

**TESTIMONY OF GÖRAN MARBY
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**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)
A CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION**

**BEFORE THE U.S. SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL
RIGHTS AND FEDERAL COURTS**

**HEARING:
PROTECTING INTERNET FREEDOM: IMPLICATIONS OF ENDING U.S.
OVERSIGHT OF THE INTERNET**

WEDNESDAY, SEPTEMBER 14, 2016

Mr. Chairman, Ranking Member, and members of the Committee, I am Göran Marby, the President and CEO of ICANN, the Internet Corporation for Assigned Names and Numbers. Thank you very much for the invitation to testify before you today on the implications of ending the U.S. contractual stewardship role over key technical functions of the domain name system. I am very pleased to be testifying before you today.

On March 14, 2014, the Department of Commerce's National Telecommunications and Information Administration (NTIA) announced its intent to continue its ongoing transition of Internet governance oversight to the multistakeholder model. It called upon the ICANN community to convene a process to develop a proposal that meets a clear set of criteria, including ensuring that no government-led solution or intergovernmental organization could gain control of the IANA functions. NTIA's announcement also furthered Congress' commitment to the multistakeholder model of Internet governance, taken in 2012 S.Con.Res.50 and H.Con.Res.127.

Since March 2014, the multistakeholder community, including U.S.-based companies, fully engaged and met the NTIA's call to action, developing proposals on both the evolution of the stewardship of the technical functions, as well as on enhancing and strengthening ICANN's accountability in light of the removal of the historical backstop that the IANA Functions Contract represented to many in the community.

I joined ICANN earlier this year, after the broad ICANN multistakeholder community delivered their Transition Proposals. Since I've been with ICANN, the organization and the broader community have been working towards implementation. As NTIA has agreed, nearly all of the necessary tasks needed to put the community's Proposals in place have been completed, with the remaining tasks on schedule to be completed in the next weeks. ICANN and its multistakeholder community are ready to deliver.

Background

In 2000, NTIA entered into the IANA (or Internet Assigned Numbers Authority) Functions Contract with ICANN. ICANN was formed in 1998, and was purpose-built to perform the IANA functions, which consist of the coordination of unique Internet identifiers (domain names, IP numbers and protocol parameters). ICANN has performed the IANA functions pursuant to its no-fee contract with the U.S. government ever since, while maintaining the security, stability and resiliency of the Internet. This technical mandate helps maintain a single, global, unified and interoperable Internet. ICANN, however, cannot and does not use this technical mandate to control what Internet users access, do, or say over the Internet. ICANN is just one of the entities that performs work necessary to the operation of the Internet, and there is no single point of control.

One of the key things that ICANN does is to make it possible for people use memorable names on the Internet instead of having to recall a series of numbers.

For example, your constituents need only type www.senate.gov to find information on your activities, instead of having to use the IP address 184.30.235.199. ICANN, of course, does not control what the Senate puts on that website. Similarly, ICANN does not have any means to control what you tweet, what you stream through an online television provider, or what you post on social media. The IANA Functions Contract does not give the U.S. Government, ICANN, or any other government or entity the power to reach that type of content or regulate the freedom of expression.

At the time of ICANN's formation, it was envisioned that the U.S. Government would transition its stewardship role over the key unique Internet identifier functions within two years. With this commitment to transition existing across three presidential administrations, the temporary arrangement lasted far longer than anyone anticipated. The ICANN community, including U.S. business, has now completed its work allow the transition to proceed.

The ICANN Community Had The Time and Support Needed To Develop

Proposals

Once NTIA made its announcement in 2014, the process to develop the transition proposals was deliberate and measured, with the community given the time it needed to complete its work, For the proposal preparations there were two tracks of work facilitated by ICANN:

- The first track, coordinated by the IANA Stewardship Transition Coordination Group (the ICG), focused on the operational and technical performance of the IANA functions; and
- The second track, performed by the Cross-Community Working Group on Enhancing ICANN's Accountability (the CCWG-Accountability), identified accountability enhancements to prepare for an ICANN organization without contractual ties to the U.S. Government.

Across the transition and accountability work, stakeholders have logged more than 800 hours worth of meetings/calls, many of which were ICANN-funded face-to-face meetings. This does not include the hours spent drafting and developing documents. There were over 32,000 mailing list exchanges on these two processes.

