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United States Senate
Committee on Commerce, Science, and Transportation
Washington, D.C. 20510-6125

MEMORANDUM

Date: March 30, 2015

To: Mr. Fadi Chehadé

Date of Hearing: February 25, 2015

Hearing Title: "Preserving the Multistakeholder Model of Internet Governance."

Thank you for your recent testimony before the Senate Committee on Commerce, Science, and Transportation. The information you provided is greatly appreciated.

Attached are **post-hearing questions** pertaining to the above-mentioned hearing. As a courtesy, please submit a single document consolidating the posed questions followed by your answers for insertion in the printed hearing record. They should be mailed electronically to the Committee via the Internet to docs_commerce@commerce.senate.gov and Matthew_Plaster@commerce.senate.gov.

Should the Committee not receive your response within this time frame or if the Committee staffer assigned to the hearing is not notified of any delay, the Committee reserves the right to print the posed questions in the formal hearing record noting your response was not received at the time the record was published.

Committee staffer assigned to the hearing: Matthew Plaster

Phone: (202) 224-8712

Date material should be returned: April 13, 2015

Thank you for your assistance and, again, thank you for your testimony.

JOHN THUNE

Chairman

Chairman John Thune
Written Questions for the Record to
Mr. Fadi Chehadé
“Preserving the Multistakeholder Model of Internet Governance.”
Senate Committee on Commerce, Science, and Transportation
Monday, March 30, 2015

Question 1: It seems a plurality of the Internet community wants ICANN to stay in the United States, and I am not aware of consensus support for moving to a particular country. Under what circumstances would ICANN move its headquarters outside the United States? Do you need consensus of the community to move to a particular location?

Answer 1: The Affirmation of Commitments that ICANN holds with the United States Department of Commerce includes a commitment that ICANN will remain headquartered in the United States. As I testified during the hearing before the Committee, ICANN stands by the Affirmation of Commitments and all of the commitments set out within it.

Similarly, ICANN’s Bylaws set forth that its principal office is in the County of Los Angeles (Article XVIII). Any change to a provision within ICANN’s Bylaws can only occur after public comment, so there would have to be input from the Internet community on that issue if such a change was ever contemplated, as well as a 2/3 majority of the Board voting in favor. The Enhancing ICANN Accountability process that is underway is considering issues such as whether there are particular Bylaws provisions that are so fundamental that a higher voting threshold of directors must be achieved before passage, or that the community may hold a veto power over attempts to change. It remains to be seen whether the community will recommend that additional protections be placed around this Bylaws provision relating to ICANN’s headquarters, however, the anticipated enhancements to ICANN’s accountability that will be achieved through the Accountability work will only serve to make ICANN more accountable to the Internet community for decisions of this import.

Question 2: I understand ICANN recently commissioned a legal opinion to examine whether California law permits certain accountability reforms. I am concerned this legal opinion may be used to discourage community recommendations on accountability. Will you commit to facilitating the community in getting its own, independent legal opinion?

Answer 2: Upon request of the Chairs of the Cross-Community Working Group on Enhancing ICANN Accountability, ICANN requested one of its primary law firms, Jones Day, to answer a series of questions relating to proposals to reform ICANN’s accountability practices. Responses to the Cross-Community Working Group’s questions were delivered during ICANN’s 52nd Public Meeting in Singapore in February 2015. Since the Jones Day responses were provided, as was anticipated, the Cross-Community Working Group has now identified not one, but two law firms that ICANN has retained for the provision of open, transparent legal advice to inform the accountability process.

Senator Roy Blunt
Written Questions for the Record to
Mr. Fadi Chehadé
“Preserving the Multistakeholder Model of Internet Governance.”
Senate Committee on Commerce, Science, and Transportation
Day, Month Date, Year

Question 1: Many in the United States fear that once the current relationship with the U.S. government ends that ICANN will seek to move its headquarters to another jurisdiction under pressure from foreign governments – one not subject to 1st Amendment Rights. Such a move would be exceptionally destabilizing to Internet governance, and would pose a serious threat to free speech.

