

Statement of

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Testimony before the

House Judiciary Committee,

Subcommittee on Courts, Intellectual Property, and the Internet

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***STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN  
AND ESSENTIAL STEPS TO GUARANTEE TRUST AND  
ACCOUNTABILITY IN THE INTERNET'S OPERATION***

*Stakeholder Perspectives on ICANN: The .SUCKS domain and essential steps to guarantee trust and accountability in the Internet's Operation*

1 Over 17 years, the US government has protected ICANN's multistakeholder model from government encroachment and helped ICANN move to independence. But it's not sustainable for the US to retain its unique role forever. At our government's request, the Internet community drafted proposals to transition from the US government's unique contractual relationship with ICANN.

2 NTIA's requirements for this transition are appropriate and the community's proposals are a good start, giving the Internet community new powers to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto bylaws changes proposed by ICANN board
- Veto strategic plans and budgets proposed by ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors, or recall the entire ICANN board as a last resort

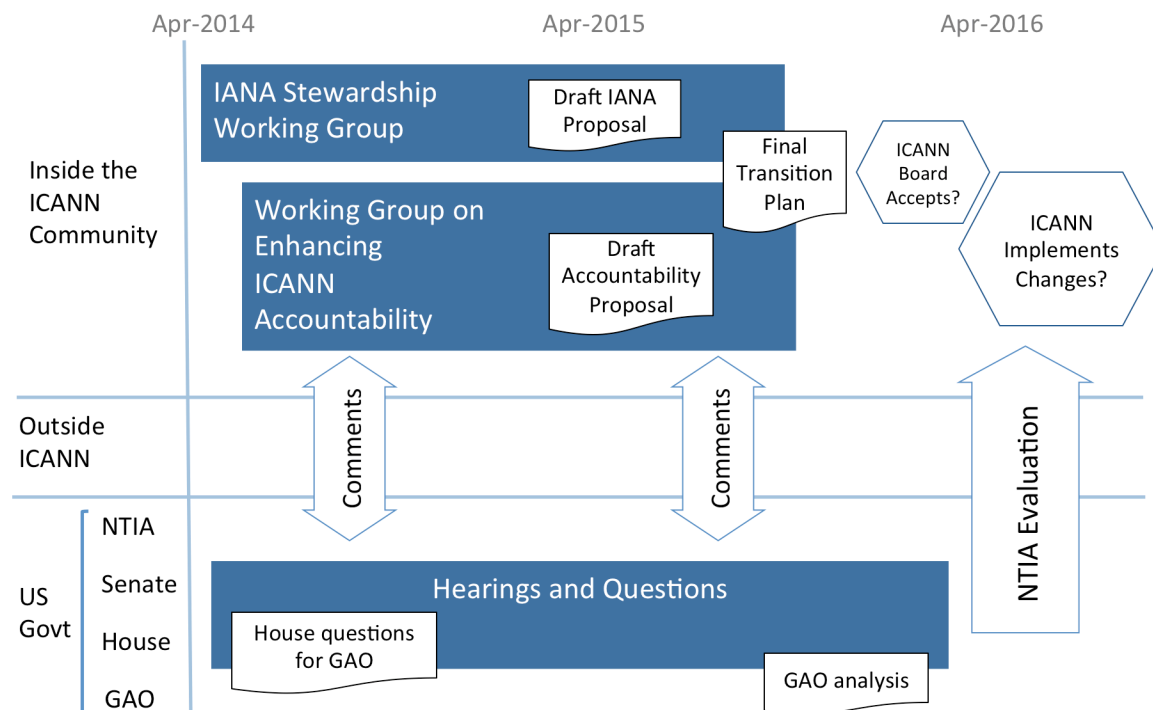
*Stress Testing* reveals these measures are adequate, but ICANN bylaws must change to:

- Add ICANN's commitments and reviews from the *Affirmation*, in case ICANN quits the *Affirmation*
- Obligate ICANN to find a mutually acceptable solution only when GAC advice has consensus

The unfortunate .SUCKS situation is another Stress Test where new powers would have helped.

We need details and review by global stakeholders, so won't be ready by Sep-2015 IANA expiration.