The community participation in the transition-related work has come from a broad range of stakeholders, including the technical community, large and small businesses, not-for-profit organizations, civil society, intellectual property experts, governments, academia, and Internet users from around the globe. American corporations are among the participants, with companies such as AT&T, Cisco, Google, Intel, Microsoft, Neustar, Verisign and Verizon, as well as industry trade groups such as the U.S. Chamber of Commerce, the Motion Picture Association of America and the U.S. Council for International Business attending meetings and providing inputs into the processes.

When NTIA made its announcement in March 2014, the IANA Functions Contract was scheduled to expire on October 1, 2015. In May 2015, neither track's work was complete. Assistant Secretary Strickling then reached out to the chairs of both the ICG and the CCWG-Accountability noting that though the Contract was set to expire on September 30, 2015, this was never viewed as a deadline for the community's work. Assistant Secretary Strickling confirmed that the schedule for proposal development was up to the community.¹ The Chairs of the ICG and the CCWG-Accountability each noted their opinion that the proposals could be finalized some time in November 2015 and implementation complete by July 2016 at the earliest.²

Based on the community's inputs, NTIA extended the IANA Functions Contract for another year. The ICANN community used this additional time to complete the proposals and finalize the implementation planning. The proposal development actually took more time than estimated; the transition proposal package was finalized and transmitted to NTIA on March 10, 2016 – two years after NTIA's announcement. NTIA then completed its assessment of the proposals within the 90-day window that had always been anticipated, and released its NTIA Stewardship

¹ ICG: <https://www.icann.org/en/system/files/correspondence/strickling-to-cooper-et-al-06may15-en.pdf>; CCWG: <https://community.icann.org/download/attachments/53774378/Letter%20to%20CCWG%20May%206.pdf?api=v2>

² ICG: <http://www.ianacg.org/icg-files/correspondence/2015-07-06-Letter-from-ICG-to-to-NTIA.pdf>; CCWG: https://community.icann.org/download/attachments/53783163/CCWG_NTIA_reply.pdf?version=1&modificationDate=1436200078000&api=v2

Transition Proposal Assessment Report on June 9, 2016.³ NTIA confirmed that: the proposals met the criteria it had set out over two years prior; the proposals address the internal controls framework assessment recommended by the Governmental Accountability Office; and corporate governance experts found the proposals consistent with principles of good governance.

ICANN, serving in its support role to the ICANN community, followed the community's timeline and provided the support requested and in the time frame developed by the community for this important work.

ICANN Is Ready to Implement the Proposals

Since delivering the proposals to NTIA on March 10, 2016, ICANN has been doing substantial planning work to make sure that it is ready to fully implement the transition proposals. On August 12, 2016, ICANN submitted an Implementation Planning Status Report⁴, which detailed all of the work that ICANN had completed in coordination with the multistakeholder community to put all elements of the proposals in place. To make sure that the Bylaws were drafted to give proper effect to the transition proposals, ICANN coordinated closely with the external counsel selected by the community groups, and received confirmation of the consistency with the proposals. ICANN also sought public comment or review opportunities for nearly all documents needed to complete the work.

³ <https://www.ntia.doc.gov/report/2016/iana-stewardship-transition-proposal-assessment-report>

⁴ <https://www.icann.org/en/system/files/files/iana-stewardship-implementation-planning-status-12aug16-en.pdf>

ICANN, working with the community has achieved all of the following, and reasserts its confirmation that all required transition tasks are completed or will be completed by September 30, 2016:

- Revised the ICANN Bylaws to incorporate all accountability enhancements, approved on May 27, 2016;
- Approved necessary amendments to the ICANN Articles of Incorporation, for filing with the California Secretary of State;
- Signed agreements with both the IETF and the RIRs for ICANN to continue performing the IANA numbering and protocol parameter functions;
- With Verisign, successfully completed the 90-day parallel testing period on the Root Zone Management System;
- Filed incorporation papers with the California Secretary of State for “Public Technical Identifiers” (or PTI), the ICANN-controlled company that will perform the IANA functions;
- Finalized the membership of the new multistakeholder group that will oversee ICANN’s performance of the IANA naming functions;
- Formed the committee that will help advise on future evolution of the root zone;
- Published final Bylaws for PTI, which the ICANN Board is expected to consider this week, with PTI Board following shortly;
- Finalized and customer service level expectations for PTI;
- Finalized community consultations on the ICANN-PTI Naming Function Agreement and a Services Agreement, for ICANN Board consideration this week, with PTI Board following shortly;
- Obtained ICANN Board approval to sign a finalized Root Zone Maintainer Agreement with ICANN; and
- Finalized PTI’s Conflicts of Interest Policy, Board Code of Conduct and Expected Standards of Behavior documents for PTI Board approval.