Can you pledge that ICANN will remain incorporated in the United States?

Answer 1: As noted in my response to Chairman Thune’s first question for the record, the Affirmation of Commitments that ICANN holds with the United States Department of Commerce includes a commitment that ICANN will remain headquartered in the United States. As I testified during the hearing before the Committee, ICANN stands by the Affirmation of Commitments and all of the commitments set out within it.

Question 2: Over the past few months, ICANN has been criticized for how it’s evaluating community-based applications. Just one example involves the accounting industry’s interest in applying for the .CPA domain. It appears ICANN is denying information on how applications are being reviewed, and has rejected most of the reconsideration requests submitted by applicants.

This one example raises questions of whether ICANN is committed to transparency and accountability. The ideas exist on paper, but they aren’t functional or accessible to actual applicants.

Can you explain how you are working with applicants generally, and accountants specifically, to understand the process and how you deal with them as you change your internal criteria?

Answer 2: While I am not able to discuss the ongoing processing of any specific application for a new generic Top-Level Domain, ICANN has been evaluating applications in accordance with the Applicant Guidebook and the criteria developed through years of public consultation. There is extensive public documentation regarding the Community Priority Evaluation component that is referenced within the question, at <http://newgtlds.icann.org/en/applicants/cpe>.

While the New gTLD Program – after public consultation – was designed to not include the ability to appeal from panel determinations (such as the Community Priority Evaluation), what is being seen now is that the community may deem such an appeals right to be important in future rounds. ICANN has already committed to a group of reviews necessary over the first application

round of the New gTLD Program, and any changes that are put in place for subsequent rounds will be part of public consultations. Information about the programmatic reviews, including assessing stakeholder experience in launching and operating the New gTLD Program and applying lessons learned as the Program moves forward, is available at <http://newgtlds.icann.org/en/reviews>. This is how potential changes to criteria for the evaluation of applications will be developed.

The Enhancing ICANN Accountability process may also impact some of the concerns noted within your question. The Cross-Community Working Group on Enhancing ICANN Accountability has highlighted ICANN's Reconsideration Process as an area where improvements may be needed, and efforts are currently underway to identify reforms to the Reconsideration Process (in addition to other accountability mechanisms).

Question 3: In January, at an inter-sessional ICANN meeting, you stated that a contract is an “enforceable instrument,” and that ICANN must do more to enforce various contractual provisions with registrars and registries. I agree that ICANN must do more to prohibit illegality online, whether it take the form of illegal drug sales, illegal counterfeit activity, or illegal distributions of copyrighted materials.

What is ICANN doing to ensure registrars and registries take action to deter illegal activity over domains they sponsor?

Answer 3: First, ICANN performs proactive monitoring activities to ensure that its accredited registrars act in compliance with Sections 3.18.1, 3.18.2 and 3.18.3 of the 2013 Registrar Accreditation Agreement, particularly as those sections relate to publishing the registrar's abuse contacts and procedures for handling complaints. These are key provisions through which suspected illegal activity can be raised to registrars. These provisions were incorporated into the Registrar Accreditation Agreement based on recommendations from law enforcement and as a result of negotiations with registrars. The Registrar Accreditation Agreement is available at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

As part of the obligations that a registrar undertakes under Section 3.18 of the Registrar Accreditation Agreement, a registrar must have a dedicated abuse point of contact to receive complaints from law enforcement, consumer protection, quasi-governmental or similar authorities and must review complaints from those sources within 24 hours of receipt. What constitutes an appropriate response to a complaint varies based on the facts and circumstances. Registrars are required to comply with court orders from courts of competent jurisdiction, and further, registrars may choose to take action without being compelled to do so by a court order. A number of registrars have suspended or disabled websites because of allegations of illegal activity, including infringement, child pornography, illegal drug sales and other activities. Registrars are not required to respond in a way that would be a contravention of applicable law and are not required to be the arbiter of what constitutes illegal activity in every jurisdiction, which is a function that is typically performed by courts.

