

Preliminary Comments on the Development of Transparency and Accountability Management Operating Principles for the Internet Corporation for Assigned Names and Numbers (ICANN)

By the Center for Democracy & Technology

Preface:

The Center for Democracy & Technology (CDT) is a Washington-based nonprofit organization that works to promote democratic values and constitutional liberties in the digital age. CDT works with public interest groups, technology companies, individuals, regulators and lawmakers to support rules and structures that preserve the essentially democratizing nature of the Internet.

From the outset of the global Internet governance debate, which began in earnest with the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN) in 1998, CDT has played an active role. Working through the ICANN process, CDT has advocated for changes to make the organization more transparent and representative. For example, in July 2004, CDT issued a paper -- "ICANN and Internet Governance: Getting Back to Basics" -- urging that ICANN offer greater openness and adhere to a narrow mission. That document is available at http://www.cdt.org/dns/icann/20040713_cdt.pdf. Outside of ICANN, through its Global Internet Policy Initiative, CDT has worked on the ground in developing nations to promote the creation of legal and regulatory structures that support development of an open Internet. CDT is actively committed to bringing together voices from industry, civil society and governments to address the unique issues posed by this global medium.

Introduction:

Earlier this year, when the National Telecommunications and Information Administration (NTIA) asked Internet stakeholders to comment on whether ICANN had met the milestones established under the Memorandum of Understanding with the U.S. Government, roughly 700 Internet stakeholders from around the world responded. The comments illustrated both the intense global interest in Internet governance and the wide range of opinions regarding ICANN, the historic role it has played in global Internet governance and the path it should follow as it continues its evolution.

Remarkably, despite the wide range of often-conflicting positions expressed in the comments, one common theme did emerge: ICANN must improve the transparency and accountability of its operations if it is to cement itself as an internationally respected steward of the Domain Name System (DNS).

Like many other groups, CDT focused on the concerns surrounding transparency and accountability in comments submitted to the NTIA last July:

"Equally troubling is that ICANN has made little effort and even less progress toward improving the transparency of its decision-making processes. Too much deliberation on important issues still takes place behind closed doors and on private phone calls. ICANN's non-appointed, full-time staff is still perceived as wielding too much influence in setting ICANN policy. Absent real representation, this lack of transparency has dealt a serious blow to ICANN's efforts to establish a truly bottom-up coordination structure. Most people outside the ICANN structure and even some that are ostensibly participating in the "bottom-up coordination" remain perplexed as to how ICANN reaches its decisions and which stakeholder groups maintain the real influence with decision makers."

*-CDT Comments to NTIA (07/07/2006)
(<http://www.cdt.org/standards/20060707noiresponse.pdf>)*

Until these issues are fully addressed, very few in the global Internet community will be comfortable with the idea of ICANN standing alone, absent any oversight. To the extent that establishing an independent ICANN is a desirable goal, improving transparency and accountability should be of foremost concern to ICANN. CDT was encouraged by ICANN's Oct. 16 announcement that it was developing a set of "Management Operating Principles" intended to establish baseline standards for transparency and accountability in ICANN. CDT welcomes the opportunity to participate in that process and to offer guidance on how to establish the procedures and structures necessary for ICANN to operate in a consistently transparent and accountable manner.

CDT would urge ICANN not to rush this process. These are some of the oldest and most serious concerns facing ICANN. Fixing these problems and creating lasting structures for ensuring transparency and accountability will minimally require a serious top-to-bottom review of ICANN's decision-making process. That review could reveal a need to establish new processes and structures, or to systemically change existing ones. In short, this is not a set of problems that can be "solved" in time for ICANN's December meeting in Sao Paulo. CDT applauds ICANN for beginning this process and would encourage ICANN leaders to devote the appropriate time, energy and resources to see it through to a satisfactory conclusion. ICANN's Oct. 27 notice clarifying that it was seeking only "preliminary" comments by Oct. 31 struck an encouraging note. CDT remains somewhat concerned with a timeline that calls for the adoption of Management Operating Principles by next March, but looks forward to addressing those concerns in later comments.

In the Oct. 16 request for comments, ICANN posed a series of questions relating to transparency and accountability. What follows are CDT's preliminary answers to those questions as well as recommendation on the timing and procedure for drafting Management Operating Principles. Given the very short timeframe for this request, these

should be construed only as preliminary comments. CDT hopes to have the opportunity to submit full recommendations later.

Question 1: How would you define "transparency" in the ICANN context?

ICANN is an institution that plays a central role in the management of an essential global resource. Although ICANN's nongovernmental status has been one of its greatest assets as a management body, the organization's unique authority over infrastructure that is a lynchpin of global communication and commerce gives it government-like powers in this space. As such, ICANN may want to look to the best practices of governments, rather than those of other corporations, as it seeks to build a model that fosters greater transparency. Internet stakeholders must be able to track policy decisions as they work their way through ICANN's bottom-up management structure on their way to board consideration.

