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Time Is Running Out: The U.S. Must Be Prepared to Renew the ICANN Contract

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Last March, the National Telecommunications and Information Administration (NTIA), an arm of the Commerce Department, announced that it intended to “transition key Internet domain name functions to the global multi-stakeholder community” when the current contract with the Internet Corporation for Assigned Names and Numbers (ICANN) expires on September 30, 2015.¹ In its announcement, the NTIA made clear that ICANN would have to meet several conditions before it would allow the transition to occur.

ICANN is in the process of developing a transition proposal that will be reviewed and approved by the multi-stakeholder community (a term used to describe private-sector users as well as others with a stake in Internet governance), the ICANN Board of Directors, and the NTIA. Unfortunately, the announced timelines make clear that necessary procedures and reforms almost certainly will not be in place before the Commerce Department must decide whether to extend its contract with ICANN or let it expire. This decision is too important to be made without due consideration or before necessary changes are agreed to and implemented. To allow sufficient time for consideration and implementation, the Commerce Department should be prepared to exercise its option to extend the contract with ICANN for two years, through September 2017.

Cause for Concern

The NTIA’s announcement was initially met with cautious support from the business and Internet communities, but increasing concerns have arisen due to the difficulty of ensuring that ICANN remains free of government control and is accountable to individuals, businesses, and others who use or rely on the Internet. Anticipating that the announced transition might cause concern, the NTIA clarified in its announcement that it would not let the contract expire unless certain conditions were met.²

Despite the NTIA’s conditions, a number of experts voiced concerns about ICANN’s lack of transparency and accountability and emphasized the need to address these weaknesses prior to the transition.³ The actions of ICANN in the months following the NTIA’s announcement underscored those concerns. For example, last summer, the ICANN Board of Directors was poised to approve a bylaw change that would have enhanced the influence of the Governmental Advisory Committee (GAC), which is the body through which governments can provide advice to ICANN.⁴ This proposal united the Internet community in opposition. Because the Internet community is notorious for widely disparate opinions, this was a remarkable achievement. A similar unified response had occurred only once before—in reaction to ICANN’s lack of accountability and transparency.⁵

At the same time, Congress has repeatedly expressed discomfort with the NTIA’s announcement and considered legislation to analyze, prohibit, or set conditions on the transition.⁶ The Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83), which was enacted in December 2014, prohibits the NTIA from using any funds to relinquish its “responsibility with

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respect to the authoritative root zone file and the Internet Assigned Numbers Authority functions.”⁷

Addressing Concerns

Responding to these calls for security, stability, and accountability as part of the transition, ICANN convened two working groups to solicit input from the multi-stakeholder community:

- The IANA Stewardship Transition Coordination Group (ICG) was established in June 2014.⁸ Thirty individuals from 13 stakeholder constituencies are charged with drafting and submitting a proposal on the steps needed to ensure that the transition will comply with the requirements outlined by the NTIA.
- The ICANN Accountability and Governance Cross Community Working Group (CCWG) was established in October 2014 after the multi-stakeholder community strongly criticized ICANN’s

original proposal for an ICANN-appointed experts group.⁹ The CCWG is charged with developing “proposals that would enhance ICANN’s accountability towards all stakeholders” after the U.S. role ends. It has identified two work streams: those accountability mechanisms that must be in place or committed to prior to the transition and those that are important but can wait until after the transition to be implemented.¹⁰

Working group participants, including one of the authors of this paper, are trying to develop recommendations that address the areas of concern and have broad support in the multi-stakeholder community, but arriving at an effective proposal acceptable to the disparate Internet community is challenging.

Tight Timelines

The ICG plans to deliver its final proposal to the NTIA for review and presumed acceptance on July 31.¹¹ The CCWG has set a deadline of June 30 for

1. News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” National Telecommunications and Information Administration, March 14, 2014, <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> (accessed January 30, 2015).
2. *Ibid.*, specifically, the NTIA required (1) ICANN to continue to support and enhance the multi-stakeholder model; (2) maintain the security, stability, and resiliency of the Internet domain name system; (3) ensure that the post-transition ICANN would meet the needs and expectations of the global customers and partners of the Internet Assigned Numbers Authority services; and (4) maintain the openness of the Internet. The NTIA also insisted that the U.S. role not be replaced by a government-led or an intergovernmental organization.
3. Contemporary examples include Milton Mueller, “ICANN: Anything That Doesn’t Give IANA to Me Is Out of Scope,” Internet Governance Project, April 16, 2014, <http://www.internetgovernance.org/2014/04/16/icann-anything-that-doesnt-give-iana-to-me-is-out-of-scope/> (accessed January 30, 2015); Philip S. Corwin, “If the Stakeholders Already Control the Internet, Why NETmundial and the IANA Transition?,” CircleID, March 16, 2014, http://www.circleid.com/posts/20140316_if_the_stakeholders_already_control_the_internet_netmundial_iana/ (accessed January 30, 2015); and Steve DelBianco, “The Path Forward: Accountability Through the IANA Transition,” CircleID, March 23, 2014, http://www.circleid.com/posts/20140323_the_path_forward_accountability_through_the_iana_transition/ (accessed January 30, 2015).
4. Paul Rosenzweig, Brett Schaefer, and James Gattuso, “Warning Signs: ICANN Headed in the Fundamentally Wrong Direction,” The Daily Signal, August 21, 2014, <http://dailysignal.com/2014/08/21/warning-signs-icann-headed-fundamentally-wrong-direction/>.
5. Brett Schaefer and Paul Rosenzweig, “Fireworks Erupt at ICANN’s London Meeting,” The Daily Signal, June 29, 2014, <http://dailysignal.com/2014/06/29/fireworks-erupt-icanns-london-meeting/>.
6. Examples from the 113th Congress include H.R. 4342 (DOTCOM Act); H.R. 4398 (Global Internet Freedom Act); and H.R. 5737 (Defending Internet Freedom Act of 2014).
7. Consolidated and Further Continuing Appropriations Act, 2015, (H.R. 83), December 9, 2014, <http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT91668/pdf/CPRT-113HPRT91668.pdf> (accessed January 30, 2015). H.R. 83 became P.L. 113-235 on December 16, 2014.
8. ICANN, “NTIA IANA Functions’ Stewardship Transition: Background,” <https://www.icann.org/stewardship> (accessed January 30, 2015).
9. ICANN, “CCWG on Enhancing ICANN Accountability,” <https://community.icann.org/display/acctcrosscomm/CCWG+on+Enhancing+ICANN+Accountability> (accessed January 30, 2015).
10. CCWG, “Charter,” last modified December 11, 2014, <https://community.icann.org/display/acctcrosscomm/Charter> (accessed January 30, 2015).
11. IANA Stewardship Transition Coordination Group (ICG), “IANA Stewardship Transition Coordination Group Process Timeline,” September 8, 2014, <https://www.icann.org/en/system/files/files/icg-process-timeline-08sep14-en.pdf> (accessed January 30, 2015).