We worry that ICANN's board and management will resist approval and implementation.



3 The role of Congress in this historic transition goes beyond posing questions and stress tests.

This committee can be more influential and helpful by insisting that NTIA require ICANN to accept and implement the final community proposals *as a condition of the IANA transition*.

This is, after all, our last chance to use the leverage we are about to relinquish.

I serve as Executive Director of NetChoice, an association of leading online and e-commerce businesses.<sup>1</sup> At state, federal, and international levels, NetChoice promotes the integrity and availability of the Internet. We've participated in 30 ICANN meetings and I'm serving my 5th term as policy chair for the ICANN Business Constituency. I've attended eight Internet Governance Forum (IGF) meetings and testified in six Congressional hearings on ICANN and Internet governance, including three in the House Judiciary Committee.

NetChoice members are deeply invested in the topic of today's hearing. Our businesses need a secure Internet address system that's resilient to cyber attacks and online fraud. We need an Internet that works the same around the globe – free from discriminatory regulation and taxation. And we need Internet policies that are predictable and enforceable, allowing innovation while protecting consumers.

My statement will focus on three points relevant to this committee:

1. Over 17 years and through three administrations, the US government has protected the ICANN multistakeholder model from government encroachment and helped ICANN mature towards independence. However, it is not sustainable for the US to retain its unique role forever. At our government's request, the Internet community has drafted proposals to transition from the US government's unique contractual relationship with ICANN, and these drafts are now being reviewed by the broader Internet community.
2. NTIA's principles and requirements for this transition are appropriate to design new mechanisms to oversee core Internet functions, to hold ICANN accountable, and to prevent government capture *after* the transition. However, we do worry about encountering resistance from ICANN's board and management when it comes to approval and implementation of the community's proposals.
3. Congress' role in this transition goes beyond asking questions about proposed accountability mechanisms and potential stress tests, such as the present situation with the .sucks domain. This committee can be extremely helpful by encouraging and supporting the Commerce Department to require that ICANN accept and implement the multistakeholder proposals *as a condition of the transition*.

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<sup>1</sup> See <http://www.NetChoice.org>. This statement reflects the view of NetChoice and does not necessarily represent the views of any individual member company.

## **1. How we got here: United States Government Stewardship of ICANN and IANA**

America invented the core Internet technologies and promptly gave them to the world. Internet hosts were appearing internationally by the 1980s. The 1990's saw the explosion of commercial uses of the Internet, based on a naming and numbering system also created in the United States. In 1998, the Clinton administration sought to privatize and internationalize the Domain Name System (DNS) with this directive in the *White Paper*:

“The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management.”

“The US Government is committed to a transition that will allow the private sector to take leadership for DNS management.”<sup>2</sup>

In the 17 years since, it's been a long road from American invention to internationalized private-sector leadership by an entity the US established for the task: the Internet Corporation for Assigned Names and Numbers (ICANN). Three administrations and several Congresses have worked to help ICANN mature and protect the vision of private-sector leadership from growing pressure for control by governments, who saw the growth of the Internet and assumed that its governance required an inter-governmental solution.

The transition to an independent ICANN was expected to take a few years, but the National Telecommunications and Information Administration (NTIA) made several extensions of its oversight arrangements, the latest of which expired in September 2009. At the time, NetChoice was among those calling for another extension so that ICANN could develop permanent accountability mechanisms.

Instead, NTIA and ICANN unveiled a new agreement, the *Affirmation of Commitments*.<sup>3</sup> The *Affirmation* established periodic reviews giving all stakeholders – including governments – a defined oversight role in assessing ICANN's performance. The *Affirmation* gave the global Internet community what was promised: independence for ICANN in a framework where governments were alongside private sector stakeholders.

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<sup>2</sup> The “White Paper” on Management of Internet Names and Addresses, US Department of Commerce, Jun-1998, see [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>3</sup> Affirmation of Commitments, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

But concerns about the US role in naming and numbering remained after the execution of the *Affirmation*, because NTIA retained its contracting role for the Internet Assigned Numbers Authority (IANA). The IANA contract is deemed essential to ICANN and therefore provided NTIA leverage to hold ICANN to its *Affirmation* obligations.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.<sup>4</sup>

All of this to say that ICANN needs a persistent and powerful reminder that it serves at the pleasure of global stakeholders; that ICANN has no permanent lock on managing the Internet's name and address system. We said at the time that ICANN's role in IANA functions should disappear if it were to walk away from the *Affirmation of Commitments*.