Upon review of the Report, NTIA notified ICANN that it intends to allow the IANA

Functions Contract to expire as of October 1, 2016.⁵ ICANN and its community have worked tirelessly to bring this work to fruition. Notably, ICANN’s operational readiness to implement the Proposals has not been questioned.

The ICANN Community Urges the Transition to Proceed

As recognized by leaders in U.S. industry, proceeding with the transfer of the U.S.’s stewardship role to the global Internet community “ensur[es] the future of a global, interoperable and stable Internet.”⁶ American companies including Cisco, Intel, Amazon, Google, Microsoft, Facebook, Dell, Hewlett Packard Enterprise, CloudFlare and Yahoo, and trade associations including the U.S. Chamber of Commerce, the Internet Association, USCIB, the Internet Infrastructure Coalition, CCIA, and SIIA all have confirmed their support for the proposals provided to NTIA and the completion of this transfer of stewardship. Just this week, 27 U.S. businesses including Amazon, Google, Facebook and Yahoo sent an open letter to Congress noting their support for the transition proposals and urging that “it is imperative that Congress does not take action to delay the October 1st transition date.”⁷

This transition process carries symbolic import beyond the limited clerical function that is at issue. Many across the world are watching to see if it will conclude on schedule. Former Homeland Security Secretary Michael Chertoff and Retired Marine

⁵ <https://www.ntia.doc.gov/files/ntia/publications/20160816marby.pdf>

⁶ <http://blogs.intel.com/policy/files/2016/04/Business-Open-Letter-supporting-IANA-Transition-VersionVI.pdf>

⁷ <http://news.trust.org/item/20160912233217-okpod>

Corps Gen. and former Vice Chair of the Joint Chiefs of Staff James Cartwright have cautioned:

If Washington fails to follow through on its longstanding commitment to privatize the DNS, it will fuel efforts by authoritarian regimes to move Internet governance to the United Nations—and potentially put the Internet, as we know it, at risk. . . . To reject or even delay the transition would be a gift to those governments threatened by a free and open Internet.⁸

Civil society groups, including Access Now, the Center for Democracy & Technology, Human Rights Watch and Public Knowledge, among others, have stated:

[T]he IANA transition will confirm the legitimacy of multistakeholder approaches to Internet policy and governance, will result in a stronger and more empowered community within ICANN and ensure that the Internet community and not ICANN or one government is responsible and accountable for the stability, security and resiliency of the Internet going forward. This multistakeholder transition both protects the Internet and best serves stakeholder interests. Blocking or delaying the transition would strengthen the hand of those who do not believe in or support an open Internet and would encourage further government intervention and control.⁹

U.S. Authority Remains Over The .GOV, .MIL and .EDU Top-Level Domains

With the NTIA removed out of its clerical role in changes to root zone entries, the U.S. Government and others have raised questions about how this will impact NTIA's ability to consider requested changes to the .GOV, .MIL, .EDU and .US top-level domains. While the U.S. role in administering these domains has long been

⁸ <http://www.politico.com/agenda/story/2016/06/keep-internet-free-and-open-icann-000140#ixzz4JwhjvdjW>

⁹

<https://www.accessnow.org/cms/assets/uploads/2016/05/CSstatementonIANAtransitionMay2016-1.pdf>

recognized,¹⁰ ICANN and NTIA did not previously enter formal documentation to recognize the U.S. authority.

The operation of and responsibility for these top-level domains are not impacted by this transition and cannot be reassigned without express approval from the U.S. Government. To formally reaffirm this, NTIA and ICANN exchanged a series of letters in June 2016, which establish the U.S. Government as the administrative authority over the .MIL, .GOV, .US and .EDU top-level domains.¹¹ ICANN frequently uses exchanges of letters to document its commitments, and intends for the commitments it set out with NTIA to be enforceable upon ICANN.