When ICANN's Contractual Compliance Department receives a report of potential illegal activity, ICANN forwards the report to the registrar (after confirming that the complainant itself

sent the abuse report to the registrar abuse contact). Registrars must take reasonable and prompt steps to investigate and respond appropriately to the abuse report. Generally this requires that the registrar forward the complaint to the registered name holder or explain why the registrar believes that forwarding the complaint should not be required.

Based on the abuse report and to ensure that the registrars are abiding by their contractual requirements, ICANN requests that the registrar provide: 1) the steps taken to investigate and respond to the abuse report; 2) the time taken to respond to the abuse report; 3) the correspondence with the complainant and the registered name holder; and/or 4) (if applicable) other data or evidence identified based on the registrar's response.

If a registrar fails to fulfill its obligations under Section 3.18, ICANN generally attempts to work constructively with the registrar to bring it into compliance with its contractual obligations. If a registrar continues to fail to fulfill its obligations, ICANN's Contractual Compliance Department can and does impose remedies up to and including suspension or termination of the registrar's accreditation agreement with ICANN. ICANN has no direct relationship with registered name holders and no ability – either technical or legal – to disable or edit the content of a registered name holder's website.

Question 4: Your new gTLD agreements obligate registries to ensure that registrars have a provision in their agreements that prohibits domain name operators from engaging in "piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law," and providing (consistent with applicable law) that registrars include "consequences for such activities including suspension of the domain name."

Has ICANN seen procedures from registries or registrars to ensure such illegal activity does not occur, and what consequences do they have in place should such activity occur?

Answer 4: Yes, some registrars have taken actions to suspend or disable a registered name holder's website as a result of allegations of unlawful activity, including infringement, child pornography, illegal drug sales and other activities. Allegations of illegal activity can raise complex questions of law and fact, and in some cases a registrar may conclude that it is not competent to determine whether illegal activity is occurring. In those cases, a registrar may defer to law enforcement or private parties to seek adjudication from a court of competent jurisdiction as to whether the conduct in question is unlawful.

Question 5: The community group that's designing enhanced accountability measures for ICANN is looking for independent legal advice on how to empower the community to override board decisions and budget proposals.

Is it true that ICANN's legal counsel wrote a memo saying the community could not override board decisions?

Follow Up: Would it be appropriate for the community to seek a second opinion?

Answer 5: As discussed within my answer to Chairman Thune’s Question 2, ICANN provided – at the request of the Cross-Community Working Group on Enhancing ICANN Accountability – responses from Jones Day to a series of accountability-related questions. Since that time, the Cross-Community Working Group has identified two law firms that ICANN has retained, and those law firms are providing legal advice to the Working Group in furtherance of the accountability work. Across Jones Day’s advice, as well as the advice that has been provided to date by the two firms reporting to the Cross-Community Working Group (Sidley Austin LLP and Adler & Colvin), each firm has identified that pursuant to the laws under which ICANN is incorporated, it is the Board that bears the ultimate responsibility for corporate decisions. However, each of the firms, including Jones Day, also provided ideas of how the ICANN community could be better empowered to have input into and/or challenge decisions of the Board, as well as how the community can better hold the Board accountable for decisions with which the community does not agree. Counsel have suggested a range of solutions that would be acceptable under law, including providing the community with rights to remove Board members and identifying ways that the community could hold a “veto” right over specific decisions, such as the approval of the annual budget.

The Enhancing ICANN Accountability work is ongoing, and ICANN remains committed to supporting the efforts of the Cross-Community Working Group as it develops recommendations.

Question 6: Earlier this month, the Senate unanimously passed a resolution Senator Hatch and I spearheaded to draw public attention to the very reason you’re here today – the transition of key Internet functions away from U.S. oversight. The resolution set forth a series of reforms that should be made before any transfer.

I want to ask you a series of yes or no questions about those reforms -- and please limit your answer to yes or no.

