

**COMMENTS OF THE
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
(SIIA)**

In response to the

Notice of Inquiry:

**“Assessment of the Transition of the Technical Coordination and
Management of the Internet’s Domain Name and Addressing
System”**

By

**DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration**

Docket No. 090420688-9689-01

The Software & Information Industry Association (SIIA) appreciates this opportunity to submit comments in the above referenced Notice of Inquiry (NOI). We commend the NTIA for its outreach in seeking comments from stakeholders on this important question.

As the principal trade association of the software and digital information industry, the more than 500 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet.¹ SIIA’s members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Our members are leaders in building the global online marketplace, providing content and infrastructure that users around the world depend on want. They depend on a robust, secure and predictable environment, which includes a reliable Domain Name System (DNS) and associated tools that permit the DNS to operate with confidence.

¹ Our website can be found at www.sii.net.

SIIA, its member companies, and its staff have been involved in ICANN since its inception in 1998, serving in key roles (member of the Nominating Committee and as an officer in the Intellectual Property Constituency) as well commenting over the years on key policies that ICANN has proposed to undertake.² SIIA has strongly supported the role of ICANN over those years, and we have continuously worked to enhance the capacity of ICANN to carry out its responsibilities. Those responsibilities are outlined in the Joint Project Agreement (JPA) that is the subject of this NOI and, just as significantly, are identified in the “DNS White Paper”³, the statement of policy on the privatization of the Internet Domain Name System (DNS) issued in June 1998.

SUMMARY

In our comments submitted during the mid-term review,⁴ SIIA put forward the view that terminating the JPA is, at best, premature and, in our view, misguided. In the subsequent months since that review, SIIA has continued to participate actively in ICANN efforts and watched closely to see whether there have been substantial and meaningful changes to the operation and governance of ICANN.

Unfortunately, despite some specific steps, our concerns remain essentially unaltered from last year. Rather, taking into account its commitments in the JPA, the implementation of the principles of the DNS White Paper, and the emerging challenges to maintaining a predictable and secure DNS, the road ahead should examine how the partnership between ICANN and the US Government should continue so as to improve ICANN’s governance and work and to meet the challenges ahead.

THE FOUR PRINCIPLES

² See, by way of recent examples, “COMMENTS OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA) on the Draft “New gTLDs Applicant Guidebook,” submitted December 15, 2008, available at: <http://forum.icann.org/lists/gtld-guide/pdfctWRsokIMz.pdf>; “COMMENTS OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA) on the New gTLD Applicant Guidebook Version 2 (V2),” submitted April 13, 2009, available at: <http://forum.icann.org/lists/2gtld-guide/pdfnb8lGivhY6.pdf>; “COMMENTS OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA) on the “Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare” (“Consumer Welfare Report”),” submitted April 17, 2009, available at: <http://forum.icann.org/lists/competition-pricing-prelim/pdfThyKTMJGMH.pdf>.

³ Statement of Policy: Management of Internet Names and Addresses (Docket Number: 980212036-8146-02), released, June 5, 1998, found at: http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.

⁴ COMMENTS OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA) In response to the Notice of Inquiry: “The Continued Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System: Midterm Review of the Joint Project Agreement” By U.S. DEPARTMENT OF COMMERCE National Telecommunications and Information Administration (NTIA)

The NOI asks if the four principles articulated in the DNS White Paper – stability; competition, private, bottom-up coordination; and representation – are still appropriate principles. In our view, the answer is a definitive ‘yes.’

The NOI further inquires whether these core principles have been effectively integrated into ICANN’s existing processes and structures. In our view, the answer is ‘no.’ There is no doubt that ICANN has, since its inception, been taking continuous steps to implement its responsibilities. But, that is not the question. Rather, the appropriate measurement at this stage is whether such principles – and ICANN’s ability to operate and carry out its responsibilities – have been institutionally incorporated to a degree that there is confidence in ICANN as an independent multi-stakeholder body that is focused on its essential responsibilities of technical coordination and management of the DNS.

THE JPA PROCESS

The NOI asks whether transition to the private sector is still the most appropriate model to increase competition and management of the DNS and, if so, are the processes and structures currently in place at ICANN sufficient to enable industry leadership and bottom-up policy making?

SIIA continues to believe that model of ICANN remains potentially a viable one, and, as originally stated, in the White Paper: “responsible, private-sector action is preferable to government control. A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users.”

The JPA established 10 responsibilities for ICANN, intended to make it a more stable organization with greater transparency and accountability in its procedures and decision making. The JPA establishes a partnership between ICANN and the US government that provides oversight of ICANN’s procedures.⁵ We take stock of some of the major items below.

