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ACCOUNTABILITY AND OVERSIGHT OF THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

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**Accountability and Oversight of the Internet Corporation for
Assigned Names and Numbers (ICANN)**

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²⁹ See Part Two C. §2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

³⁰ See Part One B. §2b.i. at 9; Part One B. §4b. at 13 (process of communicating with multiple beneficiaries); Part One B. §5b.i. at 14 (institutional structure: conflicting commitments).

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³³ See Part One B.§4. at 13 (the process of communicating with multiple beneficiaries).

³⁴ See Part One B.§1b.iii. at 8 (ICANN should account to the financing entities and to the public for its use of the funds that it raises).

³⁵ See Part One B.§1b.i. at 7 (ICANN's financial problems); Part One B.§7b. at 17 (oversight: enforcement of accountability); Part One B.§10b.i. at 20 (United States Department of Commerce); Part One B.§12b. at 22 (state of incorporation legislature); Part One B.§14b. at 23 (Congress of the United States); Part One B.§15b. at 23 (IRS); Part One B.§17b. at 25 (international organizations).

³⁶ On conflict of interest of this kind at ICANN see Part One B.§5a.i. at 14.

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³⁹ See Part One B.§16. at 24.

⁴⁰ See Part One B.§6b.iii. at 17.

⁴¹ See Part One B.§8b. at 18.

⁴² See Part One B.§9. at 18; Part One B.§10b.ii. at 20 (United States Department of Commerce).

⁴³ See Part One B.§12. at 22.

⁴⁴ See Part One B.§13. at 22.

⁴⁵ See Part One B.§15. at 23.

⁴⁶ See Part One B.§11. at 21.

⁴⁷ See Part One B.§10. at 19.

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Introduction

Since its inception, the Internet Corporation for Assigned Names and Numbers (ICANN) was criticized for lack of legitimacy, accountability and oversight. ICANN faces difficulties in financing its operations at least in part because of these criticisms. Pressures for legitimacy have arisen from internal and external sources. Internally, ICANN, like many organizations, needs to hold diverse interest groups together. These groups require proof that ICANN is implementing its objectives and that its management conforms to norms of managerial professionalism. External pressures for legitimacy flow from the sources of the organization's financing, and occasionally from governments.⁴⁹ The purpose of this Report is to evaluate and propose an approach and possible measures for rendering ICANN more accountable and subject to oversight.

The first part of this Report examines the current status of ICANN with respect to its legitimacy, accountability and oversight, and proposes guidelines to the appropriate mechanisms for its structure and activities. The second part of the Report provides a framework and outlines the critical parameters that define accountable governance structures and processes. This part examines the rationale for requiring accountability and oversight, and the tools, mechanisms and best and worst practices with regard to accountability and oversight practices in (self) regulatory and governance structures.

PART ONE: ICANN'S LEGITIMACY STATUS AND OPTIONS TO IMPROVE: When, under what conditions, and how should accountability and oversight be imposed on ICANN?

A. ICANN's legitimacy problem

§1. ICANN's unclear and disputed objectives and powers undermine its legitimacy

ICANN has had difficulties in gaining legitimacy from the day it was established. One cause for the difficulties is its unclear and disputed objectives and powers. Some argue that ICANN should exercise only technical policy making and mediate between technical and business considerations. Some, including the staff, argue for far broader powers to fully manage the infrastructure of the Internet. So long as ICANN's functions and powers are controversial, its problems of legitimacy will persist, for the following reasons.

First, unclear power boundaries allow ICANN's management and board to assert broad discretion, even if not fully supported, and at the same time assert a lower level of accounting. Second, the staff has used its vision of broad functions to justify its demand for a larger staff (from about 12 persons to 43). In turn, more employees are likely to drive the expansion and definition of ICANN's functions further. This result raises added objections because it contradicts ICANN's original purpose to avoid a top-heavy

⁴⁹ Melissa Middleton Stone & Candida Greer Brush, *Planning in Ambiguous Contexts: The Dilemma of Meeting Needs for Commitment and Demands for Legitimacy*, *Strategic Management J.* 17:633, 644 (1996).

bureaucratic institution.⁵⁰ Third, the staff's vision and ambitions trigger disagreement of stakeholders and resistance to ICANN's claim for money.⁵¹ Fourth, an unclear definition of ICANN's powers makes it difficult to evaluate ICANN's performance. This difficulty in turn reduces willingness to finance ICANN both by voluntary donors as well as those that must pay ICANN to obtain its approval.

In addition, ICANN's dual status as private/public, and its triple functions as business/technical/ political, enables the staff to pick the accountability and oversight of their choice. ICANN's staff seems to view ICANN as a run-of-the-mill nonprofit corporation for some purposes, without regard to its global political impact and its policy-making functions that require far more robust measures of accountability and oversight to achieve legitimacy.

§2. Disputes over the identity of ICANN's beneficiaries and its nonrepresentative governance structure weaken its legitimacy

While some view ICANN's beneficiaries to include all users of the Internet all over the world, others list as beneficiaries the technical, business, and government entities. ICANN has an unusual and controversial structure of selected rather than elected board members, and a very powerful staff. ICANN's management envisions a self-perpetuating board, acting as an operating corporation, and a management devoted to protecting the corporation against "capture." ICANN is not strictly supervised by governments or similar mechanisms. It is subject to little "top-down" and "bottom-up" accountability and oversight, and therefore commands little legitimacy.

§3. ICANN's staff's latest proposal to eliminate elected at large directors and the internal review board demonstrate its little concern for legitimacy

ICANN's staff's proposal would reduce further accountability and oversight of the board, the staff, and ICANN as an entity. The proposal raised significant criticism from the GAO, and from other civic groups, and has brought about a variety of counterproposals. The upcoming date for renewal of ICANN's contract with the DoC has heightened the debate.

Criticisms of ICANN's weak legitimacy come from many quarters, including those that disagree among themselves about ICANN's scope of authority and its structure.

⁵⁰ Hiring staff members involves a determination of the kind of people and expertise that will populate ICANN's staff, and that is determined by, and may in turn determine its functions. These decisions are currently made either by the staff or perhaps by the board, and are influenced by the entities that voluntarily contribute to ICANN without needing its approval (e.g., permission to operate a registry). The reciprocity for such payments is less clear. It may take the form of influence over certain decisions, or even allocation of directors' seats.

⁵¹ In his testimony before Congress ICANN's President emphasized the functionality of ICANN when other forms of communications had failed in September 11. He attributed the Internet's strength to ICANN's service. There are those who suggest that the Internet was functioning well during that period in spite of, and not because of, ICANN. They aver that ICANN is weakening the features that make the Internet strong, and that without its interference the Internet will be more robust.

Regardless of their conflicting opinions, these criticizing groups doubt the trustworthiness of ICANN's management, and that has undermined ICANN's financial support. ICANN's leadership does not seem to understand that shielding from criticism invites criticism.

B. HOW CAN ICANN GAIN LEGITIMACY? WHAT MECHANISMS ARE AVAILABLE TO IT? CURRENT STATUS, FLAWS, AND OPTIONS TO IMPROVE

Introduction

This Part discusses in the context of ICANN the different accountability and oversight mechanisms listed in Part Two. Each section discusses ICANN's current problems related to its weak accountability and oversight, and proposes options for improvement.

§1. ICANN's financial problems. Unclear scope of functions and weak accountability measures

1a. Current status

i. Controversies on the scope of ICANN's functions and entrusted powers undermine ICANN's legitimacy and threaten its survival. These controversies reduce the number and diversity of constituencies that are committed to ICANN and support it financially. Unclear scope of functions increases the difficulties of evaluating ICANN's performance, thereby weakening its financial support.⁵² Moreover, the controversies may drive ICANN to subvert its objectives by compromising them in order to raise funds, and that in turn threatens loss of legitimacy and support.⁵³

Need for revenue enables contributors to influence the institution's objectives and hold the trustees accountable. Revenue is necessary for the institution's survival, and consequently for the trustees' maintenance of their powers. Therefore, funding is a means of overseeing ICANN's trustees to ensure that their entrusted powers are properly executed.

However, funding is also a method of influencing ICANN's objectives and policy decisions. Therefore, it is important that influence over ICANN's objectives and operations will not fall into the hands of entities with conflicting interests that may be able to subvert the purposes for which ICANN was established. If ICANN does not

⁵² See Richard Hoefler, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 167 (2000) (accountability for reaching realistic results by evaluation of the services).

⁵³ Trading the objectives of an institution for donations undermines the trust even of those who influenced the institution by making the donations. These donors may rightly doubt the management's commitment to institutional goals, and wonder whether in the future management will be auctioning the institution's objectives to a higher bidder.

discriminate among its donors, tighter oversight of ICANN is necessary to ensure that its objectives are not subverted.

ICANN derives its funding from three sources. Each source can be analogized to fundraising by an existing form of organization. One source is stakeholders' voluntary contributions, similar to donations raised by nonprofit organizations. A second source is fees for services, similar to charges by providers of monopoly services.⁵⁴ And the third source is fees for approvals, similar to taxes raised by governments. These different sources raise funds in somewhat different ways.

ii. Nonprofit corporations obtain their resources by continuously soliciting funds from the public, foundations, and the government. To succeed, the donors must be convinced of the corporations' legitimacy. The corporations must prove that they use the donations to achieve their stated objectives to which the donors subscribe. To do that, the corporations disclose their balance sheets and their expenditures, and the donors offer them feedback by communications and by donating or withholding donations.⁵⁵ Before paying, donating foundations usually conduct evaluations to determine that their contributions will be spent and have been spent for the earmarked purposes. To gain support, nonprofit corporations must be subject to an examination and public input. By definition, such corporations' performance is not quantifiable but must be assessed in light of their objectives and benefits to society. Such an evaluation is complicated, but not impossible, and there are methods by which these evaluations are made.⁵⁶ Thus, transparency, evaluations of prior plans and their implementations, is essential to continued funding of nonprofit organizations.

ICANN has acted as a nonprofit corporation by soliciting funds from stakeholders. However, ICANN has not followed the accountability measures of nonprofit corporations.

iii. Service providing. Compensation for services is generally regulated by market competition and by law. Regulators address practices that preclude users from making reasoned decisions. However, if a monopoly or oligopoly offers important services (e.g., fuel), their terms and compensation are regulated to a greater extent.⁵⁷ In charging for services rendered ICANN acts similarly to a monopolistic utility. But unlike such a utility it is not regulated with respect to the fees it charges or the contract terms it signs.

The only factor that limits ICANN's arbitrary behavior is the bargaining power of the other parties, for example, Network Solutions, Inc. (NSI, now VeriSign), the manager of the root. NSI contributes to ICANN's budget in exchange for better terms in its contract. Alternatively parties create coalitions, as the ccTLD registries have done, and

⁵⁴ I assume that it may incur debt, to the extent that it can show assured future revenues.

⁵⁵ For example, the public expressed its displeasure at the salary and expenses of United Way's top executive.

⁵⁶ See Richard Hofer, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 169-173 (2000).

⁵⁷ Thus, life insurance contracts in the United States contain required clauses and the fees for fuel-utilities monopolies are regulated unless markets are available for the utilities' services and products.

withhold financing for ICANN. It is noted that the ccTLDs registries used the expression "no taxation without representation" and demanded seats on ICANN's board.⁵⁸ ICANN's staff has offered the governments positions on ICANN's board, presumably in exchange for funding. It is still unclear what the governments are willing to pay for the seats.

iv. Taxation to finance the operations of the executive branch requires congressional approval, that is, approval by the representatives of the taxpayers. Congressional approval is accompanied by budgeting, which itemizes expenditures and sets priorities and policies, thus limiting discretion. Budgets lead to accounting for the money spent and the actions taken or required. In addition, the process takes place at least annually.

Arguably ICANN's charges for approvals can be viewed as taxation. However, ICANN does not follow the process of taxation. Further, it is unclear whether approvals of a government-chartered monopolist should be created by contracts rather than by a lawmaking process. ICANN's approvals are not exchanges of powers that belong to it and owned by it. They are the exercise of entrusted powers, for the benefit of the Internet. Hence, unless it can be shown that the funds raised by this exchange benefit the Internet, the exchange should not occur. Exchange of approvals for money can be corruptive of ICANN's objectives. Therefore, perhaps approvals should be given free.