delivering its recommendations to the Board.¹² However, the NTIA would be unlikely to make a final decision before receiving the proposal of the ICG on July 31. These timelines create several complications:

- Even if the ICG and CCWG proposals were transmitted to the NTIA on July 31, the NTIA would have, at most, a month to assess the proposals before the August 31 deadline for notifying ICANN if it decides to extend the contract.¹³
- Congress is scheduled to be in recess in August. Thus, the proposal will be submitted and a decision will be made by the NTIA while Congress, which has expressed great interest in this issue, will not be able to exercise oversight by questioning the NTIA, ICANN, or industry experts at a formal hearing, thoroughly assessing the proposal, or adopting legislation expressing support or opposition.
- It is very likely that one or both of the working group proposals will require amendments to ICANN's bylaws. Past practice indicates that that process would involve multiple steps and take at least a month even if everything were expedited and no objections were raised.¹⁴ If the community raises significant concerns during the comment process, it could force revisions and a second public comment period.

In sum, the tight timeline provides only a month for the NTIA and Congress, during recess, to assess

the transition proposal. Moreover, since ICANN will wait to implement major reforms until after the NTIA notifies the organization that they are acceptable, even if the NTIA approves the proposal, there is virtually no chance that critical and binding reforms to ICANN will be adopted and in effect before the NTIA must decide to extend the contract or let it expire.

Extending the Contract Likely Necessary

Both NTIA administrator Lawrence Strickling and ICANN CEO Fade Chehade have insisted that September 30 is a goal, not a deadline.¹⁵ Administrator Strickling underscored this point in January 2015:

I want to reiterate again that there is no hard and fast deadline for this transition. September 2015 has been a target date because that is when the base period of our contract with ICANN expires. But this should not be seen as a deadline. If the community needs more time, we have the ability to extend the IANA functions contract for up to four years. It is up to the community to determine a timeline that works best for stakeholders as they develop a proposal that meets NTIA's conditions, but also works.¹⁶

Once the NTIA's contract with ICANN expires so does its ability to ensure changes are made. This matter merits serious consideration by Congress, the NTIA, ICANN, and the multi-stakeholder community. The truncated timeline creates unnecessary pressure to make a hasty decision before all of the necessary changes will be fully implemented.

12. ICANN Accountability and Governance Cross Community Working Group (CCWG), "Project Timeline," December 9, 2014, <https://community.icann.org/display/acctcrosscomm/Drafts+for+CCWG-Accountability> (accessed January 30, 2015).

13. The existing contract expires on September 30, 2015. However, the contract permits the NTIA to exercise two renewal clauses, each for two-year periods, which could extend the current contract through September 30, 2019. The U.S. government may extend the contract by written notice to ICANN 30 calendar days prior to the expiration of the contract. ICANN approval is not required. U.S. Department of Commerce, Award to Internet Corporation for Assigned Names and Numbers (ICANN), Contract No. SA1301-12-CN-0035, October 1, 2012, Sections I.59 and I.70, pp. 58 and 65, http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf (accessed January 30, 2015).

14. Past practice indicates that this process would require: (1) Board of Directors acceptance of the recommendations from the working groups; (2) drafting of the specific wording of the bylaw amendment and corresponding changes to related provisions by the ICANN General Counsel's office; (3) posting of the proposed language for public review and comment, typically for 21 to 45 days; and, finally, (4) a formal vote to adopt the bylaw amendments, which requires a two-thirds majority of the Board.

15. See, for instance, L. Gordon Crovitz, "Keeping the Internet Free—for Now," *The Wall Street Journal*, April 12, 2014, <http://www.wsj.com/articles/SB10001424052702303603904579495960709069136> (accessed January 30, 2015).

16. Lawrence E. Strickling, remarks at the State of the Net Conference, January 27, 2015, <http://www.ntia.doc.gov/speechtestimony/2015/remarks-assistant-secretary-strickling-state-net-conference-1272015> (accessed January 30, 2015).

The U.S. should be prepared to relieve this pressure by exercising its option to extend the contract with ICANN through September 2017. Moreover, it should not wait until the last minute when pressure will be highest to accept a partial or substandard proposal. When it is clear that the working groups will not produce an acceptable or final proposal with ample time for a thorough review by NTIA and Congress, the NTIA should notify ICANN of its decision to extend the contract. Only after an acceptable transition proposal is offered and all the necessary reforms to ICANN are adopted and in effect should the U.S. agree to end the contract.

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