Since the UN created the Internet Governance Forum (IGF) in 2005, IGF meetings have become increasingly productive, yet some governments still want the UN to oversee DNS tasks handled by ICANN and IANA. In its July-2010 statement to the UN, China's government asked the UN and IGF to "solve the issue of unilateral control of the Critical Internet Resources." By 'unilateral control', China means US custody of the IANA contract. And 'Critical Internet Resources' include IP addresses, root servers, and the policymaking for domain names.

China was not alone in its desire for the migration of ICANN and IANA functions to the UN's International Telecommunication Union (ITU). ITU leadership did not like a model where governments share power with industry and civil society, and warned ICANN that sooner or later governments would take greater control of the organization.

In 2011, a group of governments proposed their own replacement for US oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for "establishing a new global body" located "within the UN system" to "oversee the bodies responsible for technical and operational functioning of the Internet".<sup>5</sup> In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and unequivocal

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<sup>4</sup> Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

<sup>5</sup> Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at [http://www.culturalivre.org.br/artigos/IBSA\\_recommendations\\_Internet\\_Governance.pdf](http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf)

policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today.”<sup>6</sup>

Clearly, the last 17 years of “transition” have seen significant improvements in globalizing ICANN and IANA, although there have certainly been some challenges. Along the way, some governments and intergovernmental organizations have criticized the US role and openly coveted taking over that role. But throughout, the US Congress and multiple administrations have stayed with the vision of multistakeholder, private-sector leadership for Internet addressing and policymaking. And our government has used its contractual tools to improve ICANN’s performance and to hold the organization to the accountability measures in the *Affirmation of Commitments*.

Still, the US continued to work towards full privatization of ICANN and IANA, at a deliberate pace and with measurable progress. Then came 2013 and Edward Snowden’s revelations of US government surveillance. While not at all related to the Domain Name System or to Internet addressing, the Snowden situation was conflated with US oversight of ICANN and IANA in order to amplify international demands for globalization of these institutions.

## **2. NTIA’s Announced Transition for IANA functions and ICANN Accountability**

In March 2014 the Commerce Department announced that it would transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. The positive global response was immediate, signaling that this move, at this time, might relieve the intense pressure from foreign governments demanding an end to the unique US role in IANA oversight.

NTIA asked ICANN to develop a transition plan to shift stewardship of IANA functions into the hands of “the global multistakeholder community.” NTIA said the transition proposal must have broad community support and satisfy four principles in replacing NTIA’s role<sup>7</sup>:

- Support and enhance the multistakeholder model

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<sup>6</sup> H.Con.Res.127 and S.Con.Res.50 - Expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, Aug 20, 2012

<sup>7</sup> Press Release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions”, March 14, 2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of IANA services
- Maintain the openness of the Internet

NTIA also added a statement that it would not give up IANA control if the plan developed by ICANN would place other governments in the legacy role of the United States.

At the same time, NTIA and most stakeholders recognized that the existing contract between NTIA and ICANN provides a broader accountability framework for ICANN, and that accountability enhancements should be developed and adopted in parallel with the transition.

With the experience of the last 17 years, it's appropriate for the US government to impose these principles and to prevent any government-led organization from replacing the former US role *after* the transition is complete. Since NTIA's 2014 announcement, the Internet community and ICANN have developed two tracks to respond to the challenge:

**IANA Stewardship track:** Placing the global Internet community in the role historically held by NTIA in the IANA contract with ICANN.

**ICANN Accountability track:** Giving the global Internet community more power to hold the ICANN corporation accountable, since NTIA will lose the leverage associated with the IANA contract.

On each track, the community is comprised of representatives of ICANN's recognized Advisory Committees and Stakeholder Organizations, including business, governments, and civil society.

**The IANA Stewardship Track:** ICANN structured the IANA track to have a large community group (CWG) for naming functions, plus a smaller working group (ICG) comprised of community representatives and selected outside experts. They began meeting in October 2014 and have published draft proposals for replacing the NTIA's role in all three IANA functions: numbers, protocols, and domain names.