Further, the process of approvals by contracts, regardless of fairness and even-handedness, is flawed if ICANN's policy making decisions or principles guiding the negotiations remain flexible and are not subject to "rules of law." ICANN has no mechanisms for limiting the exercise of arbitrary power. It has not even followed its own bylaws a number of times.

v. ICANN does not act consistently nor follow precedents. ICANN does not adhere to principled decisions in its relationships to the parties that seek its approval. Rather, it negotiates contracts, including provisions that require the other parties to follow its *future* unknown policy decisions, provided the decisions command a consensus. Although ICANN's bylaws include a review board to determine whether a consensus exists, the board has never been activated and was eliminated in the staff's proposed reform of ICANN's structure. If this reform is accepted, the contracts will constitute obligations to obey ICANN's policy decisions when it avers that its decisions command a consensus. It is not clear whether such open-ended vague obligations will be upheld under contract law. Regardless, they expose the parties to possible arbitrary decisions, inspire no confidence, and undermine legitimacy.

vi. ICANN's entrusted powers may not authorize charging of fees. ICANN's authority to charge fees for approvals is not free from legal doubts. If ICANN is deemed to exercise governmental power under its letter of understanding with the DoC, then the fees that it extracts for approvals may be deemed taxes that should be regulated. Even if such fees are not taxes, they are imposed by a monopoly without any competition on the one hand or regulation on the other hand. No principles, no accountability mechanisms and

⁵⁸ However, because some of these registries are asserting their rights in conflict with their governments, they may be losing their battles on that front.

no oversight determine these amounts. Further, the services that ICANN offers for the fees are unclear. A monopolist's approval *per se* is not necessarily a service. If no service is involved, then the demand for fees beyond administrative expenses is similar to extortion by using of monopoly trust powers.

The other aspect of this fundraising undermines legitimacy as well. To raise funds ICANN is bargaining away its entrusted power. In one case it is selling its approval rights, where it may have no power to charge for the approval, and in the other it is selling part of its trust power--seats on the board of directors. Parties that do not have bargaining powers, such as small registrars, must simply pay. In all cases ICANN's objectives are not clearly distinguishable from fundraising. Yet it should not accept, let alone bargain for, funds in a way that may subvert its mission. A crude analogy would be a teacher's auction of exam grades according to the students' monetary contributions. Even a suspicion of such an exchange undermines legitimacy.

vii. ICANN has not followed the mechanisms that can legitimize its fundraising.

ICANN discloses some of its decisions, proposals and activities on a web site. Therefore, there is a significant amount of disclosure by ICANN before and after the decisions are made. However, there is little information about ICANN's plan of operations, its budget, if it exists, and its financial statements. There is little information about who pays ICANN--and thereby acquires oversight and power over it--and how ICANN's funds are spent. If information is provided to donors for comments, it is made in private communications and is not published.

In sum, ICANN and its staff are using organizational models selectively. To raise funds they seem to use the nonprofit organization model but do not provide means by which ICANN's performance can be evaluated. They do not show a willingness to be examined by the public, and its staff has demonstrated mistrust of public evaluation.

viii. Special issues in connection with ICANN's fundraising. ICANN is not a run-of-the-mill nonprofit corporation. When it raises funds by donations the question arises of who should be *allowed* to donate to ICANN. Powerful donors can influence ICANN's budget, and consequently its objectives and their implementation, in ways that may adversely affect the Internet and parties that are not wealthy donors. There is no independent body that decides ICANN's budget, how it should raise funds, how much it should spend and for what.

ICANN is a policy-making body and a public servant. A nonprofit organization devoted to "doing good" for the benefit of the public may have no fundraising limits. The more money it raises, the more good it can do. But more money and staff for ICANN does not necessarily translate into a better Internet, and may in fact undermine it. The Internet may not need micromanaging. After all, one reason for ICANN's creation was to avoid a top-heavy bureaucracy.

ICANN's current fundraising is a recipe for undermining legitimacy. It is likely to (1) subject ICANN to undesirable influences; (2) subvert its objectives by increasing its staff; and (3) render its decisions unfair and arbitrary.

1b. Options to improve

i. Commitment to accountability.⁵⁹ To the extent that ICANN raises funds and is viewed as a nonprofit corporation, it must be willing to "endure public scrutiny [and] even [invite] the public to scrutinize the behaviors of the organization's leadership."⁶⁰ ICANN should not only conduct rigorous evaluations of its performance and determine its contribution to the functionality of the Internet, but also instill in the staff "the sense that conducting evaluations is an ethical duty"⁶¹ and not an advertising tool. Organizations usually conduct some type of evaluations.⁶² However, they may differ. ICANN has not conducted any evaluations of its own performance, at least not for publication.

ii. Use of formal planning.⁶³ ICANN should prepare and publish a detailed plan of operation and a budget, linked to the plan of operations. The plan should list ICANN's objectives and its implementation, ICANN's proposed budget and justifications for the budget in financial terms and in terms of ICANN's objectives. The plan should also offer means by which the performance of ICANN can be measured, and include quantifiable and non-quantifiable measures. The plan should be published in the form of a proposal, and solicit comments. The final plan should discuss those comments that have been accepted and rejected and the reasons for the changes.

The plan should be evaluated under sufficiently rigorous methods. The evaluators may differ, including the financiers of ICANN as well as other stakeholders. Once completed, their findings should be provided to ICANN's staff. The results must be given to the funders, the public and others to ensure that these stakeholders understand what is happening with the program.⁶⁴ Thus, program evaluation requires justification that the programs are necessary and that they work.

⁵⁹ See Part Two C. §2a. at 36.

⁶⁰ See Richard Hoefler, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 167 (2000) (quoting Robert P. Lawry, *Accountability and Nonprofit Organizations: An Ethical Perspective*, *Nonprofit Management & Leadership* 6:171, 175 (1995)). For an analysis of social evaluation see also Jack Quarter & Betty Jane (B.J.) Richmond, *Accounting for Social Value in Nonprofits and For-Profits*, *Nonprofit Management & Leadership* 12:75 (2001) (proposing a system for accounting for social values); *id.* at 82 ("[N]onprofits should develop social outcome indicators and assessments for measuring their performance. However, in the tradition of social auditing, the report treats social indicators as separate from the financial accounts; it does not integrate them into what we are calling a social accounting framework."); *id.* at 86 (the "framework . . . should take into account the dual nature of nonprofits as social and economic entities").

⁶¹ Richard Hoefler, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 176 (2000).

⁶² *Id.* at 174.

⁶³ See Part Two C. §3. at 38.

⁶⁴ Richard Hoefler, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 174 (2000).

Evaluations can be used to improve the operations of the organization, but can also legitimize it. They should not be ceremonial, a form of advertising and a waste.⁶⁵ Such evaluations do not provide a basis for implementation and are for outside consumption only.

iii. Substance and verification of the disclosure.⁶⁶ ICANN should give an account to the financing entities and to the public for its use of the funds that it raises. It should publish reports of the results of its operational functions periodically. The report should describe the nature of the functions, the terms of the contract with delegates, and results of the operations and projected future similar operations, and mostly compliance with the plan and its expenditures. The plan should also disclose the sources of ICANN's income and its expenditures, verified by certified public accountants. Models of such reported functions are available and a form report can be easily designed. The process is most successful for nonprofit organizations and consists of their best practices.

If ICANN cannot achieve greater consensus concerning its objectives and its powers, the DoC should define ICANN's functions with more precision, and determine the identity of ICANN's beneficiaries for the purpose of fundraising, and structural issues. The Department may conduct public hearings on the subject or engage another entity, such as a foundation or the General Accounting Office (GAO), to review and recommend ICANN's scope of objectives, powers and identity of its beneficiaries.

iv. ICANN's burden of showing authority of entrusted power. On controversial powers ICANN should show not only that it exercises these powers well but also that it is allowed to exercise them in the first place. It can justify its assertions on express or implied authority derived from the United States government or a consensus, which can be built by precedent.

§2. Classifying policy and operational decisions for transparency, disclosure, and appropriate processes

2a. Current status

In the cases described below ICANN often does not consistently follow pre-determined principles, which would bind it to legitimate rather than strategic results. The mechanisms and guidelines described in Part A are available for each of these decisions, and could be adopted and followed.

The distinction between policy decisions and operational decisions can be made in most cases. In borderline cases the following tests could be used. One test relates to the impact of the decision. The greater the number of impacted parties the more likely the decision would be a policy decision. A second test is the degree to which the results of the decisions can be evaluated. The more predictable the results, the less likely are the

⁶⁵ *Id.* at 175.

⁶⁶ *See* Part Two C. §1d. at 35.

functions to be policy making. The third test concerns implementation. A decision that requires implementation is likely to be a policy decision. The fourth relates to the novelty of the decision. The more novel it is the more likely it is to be a policy decision. The fifth test is timing. A decision that requires short-term action is not likely to be a policy decision but an operational decision. Thus, decisions on whether to increase the number of gTLDs and ccTLDs, their choice and the process of their allocation involve policy. Routine decisions involve operation.

2b. Options to improve

i. Policy versus operational decisions.⁶⁷ These functions correspond to the appropriate mechanisms for accountability. In general, the functions should be divided into operational and policy functions. Operational decisions, such as supervising as a routine matter the operations of the entities to whom ICANN outsourced functions, need not be disclosed before action is taken but should be reported after it was taken.⁶⁸ Policy decisions must be made in a process suitable for such decisions, that is, publication before the fact, feedback by the public, feedback by the board, and reasoned determinations.⁶⁹ Similarly, contractual regulation of registrars and registries are matters of policy. ICANN must establish their justification. After the relationships become standard, ICANN may become accountable by operational accountability practices.

ICANN is engaged in a number of operational functions. It outsources most of these functions to expert delegates. Operational functions are less discretionary, and require more immediate decisions that are not amenable to approval before the fact. Therefore, if ICANN performs the services in house, there is a list of accountability mechanisms that should apply. If ICANN delegates these functions, then it should account for the process by which it chooses the delegates, for the terms of the delegation, for its monitoring their performance, and for the costs that are incurred in its monitoring. These functions and their results can be reported, and do not require feedback from beneficiaries before the fact. For example, servicing existing ISPs and signing routine standard contracts on which consensus has been reached are matters that can be performed under accountability and oversight of less discretionary operations, in published periodic reports. Certified public accountants should verify its financial statements. Qualified lawyers should approve its legal decisions.

Other decisions, as well as some aspects of the operational decisions, such as the process by which ICANN chooses delegated parties, involve broader discretion. The performance of these functions should follow the accountability mechanisms prescribed for policy matters. Among ICANN's most prominent discretionary decisions are the following:

ii. Negotiating contracts with established registries. ICANN is still negotiating with the registries of country code Top-Level Domain names (ccTLDs) and their governments.

⁶⁷ See Part Two A. §2b. at 28.

⁶⁸ For discretionary trustees' accountability after the fact see Part Two C. §1b. at 33.

⁶⁹ For discretionary trustees' accountability before taking action see Part Two C. §1c. at 34.

The negotiations are complex and have not yet been resolved. ICANN conducts these negotiations partly in private. Instead ICANN should publish articulated principles on which such negotiations should be based, and open the principles to public scrutiny, obtain comments and include its reasons in the final statement of these principles. A similar accountability mechanism should be applied to negotiations with new registries.

iii. Issues concerning conflicts between trademark and domain name holders require principled guidelines. ICANN has established conflict resolution mechanisms that have been found to prefer trademark owners at the expense of domain name owners. ICANN should demonstrate an even-handed treatment of the issues and appropriate concern for domain name holders through appropriate mechanisms of accountability.

iv. Standardizing contracts with the registries. ICANN has undertaken to regulate and standardize the agreements between the registries (managing gTLDs) and registrars, the amounts charged to the users, and the registrars' qualifications. This decision involves an important and complicated policy question concerning the extent to which ICANN has authority to, and whether it should, formalize and standardize these contracts. It requires appropriate accountability mechanisms.

v. Creating and choosing additional gTLDs. Creating new gTLDs was one of ICANN's explicit mandates. It is a policy decision that affects technical personnel, businesses and users. ICANN took a very long time to determine the number of the new gTLDs and their classification. These decisions should have involved principles by which the number and the classifications should have been made. It is not clear what principles were used to make the decisions. Some of the choices are rather curious, such as Museums. This gTLD may not be controversial, but may also not be of the highest priority. The analysis that resulted in the choices was not explained and the comments made were not addressed. Thereafter, ICANN outsourced to a contractor two of the most important functions that it was expected to perform. These include establishing the principles on which the allocation of the new gTLDs should be made and implementing the allocation. The outside contractor established principles for the process of allocation and implementation that got embroiled in court proceedings. In this case ICANN abdicated one of its major responsibilities. It should have retained the functions (with or without the aid of advisers) and adopted a process that would gain support in accordance with the mechanisms for making policy decisions.

