



May 27, 2014

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

VIA ELECTRONIC TRANSMISSION

**Re: Call for Public Input: Enhancing ICANN Accountability**

Dear Ms. Swinehart:

The U.S. Council for International Business (USCIB) is pleased to respond to ICANN's May 6, 2014 solicitation of comments about enhancing ICANN's accountability. USCIB is a trade association composed of more than 300 multinational companies, law firms, and business associations, which includes a broad cross-section of the leading global companies in the information and communications technology (ICT) sector. [USCIB members](#), which include members of both the non-contracted and contracted houses of ICANN, welcome this opportunity to offer a cross-community, cross-sectoral perspective on this critically important issue for the Internet ecosystem.

USCIB welcomed the statement by ICANN's CEO Fadi Chehade at the NETMundial meeting in Sao Paulo, Brazil last month that ICANN accountability must be "taken to the next level" in light of the transition of NTIA's stewardship over the IANA functions, and that the IANA transition and ICANN accountability are "interrelated and interdependent." USCIB agrees that the IANA transition discussion must be informed by the parallel ICANN accountability process and vice versa. We further concur that going forward, ICANN must be "accountable even beyond its [current] role as the administrator of the IANA functions" to ensure the stability, reliability, resiliency, interoperability, and security of the global Internet *in perpetuity*.

The notice concerning the ICANN accountability process rightly acknowledges the important "backstop" function provided by the U.S. Government contract. USCIB believes it is imperative that a new accountability mechanism be built into the bylaws and associated rules of ICANN before an NTIA transition to strengthen trust among ICANN stakeholders. In our view, such an accountability mechanism would entail (1) changing current corporate governance practices, (2) revising certain bylaws, (3) binding key elements of the Affirmation of Commitments, and (4) ensuring greater certainty with respect to legal recourse.

Clear Separation of ICANN/IANA Functions

- If the multistakeholder process to determine the transition of NTIA's stewardship of the IANA functions ultimately concludes that ICANN should assume these functions, USCIB urges the following to ensure accountability in the absence of the NTIA contract:
  - ICANN must be subject to similar third party oversight and demonstrate annually to an independent third party that the organization has established a structural separation between

its traditional names/numbering functions and the four core IANA functions: (1) the coordination of the assignment of technical Internet protocol parameters; (2) the administration of certain responsibilities associated with Internet DNS root zone management; (3) the allocation of Internet numbering resources; and (4) other services related to the management of the .ARPA and .INT top-level domains. The third party report will be posted and available for public comment.

#### Internal Controls

- We acknowledge that Article II of the By-Laws (“Powers”) prohibits ICANN from acting as a Registry or Registrar in competition with entities affected by its policies. However, we feel this Article now warrants more specific language detailing how ICANN would design and implement improved internal controls and measurements. Such an explanation would increase the community’s confidence that solid corporate governance and the global public interest principles are respected.
- The internal controls and internal and external audits, in turn, would be subject to review by the third party tasked in the above paragraph and any related findings would be contained in its annual report. As stated above, the report would be made available for public review and comment.

#### Legal Certainty

- The opportunity for judicial redress is critical to accountability. This is especially the case for ICANN, which does not have shareholders to serve as a check and balance on Board decisions. We note that Mr. Chehade testified before Congress that ICANN has no intention of leaving Los Angeles or changing its structure as a not-for-profit public benefit entity incorporated in California. Even absent the U.S. Government’s backstop role as the IANA contractual authority, the California legal system provides the business community located in the United States with confidence that ICANN could be held accountable for extreme violations of its bylaws. Furthermore, the State of California has special fiduciary obligations applicable to California nonprofits and well-established precedents in arbitration resolution that are respected by many members of the global business community and provide a foundation of confidence that a stakeholder could seek meaningful redress.
- We note that ICANN is embarking on a process of globalizing its operations, which we support and respect as an international business community. As part of ICANN’s globalization, however, there also have been reports of plans to relocate from California or add headquarters in other countries. Any relocation decision is a highly material step that would impact legal certainty and business planning. This requires significant consideration and study and should be undertaken only if there is a demonstrable benefit that clearly outweighs costs.
- Before making a final decision concerning adding or changing the location of ICANN’s incorporation – whether to another U.S. State or to other countries -- USCIB strongly urges ICANN to prepare a report based on in-depth research and a cost-benefit analysis. This report should provide the community with strongly compelling reasons as to why such a move is desirable and confirm that the move would not in any way compromise current legal remedies available to parties aggrieved by ICANN. This report would need to include an analysis of the mechanisms for judicial redress in any jurisdiction under question, including a review of how well established and utilized are the legal precedents on which the ICANN stakeholder

community would need to rely. ICANN should also establish that any new headquarters location must provide the same or higher levels of fiduciary obligations to the public applicable to nonprofits in California.