The numbers and protocol proposals were quickly developed by the customer groups concerned with those functions, and published their draft proposals in January 2015. The naming function proposal is more complicated and involves multiple stakeholder groups with existing contractual arrangements with ICANN. In late April, the naming group published its 2<sup>nd</sup> draft proposal, including these key elements:

- Create a new legal entity to contract with ICANN to operate IANA naming functions
- Establish a customer committee to monitor the performance of IANA functions

- Establish a periodic review of the IANA Functions, embedded in ICANN bylaws
- Empower the community select a new operator for the IANA Functions, if needed

Finally, the IANA naming proposal acknowledged its reliance upon enhanced community powers to hold ICANN to new obligations developed by the ICANN Accountability Track.

**The ICANN Accountability track:** ICANN stakeholders named representatives to a cross-community working group (CCWG) that began meeting in December 2013. (I serve as the representative of Commercial Stakeholders on the CCWG). After more than a hundred meetings over 5 months, we published a draft proposal giving the community new powers to ensure ICANN the corporation was answerable to more than just itself. New powers for the community include the ability to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto Bylaw changes proposed by the ICANN board
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors
- Recall the entire ICANN board, as a last-resort measure

Independent legal counsel is advising the working group on ways to give these powers to the ‘community’ of Advisory Committees and Stakeholder Organizations and to draft the necessary changes to ICANN bylaws. That includes bringing into the bylaws key commitments and reviews from the NTIA’s last remaining bilateral agreement with ICANN – the 2009 *Affirmation of Commitments*. Bylaws amendments also include changes indicated by stress testing. One amendment would restrict ICANN from straying outside its narrow technical mission. Another would limit the power of governments to affect policy, by clarifying that only *consensus* advice from the Government Advisory Committee would obligate ICANN to try and find a mutually acceptable solution.