§3. Disclosure of conflicts of interest

3a. Current status

i. Personal conflicts of interest. ICANN does not seem to disclose either the staff's or the directors' personal conflict of interest in dealing with ICANN, or the procedure by which these conflicts are resolved. It is also unclear whether the DoC or any other government agency or constituencies receive information about any such personal conflicts. Unless none exist, this secrecy contradicts best practices of private institutions, whether nonprofit or for profit, and by public institutions.

ii. Inter-institutional conflicts of interest. Like any organization, ICANN's board is populated by individuals that represent (and are selected by) self-interested constituencies. The question is whether ICANN's board members are required to commit to the interests of the Internet and disassociate themselves from the particular interests of the constituencies that selected them. To what extent are these board members independent of those who elected them? If they are not, and if they represent a party on the bargaining table attempting to gain advantages from the opposite parties, then the interests, which ICANN is bound to guard, may fall between the cracks of the self-interests of those who selected the board members.⁷⁰ Yet, the commitment of the board members and staff to their constituencies seems to be far greater than the commitment of a private sector corporation to their shareholders. Thus, it is not clear that the private sector model of a corporation (for profit or nonprofit) fits ICANN's board today.

ICANN does not fit the legislative model either. ICANN's board and its management differ from legislators in fundamental ways. Unlike legislators ICANN's transparency is far more limited. In fact, the board insists on a model of a private sector corporation on this score. Further, because legislatures deal with most aspect of our lives there are people and organizations that react to what legislators are planning to do. Even though the impact of ICANN on the Internet and on global society is very great, ICANN is far less known or understood by the public. Interest in ICANN's accountability and actions is lower than the interest in the actions of even one large corporation, let alone a legislature. Hence, it is unlikely that the public at large would find spokespersons for its interests. Further, today's legislatures represent most if not all segments of the society they govern. These spokespersons speak for those who are affected by the deals regulators make. In contrast, not all groups affected by ICANN's decision are represented.⁷¹ Finally, legislators are elected. ICANN's board members are nominated by specific interest groups that may hold their power in perpetuity. Outsiders will remain outside.

Thus, it seems that ICANN's insiders have a stronger hold on the institution to the exclusion of outsiders, more commitment to their constituencies than to ICANN and at the same time have far weaker accountability. ICANN's bylaws and policies do not provide for strict accountability and oversight of its board and management. Perhaps it is assumed that the constituencies, which selected the board members, would render the

⁷⁰ For example, the interests of large trademark holders may well conflict with the interests of the Internet or other constituencies on the number and kind of additional gTLDs that the Internet should have. Large trademark holders worked to obstruct the creation of new gTLDs because new names increase the trademark holders' costs of protection. But some argue that lack of new domain names imposes costs on those who wish to enter the registries and registrars' business and on users who would benefit from more available names and from competition among registries and registrars. These two parties, however, are not represented on the board. What is the best solution for the Internet as an enterprise is a difficult question but should not be determined by favoring the large trademark holder corporations.

⁷¹ The staff's reform proposal would eliminate board members to be elected by "the public" or "the users." In their stead, governments would send representatives, on the assumption that governments represent the public or at least their citizens. This representation may strengthen the representation of the public consumers.

members accountable. Indeed, it may be safe to assume that many board members are accountable to those who selected them. But in the case of a conflict between the interests of the constituencies and the Internet, there are no mechanisms for assuring that those who control ICANN will commit to the Internet and follow their mandate.

It is unclear that ICANN's trustees understand the principles involved, whether they see the difference between commitment to ICANN or to its constituencies, and whether they act according to any articulated distinguishing guideline.

3b. Options to improve

i. Transparency and disclosure of personal and inter-institutional conflicts of interest.⁷² Personal and inter-institutional conflicts of interests are usually remedied by transparency and disclosure of the conflicts. Any benefits that the staff or the directors receive from ICANN should be disclosed and subjected to public perusal. However, disclosure is not entirely effective if the affected parties do not have a voice to influence the company or a way to "exit" it. Because one cannot exit ICANN without exiting the Internet, the affected parties must have a mechanism through which they can react directly or through representatives or enforcers and prevent or remedy abuse of entrusted power.

ii. ICANN's directors and staff should publicly disclose their personal conflicts of interest. Conflicts of interest transactions, in which members of the board and the staff are personally interested, whether directly or indirectly, should be published by ICANN. Directors and staff in such conflicts should not take part in decisions involving such conflicts.

If ICANN's model of loyalty is closer to a private sector nonprofit corporation, as it is organized, then the directors and staff may not serve the purposes of the members that selected them but must commit to the Internet's interests as a whole. If board members and staff act in conflict of interest to the Internet's interests, they must disclose their conflicts, and abstain from participating in the decisions.

If ICANN follows the legislative model and if board members are allowed to bargain for the benefit of the stakeholders they represent, their views on ICANN's policies and activities should be published and their representative role should be made clear. It is not the adoption of one form of commitment or another that undermines ICANN's legitimacy but a suspicion that board members and staff *seem* exclusively committed to ICANN's objectives while in fact are following the directives and serving the interests of the stakeholders who selected them.⁷³ Directors should not give a

⁷² See Part Two A. §3. at 29 (discussing conflicts of interest) and Part Two C. §1. at 33 (discussing transparency and disclosure).

⁷³ A board member who was selected by large corporations in part for the purpose of protecting corporate trademarks should not take part in discussions of policies that conflict with the interests of their wards. Alternatively, such a member must announce its policies and allegiances in public. In addition, all parties affected must be represented in the negotiations.

misleading impression that its members act as a collegiate body committed to ICANN while in fact the members represent particular interests and negotiate. Such a misrepresentation undermines ICANN's legitimacy.

§4. The process of communicating with multiple beneficiaries⁷⁴

4a. Current status

i. Feedback from ICANN to its constituencies. ICANN's board conducts open meetings as a forum for inputs. It also solicits inputs in its proposals. But ICANN's board and staff give the inputs little weight or respect. They do not demonstrate their focus on these inputs or respond to them in a reasoned way. Negotiations among various stakeholders and ICANN are conducted in private, even though they include matters of policy. There is no consensus among the members of the board. It is not clear whether the board's considerations cover the interests of the excluded stakeholders. ICANN's staff and some of its board members view ICANN as a private operating nonprofit corporation. They do not know how a public entity functions, and have deep suspicions of outsiders who may capture ICANN. This situation undermines ICANN's legitimacy

4b. Options to improve

i. Dividing ICANN's functions into policy and operational decisions.⁷⁵ The mechanisms for communicating on policy matters are described in section C of Part Two. ICANN, however, lacks staff experienced in choosing and utilizing such mechanisms. Since the staff of ICANN is very powerful and experienced, and believes in its approach, a change in the staff's attitude is unlikely. Two possibilities are available to change ICANN's practices. One is to separate the staff into two independent groups. One group would deal with operational issues and one would deal with policy-making issues. The other proposal is to separate ICANN into two divisions one for operations and one for policy making. Both solutions involve a separation of ICANN's operational functions from its policy-making functions. Therefore, they are discussed in section 6 below dealing with structural changes.

The relevance of these solutions to the mode of communication is that a staff experienced with policy issues would improve ICANN's approach to communications and feedback that ICANN is now wanting. A separation of the functions and authority into operation and policy making would achieve the same purpose.

⁷⁴ See Part Two C. §1c. at 34 (discretionary powers, including policy making, require before the fact accounting and thereby reduce the discretion).

⁷⁵ See Part Two A. §2b. at 28.

§5. Institutional structure. Conflicting commitments.

5a. Current status

i. Conflicting commitments. The conflicts among ICANN's board members and its stakeholders present legitimacy and support problems for ICANN. Nonprofit and for-profit organizations as well as governments have diverse, conflicting constituencies, whose support the organizations need to maintain.⁷⁶

Organizations must gain the approval of their supporters and funding entities to survive. This need affects their quest for identifying with their constituencies.⁷⁷ "Identification is strongest when members believe that preserving the organization's identity also fulfills their own needs. . . . Identification is further strengthened by members' positive associations with the organization."⁷⁸

However, "when board members take actions in a public setting that breach their expected role, latent contradictions in the hybrid identity are surfaced which hinders (sic) individuals' abilities to fulfill particular needs [and raise] 'conflicts of commitment.'" This threatens the organization's identity and weakens the members' commitment. To mitigate the harm, transform the organization and reduce tensions, some board members and staff engage in "facework."⁷⁹ But internal role conflicts make it harder to repair and restore the identity of the organization. When the threat to the organization's identity occurs, a coalition of conflicting interests can work to restore it, provided the existence of the organization is important to its members. Different responses are triggered when debates are publicized rather than remain internal. The publicity may sometimes be harmful, if no consensus has been reached.⁸⁰

The recent events in ICANN fit this description. ICANN's staff and members of its board are conflicted with at least with one board member--an elected member--and the conflict reached the courts. In addition, ICANN is in conflict with the strong constituency of the ccTLD registries, and some of the ccTLDs seem to be conflicted with their governments. The conflicts are fundamental. They relate to the nature of ICANN (private or public), and its power structure (board as a collegiate body v. a legislature representative body). Indirectly they relate to the organization's objectives and functions because they weaken the constituencies' identification with ICANN's main objectives. These conflicts undermine ICANN's legitimacy and support.⁸¹

⁷⁶ Self-regulating organizations may be an exception in that most of their members have strong identity of interest, but they too are competitors.

⁷⁷ Melissa Middleton Stone & Candida Greer Brush, *Planning in Ambiguous Contexts: The Dilemma of Meeting Needs for Commitment and Demands for Legitimacy*, *Strategic Management J.* 17:633, 633-36 (1996).

⁷⁸ Karen Golden-Biddle & Hayagreeva Rao, *Breach in the Boardroom: Organizational Identity and Conflicts of Commitment in a Nonprofit Organization*, *Organization Science*, 8:593, 601 (1997).

⁷⁹ *Id.* at 602.

⁸⁰ *Id.* at 609.

⁸¹ See Part Two C. §2e. at 37 (conflicts of interest).

5b. Options to improve

i. Dividing ICANN's functions into policy and operational decisions.⁸² The different modes in which ICANN's board members interact depend on the nature of their activities. It is inappropriate for an operation to be conducted as a legislature. Time pressures, confidential information, work in progress, and inter-group discussions should not be transparent and subject to each member's public activities. In contrast, the process of policy making may be more productive if publicly disclosed, as different members represent the various views. Further, the commitment of the board in connection with operational objectives must be to ICANN; their commitment in connection with policy decisions may be lower, but strong enough not to adversely affect ICANN's legitimacy. In fact, the same division is necessary with respect to the transparency and disclosure, which ICANN should offer.⁸³

ii. Special and separate expert staff. Arguably, in order to effectuate this bifurcated approach there is a need for two groups of board members and two groups of staff. The division of the staff is less intrusive and fundamental, however. This is especially so when some of the leading staff members of ICANN have announced their intention to leave the organization after its reform gets under way. Therefore, rather than allow current staff members to remain and supervise a reform they might be encouraged to leave before the reform is launched. A new staff should be hired to lead the effort of reforming ICANN's accountability measures as soon as possible, while the current members are still there to smooth the transition.

