The U.S. Must Reject the ICANN Transition If Accountability Falls Short

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Since the U.S. National Telecommunications and Information Administration (NTIA) first announced that it intended to transition U.S. oversight of the Internet Corporation for Assigned Names and Numbers (ICANN) to the global multi-stakeholder Internet community in March 2014, the multi-stakeholder community has been working diligently on proposals to ensure that ICANN remains accountable and the Internet remains stable, secure, and resilient absent U.S. oversight.

Although work remains to be done, this effort produced a broad consensus proposal that would transform ICANN into a membership organization. Membership is the only option that would allow the community to fully exercise all of the powers deemed necessary to hold ICANN accountable and entrench the multi-stakeholder community as the final authority for operation of ICANN. Regrettably, the ICANN board recently upended this careful consensus by opposing the multi-stakeholder community proposal and suggesting an alternative that would preserve the board as the final authority, preclude the community from exercising all of the powers it thinks necessary to hold ICANN accountable, and possibly allow the board to rescind the community’s powers after the transition occurs.

The board’s actions stand in direct opposition to the bottom-up, multi-stakeholder model of Internet governance endorsed by the NTIA and Congress. Moreover, if successful, the board’s proposal would gravely hinder the ability of the community to hold ICANN accountable absent the historical U.S. contractual relationship with the organization. The NTIA and Congress should step forward and support the multi-stakeholder community and inform the board that the transition will not occur unless the community’s accountability measures are adopted and implemented.

ICANN’s Rejection of the Multi-Stakeholder Model

The NTIA, an arm of the U.S. Department of Commerce, announced in March 2014 that it intended to “transition key Internet domain name functions to the global multi-stakeholder community.” In its announcement, the NTIA made clear that ICANN would have to meet several conditions before it would allow the transition to occur. Two of those conditions were that the proposal must “support and enhance the multi-stakeholder model” and “meet the needs and expectation of the global customers and partners of the IANA services.”

Initially, discussions on the proposed transition focused on the more technical and bureaucratic issues relating to the Internet Assigned Numbers Authority (IANA). In particular, they examined how, in the absence of the contractual relationship with the NTIA, ICANN should consider, vet, and implement changes in the domain name system (DNS) and the root zone file, numbering resources, and protocol parameters. The IANA Stewardship Transition Coordination Group (ICG) was established to address
these issues and held its first meeting in July 2014. The three subgroups of the ICG completed their work relatively quickly with the numbering resources and protocol parameters groups submitting their final drafts in January 2015 and the domain names group submitting its final draft in June 2015. The ICANN board has minimal comments on the Stewardship proposal and ICANN’s chartering organizations (GAC, SSAC, GNSO, ccNSO, and ALAC) approved the final proposal in June 2015.

Although not originally planned, the proposed transition prompted the multi-stakeholder community to question whether ICANN as an institution would be sufficiently accountable absent the historical contractual relationship with the U.S. This concern led to the creation of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG) in October 2014.

**Directly Linked and Interdependent.** There is nearly universal agreement that the transition should not proceed, regardless of the status of the stewardship proposals, until measures to enhance ICANN accountability are identified and implemented.

Indeed, the ICG-approved proposal for the transition of the IANA function was made directly and explicitly contingent on completion of work on enhanced accountability for ICANN. Significantly, some of the technical and structural proposals offered in the ICG were not incorporated into that proposal because they were considered redundant in light of the promised accountability changes that ICANN would adopt.

The mutual reliance of the accountability and stewardship proposals has been a central operating assumption since the CCWG was established. As Lawrence E. Strickling, Assistant Secretary of Commerce for Communications, has repeatedly emphasized, “These two multistakeholder processes—the IANA transition planning and enhancing ICANN accountability—are directly linked, and NTIA has repeatedly said that both issues must be addressed before any transition takes place.”