Accountability Work Stream 2 Is a Post-Transition Effort

ICANN's multistakeholder community developed the accountability review process to have two stages; one to be part of the work completed prior to the transition of the IANA stewardship to the multistakeholder community, and the other to extend beyond time of transition. The second track, Work Stream 2, was defined in the proposal as a post-transition effort.¹² In line with the CCWG-Accountability recommendations, the series of accountability has always been planned as follows:

¹⁰ <https://www.ietf.org/rfc/rfc1591.txt> (noting .MIL and .GOV are used by the U.S. Government)

¹¹ <http://www.ntia.doc.gov/page/exchange-letters-us-government-administered-tlds>.

¹² <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>, at Annex 12

first, build rich mechanisms for the community to directly hold ICANN accountable for its actions or inactions; second, with the community powers in place, focus on providing recommendations on some key accountability-related topics.

Work Stream 2 – Jurisdiction-Related Questions

One of the topics for discussion in Work Stream 2 is defined in ICANN’s Bylaws as “Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN’s accountability.” While some observers of the ICANN community process have raised concerns that this will result in ICANN leaving the United States, there are many protections against such an outcome.

ICANN is a California nonprofit public benefit corporation and has been since 1998. ICANN, as a California corporation, holds over two thousand contracts with registries and registrars based in California law. The affiliate that ICANN has incorporated to perform the IANA functions upon the ending of the contract with NTIA is also a California nonprofit public benefit corporation. The accountability reforms recommended by the CCWG-Accountability make ICANN even more deeply rooted in California law. The multistakeholder community gains enforceable powers against ICANN – including the power to sue ICANN in court – through a reliance on a California corporate law concept of a “designator.”

To remain aligned with the community proposals, moving ICANN to a different location would essentially a re-do of the entire accountability process, which is not

contemplated in the CCWG-Accountability proposal. Further, there would be a high bar to either making or implementing such a recommendation. To even make that recommendation, there would have to be consensus among the CCWG-Accountability members, sign-off by the six organizations that charter the group, and acceptance by the ICANN Board. Next, because a change in ICANN's place of incorporation would require a change to the Articles of Incorporation, 75% of the ICANN Board *and* at least three of the community groups participating in the new Empowered Committee mechanism would have to approve such a change, after a required opportunity for public comment. This is the highest threshold within ICANN to implement such a change. Under the "old" Bylaws, only 2/3 of the Board need support a change to the Articles, and there is no voice of the community that must be taken into account for such a move.

Impacts of the Transition – What Will and Will Not Change

With the proposals finalized and implementation near complete, we are able to assess what changes will come about – and what will not change – as a result of the transition.

The Community Has More Power to Hold ICANN Accountable

With the CCWG-Accountability's Work Stream 1 proposal, the ICANN community introduced significant enhancements to the accountability mechanisms in place today.

Independent Review

While ICANN has a process in place for independent review of Board actions, post-transition that independent review process is strengthened. As modified, the community (individually or collectively) can bring requests for independent review of acts of both ICANN staff and Board. The outcomes of those independent review processes will be binding upon ICANN, which they are not today. ICANN will directly fund more of the costs of the independent review processes, making it easier for any in the community to access.

Reconsideration

ICANN already allows those impacted by ICANN staff or Board actions to seek reconsideration of those actions. The reconsideration process has been enhanced, with the introduction of the ICANN Ombudsman as a first point of review. There will also be increased transparency around the reconsideration process, with recordings and transcripts of Board deliberations on reconsideration requests becoming available.

Empowered Community

The ICANN community will now be part of an “empowered community”, through which the community can:

- Reject ICANN’s budgets, strategic plans and operating plans, as well as changes to ICANN Bylaws;

- Approve any changes to Bylaws housing key accountability commitments (referred to as “fundamental” Bylaws);
- Collectively bring a request for independent review or reconsideration;
- Seek special investigatory audits over allegations of fraud internal to ICANN;
- Inspect ICANN’s books and records;
- Remove individual ICANN Board members; and
- Recall the entire Board.

Along with these new powers, under my leadership, ICANN the organization is renewing its focus as a service and support organization to ICANN’s community. ICANN is not only ready to perform the operational work defined in the technical proposal, but ICANN is ready – and has already begun – to serve the community in the face of these new checks and balances.