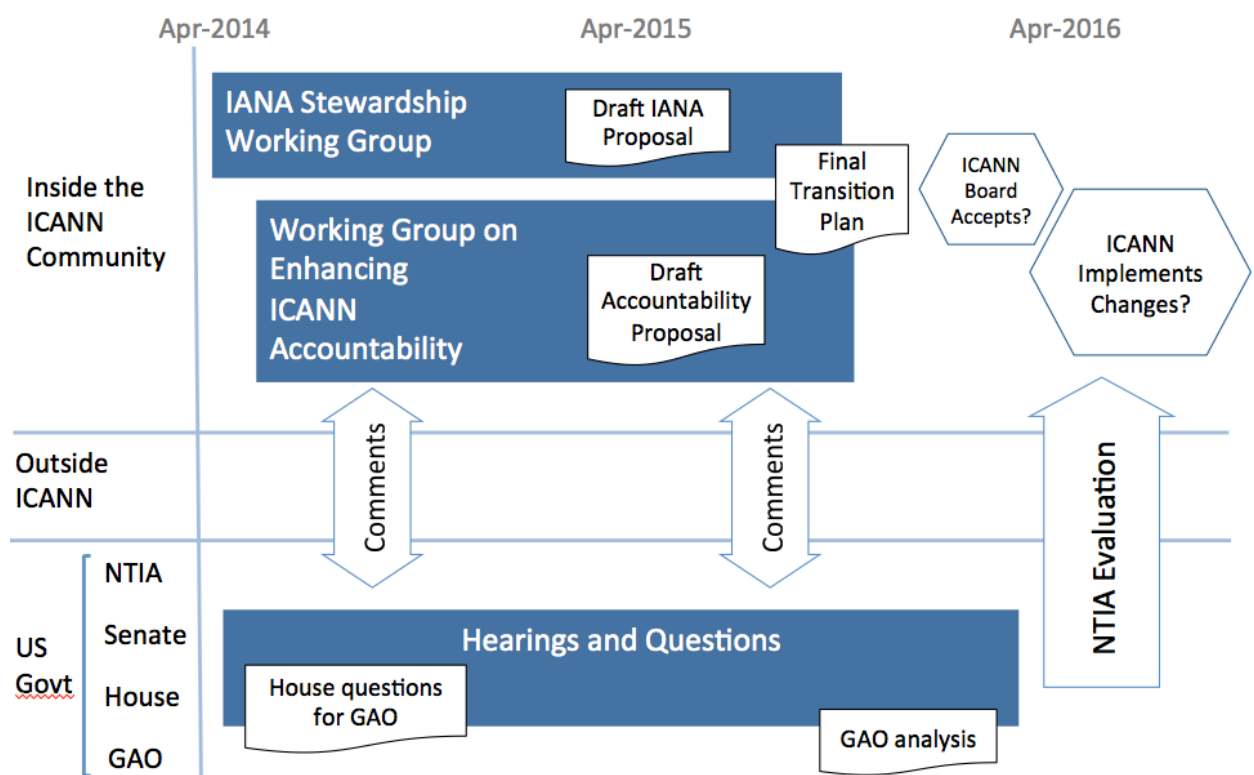
### **3. Next Steps in the Transition**

The IANA stewardship 2<sup>nd</sup> draft proposal was published April 22 and the accountability draft proposal was published May 4. The global Internet public can submit comments and questions before and during ICANN’s meeting in Buenos Aires in late June. Discussions there will contribute to revised proposals for one or both transition tracks. We will also need to



implement critically important measures (known as Work Stream 1) and plan for implementing additional measures identified for Work Stream 2.

Some ICANN Advisory Committees and Stakeholder Organizations may not be ready to approve the final proposal until after the ICANN meeting in October 2015. That means NTIA will need to extend the IANA contract for several months beyond its September 30, 2015 expiration. Once the community has approved proposals for IANA and ICANN accountability, it's up to NTIA and Congress to assess whether those proposals meet the test, before allowing the IANA contract to expire. Below is a simplified illustration of the timeline and actors:



#### 4. Accountability Enhancements Suggested by Stress Testing

In testimony we submitted to this committee for its April 2014 ICANN hearing, I described 8 stress tests that should be applied to a post-transition ICANN<sup>8</sup>. NTIA leadership and many in Congress embraced stress testing as a prudent means to allow community planning to

<sup>8</sup> See Stress Tests, pages 7-10 at [NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

proceed, while informing and evaluating the proposals against potential threats. Even the Government Accountability office (GAO) is examining stress tests in response to the House Commerce Committee letter last June<sup>9</sup>. As the accountability group noted:

The purpose of these stress tests is to determine the stability of ICANN in the event of consequences and/or vulnerabilities, and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community.

Also, note that the CCWG-Accountability charter does not ask that probability estimates be assigned for contingencies. The purpose of applying tests to proposed accountability measures is to determine if the community has adequate means to challenge ICANN's reactions to the contingency.

Beginning with 8 stress test scenarios that NetChoice presented to your committee last April, the accountability and IANA stewardship groups added 18 more and sorted into 5 categories:

I. Financial Crisis or Insolvency

ICANN becomes fiscally insolvent, and lacks the resources to adequately meet its obligations. This could result from a variety of causes, including financial crisis specific to the domain name industry or the general global economy. It could also result from a legal judgment against ICANN, fraud or theft of funds, or technical evolution that makes DNS obsolete.

II. Failure to Meet Operational Obligations

ICANN fails to process change or delegation requests to the IANA Root Zone, or executes a change or delegation over the objections of stakeholders

III. Legal/Legislative Action

ICANN is the subject of litigation under existing or future policies, legislation, or regulation. ICANN attempts to delegate a new TLD, or re-delegate a non-compliant existing TLD, but is blocked by legal action.

IV. Failure of Accountability

Actions (or expenditure of resources) by one or more ICANN Board Members, CEO, or other Staff, are contrary to ICANN's mission or bylaws. ICANN is "captured" by one stakeholder segment, including governments via the GAC, imposing its agenda on all other stakeholders or abusing accountability mechanisms to block processes.

V. Failure of Accountability to External Stakeholders

ICANN modifies its structure to avoid obligations to external stakeholders, such as terminating the *Affirmation of Commitments*, terminating presence in a jurisdiction where it faces legal action, moving contracts or contracting entities to another jurisdiction. ICANN delegates, subcontracts, or otherwise abdicates its obligations to a third party in a manner that is inconsistent with its bylaws or otherwise not subject to accountability. ICANN merges with or is acquired by an unaccountable third party.

