June 8, 2009

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National Telecommunications and Information Administration
1401 Constitution Avenue, NW
Room 4701
Washington, DC 20230

Re: NTIA Notice of Inquiry, Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name System

The United States Council for International Business (USCIB) appreciates the opportunity to provide input to the U.S. Department of Commerce on the important issue of the transition of the technical coordination of the Internet's Domain Name System (DNS). USCIB is a founding member of the ICANN GNSO's Business Constituency and was very active in the formative stages of ICANN. The technical coordination of the Internet is of critical importance to all of our members given the amount of their business that is conducted over it.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Our members include leading U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, including the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

USCIB has supported ICANN since its inception and continues to believe that ICANN, and its model of private sector leadership, with representation from all stakeholders from around the globe, is the appropriate forum to perform the administration and coordination of the Internet's name and number system. USCIB's ongoing commitment to a private sector led model was evident in the comments we provided to NTIA during its previous midterm review of the JPA (dated February 15, 2008), along with our numerous submissions to ICANN on various policy issues, most recently our comments on ICANN's Improving Institutional Confidence (IIC) initiative (dated October 20, 2008).

ICANN has evolved in recent years -- making measurable improvements in areas that the USCIB and others have advocated. The members of USCIB acknowledge and applaud the progress made by ICANN staff, its Board of Directors, and especially its stakeholder volunteers. Nevertheless, USCIB's members support the need for further improvements in order to facilitate a sound transition to a stable and accountable ICANN.

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In fact, ICANN itself recognizes that this evolution is not yet complete. In its own IIC process, ICANN has identified clear areas where its internal governance and relationships with external parties must be improved. Only days ago ICANN released a document proposing changes to ICANN's bylaws to establish an "Independent Review Tribunal" among other proposed changes. Thus while USCIB acknowledges that ICANN has made significant strides in certain areas, even by ICANN's own standards, the organization is not yet currently ready for a satisfactory transition on September 30th.

As the U.S. affiliate to the International Chamber of Commerce (ICC), USCIB has contributed to and supports the comments reflected in the ICC input to this NOI. Additionally, with a view to strengthening ICANN in its transition, we offer the following priorities and recommendations.

Priorities
USCIB supports continued dialogue and efforts to progress towards a sound and stable transition to a fully independent, accountable, private sector led and multi-stakeholder ICANN. Such a transition must ensure that ICANN has the requisite structures and procedures in place to meet the ongoing demands and fulfill its mandate. In this regard, priorities include:

- Maintaining ICANN's credibility and legitimacy by preserving and enhancing the private sector led bottom-up consensus policy development model that has made ICANN successful;
- Ensuring the continued security and stability of the Internet's names and numbering system;
- Establishing effective accountability mechanisms that are responsive to the Internet community and independent from and binding on ICANN staff and its Board of Directors.
- Making the newly devised accountability mechanisms part of a comprehensive structure that safeguards the organization from both external and internal capture, including unambiguously defined authority and duties; enhances support for and participation of governments in the GAC; and improves transparency, comment and reconsideration procedures
- Promoting, within its mandate, continued Internet growth globally to address user needs and build an inclusive Information Society driven by private-sector investment

USCIB members believe an agreed upon transition must be consistent with the above priorities if ICANN is to transform itself into an effective, independent organization. Our members note that many of the responsibilities ICANN agreed to in Annex A of the JPA will evolve as ICANN's work proceeds, with new challenges and opportunities constantly arising as the Internet grows and develops. In fact, USCIB notes that ICANN is still undertaking development of processes and activities to address several of these responsibilities. How ICANN puts in place an effective framework to allow it and the Internet community to fulfill these responsibilities in this constantly evolving environment is critical to the Internet's continued successful growth.

The JPA states "ICANN reaffirms its commitment to maintaining the security and stability in the coordination of the technical functions related to the management of the DNS and to perform as

an organization founded on the principles of stability and security, competition, bottom-up coordination and representation". USCIB members believe these principles continue to be critical in guiding ICANN. USCIB also believes that accountability to its multi-stakeholder community must become an underlying and integrated concept for ICANN.

We also view the immediate implementation of appropriate measures in the key areas identified in the ICC response to the NOI (capture, accountability and transparency, contract compliance, and streamlining priorities) as the best way to strengthen ICANN and ensure the long-term stability of the private sector led bottom-up consensus policy development model. These steps set forth in the ICC input must be achieved prior to the termination of the JPA. ICANN's practice of announcing procedures to address raised concerns has frequently not led to effective mechanisms and responsive outcomes. Therefore, consideration must be given to accomplishments and not just process or announced process improvements. It is important to note that USCIB and ICC have raised the above issues previously and hope that ICANN will take immediate steps to address these outstanding issues critical to its success and transition. We offer the following recommendations within the areas of capture and accountability to build on the suggested ICC action points.

Safeguard against capture
The threat of capture stems from internal interest groups, staff and Board decisions or actions, and external capture by governments and/or outside organizations like intergovernmental institutions. Capture of ICANN by a single interest or set of interests undermines the balanced nature of ICANN's structures and decision-making processes, thus undercutting the very strength of ICANN's multi-stakeholder model. USCIB believes ensuring this balance into the future is critical to maintaining the credibility and benefits of ICANN's private sector leadership, which must be maintained without doubt beyond the conclusion of the JPA.