The new staff should not be composed of legal litigators but of lawyers and public officers with experience in government and public policy accountability. These include, for example, chief counsels of a congressional committee, a government agency (e.g., the Securities and Exchange Commission), or the Treasury. It may also include a former court of appeals judge, and a person that was involved in issues concerning the Freedom of Information Act issues. This group can design and prepare the process and text that should be used when a policy decision is to be made. It should classify the nature of ICANN's decisions and determine the appropriate process and language for them. The groups should receive inputs from the members of the board and others. When these processes have been adopted and established as a matter of tradition, the staff may be reduced.

iii. Divide ICANN's functions and authority into two separate organizations. Mr. Karl Auerbach, a board member that is in conflict with the rest of board and with the staff, suggested in his testimony on June 12, 2002 to split ICANN's organization into two. One organization would be responsible for policy making and one for operations. Each such organization should be divided into three independent authorities that would function under one roof, presumably under the direction of ICANN's board.

⁸² See Part Two A. §2b.at 28.

⁸³ See Part Two C. §1.at 33.

This structure might raise more objections and create more conflicts between the persons who will act independently of each other. The establishment of an umbrella board is also open to conflicts unless its authority is determined in some detail. If it has the authority to veto or overrule the independent decision makers then principles should be established in advance on its review functions. If such a plan is adopted policy-making functions must be clearly defined and its accountability and oversight mechanisms established.

§6. Institutional structure. Representation of the users and small businesses

6a. Current status

ICANN's current representativeness and the identity of those affected by its decisions are not well defined. Powerful constituencies, such as the large business interests, the trademark holders, various countries, and the technical communities, have anchored their representatives within ICANN's corporate structure and these representatives presumably can protect their interests. But the users of the Internet, both individuals and small business, have not had a voice or specific representation. Arguably, governments might fill this role. Yet governments have decided not to take a direct part in managing ICANN. The staff's proposal to include government representatives on ICANN's board has not been enthusiastically received by the governments themselves. Besides, the proposal seems to aim at offering the governments seats on the board for payment of dues to support a larger staff, and that may not be acceptable to many governments and others. Such a deal establishes an undesirable precedent.

6b. Options to improve

This Report does not focus on ICANN's structural issues but on its accountability. However, representativeness is an important element on which legitimacy is based. It convinces the parties affected by ICANN that their interests are not ignored, that their interests have been considered. Then ICANN's decisions will be accepted even when its decisions do not favor the particular parties.

i. Formal institutional mechanisms – voting and voters.⁸⁴ Even though the effect of ICANN on the future of the Internet is not free of controversy, it is clear that today it affects the infrastructure of the Internet. Therefore, ICANN has been entrusted with power for the benefit of all users and should mediate among their conflicting interests. Its power structure should include representatives of the users and small businesses.

ii. User's representation and membership. Viewed as consumers, users may be protected by competition among the registries and registrars, just as consumers of other items are protected without power to elect the management of the producing and marketing corporations. Only select problems are regulated, as they arise. However, competition is lacking if ICANN controls and micro-manages the registries and registrars' relationship with the users. To the extent that ICANN asserts a regulatory power or

⁸⁴ See Part Two D. §2c. at 40.

negotiates agreements that affect users, users should be represented at the negotiation table.

The issue of users' representation is difficult. Creating representatives for millions of users can be costly and time consuming. However, some of the work concerning representation already has been done and should continue. How consumers of a regulated industry should be protected is a topic outside this Report. Suffice it to note that there are many models for such a protection, including oversight by courts and government agencies. Users may be entitled to a place on ICANN's board, or to an advisory board as the governments have organized, or to have their representatives participate in the governments' advisory board. Perhaps explicit protection of consumers should be taken by the existing government advisory board with power to overrule ICANN's decisions that affect the consumers. Another possibility for consumer representation would be through representatives selected as users' representatives by the members of the board. Such representatives are more removed from the stakeholders and can be in the position of an umpire on issues concerning users. Finally, there are many forms of representation through organizations of "chapters" or "electoral colleges" whose representatives convene to elect the members of the board or another form of governing body within ICANN. The usual method of representation is by vesting in the beneficiaries the power to vote for board members. In the case of nonprofit organizations members usually have such a membership vote.

iii. The problem of formal external institutional mechanisms.⁸⁵ Members have a right to sue directors and staff derivatively, on behalf of the organization. People sue for various reasons, sometimes unrelated to the merits of their claims, including, for example, the quest for publicity. Millions of persons with full membership rights can pose an unprecedented threat of court claims for ICANN. Therefore, rights to claim derivatively should not necessarily be attached to voting individuals. The right may attach to organizations that represent such individuals. Besides, it is not clear that the courts should be the ones to determine ICANN's corporate structure. Alternative dispute resolution mechanisms may be more appropriate in such a case.

iv. Use of formal planning.⁸⁶ Structural changes as discussed are usually implemented by formal plans. "In the case of nonprofits, structural reorganization, shifting balance of power between board members and top management, and changes in board and staff composition were associated with formal planning and often followed difficulties acquiring external legitimacy."⁸⁷ In sum, ICANN must change its structure not the way the staff has proposed but the opposite. It must find ways to become more representative. ICANN with a self-perpetuating board and a staff that "knows what is good for everyone" should not last long.

§7. Oversight: Enforcement of accountability

⁸⁵ See Part Two D. §2d. at 41.

⁸⁶ See Part Two C. §3. at 38.

⁸⁷ Melissa Middleton Stone & Candida Greer Brush, *Planning in Ambiguous Contexts: The Dilemma of Meeting Needs for Commitment and Demands for Legitimacy*, Strategic Management J. 17:633, 640.

7a. Current status

i. Review board. Currently ICANN's constitutional documents provide a review board to determine whether its policy decisions command a consensus. The establishment of the board was never implemented. The staff's proposal eliminates this review board, and leaves the board the sole arbiter of whether its decisions command a consensus. Such a structure is the epitome of arbitrariness and the opposite of accountability.

7b. Options to improve

i. Commitment to accountability.⁸⁸ If the proposal of ICANN's staff to eliminate the review board is rejected, the review board should be activated to address issues concerning ICANN's policy decisions, to receive complaints and to develop principles, which ICANN's board should follow in its decisions. Along the lines of a model such as the Securities and Exchange Commission, ICANN's staff can have standing to make its arguments before the board.

§8. Market enforcers. Insurance, guarantees, and verification by third parties.

8a. Current status

i. Weak accountability mechanisms. ICANN may use accountants and lawyers. However, it is unclear whether the services of these professionals enhance the accountability and oversight of ICANN. It seems that the current role of lawyers in ICANN's governance is quite prominent. ICANN's board is concerned with possible capture and legal attacks. Its documents are carefully crafted to protect against legal vulnerabilities. This practice is applauded. However, a siege mentality and emphasis on outsiders v. insiders have led to actions that are in conflict with ICANN's legitimacy, such as the staff's proposal. In addition, the public altercations between at least one lawyer and a board member exhibit a disturbing personal vendetta that does not help ICANN's image or legitimacy.

8b. Options to improve

i. Market enforcers.⁸⁹ Independent certified public accountants should verify ICANN's financial statements. Most importantly, ICANN should employ transaction lawyers that understand and are expert not only on the vulnerability of litigation but also and mainly on the laws concerning accountability of trustees. If ICANN acts as a fiduciary, its vulnerability in the courts would be reduced even as its transparency and disclosure expands. Private sector lawyers may not be the best advisers to ICANN on the method of gaining legitimacy in policy-making decisions. Therefore, both outside lawyers and staff should be recruited from the ranks of more expert legal advisers.

⁸⁸ See Part Two C. §2a. at 36 (commitment to accountability).

⁸⁹ See Part Two D. §3. at 41.

§9. Competitors⁹⁰

§9a. Current status

i. Balance of power among hesitant competitors. Based on the assumption that the Internet name and number infrastructure must be structured under one root, the naming and numbering system is a natural monopoly. Based on the assumption that the Internet's one root is best managed by one entity ICANN is a monopoly managing a natural monopoly. However, this conclusion does not preclude competitors from vying for its power. There are many institutions that can perform ICANN's functions, such as the International Telecommunication Union, and countries, such as China. Technical organizations that used to be involved in managing the system when Dr. Postel was alive claim the ability and readiness to do so now.

Some competitors are not declaring their readiness to manage ICANN. Some are suggesting splitting ICANN's powers, and shifting some of the powers to them. Others suggest mechanisms for oversight outside the ICANN umbrella.

The reason for the reluctance to claim ICANN's power may be the same as that which deterred these parties from claiming it four years ago. It is a recognition that the other interested parties may not agree to their taking ICANN over. It is clear that the United States is not ready to fully relinquish control over ICANN. It is also clear that other countries would object to active U.S. control of ICANN. Therefore, without publicly asserting full control (and the responsibility and the blame) many parties may attempt to influence ICANN's structure and its operations in directions that are amenable to them.

§9b. Options to improve

i. Maintain the status quo. The unclear control over the naming and numbering system is not necessarily adverse to the development of the Internet. Some argue that the less control over the system, the more robust the Internet would be. Others believe that ICANN must fully micro-manage the system. It seems that ICANN's competitors have developed a balancing power pressure, which keeps ICANN and each other in check. The fact that many competitors have united in their dissatisfaction over ICANN's accountability and legitimacy suggests that if ICANN does not make drastic changes in these areas it might face the power of a united group of competitors rather than competitors whose power is checked by that of the others.

§10. Enforcement of ICANN's accountability, and oversight over its activities. The United States Department of Commerce (DoC)

Current enforcers of ICANN's trust functions are:

The United States Department of Commerce (DoC)⁹¹

⁹⁰ See Part Two D.§4. at 41.

10a. Current status

ICANN's power to manage the naming and numbering system is grounded in a contract with the DoC. The courts have not passed on the legal basis of the DoC's power. The nature of its relationship to ICANN is unclear. It seems that ICANN's management consults with the DoC before making significant decisions. But DoC does not formally approve, disapprove, or overrule these decisions, and seems to exercise little oversight over ICANN. On June 12, 2002 Senator Conrad Burns called for tighter ICANN supervision by the United States government, using the withdrawal of the contract with the DoC as a threat.

The ability of the DoC to formally control ICANN is limited because full control may render ICANN a government corporation and require a congressional statute for its establishment. Among other things, this requirement is as undesirable today as it was four years ago, one reason being pressures by foreign governments and entities to de-Americanize ICANN. In addition, it is unclear whether members of Congress are interested in devoting the resources and attention to ICANN when so many important issues are on their agenda, and the public's attention is not drawn to ICANN's status. The DoC has not conducted performance evaluations of ICANN, at least not in public.

10b. Options to improve

i. Demand greater commitment to accountability and greater oversight.⁹² Subject to the limitation described above, the DoC could use its power to withdraw ICANN's contract to require changes in structure and personnel, especially if other governments and interests support these changes. Further, the DoC should exercise greater oversight over ICANN's operations and demand a formal plan, comment on the plan and require reporting of the plan's implementation.

ii. Put ICANN's contract to a bid. The competitors.⁹³ Some believe that ICANN cannot be fixed, and rather than tinker with partial solutions that would not make any difference it is time to start all over again. Others believe that this drastic option may be considered at a later date, when less drastic options have been attempted and failed. The question of whether the basis for ICANN is utterly faulty is hard to answer. That is because ICANN is reshaping. It may still drop some of its functions, change its personnel, establish a different process and restructure its internal organization. At the same time, it is now providing services that have not harmed the stability of the Internet. Hence a change may be premature.

In addition, there is no ready-made alternative to ICANN today. Arguably, no one, except the International Telecommunication Union, is willing to offer for the contract because of the assumption that the offer is very unlikely to be accepted.

⁹¹ See Part Two D. §5a.v. at 43.

⁹² See Part Two C. §2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

⁹³ See Part Two D. §4. at 41.

Nonetheless, there is no clear alternative that has gathered significant support. The only entity that expressed an interest in substituting for ICANN is the International Telecommunication Union. There were reasons why its interest four years ago did not materialize, and these reasons exist today. The United States may not be interested in severing the ties to an ICANN-like entity. The ITU is not organized under a United States statute and is not subject to the United States Congress. The only tie that remains is the DoC contract, and that may weaken. In addition, allegedly the reactions of ITU are too slow to address the needs of an Internet organization. The technical communities that dealt with the Internet naming and numbering system are also possible candidates. However, they are involved in ICANN's operations to some extent and may not be sufficiently attuned to the other interests that are currently involved, such as the business interests.