- **Transparency and accountability.** The evidence continues to point to the need for a further, enhanced partnership by the U.S. Government and ICANN, since the effort to promote transparency and accountability is an on-going effort, and ICANN’s commitment to create an even more transparent and accountable organization with the highest standards of governance is critical to its stability and growth. Based on our experience, we believe many roadblocks still exist to greater private sector participation, which is essential to ICANN fulfilling its role and building confidence. Moreover, steps that have been initiated, such as the proposed GNSO “reforms,” will make the problem worse and are far from being implemented effectively.

⁵ A second contract between ICANN and the U.S. government controls additions to the root zone file, which governs DNS hierarchy of tables and servers translating domain names into Internet addresses. SIIA strongly believes that this contract will continue in place, regardless of what happens with JPA.

- **Implementation of Multi-Stakeholder Model.** ICANN's own assessments on this point highlight the need for a continued, enhanced partnership with the US Government. While scheduled reviews are planned and underway (in some cases), the stark reality is that our industry is participating actively, through constituencies and in the public comment processes, but have deep concerns about whether our voice is being heard, particularly on matters that directly affect the ability of members to combat bad actors in the online world.
- **Contract compliance/enforcement.** SIIA recognizes that ICANN has taken initial steps – e.g., producing and publishing a report, and building a compliance department. However, such 'evidence' is far from documenting the on-going institutionalization of a program of effective contract compliance, as the lack of action in this regard directly affects the ability of our members, and other leaders in global eCommerce, to operate with confidence. It is our view that contract provisions (including but not limited to Whois obligations) are not effectively enforced.
- **Security and stability.** SIIA appreciates that ICANN recognizes that "ensuring the stable and secure operation of the Internet's unique identifier systems will continue to be ICANN's central mission."⁶ However, that is not sufficient. Rather, it is concrete manifestation of the need to look ahead to the future challenges that the DNS faces through an updated partnership arrangement. As the US Government assesses how best to continue the partnership, an important question is whether ICANN is doing all it can to proactively adopt and enforce DNS policies that respond to and combat stability threats such as phishing and domain tasting?
- **Top Level Domain Management.** SIIA has been closely involved and observing the roll out of new gTLDs, and actively commenting on the various draft guidebooks for applicants. We recognize the positive step taken by the ICANN Board to establish the Implementation Recommendation Team (IRT) to address one of the four key 'outstanding' issues, even as progress on (or even, in some cases, a plan to address) the other three issues is wanting. It is our view that the process of evaluating new TLD's and the resulting expansion has not promoted confidence, but rather confusion on the part of key stakeholders. SIIA also notes that the economic study on the competition issues of gTLDs, which the ICANN Board called for almost 2.5 years ago, has still not been undertaken, and the recalcitrance on the part of ICANN staff to undertake this is remarkable.⁷ As we commented during the review of the DAGv2, SIIA notes, again, our industry's attempt to actively participate, but our experience does not convince us that ICANN has institutionalized its consideration of new TLD's in a manner that takes into

⁶ Citing Article I, Section 1 of ICANN's Bylaws at <http://www.icann.org/general/bylaws.htm#I>.

⁷ On June 6th, ICANN released a "final" report on competition prepared by Prof. Carlton. It appears, in large part, to be essentially the draft report released early this spring that was widely criticized. SIIA notes that the "final" report includes the statement by Prof. Carlton to the effect that the direction given by the ICANN Board remains an "interesting question", but nonetheless concludes that "evaluation of the impact of ICANN's gTLD proposal on consumer welfare does not depend on the answer to this question." See para. 9, p. 4, available at: <http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.

account the stability/security and governance impacts of quickly adding dozens of new TLDs.

Taking into account the points above, as well as the further steps that ICANN needed to take to increase institutional confidence related to long-term stability, stakeholder participation, increased contract compliance, and enhanced competition, the NOI asks whether sufficient progress has been made for the transition to take place by September 30, 2009. Based on our review of the implementation of the JPA, the answer is 'no.' Indeed, there is much unfinished business in ICANN's operations and agenda that suggests that a formal closure in "transition" is not ripe at this time, or in the foreseeable future.

In our comments submitted during the Mid-term review, SIIA urged the USG to initiate discussions with ICANN on what should be the elements and structure of its on-going partnership with ICANN, taking into account ICANN's implementation of its commitments in the JPA and the principles laid out in the "DNS White Paper." We reiterate that recommendation here.