ICANN must more actively discern ways by which to prevent external capture by governments or intergovernmental entities. This includes, but certainly not limited to:

    i)   Implementing mechanisms to ensure effective and timely consideration of the advice from the GAC by all ICANN bodies, not just the Board of Directors; this should include seeking the views of the GAC on issues that address public policy matters at an early stage of consideration. The recent opening of GAC meetings to all stakeholders and transcripting the proceedings of these meetings has positively contributed in this regard.

    ii) Continuing and enhancing efforts to better engage governments throughout the world to actively participate in the GAC, including enhanced delivery of informative materials; translation of documents and interpretation for GAC meetings, and establishing a travel support program, as proposed by the PSC, to support participation of attendees from the least developed countries.

    iii) Carefully considering the impacts, benefits, and risks of establishing foreign legal presences and how these may affect ICANN's susceptibility to external capture

While the GAC is an important advisory body, USCIB firmly believes in an Internet whose innovation and technical coordination is driven and coordinated by the private sector. Discussions regarding the role of various stakeholders in ICANN should remain committed to this principle, as the past decade has firmly revealed the innovative capacity this structure enables in all areas, fostering new business, social, and e-government opportunities.

Formalizing provisions within ICANN's Bylaws that safeguard it against capture would help strengthen the organization and improve stakeholder confidence in those safeguards. It is only through sustained and routine implementation of such processes and safeguards that they will be effective.

Accountability and transparency
USCIB and the broader business community have stressed the need to strengthen ICANN's accountability and transparency for some time, including the JPA Midterm Review and ICANN's IIC process. USCIB applauds ICANN's actions to increase transparency through the development of information tools to keep stakeholders informed of various ICANN processes and decisions, and to facilitate stakeholder involvement in decision-making. ICANN's recent analysis of how comments are incorporated and reflected in important policy development processes, such as the possible rollout of new gTLDs, have been welcome improvements. This approach should be continued as standard procedure and codified into ICANN's Bylaws.

With regard to accountability, USCIB recognizes and appreciates the proposals for new accountability mechanisms in the draft Improving Institutional Confidence (IIC) Implementation Plan, prepared by the ICANN's President Strategy Committee (PSC), including the possible requirement for a Board re-examination of decisions, and an extraordinary mechanism for Board removal. However, USCIB is not persuaded that either of these mechanisms achieves the changes and improvements needed in this critical area. In particular the opportunity for the community to remove the entire ICANN board is an unrealistic option because it would never be implemented, as it would disrupt and destabilize all ICANN activities and decision-making processes. Further, USCIB members remain concerned that contracted and non-contracted parties, who can be significantly affected by ICANN's decisions currently have no practical recourse to challenge adverse decisions. To be truly effective, ICANN must have binding accountability mechanisms that are independent of both the ICANN Board and governments or intergovernmental organizations.

A number of accountability reform proposals have been suggested in ICANN proceedings or discussed informally within the ICANN community, as well as the establishment of improvements and changes in ICANN's decision-making system similar to that established by the U.S. Administrative Procedures Act (APA) that might be adaptable to ICANN's private sector-led, multi-stakeholder environment.
USCIB notes that ICANN has not implemented many of the suggested improvements discussed with ICANN's stakeholder community. While ICANN has identified some accountability

improvement options, ICANN will only be recognized as fully accountable to its stakeholders when it actually establishes an improved accountability structure. This should be a higher priority, above other ICANN driven processes to which the organization has already contributed significant resources.

ICANN should consider constituting an independent, trusted, non-governmental appeals mechanism through which the actions of ICANN staff and Board can be measured against an agreed upon standard in the event of a dispute with ICANN policy. This independent appeals body should upon appeal be tasked with reconsideration of ICANN Board actions and decisions and have the authority to overturn such decisions. USCIB looks forward to working with ICANN and the community in developing the implementation details for this key accountability mechanism.

Another possible way forward could be to quickly convene a group of multi-stakeholder experts to explore and recommend independent accountability mechanisms, with a proper and robust community consultation process. The recent example of the Implementation Recommendation Team that convened to develop recommendations on trademark protections for the possible rollout of new gTLDs suggests that rapidly forming such expert groups and getting recommendations is possible within a limited timeframe. Any such activity should be undertaken with a view to implementing an effective accountability structure as expediently as possible.

Whatever accountability mechanisms are chosen, our members believe any effective accountability mechanisms for the organization and the ICANN Board must be reflected in changes to ICANN's Bylaws and should be established prior to transition.

Fully developing proposals for such mechanisms, inclusive of broad community feedback and multi-stakeholder input, and implementing structural changes will take some time. There are critical areas where ICANN must evolve before it becomes a truly accountable, effective, stable and transparent, multi-stakeholder body that can ensure the security and stability of the DNS. USCIB fully supports ICANN's private sector led and multi-stakeholder model, but ICANN is currently not ready to commence existence as an organization without any oversight via effective ICANN accountability mechanisms. What is at stake here is too important to all stakeholders, including global business, to rush change; instead, ICANN should focus on what needs to be done to stabilize and protect this critical resource. Therefore, we request the Commerce Department and ICANN to continue the transition process to allow for consideration, adoption, and implementation of needed reforms.

USCIB firmly believes in the private sector led model embodied by ICANN over other models, and we believe ICANN and its multi-stakeholder community have the capacity and the will to design and implement the needed reforms to best realize ICANN's transition. USCIB and its members look forward to working with ICANN and its community on those necessary reforms in the very near future.