Governments Do Not Gain Additional Power Through The Transition Proposals

The only country today that holds a special relationship in the management of the key technical resources of the domain name system is the United States. This special role is reflected in the IANA Functions Contract. The U.S. agreed, even in 1997, that its special role should be phased out as quickly as possible. In setting the criteria against which it would evaluate any community proposal, NTIA made clear that it would not accept any proposal that would replace NTIA’s role with a government-led or an intergovernmental organization.¹³ NTIA’s review of the

¹³ <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

transition proposals confirmed that its criteria was met. ICANN has embraced this criteria and included in its Bylaws that future accountability changes must not result in ICANN becoming a government-led or intergovernmental organization.¹⁴

There is nothing in the transition proposals that provides any government with an opportunity to use ICANN to regulate or control content. There is also nothing within the proposals that changes or impedes any country's sovereign right to regulate within its borders.

There have been suggestions that the CCWG-Accountability's proposal leads to an increase in governmental power within ICANN. However, as Assistant Secretary Strickling has confirmed, "the transition proposal does not expand the role of governments vis-a-vis other stakeholders." ICANN's Governmental Advisory Committee, or GAC, is one part of ICANN's multistakeholder community, and has been specified in ICANN's Bylaws since 1998. The GAC, currently comprised of over 160 government members, provides advice to the ICANN Board on ICANN's activities as they relate to concerns of governments. The GAC is just one part of the checks and balances within the ICANN ecosystem, and does not have unique power to independently control ICANN's operations.

One new things that the CCWG-Accountability proposal introduces into the multistakeholder model that *any* entity within ICANN that is now a member of the

¹⁴ <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

Empowered Community has the opportunity to weigh in on ICANN operational issues such as the ICANN strategic plan, operating plan and changes to Bylaws. The GAC is one of five groups across ICANN that have this new power.

The accountability reforms also bring in new protections around how ICANN is to consider the advice of the GAC, developed after stress testing against the possibility of capture. With the new Bylaws, ICANN must only provide special consideration to the advice of the GAC when that advice comes without objection from any single GAC member. The ICANN community never before had assurance that GAC advice must be by a defined level of consensus. Further, the ICANN Board is not obligated to follow any advice from the GAC. For consensus advice coming from the GAC, as the community requested, the ICANN Board has committed that it will only go against that advice if 60% of the Board supports such an action. In effect, this adds only one additional vote among the 16 voting members on ICANN's Board than was required previously. While some have questioned whether the Board is allowed, under California law, to impose this higher voting threshold to override GAC advice, ICANN has received assurances from its external counsel, Jones Day, as well as both independent firms selected by the CCWG-Accountability (Sidley Austin LLP and Adler & Colvin), that this arrangement is permissible under California law.

ICANN Remains Subject to Antitrust Laws

ICANN is not now and has never been exempted from antitrust laws. The 1998 White Paper that led to ICANN's creation stated that the new organization would be

subject to antitrust laws: “Applicable antitrust law will provide accountability to and protection for the international internet community.”¹⁵ ICANN has not been granted an antitrust exemption by any of its contracts with NTIA. No court ruling in ICANN’s favor has ever cited an antitrust exemption as the rationale. Proceeding with the transition does not modify the ability for any country’s antitrust laws to apply to ICANN and its conduct.

The Trust Built in ICANN’s Multistakeholder Community Supports Moving Forward Today

The U.S. Government policy on the stewardship over these key technical functions has been, since 1997, to eventually have the U.S. step out of this role. The special role of the U.S. Government was initially expected to end in 2000. It took until 2014 for NTIA to announce its intent to transition out of its stewardship role, and the multistakeholder community stepped up to the task.

The ICANN multistakeholder community took nearly two years to develop its transition proposals. Those proposals identified how the stewardship of the IANA functions will be performed once the NTIA contract expires. The proposals also identify how the multistakeholder community will hold ICANN accountable.

U.S. businesses and U.S. civil society groups like Freedom House have expressed their support for moving forward with a transition on time. Just this week, twenty-

¹⁵ <https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

seven U.S.-based businesses and trade groups, including Amazon, Facebook, Google, Yahoo and Twitter sent an open letter to Congress urging the transition to proceed without delay. U.S.-based businesses agree that a timely transition is important to the U.S. economic interests.

Today, ICANN is operationally ready to implement the transition proposals to the terms set by the community. Bylaws have been approved; a company has been formed; contracts are ready for signature. We look forward to moving forward with the community towards the completion of this 18-year transition process.

I thank you for your continued commitment to ICANN, and to the multistakeholder model of Internet governance that ICANN represents. Thank you for inviting me to testify. I am happy to answer any questions you might have.