To restate the obvious, assessing a checklist of responsibilities should not be singularly determinative of whether the goals of the JPA have been met. The current situation is one where the current operation of ICANN is far from ready to become "fully independent." It is the view of SIIA that it is essential to remember why these responsibilities are included in the JPA in the first place: to promote and encourage "*private sector leadership in the innovation and investment that has characterized the development and expansion of the Internet around the globe*"⁸ This objective is also at the core of the DNS White Paper, which laid out the principles upon which ICANN was recognized as the entity to take on transition of the DNS from the National Science Foundation.

SERIOUS THREATS REMAIN TO THE ICANN MODEL

The NOI inquires whether sufficient safeguards are in place to ensure the continued security and stability of the Internet DNS, private sector leadership, and that all stakeholder interests are adequately taken into account. SIIA recognizes that ICANN has taken some steps in all of these areas, but based on our review of the threats and challenges facing ICANN as an organization and as a model for coordinating technical issues on a global basis, SIIA has identified the following challenges that remain unaddressed:

- ICANN's current structure makes it dependent on revenue from precisely the entities that it seeks to oversee, the registrars and registries. Without the US Government as a partner, the risk that the "funders" of ICANN will dominate the "oversight" functions of ICANN mounts, and will ultimately make ICANN unable to achieve its responsibilities as outlined in the DNS White Paper.

⁸ Joint Project Agreement, at www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm

- It is well reported that various public authorities (including national and regional governments, as well as treaty-based organizations) have, over the course of many years, been unsupportive of ICANN, both as a model for carrying out the functions outlined in the DNS White Paper and its current organization. The JPA, and its predecessor arrangements, have been an essential stabilizing force in this regard. In the period since the mid-term Review, this concern has grown rather than abated.
- Of deeper concern, these public authorities do not appear to be merely calling for the elimination of the U.S. government's partnership with ICANN. Rather, the statements also appear to call for greater control of ICANN through either international treaty or some other intergovernmental arrangement that would supersede the critical role of the private sector and substitute, instead, increased governmental direction. SIIA is concerned that this could result in a number of detrimental harms, including the confidence in the DNS, as well as an environment that fails to promote innovation and investment in online business.

INSTITUTIONALIZING ICANN

NTIA should be cognizant that termination of the JPA would send, whether intentional or unintentional, the signal that ICANN has, in fact, satisfactorily undertaken its responsibilities as expected, institutionalized the principles in the White Paper, and otherwise demonstrated that it can promote confidence and stability in the DNS. With due respect to the steps that ICANN has taken since the Mid-Term Review, nothing in the record indicates that this is the case.

In our Mid-Term Review comments, we urged that steps be taken to begin working toward the next chapter in the partnership between the U.S. Government and ICANN. We believe that the unique and special relationship between the Department of Commerce and ICANN should not terminate on September 30, 2009.

Rather, as progress is sought on the continued transition of ICANN, a binding, concrete arrangement (which is more than the Report currently envisioned in the JPA) must be undertaken to:

- Effectively institutionalize ICANN independence, protect it from takeover by financial interests, and preclude it from being effectively captured by other government and quasi-governmental organizations. This will likely require some form of binding document, founded in the ICANN bylaws, to effectively describe ICANN's Mission and its detailed obligations to community stakeholders, and to institutionalize the core principle of private-sector leadership. In order to build confidence, such steps should include changes to ICANN's board to ensure substantial representation of non-contracted business and commercial interests.
- Ensure a culture of compliance where ICANN effectively polices the conduct of its contracted parties.

- Where ICANN undertakes policy development, policy making or other issues affecting the stakeholders and affected parties of ICANN, the binding commitment must include specific, workable and transparent advance notice of proposals that give adequate time for full and meaningful input, and include a draft decision (and detailed justification) for particular outcomes. Where decisions are taken, provide documentation on votes, staff recommendations, consultants advice, legal input and supporting materials provided to the Board in taking its actions.
- Consider some form of effective independent review body, which should include meaningful representation of non-contracting commercial interests, whose mission is to strengthen ICANN accountability processes and ensure that those affected by an ICANN decision are able to participate in the accountability process.

In order to effectuate the binding, concrete commitment, ICANN should remain a US not-for-profit corporation headquartered in the US.

The Department of Commerce will recall that during the White Paper process ten years ago, the USG committed to engage at the international level to facilitate implementation of the principles and the ramp up of ICANN. SIIA commends the hard work of the career staff in the USG, and in particular NTIA, for their dedication. SIIA believes that, at this critical time in the transition, it is essential that the USG, at a very senior level must commit to work with its international partners.