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<sup>9</sup> Letter to GAO from House Commerce Committee and subcommittee chairs, 5-Jun-2014, at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140605GAO.pdf>

The community working groups created a team focused on applying these stress tests using draft proposals for new community powers. For some stresses caused by external events, new accountability measures could help the community challenge the board's preparation and reaction, but could not completely mitigate the impact on ICANN. One stress test regarding country-code domains could not be completed pending policy development by the country-code supporting organization.

Overall, the stress test team determined that proposed new accountability measures were a significant improvement compared to existing measures, and would give the community adequate powers to challenge ICANN's decisions and actions. Two particular stress tests are worth exploring in this hearing, since they identified critical risks of having ICANN quit the *Affirmation of Commitments*, and avoiding expansion of governmental influence over ICANN.

#### **4.1 Proposal to bring *Affirmation* commitments and reviews into ICANN bylaws**

In our April 2014 testimony, NetChoice described a stress test scenario where ICANN decides to quit the *Affirmation of Commitments*, which it may do with just 120 days notice.<sup>10</sup> The accountability group was concerned about that stress test and said in its proposal:

After the IANA agreement is terminated, the *Affirmation of Commitments* will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.<sup>11</sup>

Once the IANA contract is gone, the *Affirmation* stands out and would be targeted for elimination by governments who resent the US having a unique, bilateral relationship with ICANN. Against this contingency, the accountability group examined *Affirmation* items to determine if they were already part of ICANN bylaws. This resulted in a proposal to add key *Affirmation* commitments to the Core Values in ICANN bylaws:

Ensure that decisions made related to the global technical coordination of the DNS are made in the global public interest and are accountable, transparent and should respect the bottom-up multistakeholder nature of ICANN.

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment that enhances consumer trust and choice.

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<sup>10</sup> See Stress Test 1, on page 8 at [NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

<sup>11</sup> p.51 at [draft report](#) of Cross Community Working Group on Enhancing ICANN Accountability, 4-May-2015

ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or non-financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

ICANN shall adhere to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and strategic and operating plans.

ICANN shall provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

ICANN shall maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet.

Operate as a multi-stakeholder, bottom-up private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

*Affirmation* section 8b generated questions during the Senate Commerce Committee hearing in February 2015. 8b commits ICANN to “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” The community working group concluded this commitment was reflected in current ICANN articles of incorporation and in bylaws Article XVIII section 1:

“OFFICES. 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. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”

While ICANN's board *could* propose a change to this bylaws provision, the newly-empowered community could block the proposed change. We are also considering whether bylaws Article 18 Section 1 should be listed as a “Fundamental Bylaw,” where any change would require approval by 75% of community members.

As part of this stress test analysis, the accountability working group also proposed bringing the 4 periodic community reviews from the *Affirmation* into ICANN's bylaws:

ICANN's accountability & transparency

Preserving security, stability and resiliency

Promoting competition, consumer trust, and consumer choice

The extent to which WHOIS services meet legitimate needs of law enforcement

These reviews are proposed for addition to ICANN bylaws, modified to give the community access to ICANN internal documents and control over review team composition. In addition, the

IANA stewardship group proposed an IANA Functions Review be added to the bylaws. When combined with proposed new powers to challenge ICANN board decisions, these bylaws changes would enable termination of the *Affirmation of Commitments*.