**The Board’s Rejection.** Over the past year, hundreds of people have worked thousands of hours across more than 150 teleconferences and four lengthy in-person meetings to develop a wide-ranging proposal for accountability. A great deal of this effort focused on

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2. The complete list of these principles is as follows: (1) ICANN must continue to support and enhance the multi-stakeholder model; (2) the security, stability, and resiliency of the Internet domain name system had to be maintained; (3) the post-transition ICANN would have to meet the needs and expectations of the global customers and partners of the Internet Assigned Numbers Authority services; and (4) the openness of the Internet had to be maintained. The NTIA also insisted that the U.S. role not be replaced by a government-led or an intergovernmental organization. News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions.”


5. The CWG-Stewardship final draft stated, “The CWG-Stewardship proposal is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) as described below. The co-chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability recommendations, if implemented as envisaged, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG. If any element of these ICANN level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship proposal, this CWG-Stewardship proposal will require revision.” ICANN, “Response to the IANA Stewardship Transition Coordination Group Request for Proposals on the IANA Stewardship Transition from the Cross Community Working Group on Naming Related Functions (CWG-Stewardship),” June 11, 2015, 106, https://community.icann.org/pages/viewpage.action?pageld=53779816 (accessed October 13, 2015).


7. As of October 6, 2015, the CCWG had held 157 meetings for 288.75 hours and generated 8,703 mailing list exchanges. The total time commitment from the CCWG group (number of attendees per meeting times the time of the meetings) was approximately 10,800 hours or 450 days. This does not count the substantial time devoted by participants to the development of the proposal outside the time of formal meetings and calls: time spent drafting, commenting on text, and coordinating discussion.
a number of stress tests—“a simulation exercise where a set of plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect a system, product, company or industry”—to assess whether the current or proposed accountability measures would be sufficient to address various problems.

The process, admittedly challenging, produced a broad consensus. The CCWG agreed that ICANN accountability would be deficient unless the community had several key powers, including the authority to dismiss individual ICANN directors and the entire board if necessary, the authority to veto the budget, the authority to veto the strategic plan, and the ability to block bylaw changes. According to legal experts advising the CCWG, under California nonprofit public benefit corporation law, which governs ICANN as a California-based nonprofit corporation, full exercise of these powers requires ICANN to become a membership organization. Therefore, the CCWG proposed making ICANN a membership nonprofit organization, which has an extensive legal provenance in California, so that the community could exercise the powers that it had decided were necessary.

The first draft of the CCWG proposal was submitted for public comment in May 2015. After taking comments into consideration, a second draft was opened to public comment in August 2015.

At the very end of this process, the ICANN board submitted comments that directly challenged central elements of the CCWG proposal. Specifically, the board objected to transforming ICANN into a membership organization and proposed an alternative that would substantially weaken or preclude the powers that the community would have in a post-transition ICANN. In subsequent comments to the CCWG, ICANN Board Chairman Steve Crocker made clear that the board opposed both membership and the more modest designator option that would grant the community lesser authority and fewer powers than membership would grant.

The actions of the board are a rejection of the bottom-up, multi-stakeholder-led process advocated by the NTIA and Congress. Moreover, the board’s rejection of the CCWG proposal breaches two of the principles announced by the NTIA in March 2014: The board has asserted its opinion as superior to that of the bottom-up, consensus proposal of the multi-stakeholder community on the accountability measures deemed necessary by the customers and partners of the IANA services as represented by the CCWG. Finally, it contravenes the commitment made by ICANN CEO Fadi Chea de to Congress and the board to the NTIA that ICANN would forward the ICG and CCWG proposals promptly and without modification.


12. Statement by Steve Crocker made at the face-to-face meeting of the CCWG in Los Angeles on September 25–26, 2015, and an October 6, 2016, e-mail correspondence to the CCWG.