§11. The United States Courts.⁹⁴

11a. Current status

To the extent that the courts take jurisdiction in conflicts involving ICANN, courts will regulate ICANN. Currently, the California courts are hearing a dispute between a board member and the representatives of ICANN on the issue of governance, that is, the extent to which a board member may demand corporate information and then use the information independently of the board's approaches, for example, to criticize ICANN. The conflict demonstrates the duality of ICANN and the divergent views of board members. While one member views ICANN as a legislature or a public policy maker, other members and the staff view ICANN as a private sector corporation and the board as a collegiate body whose members cannot act on their own.⁹⁵ This conflict may also explain why, among other things, the ICANN's staff seeks reform by eliminating the voting constituency that elected the suing board member. In any event, judicial oversight of ICANN is limited. Unlike private trustees, ICANN is not required to report to the courts but must appear only in cases of conflicts, when it sues or is being sued.

11b. Options to improve

i. Appropriateness of courts' regulation. Whether courts are appropriate bodies to determine ICANN's governance structure is unclear. Courts will apply the California nonprofit corporation law, which does not fit ICANN. It may well be that on operational issues the board ought to act as one body while on policy issues it should act as a legislative body.

This is especially so with respect to ICANN's financial condition. Its sources of revenue are in part controlling ICANN and its expenditures should be available to the public. It should be noted that had ICANN been a for-profit corporation the law would require publication of these sources and expenditures, even if the board's meetings are privately held. Even though ICANN's open meetings suggest a policy-making legislative

⁹⁴ See Part Two D. §5a.iv at 43.

⁹⁵ See Part One A. §1. at 1.

body, with respect to the finances and perhaps other items, the board and staff view the information as confidential. In any event, the law that binds the court makes little distinction between operation and policy making. It requires the filing of financial information of nonprofit corporations with the Attorney General of the state, as representative of the people. This approach may not be appropriate for ICANN.

§12. State of incorporation legislature⁹⁶

12a. Current status

ICANN is organized under a statute that is inappropriate for its functions. It is not a nonprofit organization engaged in a civic activity nor a self-governing organization of any homogeneous group. Its articles of association and bylaws allow freedom from accountability that is suitable for managing a museum or a hospital but not a significant part of the Internet's infrastructure. Nowhere in the statute or in ICANN's constitutive documents are there requirements for the type of accountability and oversight that would support its legitimacy. An important legal requirement for following these mechanisms would enhance ICANN's legitimacy, but none is available under the California statute.

12b. Options to improve

i. Proposed ICANN statute demanding greater commitment to accountability and oversight.⁹⁷ The sooner ICANN is recognized as a one of a kind entity the better. A proposal for a special statute covering ICANN is in order. If California is not inclined to pass such an accommodating statute the state of Delaware is. It has done so with respect to nonprofit organizations that are special. The Delaware legislature has in the past accommodated the needs of nonprofit organizations with unique needs, such as the MasterCard and Visa organizations, and established them special provisions for them. ICANN can then easily reincorporate in Delaware. ICANN may have to be reformed, but not necessarily in accordance with the staff's proposal. The Act should require the application of accountability and oversight mechanisms discussed in the second part of this Report.

§13. The Attorney General of the state of incorporation⁹⁸

13a. Current status

ICANN is incorporated in California. ICANN is a nonprofit corporation that does not have clear "owners" to whom the board is accountable. The California Attorney General serves as the representative of the beneficiaries of such nonprofit corporations. The Attorney General, however, is not a strict regulator, perhaps because the donors of nonprofit organizations are active monitors of the organizations to ensure that they meet their objectives. The Attorney General interferes when serious abuse of power is evident.

⁹⁶ See Part Two D. §5a.i. at 42.

⁹⁷ See Part Two C. §2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

⁹⁸ See Part Two D. §5a.ii. at 42.

13b. Options to improve

i. Maintain the status quo. If ICANN remains incorporated in California, the Attorney General may be asked to exercise a far greater oversight than it now does. Whether this approach is politically desirable for it or for ICANN, for the United States, and for ICANN's constituencies is questionable. ICANN was established to de-Americanize the control of the root, and the Attorney General may rightly decline to enter international complicated issues, especially if the federal government is not in favor of such interference, and if the Attorney General has no experts who can monitor and supervise ICANN's operations. Thus, if more oversight is needed, the Attorney General is not the likely or desirable entity to exercise this power.

§14. The Congress of the United States.⁹⁹

14a. Current status

Congress has been monitoring ICANN by holding hearings and requesting the GAO to research and report on ICANN's activities, legality, and legitimacy. This continuous oversight has been effective to the extent that it reminds ICANN's staff of periodic oversight. The oversight is likely to continue periodically and exert pressure for change, but not specifically effect the necessary changes to establish ICANN as a more accountable institution.

14b. Options to improve

i. Continued commitment to accountability and oversight of accountability, including investigation of financing.¹⁰⁰ Congress and the GAO have been performing an important role in overseeing ICANN's status and accountability. A subject that the GAO has not yet investigated and which might be of great importance is ICANN's fundraising and its use of financing. In addition, the method and principles by which ICANN determines the fees to be charged for its approval and its services should be examined and published. This subject may be the next appropriate topic for the GAO's investigation.

§15. The IRS.¹⁰¹

15a. Current status

The IRS monitors ICANN to ensure that it does not engage in impermissible for-profit activities while retaining its not-for-profit status. It is not involved in ICANN's accountability and oversight. The limited function of the IRS does not lend itself to oversight over ICANN's accountability in other areas.

⁹⁹ See Part Two D. §5a.vi. at 43.

¹⁰⁰ See Part Two C. §2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

¹⁰¹ See Part Two D. §5a.iii. at 43.

15b. Options to improve

i. Commitment to accountability and oversight of accountability.¹⁰² The Treasury Department has expertise in supervising the performance of fiduciary duties in some financial areas, such as pension funds. Funds may lose their tax status if they violate certain sections of the Employee Retirement Income Security Act of 1974. It may well be that in addition to the DoC, the Treasury could be imposed with the duty to ensure that ICANN is accountable for its actions and that the penalty for violating its entrusted duties is the loss of its tax-exempt status.

§16. Financing entities.¹⁰³

16a. Current status

The entities that have been financing ICANN have had influence over it. However, some entities have contributed to ICANN's treasury without such influence. These are the entities that must pay ICANN fees for approvals and registration. The group that has paid significant amounts and lately refused to pay for such approvals is a strong constituency of the ccTLDs. Fees for service and fees for approvals are not supervised. In part, the financiers of ICANN have no public information before the fact to judge its performance. In part ICANN's financiers have no choice and no representation in the power structure of ICANN to supervise its decisions, and none has the power to determine the acceptability of its expenditures. Thus, ICANN is unsupervised with respect to budget or spending.¹⁰⁴

16b. Options to improve

i. Transparency and disclosure regarding financing.¹⁰⁵ ICANN should publish a proposed policy as to its sources of financing and the methods by which it should establish the fees its charges. This policy should be published, comments should be solicited, and a final reasoned proposal should be presented to the DoC for approval and to Congress for comments. The final document should not be changed unless a similar process takes place.

¹⁰² See Part Two C. §2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

¹⁰³ See Part Two D. §1. at 38.

¹⁰⁴ See Part Two D. at 38 (oversight).

¹⁰⁵ See Part Two C. §1. at 33.

§17. International organizations.¹⁰⁶

17a. Current status

Another possible oversight body is an international organization. This could be a new organization established for the oversight of ICANN, or an existing one, like the ITU, or a judicial one, like the International Court of Arbitration.

This is an idea that must be examined with care. First, should the supervising body be an existing one or a new one? How would it work? How should its members be selected, and under what principles should it make its decisions? If it should function like a court, then some international judicial bodies already exist and we can predict how they would function in the future. If we expect the oversight committee to function as a legislator, then we might witness an evolving negotiating process, which may not be desirable, and may raise questions of representation. Finally, there is a question of the power of such oversight body. Should its decisions be final? Should it have the authority to overrule ICANN's board decisions? Should it provide guidelines on particular issues before a conflict arises?

17b. Options to improve

i. Strengthening of accountability through oversight.¹⁰⁷ ICANN's legitimacy will be strengthened by supervisions. Care must be taken to prevent supervision from undermining its efficiency. Thus, supervision by international bodies which may be slow in reaction should be reserved for those issues that are fundamental where decisions are not necessary for immediate or even short-term action. ICANN is missing principles of accountability. These can be most appropriately established by a judicial-like body that is not political yet has among its members persons who understand (1) the workings of the Internet, its impact, and the political and business ramifications of ICANN's decisions and (2) the measures ICANN must take to gain legitimacy.

Conclusion

ICANN has a long way to go to improve its legitimacy and accountability. The question is not whether it can be done. Mechanisms are available to make the change internally, and there are outside parties to exercise tighter oversight. The question is whether there are persons inside the organization who understand, know how, and *want* to achieve the transformation. Without such persons no amount of information and advice will be bring the change.

PART TWO: ACCOUNTABILITY AND OVERSIGHT. GENERAL PRINCIPLES

A. When and under what conditions are accountability and oversight required?

§1. Nature of entrusted power and the trustees' accountability

¹⁰⁶ See Part Two D.§5b. at 43.

¹⁰⁷ See Part Two C.§2a. at 36 (commitment to accountability); Part Two D. at 38 (oversight).

An ordinary meaning of accountability is responsibility that people must bear for the effect of their voluntary actions on others. In this Report, however, the terms are used in a narrower sense. When persons or entities (trustees) are entrusted with property or power (power) for the sole purpose of performing their services more effectively, they must exercise that power appropriately, that is, to achieve the purpose for which the power was vested. In addition, they must exercise the power in compliance with social norms of fairness. Accountability and oversight of trustees' exercise of vested power are methods to ensure that trustees use their power appropriately. Because the beneficiaries vest trustees with the power, trustees must gain the beneficiaries' trust and support, and to do that trustees must exercise entrusted power legitimately, that is, fairly and with respect. Not only must they act fairly, but they must also *seem to act fairly* to avoid a contrary impression.

Duties of fairness and respect are imposed for efficiency and moral reasons. If trustees have broad discretionary powers, and especially if they are entrenched trustees, as defined below, the parties' relationship seems to reverse, as the trustees may impose their edicts on the beneficiaries. For example, when trustees have entrusted power to require the beneficiaries to follow the trustees' decisions (e.g., government officials). Or when the beneficiaries may not act without the trustees' consent and are subject to their conditions (e.g., beneficiaries who wish to engage in the business of Internet registrar or registry).

Trustees will be able to perform their functions more efficiently if the beneficiaries follow the rules that the trustees impose on them voluntarily. People voluntarily follow rules that impose restrictions or burdens on them when their trustees act fairly, with respect and legitimacy. In addition, it is morally unacceptable to allow trustees to use entrusted power in ways that the beneficiaries would not have accepted had they been given a prior choice. When beneficiaries surrender their power to trustees, they do so on condition that the trustees will deal with them in this manner and not arbitrarily.

Even though fairness is hard to define with precision, there is usually a consensus on what it means and its signals are readily recognized. One signal of fairness is even-handedness. Trustees must treat all similar cases without discrimination or favoritism. The second signal, which is related to even-handedness, is treating beneficiaries with respect. Respect signals to beneficiaries that they still are the ultimate power holders. Oversight, as the word denotes, is supervision over the trustees, and supervision is important to highlight the requirement for fair treatment and respect by the power holders to those who bestowed the power on them. One form of respect is the explicit recognition that power is held in trust temporarily and that, even as they must obey the trustees' edicts, the beneficiaries hold the ultimate true power.

A concept that is related to fair dealing is legitimacy. "*Legitimacy* is external validation . . . defined by a set of social norms as appropriate."¹⁰⁸ Accountability and oversight are the general means by which legitimacy is attained. It should be emphasized that legitimacy is not legality. Many rules and institutions can be legal but not necessarily legitimate. Legitimacy involves fair conduct and is important because it contributes to voluntary compliance. In a democratic society, trustees that attempt to impose their entrusted power without legitimacy may find it very hard to do. If their exercise of the power is fair and legitimate, they will gain consensus and following, even among those who are not fully in agreement with them. Even coercive power raises fewer objections when it is deemed legitimate. In sum, legitimacy and fair dealings are powerful enforcement mechanisms for trustees.