Do you agree that ICANN’s authority is and should be limited to the coordination of Internet unique identifiers in order to avoid “mission creep?”

Do you agree that there should be a separation of the functions of policy-making, implementation and an independent adjudication or arbitration for dispute resolution?

Do you agree that policy making must remain with the broad multistakeholder community?

Do you agree that ICANN actions must reflect true, if rough, consensus?

Do you agree that the Board of Directors is responsible for policy implementation?

Do you agree that the dispute resolution function must necessarily involve the power to order remedial action?

Do you agree that today there is no truly independent adjudication or arbitration authority with this power?

Do you agree that it is essential ICANN undertake structural reforms to ensure that it is protected against undue influence or capture by one or more governments, multilateral organizations, or a single set of commercial or noncommercial stakeholders?

Do you agree that in the absence of the Affirmation agreement with the US Government that structural changes to reinforce and expand ICANN's transparency and accountability are necessary?

Do you agree that before the transfer occurs all necessary reforms are embedded in ICANN's articles of incorporation and bylaws and subject to independent adjudication or arbitration for dispute resolution?

Answer 6: Thank you for your continued support of ICANN's multi-stakeholder model, and for keeping these issues front-and-center. Recognizing how busy Congress is (inherent in your request for extreme brevity), I offer these concise answers, constrained only by the need to respond with maximum accuracy.

- Do you agree that ICANN's authority is and should be limited to the coordination of Internet unique identifiers in order to avoid "mission creep?"

I support the mission of ICANN as set out in the ICANN Bylaws:

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
 - a. Domain names (forming a system referred to as "DNS");
 - b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and
 - c. Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.

Adherence to this mission is key to ICANN's continued success.

- Do you agree that there should be a separation of the functions of policy-making, implementation and an independent adjudication or arbitration for dispute resolution?

Within the IANA Functions Department of ICANN, there already exists today a commitment by ICANN that the IANA functions staff responsible for performing the implementation of community-developed policies are not permitted to participated in the policy development work.

This commitment today is embodied in the IANA Functions Contract, is an important part of each the proposals that have been developed to date in the IANA Functions Stewardship Transition process, and is expected to remain in place.

There are, of course, many other policies developed across the ICANN community that don't impact the performance of the IANA functions. Policies related to generic domain names occur within the Generic Names Supporting Organization, or GNSO; those relating to country-code domain names occur within the Country-Code Names Supporting Organization, or ccNSO. These different communities each have expectations on how they then are involved in the implementation of the policies that they develop and are approved by ICANN (as applicable). Often there is a need for coordination with those who develop the policy when it comes time for implementation.

If and when matters are referred to independent adjudication or arbitration, independence from policy development, implementation, or any of the parties within the adjudication or arbitration is an essential factor of assessing those overseeing that adjudication or arbitration.

- Do you agree that policy making must remain with the broad multistakeholder community?

Yes. Each of the policy bodies I discussed above relies on the multistakeholder model, and I support policy development's remaining within those multistakeholder groups. These policy bodies and how they develop policy are incorporated in the ICANN Bylaws.

- Do you agree that ICANN actions must reflect true, if rough, consensus?

The Supporting Organizations that are charged with developing policy do so through the submission of consensus-based recommendations to the ICANN Board. The ICANN Board then considers those recommendations, and has specific processes surrounding its approval or rejection of those recommendations, often tied to the level of consensus present within the underlying policy development process. The ICANN Board is not where policies are developed. As President and CEO of ICANN, it is not up to me to define the thresholds or consensus requirements of the policy development groups or advisory committees that have inputs into ICANN's processes.

- Do you agree that the Board of Directors is responsible for policy implementation?

The ICANN Board of Directors is responsible for the assessment of and approval of policy recommendations that come to it through defined processes. Once approved, the Board retains a general responsibility for the oversight of the affairs of the organization, and that includes oversight of how I, as President and CEO, work with the ICANN staff to implement those approved policies.

- Do you agree that the dispute resolution function must necessarily involve the power to order remedial action?