14. According to Assistant Secretary Strickling, “ICANN has indicated that it expects to receive both the ICG transition and CCWG accountability proposals at roughly the same time and that it will forward them promptly and without modification to NTIA.” Testimony of Lawrence E. Strickling, July 8, 2015. Senator Thune asked whether the ICANN board would “send a proposal to NTIA that lessens the Board’s power or authority?” Fadi Chea de responded, “We will if the community and the stakeholders present us with a proposal. We will give it to NTIA, and we committed already that we will not change the proposal, that if we have views on that proposal, we should participate with the community. Once that proposal comes from our stakeholders, we will pass it on to NTIA as is.” See “[CWG-ACCT] Regarding the Board’s Comments and It’s [sic] Obligations,” September 8, 2015, http://mm.icann.org/pipermail/accountability-cross-community/2015-September/005263.html (accessed October 13, 2015).
Playing on Community Fears. Regrettably, the board’s action has had its intended effect of fracturing the community consensus. Some in the community are fearful that if a proposal is not finalized soon, the transition will never occur. The board is playing on this fear to get the community to back down. However, the community should be more fearful of allowing the transition to go forward absent sufficient accountability measures. The transition is the one opportunity for the multi-stakeholder community to insist on accountability in ICANN. Once the transition occurs, the main incentive for ICANN and the board, which have already proven very resistant, to agree to accountability measures dissipates.

By contrast, the international political pressures that led the U.S. to propose the transition will not recede, and now that NTIA has started this process, returning to the status quo ante is unlikely. But that does not mean that the transition must happen soon. In fact, the surest way to mobilize congressional opposition to the transition is for ICANN to send the NTIA a proposal that falls short of the March 2014 principles, contravenes the wishes of the community, and provides insufficient accountability. Rejecting the board’s efforts to weaken the chosen accountability mechanisms and holding firm would be a strong sign that the community is capable of handling the responsibility being entrusted to it.

What Should Be Done

The NTIA and key congressional leaders have repeatedly expressed the opinion that “it is more important to get this issue right than it is to simply get it done.” That is the correct viewpoint and should lead them to:

- **Reiterate U.S. support for the multi-stakeholder model.** Congress and the NTIA should reiterate that it is more important to get the IANA transition done right than it is to do it on any particular timetable and should make clear that any proposal lacking consensus community support will be returned to ICANN for revision and compliance with the initial conditions set on the transfer: that the transition “support and enhance” the multi-stakeholder model and “meet the needs and expectation of the global customers and partners of the IANA services.”

- **Announce U.S. readiness to extend the ICANN contract again.** The contract between the NTIA and ICANN, originally scheduled to expire in September 2015, was extended through September 2016 based on the estimated time needed by the CCWG to complete its proposal and see it adopted and implemented. The board’s rejection of the CCWG proposal sets this process back months and, unless the community unwisely retreats from changes necessary to make ICANN accountable, makes another extension likely necessary.

- **Ensure that Congress has the opportunity to review and reject the transition proposal.** The board’s actions raise doubts on the ability of the CCWG to see its proposals implemented. Recent statements from the NTIA have been interpreted, rightly or wrongly, as tacit support for the board that has served to further demoralize the multi-stakeholder community. Congressional review, whether through a process outlined in the DOTCOM Act or through mandatory legislative approval, desired by some in Congress, would provide a welcome source of support for the community and a backstop to the requirement of NTIA approval.

Conclusion

If the ICANN board is successful, a post-transition ICAAN would be unaccountable to the multi-stakeholder community while possessing, in effect, a monopoly power of control over a critical Internet resource. An additional concern that should worry the NTIA and Congress is that a board-dominated ICANN lacking community accountability and the historical contractual relationship with the U.S. would be more easily captured by governments or special interests than one where power is more diffuse with community checks on objectionable actions.

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The ICANN board is using the community’s impatience for the transition to leverage concessions on accountability. This situation is a stress test for the multi-stakeholder community. One can understand why the board wishes to retain unfettered authority—and that is precisely why its effort to hijack the process needs to be prevented from succeeding. Congress and the NTIA must support the community and encourage it to stand against the board’s coup attempt.

Ultimately, however, it is up to the community to persevere. It must be resolute and not let its impatience for the transition undermine its determination to ensure that ICANN will be accountable. If the multi-stakeholder community does not stand firm in demanding critical powers for holding ICANN accountable, post-transition, it will be suggesting that it is not prepared to assume the oversight role currently performed by the U.S.

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