As a practical matter, this of course means that all of the entities officially involved in the ICANN decision-making process, from constituency committees, to supporting organizations, all the way up to the board itself, should examine closely their procedures for disclosing information to the public. To the greatest extent possible, meetings should be made public, and minimally, the public should have access to major documents and the minutes of key meetings. The ICANN Board itself should hold no secret meetings, particularly when discussing DNS policy. All significant decisions should be made at public meetings.

But for all of those concerns, the greatest obstacle to ICANN transparency may lie with ICANN's non-appointed, non-elected staff. Although not an official part of the bottom-up structure, the staff has historically held great sway over the decision-making process. The staff's role must either be minimized or officially acknowledged, and thus subjected to the same transparency requirements that apply to other entities within ICANN.

Question 2: What standards of transparency are appropriate in ICANN operations and activity?

ICANN is a unique organization and as such will require unique procedures for transparency, but again, CDT would urge ICANN to look toward best practices in government as it seeks to make its decision-making process more visible and accessible to the public. As ICANN moves deeper into this process it should err always on the side of greater transparency. The risks and difficulties associated with making ICANN's activities more transparent are far outweighed by the public good such changes would serve.

There may be some strictly internal decisions that ICANN should be permitted to conduct outside of strict transparency requirements; but those decisions should be strictly limited and clearly delineated in publicly available written rules. In general, the majority of

ICANN's decision-making should be subject to rules that maximize transparency and shed as much daylight as possible on ICANN's activities. For decisions that affect the DNS, all deliberations should be public.

Question 3: How would you define "accountability" in the ICANN context?

For an organization that plays a key role in managing an important resource, accountability means that decisions affecting that resource are made and publicized in a clear and predictable manner, and that redress is available to stakeholders when proper procedures are not followed. There is no question that the first step toward greater accountability for ICANN is establishing greater transparency. Too often, Internet stakeholders have been mystified by ICANN Board decisions that appear to materialize from thin air in the days and hours leading up to major meetings. It is impossible to hold decision-makers accountable when it's unclear who, exactly, those decision-makers are.

Questions 4 and 5: What standards of accountability are appropriate in ICANN operations and activity? and What specific processes and activities need to be included to ensure these standards are met?

These questions illustrate the challenges facing ICANN, and the difficulty of addressing them on an artificially limited timeline. It seems clear that a satisfactory solution to the problems of transparency and accountability will come only on the heels of a thorough examination of ICANN's existing structures. It is difficult to say -- absent a comprehensive review of ICANN's existing processes and procedures -- what new tools and structures may be needed. Since many of the improvements to ICANN's accountability will flow from increasing its transparency, it may make sense to tackle these two issues in phases.

Some commenters have already recommended the formation of a multi-stakeholder panel to review ICANN's processes for transparency and accountability and to propose needed changes. CDT would support such an approach. It would be a shame if ICANN's effort to establish processes for transparency and accountability was not itself conducted in a transparent and accountable manner.

Question 6: Are there any innovative ideas on transparency and accountability that you believe have not yet been implemented that might apply to ICANN?

Although ICANN faces unique challenges due to its unique nature, it need not reinvent the wheel in its quest for greater transparency and accountability. Instead, ICANN should focus on cultivating an organizational culture that actively supports those goals. Once that cultural shift is affected, ICANN will find no shortage of real-world examples of effective processes for ensuring openness and accountability. One excellent resource for ICANN could be the U.S. Administrative Procedures Act, which establishes rules and

timelines for agencies to follow when making policy. Some of those rules would not make sense for ICANN, but other could be lifted directly from the statute. Were ICANN, for instance, to establish a rule subjecting all major policy decisions to a 60-day notice and comment period, confusion such as that which surrounded this very inquiry could be avoided.

Conclusion:

It cannot be overstated how important it is to take a fresh look at developing accountability and transparency in ICANN. For many in the Internet community who have steadfastly supported ICANN, these concerns have been the sorest sticking point. If ICANN gets this right, it would take a major step toward attaining greater independence and realizing its potential as a truly open, bottom-up, nongovernmental management body.

For all of these reasons it is worthwhile for ICANN to take a very deliberate approach to the problem. This comment period on this initial stage was very short. CDT urges ICANN, as it formulates its plans, to issue them for public comment, with sufficient time for responses. CDT also endorses the establishment of a multi-stakeholder panel to address the issue and offer recommendations. Minimally, ICANN must allow enough time for Internet stakeholders to make extensive, thoughtful recommendations for specific structures and processes to improve transparency and accountability.

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