While trustees may use their own property as they wish, their use of entrusted power is strictly limited to the purpose for which the power was given to them. For example, corporate directors and officers may be entitled to compensation, which they may use as they wish. But they are not entitled to use, and benefit from, corporate assets and corporate opportunities. Those belong to the corporations they manage. There may be situations in which the distinction is not clear-cut. The principle, however, is the basis for determining the need for accountability of trustees and oversight over their activities. Thus, trustees are obligated to use entrusted power. They must use it to perform the services they have undertaken to perform, precisely in accordance with the purpose for which the power was given and pursuant to directions. Trustees may not use entrusted power for any other purpose, that is, they may not use entrusted powers as owned powers.

2. Variations of entrusted power related to accountability

Entrusted power exists in many forms throughout the globe. It is the foundation of democracy, advanced economies, and of any delegation of functions and specialization. Even though the variations of such power and the means of ensuring that it is properly used are enormous, a number of models, though not "pure," can serve as guides. These models are relevant to how the powers must be accounted for and supervised.

2a. Extent of power

i. Inability to specify action. Discretionary entrusted powers. Entrusted power is discretionary in various degrees. One of the main reasons for granting trustees discretionary power is that in some contexts the functions they have to perform cannot be specified in detail in advance. These include: long-term functions for which there is no information about future environment related to the functions, such as managing a business; short-term functions that are subject to unpredictable situations, such as determining the route of packets through the Internet; and functions that require expertise, such as medical treatment or creating software for project management through the Internet. In these cases the trustees must be given freedom to determine how their functions will be executed.

¹⁰⁸ Karen Golden-Biddle & Hayagreeva Rao, *Breach in the Boardroom: Organizational Identity and Conflicts of Commitment in a Nonprofit Organization*, *Organization Science*, 8:593, 634.

Discretionary power is greater than power subject to detailed instructions. Very general standards of behavior must then guide discretionary trustees, and these are often implied. Trustees that deviate from these guides must show that the guides do not apply to their particular case or function or to a particular event.

ii. Inability to evaluate the results of the actions. The exercise of powers produces results, some of which can easily be evaluated, while others cannot. For example, we can generally evaluate the exercise of power to purchase by information about the purchased products, their performance, their price, and the market conditions. These can be documented. In contrast, it is far more difficult to verify the results of a policy decision to increase the number of top-level domain names in light of their impact on trademark holders, business conditions of registrars and registries, and the users of domain names, including individuals and businesses. Selection of the appropriate accountability mechanisms for exercise of entrusted powers is affected by the ease by which we can evaluate their results.

iii. Inability to remove the trustees. Entrenched power. Entrusted powers can be entrenched under certain circumstances. For example, when, with very few exceptions, beneficiaries cannot remove the trustees during their tenure (e.g., corporate directors). Or when the trustees have a lifetime position or have the power to nominate their successors.

2b. Policy versus operational decisions¹⁰⁹

In most cases it is not difficult to distinguish between policy decisions and operational decisions. In borderline cases the following tests can be used. The greater the number of impacted parties, the more likely the decision involves policy. Thus, legislation and regulatory rules usually apply to more persons than specific decisions, although court cases apply to those who were not parties to the cases because the decisions are viewed as rules, by analogy. Further, the degree to which the results of the decisions can be evaluated can signal a distinction. The more predictable the results, the less likely are the functions to involve policy. Thus, policy decisions, such as whether to increase the number of gTLDs and ccTLDs, their choice and the process of their allocation, must be determined by a process suitable for policy decisions. Similarly, the "regulation" of registrars and registries and the contracts that they sign with ICANN are matters of policy and must be justified as such. If the relationship becomes standard, accountability may then follow mechanisms for operational practices.

It should be noted that policy decisions are broad but do not have a direct effect until they are implemented. Implementation is narrower, but has greater effect on specific individuals or entities when the policies apply to them. Thus, discretionary and non-discretionary powers are each limited in a different way. An entity that holds power to make policy decisions as well as to implement them has far more power than an entity

¹⁰⁹ See Part One B.§2b.i. at 9; Part One B.§4b. at 13 (process of communicating with multiple beneficiaries); Part One B.§5b.i. at 14 (institutional structure: conflicting commitments).

that has one or the other. Therefore the accountability mechanisms over such an entity should be relatively stricter.

2c. Public sector and private sector powers

Power can be entrusted in a political context, such as the power of democratic governments entrusted to them by the people. Governmental power can be classified as legislative—laying down general policies, and executive—implementing the policies.

Power can be entrusted in a private sector context. It can be held by individuals, such as agents and private trustees, and entities, such as corporations (for profit and not for profit) and partnerships. Private sector institutions can combine limited legislative powers—laying down general policies for actors within the institutions, and executive—implementing these policies.

Both public and private sector powers can be coercive and expansive, and both are limited and controlled by virtually similar mechanisms that differ depending on their scope and the degree of coercion that backs their enforcement.

2d. Boundaries of entrusted power by beneficiaries' ability to terminate the relationship

Beneficiaries can contain and control the use of entrusted power by their ability to terminate the relationship. They can do so by dismissing the trustees and retrieving the entrusted power, or, in an institutional context, by exiting the institutions. For example, in a private sector corporation shareholders can remove the trustees or elect others, or sell their shares. Beneficiaries choose "voice" or "exit" mainly depending on their cost. Shareholders' cost of exit (although sometimes with losses) is far lower than citizens' or residents' cost of exit from a region or a country. But in both cases they exercise some control over the trustees' behavior. Thus, the level of trustees' accountability can vary according to the beneficiaries' cost of exit: the higher the cost, the more powers the trustees have, and the greater the requirement that they account for the exercise of their powers.

3. Limitations and duties on the use of entrusted powers

Entrusted powers can be express or implied, and are limited by prohibitions on certain activities and duties to perform other activities. Limitations on conflict of interest as well as fairness in decision making are crucial to gain beneficiaries' trust, to induce them to entrust power to trustees and to accept the trustees' decisions.

3a. Personal and inter-institutional conflicts of interest.¹¹⁰

Conflicts of interests to which trustees must account are of two related kinds. One involves personal conflicts, that is, actions that may result in benefits to the trustees or to

¹¹⁰ See Part One B.§4b. at 12 (disclosure of conflicts of interest).

third parties outside the mandates of the entrusted powers. The second type of conflicting interests involves conflict between the interests of the beneficiaries as stakeholders and those of the institution as a whole. In both cases the trustees' loyalty to their institution and its objectives is subverted and involves their own interests mixed with those of third parties.

3b. Inter-institutional conflicts of interest. Private sector model and legislative model.

Usually stakeholders' interests and those of the institution have much in common. However, in some aspects their interests may conflict with those of other constituencies and with those of the institution. Rarely are all interests aligned in full harmony.

i. Loyalty to the institutional objectives. Private sector model. A typical model in the private sector is the trustees' loyalty to the institution and its objectives. An institution's trustees are, in principle, independent of any constituency, even if that constituency elected them. They have no duty to comply with the wishes of those who elected them, although they may consult them. Their duty is to the entity. The trustees must weigh conflicting arguments and claims in light of the benefits to the parties but with the primary purpose of benefiting the institution as an enterprise in its own right. In this view, the trustees have no authority to manage the institution any other way. For example, if they use entrusted powers to benefit their constituencies at the expense of the institution they are deemed to have abused their trust. Needless to say, if they misappropriate the power for their personal benefit, they have abused their trust in violation of the law.

ii. Greater loyalty to the constituencies. Legislative model. Another model of trustee relationship is that of a legislature. Legislators act more as an aggregation of negotiating representatives. They care about the country as a whole, but are far more justified in protecting their constituencies' turf and fighting for their enrichment. They negotiate on behalf of their voters with representatives of other constituencies for a large slice of the pie. And that is legitimate. But even legislatures draw the line. No legislator may act to benefit personally or benefit others from his decision, except when the benefits inure to the country, his state, or an industry or a broad interest group. No specific individual or entity should benefit without sharp condemnation or, perhaps, legal repercussions.

As compared to private sector trustees, legislators are subject to greater accountability. They live in a truly transparent glass bowl. Their sessions are more public than private sector trustees' sessions. Deals may be made in private. But the deals are disclosed and must be explained and justified under the bright glare of publicity. The reason for the transparency is that legislators have a very broad substantive discretion, dealing with every aspect of our lives. Private sector trustees have a relatively narrower area of impact.¹¹¹ In addition, legislators must receive far more inputs from their

¹¹¹ There are exceptional cases, such as company towns, on which courts have imposed duties similar to those imposed on governments.

constituencies to whom they are more beholden and accountable than private sector trustees.

B. Accountability and oversight mechanisms (A non-exclusive tool box)

1. The nature and reasons for accounting and oversight. Reduce costs to the trustees and their beneficiaries

One reason for the trustees' duties to account is cost. When power is entrusted, the beneficiaries may incur significant cost in ensuring that the trustees will use the vested power as directed. Accountability and oversight reduce this cost to the beneficiaries. In a competitive environment, when trustees vie for clients or voters, trustees must establish their trustworthiness to win the beneficiaries over. Accountability and oversight reduce the trustees' cost of persuading potential beneficiaries and voters that they, the trustees, are trustworthy. In the private sector, competition is established by the abundance of trustees who offer the same services. In the public sector, competition is established by the abundance of candidates who seek the vote of the beneficiaries. In both sectors competing trustees offer accountability and oversight to demonstrate their trustworthiness.

Trustees who hold monopolistic positions, such as self-perpetuating directors or life presidents, are less driven to adopt measures of accountability and oversight. However, even they may prefer to be considered trustworthy, especially in a public sector environment where the trustees must induce their beneficiaries (citizens or residents) to follow and obey the trustees' decisions. If they are less trusted, the enforcement of their edicts can be more costly, for example, they may have to use force.

2. The different mechanisms of accountability

2a. Accountability for the exercise of entrusted discretionary power. Narrow and broad discretion

The mechanisms of accountability differ depending on a number of factors. One factor is the type and degree of the power with which trustees are vested. Thus, if the trustees are vested with broad discretion they bear a heavier burden of accountability. Those with narrower discretion may have to account only after they exercise their entrusted power.

2b. Broad discretion should require more accountability. Broad discretion cannot be controlled without eliminating its benefits. Therefore, accountability for broad discretion requires different mechanisms that do not destroy its benefits

Trustees can be subject to varied degrees of controls, depending on the extent of their discretion and the practicality of controls over their decisions. If trustees are vested with broad discretion that is necessary in order to perform their services effectively, controls present a problem. Specific and direct controls may limit discretion and

eliminate or undermine the benefits of the trustees' services. Many "principals," such as voters, are unable to control their trustees without much duplication, personal costs and conflicts among the beneficiaries. Therefore, even though trustees with broad discretionary power should be more accountable and strictly supervised than those with limited discretion the accountability measures over such trustees must not limit their discretion and must not require control by the numerous beneficiaries.¹¹² Discretionary trustees may be required to follow certain procedures but relieved from oversight on the merits of their decisions (unless they acted in conflict of interest).

2c. Public and private sectors

Public and private sector trustees are subject to similar accountability mechanisms, depending on the nature of their entrusted power. Thus, accountability techniques of private sector officers and employees within a corporation are similar to techniques used over government officers and employees. The latter are subject to less flexible guidelines, however may have greater security of employment (though not full entrenchment), which protects them from oversight, to some degree.

Legislators are subject to similar types of accountability and controls, by reporting their activities periodically, after the fact. In addition, voters may fail to elect them periodically. Thus, reporting on actions and proposed actions, budgeting, election, and voting on particular issues and for particular candidates, policy statements, targeting, such as profit and timing targets, and termination of office or employment, constitute the main accountability mechanisms for private and public sector trustees. Within their organizations, private sector trustees use similar accountability techniques.

2d. The mechanisms of accountability may depend on the degree to which the exercise of entrusted powers can be evaluated by the results that they produce

Many discretionary decisions are more difficult to evaluate by their results. The results may be too complex and costly to evaluate or may appear many years after the decisions (e.g., a declaration of war, or a preparation of a will that may be faulty).