#### 4.2 Proposal to limit ICANN obligations to advice from governments

In our April 2014 testimony, NetChoice described stress tests where global governments could increase their sway over ICANN policies and decisions<sup>12</sup>. In the accountability group this stress test generated much interest since it addresses ICANN’s response to government advice in the context of NTIA’s statement regarding the transition: “NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution”.<sup>13</sup> This stress test was applied to existing and proposed accountability measures:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
<p>Governments in ICANN’s Government Advisory Committee (GAC) could amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN’s board.</p> <p>Consequence: Under current bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve GAC advice that restricted free expression, for example.</p>	<p>Current ICANN Bylaws (Section XI) require ICANN to try to find “a mutually acceptable solution” for GAC advice.</p> <p>This is required for any GAC advice, not just for GAC consensus advice.</p> <p>Today, GAC adopts formal advice according to its Operating Principle 47: “<i>consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.</i>”<sup>14</sup> But the GAC may at any time change its procedures to use majority voting instead of its present consensus.</p>	<p>One proposed measure is to amend ICANN bylaws (Article XI Section 2, item 1j) to require trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus.</p> <p>The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require trying to find a mutually agreeable solution only on advice that had GAC consensus.</p> <p>GAC can still give ICANN advice at any time, with or without consensus.</p>

Some government representatives in the working group opposed this change to ICANN bylaws. That is not unexpected, since some government representatives have previously voiced dissatisfaction with the present consensus method of approving Government Advisory

<sup>12</sup> See Stress Tests 6 and 7, on page 9 at [NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet](#), 2-Apr-2014

<sup>13</sup> NTIA Announces Intent to Transition Key Internet Domain Name Functions, 14-Mar-2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

<sup>14</sup> ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

Committee (GAC) advice. It is entirely plausible that the GAC could change its method of approving advice at some point, and it is entirely within their right to do so. On the other hand, several governments supported the change, including a forceful statement from NTIA<sup>15</sup>:

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

This historic transition creates the opportunity for the community to obtain accountability enhancements that the ICANN board would not likely approve if those enhancements were proposed after the leverage of the IANA contract is gone. By the same token, the GAC would not welcome this bylaws change if it were proposed at some point after the IANA transition.

This transition is the best opportunity to pursue difficult and sometimes controversial changes to ensure that ICANN is accountable to the entire community it was created to serve. By the same token, this transition is the last opportunity for the US government to use its leverage to get ICANN to accept and implement the community's proposed accountability enhancements.

### ***5. Ensuring that ICANN accepts and implements the community proposals***

In September 2014 all ICANN advisory committees and stakeholder groups wrote a joint letter raising questions about ICANN's proposed accountability process<sup>16</sup>. ICANN responded by asking whether and why the community seemed to lack trust in ICANN's board and management. The Business Constituency's reply is remarkable for its clarity on why the community needs new measures to hold ICANN accountable<sup>17</sup>:

First, this discussion is not about whether the community 'trusts' the current ICANN board. It's about trusting future boards — after we no longer have the leverage/influence

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<sup>15</sup> Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

<sup>16</sup> Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf>

<sup>17</sup> p. 3, Business Constituency comment on Enhancing ICANN Accountability Process, 27-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf>

of the US Government to rely upon. This IANA transition is the community's chance to establish mechanisms to rein-in a future board that would put ICANN's corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging that the board is obliged to protect the corporation's interests first, as required by ICANN bylaws:

Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

Should there be any confusion about whether the bylaws refer to 'ICANN' as the corporation or the community, see ICANN's *Management Operating Principles* (2008):

"The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."<sup>18</sup>

The Business Constituency had it right: ICANN's present bylaws do not hold the board accountable to the community. Before the US government lets go of the oversight leverage inherent in the IANA contract, it must ensure that ICANN accepts and implements the proposals needed to keep the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

## **6. Stress Testing the .sucks Situation**

Other panelists in today's hearing are better able to describe concerns with practices of the .sucks registry<sup>19</sup>. Given my involvement with stress testing of ICANN accountability measures, I suggest looking at the .sucks situation as a set of stress tests.

To conduct a stress test in this context, we first start with a plausible scenario for an internal or external contingency that could undermine ICANN's operations, finances, credibility,

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<sup>18</sup> ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf>

<sup>19</sup> See IPC Letter to ICANN, 3-Mar-2015, at <https://www.icann.org/en/system/files/correspondence/shatan-to-atallah-27mar15-en.pdf>, Business Constituency letter to ICANN, 8-May-2015, at <http://www.bizconst.org/wp-content/uploads/2015/05/Letter-to-ICANN-dotSucks.pdf>, Business Constituency letter to FTC and Canada consumer protection authority, 8-May-2015, at <http://www.bizconst.org/wp-content/uploads/2015/05/Letter-to-FTC-and-OCA-dotSucks.pdf>

etc. Second we examine ICANN's existing accountability mechanisms to determine whether they give the Internet community adequate means to challenge board decisions in preventing and reacting to the stress, and to hold the Board accountable for its actions. Third, we assess proposed accountability measures against the same stress test criteria – can the community challenge ICANN decisions and hold it accountable. Finally, we conclude whether the proposed accountability measures are a significant improvement over ICANN's existing mechanisms.