- We note that Article XVII states, “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.” The Affirmation of Commitments (AoC) echoes this bylaw, stating that ICANN commits to “remain a not-for-profit corporation, headquartered in the United States of America with offices around the world . . .”
  - We understand that ICANN’s accountability structures must evolve to continue to serve the global public interests and to serve the globally located ICANN business communities.
  - As part of the current accountability process, we urge ICANN to strengthen this commitment by revising the bylaws to require a unanimous decision, or at minimum a super-majority, concerning any plans to change the location of ICANN’s incorporation or its nonprofit status. Such changes must also be approved by a two-thirds majority vote of the ICANN multistakeholder community.

#### Corporate Governance Practices

- Once established, the accountability function should not be easily altered, weakened, or dissolved by the ICANN Board. USCIB urges a change to the bylaws which notes that any Board actions that could change the new accountability function and/or alter or weaken bylaws deemed essential to ICANN’s missions, powers, transparency, and accountability and review procedures (i.e., Articles I-IV) now require a unanimous decision, or at minimum a super-majority, plus a two-thirds majority vote by the ICANN multistakeholder community.

#### Binding Key Elements of the Affirmation of Commitments (AoC)

- The U.S. Department of Commerce and ICANN developed the AoC in September 2009 “to institutionalize and memorialize” the technical coordination of the DNS. As ICANN and its multistakeholder communities work together to develop a plan to transition the NTIA’s IANA stewardship functions, it is imperative to determine concurrently how ICANN would be legally obligated to uphold these commitments absent the NTIA contract.
- The AoC currently calls for several reviews that have served as effective tools for reviewing and strengthening ICANN’s accountability. USCIB strongly supports the inclusion of these accountability processes into Article IV of the bylaws so that ICANN will be legally bound to continue them on a regular and permanent basis. We further propose that the Board be required to approve related amendments to Article IV by at least a super-majority:
  - The Accountability and Transparency Review (ATRT) should be continued at least every three years as set forth in the AoC and open to public comment. In addition, the ATRT process should be broadened to enable the sunseting of certain reviews as well as the launch of new reviews. Such actions would be open to public comment.
    - As part of the ATRT process, USCIB also feels it is important to devote ongoing attention to improvements in public notice and comment procedures as follows:
    - In our comments pertaining to the ATRT2 Final Report & Recommendation (February 21, 2014), USCIB urged greater specificity and a call to action aimed at improving public notice and comment procedures. The public comment period is critical to ensuring effective multistakeholder participation that serves to hold ICANN accountable.

However, it takes some amount of time for stakeholders to become aware, analyze, and obtain internal approval for comments on a considerable volume of material. We urge that ICANN allow greater time for comments if a stakeholder can demonstrate a direct effect on material interests.

- The Security, Stability & Resiliency of the DNS Review should be continued at least every three years and open to public comment.
- The Competition, Consumer Trust & Consumer Choice Review should proceed next year as set forth in the AoC and at least every two years thereafter to examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust, and consumer choice, among other criteria detailed in the AoC. The review should be open to public comment
- The WHOIS Policy Review should be continued at least every three years to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of the multistakeholder community, law enforcement, and promotes consumer trust. The WHOIS review should be open to public comment.
- These elements of the AoC need to be integrated into the bylaws before the transitioning of IANA functions to provide confidence to the Internet user community that the safety, security, and resiliency of the DNS will continue uninterrupted as NTIA's stewardship of the IANA functions is transitioned.

#### Transparency

- USCIB notes that Article III of the By-Laws sets forth a number of requirements aimed at ensuring transparency to ICANN's policy making and technical processes. In general, these serve as a solid foundation, but should be improved as part of the broader effort to enhance accountability.
  - ICANN should codify its commitment to transparency by creating a more robust Freedom-of-Information (FOIA)-type process. One way to accomplish this would be to have such requests administered by a third party, independent entity that would be retained by ICANN and operate independently of the Board. It would be modeled on freedom of information best practices, develop criteria concerning what information may be released, and generally enable stakeholders to access documents, email communications, staff memos and other unofficial correspondence pertinent to the policymaking process.

#### Compliance Reporting

- Consistent with the ATRT2 recommendations, the new accountability process should entail development of additional clear metrics and benchmarks to measure improvements in ICANN's accountability and transparency. Metrics should include adherence to bylaws, quality and effectiveness of the Board, response to Freedom of Information requests, the effectiveness and success of ICANN's programs, financial accountability, and disposition of redress efforts. These metrics should be published as periodic reports to evaluate on an ongoing basis ICANN's compliance performance.

USCIB appreciates this opportunity to provide input aimed at enhancing ICANN's accountability going forward. Continued improvements in this area will go a long way toward inspiring confidence among the growing legions of global Internet users in ICANN's technical competence and organizational integrity.

Sincerely,

A handwritten signature in cursive script that reads "Barbara P. Wanner".

Barbara P. Wanner  
Vice President, ICT Policy

cc: Peter Robinson, President  
Robert Mulligan, Senior Vice President, Policy and Government Affairs