If the results cannot be evaluated easily, trustees may have to seek the beneficiaries' input and take these inputs into consideration before they take action. Corporate directors have far broader discretion because the specific activities that they must undertake cannot be specified. They depend on complicated evaluations of changing circumstances. The directors must, therefore, be accountable by other means. They sometimes must request the shareholders' approval for certain actions in advance.

2e. Accountability mechanisms may depend on alternative controls to which the trustees are subject

¹¹² For discretionary trustees' accountability before taking action see Part Two C. §1c. at 34. For accountability after the fact see Part Two C. §1b. at 33.

Alternative controls may be exercised by markets or governments. Thus, if trustees are exposed to significant competition from other trustees, the accountability mechanisms regarding their fees may be left to the markets. If, however, the trustees have little or no competition, they may have to be accountable for the use of their profits and costs, and perhaps subject to budgetary constraints.

If beneficiaries control the trustees' actions, such as principals who control their agents, most accountability mechanisms are left to the direction of the principals, although agents must account to principals for those actions that principals may find costly to discover, for example, the agents' receipt of secret profits.

In contrast, legislators have broad discretion to introduce and vote on legislation. Their discretion is very broad, because legislation extends to almost every facet of the voters' lives. On some issues, voters can bind the regulators by a referendum, similar to direct shareholder votes on select issues. Usually, voters express their views of the legislators' performance by voting them into or out of their positions. Voting as a means of termination of position is the main tool of accountability by legislators. But if the trustees have broad discretionary power, and have tenure for a number of years as well, as legislators have, then the accountability mechanisms involve far more transparency, rigorous voting requirements, competition from other candidates, and voter referenda on particular issues.

C. What mechanisms of accountability are imposed on trustees and under what conditions?

Introduction

In a one-to-one relationship between a trustee and a beneficiary, the parties may determine how the trustee will account to the beneficiary. Usually, the trustee has to seek the beneficiary's consent or directive before taking an important step and give an account for his more routine activities after the fact. But in relationships between the leaders of institutions and their many beneficiaries, accounting is neither left to arrangements among the parties nor to the arbitrary decisions of the trustees. There are acceptable norms which trustees must follow in the private and public sectors. Many of these rules are established by law.¹¹³ Some rules constitute best practices that embody acceptable norms, without which legitimacy is very difficult to achieve. These are default rules, serving as surrogates for agreements among the parties.

The following mechanisms to achieve accountability and legitimacy are divided into the following three categories: (1) methods of communications, oversight and controls; (2) institutional structures and outside relationships; and (3) private sector organizations and public sector organizations.

¹¹³ See Ann Taylor Schwing, *Open Meeting Laws 2d* (2000) (containing compilation of the laws that require open public meetings for certain decision-making functions).

1. Transparency and disclosure¹¹⁴

1a. Transparency and disclosure by the trustees

Trustees account for their actions by providing information about their use of entrusted powers. As trustees, they must be "transparent" with respect to the exercise of entrusted power. Transparency serves two functions. First, it allows the viewers to determine whether the trustees have exercised or are going to exercise their powers properly. Second, if the trustees know that their actions are transparent, there are certain prohibited actions that they will not take. Thus, transparency is also a preventive measure against violations of trust. Transparency is achieved mainly by imposing on trustees a duty to disclose. The duty usually involves details about the items that should be disclosed.

1b. Limited discretion and accountability after the fact

When the trustees' discretion is limited and when the results of the trustees' decisions can be evaluated, the trustees usually are required to disclose what they have done after the fact. For example, trustees that have spent specified earmarked expenditures will provide an account of the money spent after the fact.

1c. Discretionary powers, including policy making, require before the fact accounting and thereby reduce the discretion. The process of communicating with multiple beneficiaries¹¹⁵

When the trustees' powers are discretionary, and if the results of the decisions are not easy to evaluate after the fact, a far more complex type of disclosure is required. These powers usually involve policy decisions, whether in the public or the private sector. Thus, proposals for legislation, as well as decisions to change corporate structure or fundamental policies, fall within this category. Such policies will include, for example, ICANN's policy decisions to increase the number of country code top-level domain names or generic top-level domains or legislative decisions to impose certain forms of contracts or qualifications applicable to all registrars.

The process by which discretionary entrusted power is to be accounted for involves a number of steps. First, the trustees must disclose their intention to take certain actions. Disclosure must be published to reach those who are affected and those who otherwise have an interest in the issues. If the public is interested, then disclosure must be made in a predictable particular place, such as the Federal Register, or in the case of ICANN on its web site, and should be easily accessible. If the beneficiaries are many (e.g., shareholders in a publicly held corporation or citizens of a state), or if the issue is very important, disclosure may involve publication in newspapers or other media, as well as written reports in official publications. When trustees account to beneficiaries by

¹¹⁴ See Part One B. §3b. at 12 (disclosure of conflicts of interest); Part One B. §5b.i. at 14 (institutional structure: conflicting commitments); Part One B. §16b. at 24 (financing entities).

¹¹⁵ See Part One B. §4. at 13 (the process of communicating with multiple beneficiaries).

disclosure, they must be sensitive to the level of understanding and language of the beneficiaries. The information must be understandable and accessible.

Second, the public is invited to provide input and comments on the proposed actions. Those affected by the decisions of the trustees should have an opportunity to be heard. This does not necessarily mean in the presence of the decision makers, but it means opportunity to express their view in a form that will reach the decision makers. Input from beneficiaries can be obtained in many ways, including voting and requests to an ombudsman, both of which are discussed in greater detail in the section addressing structural organizational mechanisms.

Third, the trustees may publish a revised proposal, if their proposal is significantly different from the initial one. In the revision, the trustees address the public's comments and respond to them by accepting or rejecting them, in each case explaining their response. Alternatively, or after additional comments, the trustees may make their decision, publish it and respond to any comments that were left unanswered. In either case, it is crucial for trustees to provide beneficiaries with some evidence that the trustees received the beneficiaries' inputs, and considered and reacted to the inputs, whether by accepting or rejecting them. In all cases, the trustees must explain their reasons for their decisions. A classic example of this approach can be found in court decisions, in releases of the Securities and Exchange Commission preceding rulemaking, and, to a lesser extent, in "legislative history" accompanying congressional legislation. This process supports the respect and fair dealing on which trust and legitimacy are grounded, and induces those who do not agree with the decision to accept it nonetheless.

The reasons for this rather cumbersome and lengthy process are to require trustees to articulate their proposed actions and notify beneficiaries of the proposed actions. The process narrows the trustees' discretion on the issues at hand. It narrows their discretion further by requiring them to respond to comments and provide reasons for their decision. Another important reason for the process is to assure the commenting beneficiaries that their comments have been read and addressed. Judicial decisions, legislative enactments, and regulators' actions all provide this type of response.

In the private sector a similar process is required, but response and comments by the beneficiaries are not as common. The beneficiaries have the right to accept or reject by a referendum vote certain specific proposed actions, such as mergers and some acquisitions. By and large, however, they receive information and comment by votes or actions rather than verbal input. The trustees usually respond in court proceedings under a judge's orders.

1d. Substance and verification of the disclosure¹¹⁶

i. What trustees must disclose. Trustees must disclose how they used the entrusted power, who benefited from the use of the power, whether the benefit inured to third

¹¹⁶ See Part One B. §1b.iii. at 8 (ICANN should account to the financing entities and to the public for its use of the funds that it raises).

parties or the trustee in violation of the purpose for which the power was vested, and any other fact that is material to the beneficiaries. They must disclose conflict of interest situations that arose in connection with the performance of their services. Because trustees must be informed and deliberate in making their decisions, trustees may have to disclose the reasons that underlie their decisions.

ii. Verification of disclosed statements. It is not enough for the trustee to disclose the material facts to the beneficiaries. Trustees must also provide evidence to verify the disclosed facts, such as receipts of expenditure items, verification by certified public accountants, and in some cases, approval by government officials.

1e. Limits on transparency and disclosure requirement. Private sector corporations and public servants

Transparency and the duty to disclose are not unlimited. Trustees cannot act effectively as a collegiate body under continuous scrutiny. For example, a board of directors of an operating corporation may hold closed meetings because full disclosure may harm the competitive position of the corporation in the market. In addition, disclosure may have a chilling effect on free debates among the directors, persuasion, and change of mind without loss of face. Nonetheless the board should keep minutes of the meetings. Further, only parties with legitimate interests should have access to internal information. Directors usually have unlimited access to corporate records. But shareholders must show a "proper purpose."

Public servants are exposed to "sunshine laws" which can be very stringent, so as to preclude officials to speak to parties during proceedings before them or even prohibit members of a collegiate group to speak to each other in a nonpublic environment.

2. Self-limiting principles

2a. Commitment to accountability¹¹⁷

Acceptance of accountability means "willingness to endure public scrutiny [and] even [to invite] the public to scrutinize the behaviors of the organization's leadership."¹¹⁸ This approach signals to the world that the trustees have nothing to hide, and that they trust the public. This last signal of trust is important, because it gains reciprocity.

¹¹⁷ See Part One B.§1b.i. at 7 (ICANN's financial problems); Part One B.§7b. at 17 (oversight: enforcement of accountability); Part One B.§10b.i. at 20 (United States Department of Commerce); Part One B.§12b. at 22 (state of incorporation legislature); Part One B.§14b. at 23 (Congress of the United States); Part One B.§15b. at 23 (IRS); Part One B.§17b. at 25 (international organizations).

¹¹⁸ See Richard Hofer, *Accountability in Action? Program Evaluation in Nonprofit Human Service Agencies*, *Nonprofit Management & Leadership* 11:167, 174 (2000) (quoting Robert P. Lawry, *Accountability and Nonprofit Organizations: An Ethical Perspective*, *Nonprofit Management & Leadership* 6:171, 175 (1995)).

2b. The purpose of self-limiting rules

Trustees create or undertake self-limitation because, like self-bonding, this is a measure of accountability. It reduces the beneficiaries' cost of establishing their trustees' use of entrusted power and enhances their trustworthiness. Self-limiting rules create predictable (as opposed to arbitrary) use of discretionary power, thus limiting the trustees' opportunities to abuse their trust. These rules also provide criteria against which the trustees' decisions can be evaluated. The rules are especially important when trustees have broad discretionary powers that cannot be specified in advance. The rules contain principles that the trustees must follow in exercising their discretion and the processes that they must adopt.

2c. Source of self-limiting rules

Some self-limiting practices are based on the norms of the particular society, those assumed by the society and traditionally acted upon by trustees. Some practices are based on self-imposed rules, such as codes of conduct, whether required or encouraged by law and regulators. Most large private sector corporations and financial institutions; self-regulating associations, such as the diamond and securities exchanges; and social self-regulatory organizations have adopted such codes of conduct.

2d. Deviations from the self-limiting rules

Deviation from the self-limiting rules requires approval in advance by a higher authority. Deviation by the staff requires approval of the directors. Deviation by the directors can be challenged in court. The directors bear the burden of showing that the deviation was justified on the merits (e.g., that the particular case did not pose the problems that the rules of conduct were designed to address or that the problem was addressed in another way). Deviation may undermine legitimacy unless explained and justified.

2e. Substance of the rules. Conflicts of interest

Most self-limiting rules deal with trustees' conflict of interest transactions, foreign corrupt practices and other practices that are likely to undermine accounting structures and implementation of explicit laws, such as the prohibition on insider trading in securities. In all cases, large institutions exercise controls to enforce these self-limitations and accept responsibility for their trustees' and employees' transgressions. The rules limit not only actual abuse of trust, but also activities, which either tempt, or lead to possible, abuse of trust. For example, trustees that hold entrusted property must earmark and segregate trust property, lest they will be tempted to use it for other than trust purposes. Trustees should not be beholden to the persons that seek their exercise of discretionary power as trustees. Most extreme examples are judges who should refrain from speaking

to one of the litigating parties unless the other party was present.¹¹⁹ Another example is even-handedness, as part of the principle of fairness.¹²⁰

Self-limiting rules may be substantive principles, for example, "we will, or will not, take a certain action except under the specified circumstances," or principles to be followed under described circumstances, for example, "in deciding certain subjects, we will consider only the following items but not others." These limitations represent an attempt to reduce the trustee's discretion in ways that do not limit their ability to act under unknown future situations. In addition, the limitations may be subject to exceptions in extraordinary circumstance. Among these rules are principles of even-handedness and fair dealing with members, as well as previous and future members. The rules contain also processes for hearing complaints and provide for remedies.