.Sucks Scenario 1: A new gTLD applicant successfully passes initial financial evaluation even though its parent company and affiliates had previously defaulted on substantial payments owed to ICANN. This revelation calls into question ICANN's objectivity and transparency.

Under existing ICANN accountability mechanisms, potential domain name registrants have no standing to challenge the evaluation panel finding or to force a review of ICANN's decision to accept the evaluation. But under the proposed accountability measures, the community gets standing and affordable access to Reconsideration Request and Independent Review Panel (IRP). Moreover, the new IRP would use objective standards and be able to issue binding decisions. Clearly, these new accountability measures are needed to adequately address this stress test.

.Sucks Scenario 2: ICANN quietly negotiates a registry agreement with the new gTLD applicant described above, adding \$1 million in extra fees payable to ICANN. Again, this undermines the promised objectivity and transparency of ICANN processes as well as the judgment of ICANN management.

Existing ICANN accountability mechanisms would not enable challenges by the domain registrants whose fees would provide the funds going to ICANN. But under proposed accountability measures, the community gets standing and access to Reconsideration Request and IRP to challenge ICANN's decision to sign that contract. Again, the new accountability measures are needed to adequately address this stress test.

.Sucks Scenario 3: ICANN's legal department asks a national government's consumer protection authority to review the practices of a TLD registry to whom ICANN has just given a contract. Aside from questions about the diligence and objectivity of ICANN's contract team, the precedent here is troubling: ICANN is responsible to enforce its registry and registrar agreements – not governments; and will ICANN now do referrals to authorities in every country where users and registrants are located?

Under existing ICANN accountability mechanisms, the ICANN community has no standing to challenge ICANN's decision to defer to national governments for contract compliance. But under the proposed accountability measures, the community would have standing and access to Reconsideration and IRP measures. Again, the new accountability measures are needed to adequately address this stress test.



These stress tests for .sucks point the way to solving similar situations long after the US government lets go the leverage of the IANA contract. It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. That leads us to the final segment of our testimony, on the role for Congress in this transition.

### ***7. The Role for Congress in Ensuring an Accountable ICANN After Transition***

Members of this committee and Congress in general are right to raise questions and concerns about this transition, proposed accountability mechanisms, and potential stress tests. For example, the House Commerce Committee assigned several questions to the Government Accountability Office (GAO) last June and GAO staff has already met with many community participants (including two meetings with NetChoice). As Chairman Goodlatte asked in his February post on CircleID.com, “what guarantees, capabilities and conditions first should be demanded and stress-tested by the global multi-stakeholder community?”<sup>20</sup>

However, this committee –and all of Congress—can be more influential and helpful by insisting that NTIA require ICANN to accept and fully implement the multistakeholder community proposals *as a condition of the IANA transition*.

To prepare ICANN for a future independent of US government contracts, the Internet community needs to hold ICANN accountable, with powers like shareholders have over corporations, voters over their elected officials, and members over their trade associations. There are a lot of details left to decide, but the present draft transition proposals are a good start at bringing constituent accountability to ICANN, who has never faced formal measures such as shareholder resolutions and recalls of board directors.

The *White Paper* vision for ICANN should be preserved: ICANN should be led by, and accountable to its multistakeholder communities, including the private sector, civil society, and technology experts – along with governments. These stakeholders have built the Internet into the transformative platform that it is today. These stakeholders will create the innovations and make the investments to bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

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<sup>20</sup> “Ensuring Trust in Internet Governance”, 11-Feb-2015, on CircleID, [http://www.circleid.com/posts/20150211\\_ensuring\\_trust\\_in\\_internet\\_governance/](http://www.circleid.com/posts/20150211_ensuring_trust_in_internet_governance/)