manner. ICANN's audited financials for Fiscal Year 04-05, for example, were not completed until April 2006 – ten months after the end of the fiscal year.

- Develop a budgetary oversight function. To this end, ICANN's Budget Advisory Group should be reformed and empowered to provide meaningful budgetary input to the ICANN staff and the Board's Finance Committee.

- Conduct and release on a timely basis the results of ICANN's audited financial reports.

Contractual Accountability

ICANN must change its Bylaws to ensure accountability at the period of contract formation. It should by crystal clear in the Bylaws that ICANN must publish for review and comment all material contracts before it signs them. To do otherwise, would be to violate fundamental tenets of accountability and transparency. Furthermore, when ICANN is asked to approve contracts or contract revisions between third parties (i.e. registries and registrars), it must ensure that both parties have had an opportunity to review and comment on the proposed agreements prior to providing its approval. This seems like an obvious point, but one that ICANN has not always followed in the past.

Additionally, ICANN must enforce existing contractual requirements contained in registry and registrar agreements. There are numerous instances in which registrars and/or registries have failed to comply with certain contractual requirements and ICANN has not taken action against such entities. These abuses include, but are not limited to, domain hijacking, transfer abuses, and a failure to abide by Whois requirements. This lack of enforcement sends the wrong message to those entities that do expend the resources to comply with their requirements, as well as places them in a competitive disadvantage. An active compliance and enforcement policy would be a deterrent to bad actors and bad behavior and would be very welcome to those who comply with their requirements.

Those entities that engage in abusive behavior should lose their accreditation with ICANN. Unfortunately, ICANN has never taken such action against any registry or registrar despite significant non-compliance. Additionally, ICANN could use public and economic pressure to encourage bad behavior. ICANN should make public examples of registrars and registries that don't comply with contractual requirements. ICANN should use its expanding communications infrastructure as a bully pulpit to notify the community of unacceptable activities. ICANN also should coordinate closely with consumer protection agencies and advocacy groups that are involved in policing abusive behavior.

- Amend the ICANN Bylaws to ensure that all material contracts and contract revisions are published for review and comment prior to Board approval.

- Take a proactive role in enforcing compliance with registry and registrar agreements by de-accrediting bad actors and making public examples of registrars and registries that don't fully comply with contractual requirements.

Transparency

Something that is transparent has the qualities of being open, frank and candid. In the context of ICANN operations, transparency also should imply being easily knowable and understood. Until

its processes are clear to all stakeholders, ICANN will not enjoy the full trust of its global constituent bases. Transparency is not an option for ICANN: its Bylaws require ICANN to "operate to the maximum extent feasible in an open and transparent manner . . . ." Article III (Transparency), Section 1. Notwithstanding this transparency obligation, it is often difficult to determine what issues the ICANN Board is considering and what information Board members evaluate in making a decision. Agendas and minutes of meetings often are not posted in a timely basis. For example, as of March 14, 2006, ICANN had failed to publish the minutes of the previous *ten* Board meetings, from July 28, 2005 through February 28, 2006.

As for Board decision-making, although public comments are often posted in a timely manner on ICANN's website, it is not clear whether and how the Board considers these inputs. Likewise, ICANN rarely discloses the details of staff's advice to the Board, or any deliberations over the input of external experts.

Finally, ICANN should routinely review its performance related to the fundamental principles of transparency and accountability.

- Publish Board agendas and minutes of meetings on a timely basis.

- Comply with basic decision-making procedures, which include providing an analytical component of decisions explaining how feedback from stakeholders, staff, and experts were taken into consideration and how and why such inputs were or were not followed in the final decision.

- Engage a third party to periodically review ICANN's performance and procedures regarding transparency and accountability.

Conclusion

Network Solutions appreciates this opportunity to provide input on improving the transparency and accountability of ICANN's operations. We look forward to working with ICANN on implementing such improvements in the very near future.

Jonathon L. Nevett
Vice President and Chief Policy Counsel