The Cross-Community Working Group on Enhancing ICANN Accountability is working on creating refinements to ICANN's accountability mechanisms. They are working closely with their retained legal advisors to identify the full scope of recommended changes to ICANN's accountability measures such as the Reconsideration Process and the Independent Review Process, including what the outcomes of those processes should be. The ICANN Board has expressed support for the Enhancing ICANN Accountability work, and I stand with my colleagues on the Board.

- Do you agree that today there is no truly independent adjudication or arbitration authority with this power?

There are a variety of dispute mechanisms available throughout ICANN today, as well as the accountability mechanisms such as the Reconsideration Process and the Independent Review Process. Depending on the nature of the issue at hand, remedial powers could be exercised, such as arbitration as required in ICANN's registry and registrar agreements. Existing accountability mechanisms, such as the Reconsideration Process, which can require a "do over" of a decision or action, could also result in remedial action being achieved. Of course, the sufficiency of the Reconsideration and Independent Review Processes and the outcomes of those processes are key items under consideration within the Enhancing ICANN Accountability work and we are awaiting the Cross-Community Working Group's recommendations.

- Do you agree that it is essential ICANN undertake structural reforms to ensure that it is protected against undue influence or capture by one or more governments, multilateral organizations, or a single set of commercial or noncommercial stakeholders?

I agree that a key question facing ICANN today, as well as a key stress test of any reforms that are being developed through the Enhancing ICANN Accountability process, is how well are we protecting against undue capture or influence by one or more governments, multilateral organizations, or a single set of commercial or noncommercial stakeholders, across the organization. This also includes that the community itself must meet high standards of accountability in any proposed community mechanism, including the development of proper checks and balances to mitigate against the possibility of capture. The Cross-Community Working Group has identified that "the community, however it is constituted, must itself meet high standards of accountability" within the enhancements that are being developed.

As stated in NTIA's original announcement, and as reinforced by the ICANN community and Congress, protections against capture must be a central component of any structural change of the organization.

- Do you agree that in the absence of the Affirmation agreement with the US Government that structural changes to reinforce and expand ICANN's transparency and accountability are necessary?

ICANN has no plans to withdraw from the Affirmation of Commitments.

While there is no suggestion that the Affirmation of Commitments should or will be terminated, ICANN supports the recommendations of Chairman Thune and Senator Rubio to incorporate the provisions of the Affirmation of Commitments into the ICANN Bylaws to help provide assurances of ICANN's intent to maintain its commitments thereunder. This is also a central focus of work within the Enhancing ICANN Accountability process. Further, as indicated above, ICANN supports the work of the Cross-Community Working Group on Enhancing ICANN Accountability and is awaiting its recommendations on how ICANN's accountability and transparency can be enhanced and reinforced.

- Do you agree that before the transfer occurs all necessary reforms are embedded in ICANN's articles of incorporation and bylaws and subject to independent adjudication or arbitration for dispute resolution?

The final proposals on the stewardship transition and enhancing ICANN accountability will delineate the key enhancements that must be in place or committed before the transition can take place. ICANN is committed to working with the multistakeholder community to achieve this goal prior to a transition.

Senator Steve Daines
Written Questions for the Record to
Mr. Fadi Chehadé
“Preserving the Multistakeholder Model of Internet Governance.”
Senate Committee on Commerce, Science, and Transportation
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Question 1: As you mentioned in your testimony, ICANN has contracts with registrars that prohibit illegal activity. Specifically, under section 3.18 of the 2013 registrar accreditation agreement, section registrars must take “reasonable and prompt steps to investigate and respond appropriately to any reports of illegal activity.” Please explain what ICANN is doing to ensure registrars abide by this provision, and explain what processes and analysis ICANN performs when it receives a complaint that a registrar has not complied with this obligation.

Answer 1: Please refer to my answer to Senator Blunt’s Question 3, which also was focused on Section 3.18 of the 2013 Registrar Accreditation Agreement and ICANN’s enforcement of those requirements.