2f. Procedure

Self-limiting principles can impose procedures rather than substantive areas. For example, trustees may announce that they will make a decision within a certain period, determine certain subjects by sub-committees, hold hearings, or invite written comments, or publish proposals and decisions in certain publications. The legislatures, the courts, the regulators all have such procedural self-limiting rules. Corporations include such rules in their constitutional documents.

2g. Application to government personnel

All government employees and government offices must comply with rules of conduct. The object of the rules is similar to that in the private sector institutions, and is aimed at preventing personal conflict of interest transactions. Thus, government officials at the Securities and Exchange Commission, for example, may not accept the payment for a meal beyond a few dollars, even from long-time friends. They must seek approval by the controller for every transaction in stock and receipt of payment for advice even on matters that were not within the staff's jurisdiction.

2h. Obligation to follow precedents

Another mechanism for establishing accountability is the trustees' obligation to follow precedents, both rules and decisions made by the trustees or by others. Precedents are valuable and efficient. They offer predictability and demonstrate fairness and even-handedness for the like cases. They incorporate the studies, wisdom and ideas of people who dealt with the same issues from which the current trustees can learn. Precedent application is efficient in precluding repetitious efforts. Precedents are rarely identical to situations at hand but can be applied by analogy, especially if the policies underlying the precedents are similar to those underlying the cases at hand. Adherence to precedents demonstrates self-limitations and invokes trustworthiness.

¹¹⁹ On conflict of interest of this kind at ICANN see Part One B.§5a.i. at 14.

¹²⁰ See discussion at Part Two A.§1. at 25.

3. Use of formal planning¹²¹

Institutions establish formal strategic (long-term) and tactical (short-term implementing) plans. Formal planning, including budgeting, is a process that binds trustees. These plans can be analogized to the trustees' own promises. The trustees' performance can then be judged by these plans. The strength of these plans is in part that they are written by the trustees themselves and not imposed on them, and they serve as a pledge. The plans become "an orienting metaphor that allows the organization to be understood by" the institutions' financing entities and other stakeholders.¹²²

D. Oversight: Enforcing accountability¹²³

1. Financing entities as a mechanism for control, accountability and oversight¹²⁴

The power to finance, supervise a budget and require accounting for money spent is an important mechanism for controlling and creating rules of accountability and for overseeing trustees' activities.

Corporate management has used this mechanism for controlling employees, and university administrations have used the mechanism for directing and influencing independent faculties and their departments. The budget and financing can be used to direct trustees to act in certain ways, with various degrees of detail. Accounting based on budget provides the feedback from the trustees, as they must show how they used the money and the results of their use.

1a. A similar scenario appears in nonprofit corporations.

Large donors influence the way the organizations will use their donations and may be offered choices for targeted projects rather than allow the management to determine the allocation of the funds. Further, in many nonprofit corporations large donors are board members and, in this capacity, they influence and monitor the way their donations are being used.

1b. Budgeting.

Congress may add guidelines, for example, to devote more resources to certain activities, and itemized directives, for example, for certain activities, such as roads or other projects. "No taxation without representation" represents the demand of even small taxpayers for influence on how their money is spent. Every government department is

¹²¹ See Part One B.§1b.ii. at 7 (ICANN's financial problems); Part One B.§6b.iv. at 17 (institutional structure: representation of the users and small businesses).

¹²² Melissa Middleton Stone & Candida Greer Brush, *Planning in Ambiguous Contexts: The Dilemma of Meeting Needs for Commitment and Demands for Legitimacy*, *Strategic Management J.* 17:633, 645 (1996).

¹²³ See Part One B.§10b.i. at 20 (United States Department of Commerce); Part One B.§12b. at 22 (state of incorporation legislature); Part One B.§14b. at 23 (Congress of the United States) Part One B.§15b. at 23 (IRS); Part One B.§17b. at 25 (international organizations).

¹²⁴ See Part One B.§16. at 24.

also budgeted, allowing the heads of the department to control to some extent the activities of their subordinates.

In sum, both small and large contributors to trustees refuse to pay unless they are convinced that their money is used for the purposes for which they were told it would be used. Trustees who do not account for their activities are unlikely to induce contributors to finance their activities.

1c. Limits on contributors' powers.

While contributors exert powerful influence over the use of their contributions, they do not and should not have unlimited power to guide the institutions' activities. The institution has its own objectives. Financing entities offer their contributions because they agree with the main objectives of the institution. If a serious disagreement emerges, contributors will not contribute but it would take more effort and convincing of other constituencies to change the objectives or directions of the institution.

2. Institutional structure

2a. Hierarchical mechanisms

The power allocation within the organization restricts the trustees' powers and each group then becomes the supervisor of the other. Trustees' duties can be enforced by the structure of the organization in which they serve. Organizations are usually hierarchical, each layer of authority supervising the lower layer. Thus, accountability mechanisms apply within the organization. Employees account to their superiors, management -- to the board of directors.

Accountability of the board depends on how board members obtain their powers in the first place. If they are elected periodically, then election serves to influence how the board behaves, and, if voters' displeasure is sufficiently strong, they remove them from office. As a result, the boards attempt to account to their voters throughout their tenure, and are sometimes required to do so by law.

A legislative structure is less hierarchical. However, the legislature is composed of representatives of most interest groups. Today's legislatures hold representatives of all segments of the society that they govern. Thus, there are spokespeople for those who are affected by deals among others. No deal can be made without the input of minority representatives, even if they have no decisive voice. Long-term, they might have.

2b. Internal control mechanisms

Trustees' duties are also enforced by internal control mechanisms, such as a controller, internal audits, peer reviews, or an ombudsman. These are focal points for active supervision, such as are conducted by internal audits and peer reviews, and for complaints that require redress such as are addressed to ombudsmen. Review boards, as

the one which ICANN has on the books but not in practice, are designed for complaints that can be redressed by command, while ombudsmen can receive complaints but redress them only if they convince the trustees that hold the power to do so.

2c. Formal institutional mechanisms-voting and voters¹²⁵

We have dealt with financing entities in the previous section. If the organizational leadership is elected, then the second most important group of trustee supervisors is the voters. Trustees are constrained to act for the benefit of the voters through elections. Voting presents an enigma, about which many scholars have pondered. Since a voter among millions is unlikely to have any impact, what drives any voter to vote? In fact, often the percentage of voters is very low. One of the reasons, however, is that voters feel empowered by voting rights. They value the right to vote even if they do not. Voting thus increases legitimacy. Legislators pay attention to the votes, and these inputs limit and direct the legislators' discretion. These inputs demonstrate the beneficiaries' desires and opinions with respect to significant issues.

Further, in light of the transparency, under which the legislators act, there are usually people and organizations that react to legislative actions.¹²⁶ However, voters do not have unlimited power of supervision. For example, the law usually prohibits voters to vote for money or other economic benefits. Each voter is to some extent the trustee of the others. Voters are presumed to expect each other to vote according to their opinions and ideas, and may be influenced, except by money or economic benefits.

The process of voting usually follows a pattern. Nominations to a board are solicited either directly from the voters. If voters are too numerous, or if the directors require special expertise, nomination of the slate of directors is established by a nominating body. That body as well can be elected or composed of the management, as in the case of private sector corporations or by the predecessor independent directors, as in the case of mutual funds. Nomination in the political arena takes a number of forms, and is usually self-propelled, depending on the number of supporting voters a self-nominator receives.

Nonprofit corporations often have self-nominating and self-electing boards. That is because they have no shareholders. Their beneficiaries are the members of the public, too transient and impossible to identify. Further, members of the public may not have a sufficient stake in the objectives of the corporation to choose its appropriate leadership. However, some nonprofit organizations have specified members who do elect the boards. For example, banks that are members of MasterCard, a nonprofit organization, elect its board. Similarly, the members of the New York Stock Exchange elect its board.

¹²⁵ See Part One B.§6b.i. at 16 (institutional structure: representation of the users and small businesses).

¹²⁶ Large corporations may be subject to more scrutiny and interest, but institutions like ICANN are less publicly understood or known. Therefore, public monitoring and raising issues about ICANN's accountability are less effective than those of legislatures.

2d. Formal external institutional mechanisms¹²⁷

Board members, members and other participants may have, under the law, the right to sue in courts of law (or perhaps before arbitrators) on behalf of the institution and assert its claims against both third parties and other members of the organization, such as the directors. The members may also sue directly on violation by the corporation of their rights, such as the right to examine the corporation's books and records or the right to prevent the corporation from engaging in activities outside its objectives.

3. Market enforcers. Insurance, guarantees, and verification by third parties¹²⁸

Organizational mechanisms can also involve outsiders, such as outside auditors and reviewers. Markets provide enforcers of accountability, such as accountants, lawyers, investment bankers, and other experts, as well as guarantors and insurers. Some of these enforcers are regulated both by self-regulatory organizations (e.g., bar associations) and some by government agencies or the courts as well.

4. Competitors¹²⁹

Competitors can render trustees accountable and oversee the use of their discretion in a number of ways. Competitors offer their services as alternatives to the trustees' services. To the extent that the beneficiaries can choose others, these alternatives rein in the trustees. Competitors also can control naturally monopolistic trustees by posing a threat of entering the markets if the trustees exercise their power in such a way as to make it worthwhile for competitors to enter the market or capture the power. This counter-power is similar to constitutional balancing forces that limit the exercise of power by any one of the actors (legislators, courts, and regulators).

5. Government

Governments play a decisive role in controlling abuse of trust power. First, organizations are usually established under domestic and international laws that define the trustees' exercise of the power and internal controls, and the rules that trustees must generally follow or be held liable for abuse of trust. In addition, the organizations themselves establish rules under which the trustees within the organization must act.

Second, domestic and international courts exercise control over trustees that breach their trust by violating the laws, or the institutional constitutions. Third, regulators sometimes legislate and enforce trustees' duties, especially institutional trustees. While the rules prohibiting breach of trust by legislators may differ from those by private sector institutions, the bases for these rules are the same.

5a. Domestic government regulators

¹²⁷ See Part One B. §6b.iii. at 17.

¹²⁸ See Part One B. §8b. at 18.

¹²⁹ See Part One B. §9 at 18; Part One B. §10b.ii. at 20 (United States Department of Commerce).

i. State of incorporation legislature.¹³⁰ Most organizations are formally established under a U.S. state or federal statute. The statute provides the framework for the organization and its relationships to outside parties. The statute also provides the fundamental rules for accountability and oversight over the trustees who operate the corporation, usually its board of directors and its officers. The enforcement of these rules concerning accountability and oversight is generally with the members of the corporation, whether shareholders, or members.

ii. The Attorney General of the state of incorporation.¹³¹ If the corporation is a nonprofit corporation, the enforcement of accountability vests in the Attorney General of the state and is usually quite passive. Unless significant losses or deviation from the main objectives have occurred or unless there is a public outcry there is little chance that the Attorney General's office will interfere. One reason why such corporations do not suffer much abuse of power is that their large donors whose interests identify with those of the corporations sit on, and usually dominate, their boards or otherwise control the use of the corporate assets. Hence the main deterrent of abuse of trust power is not in the hands of the government but in the hands of the donors. If the donors are disappointed and cease to contribute, the corporation may expire for lack of funds.

iii. The IRS.¹³² The IRS monitors nonprofit corporations to ensure that they do not engage in impermissible for-profit activities while retaining its nonprofit status.

iv. The United States Courts.¹³³ To the extent that the courts take jurisdiction in conflicts among parties, courts regulate. However, their oversight is limited. Unlike trustees of estates that are required to report to the courts periodically, corporations whether nonprofit or for profit must appear before the courts only when they sue or are being sued.

v. The United States Department of Commerce (DoC).¹³⁴ To the extent that the powers or functions of a corporation are based on an understanding or a contract with the United States government, the DoC may regulate by its threat to withdraw the authority. This is ICANN's situation.

vi. The Congress of the United States.¹³⁵ Congress has the power to monitor and pass regulatory laws. Congress has an investigative arm, the General Accounting Office, that investigates issues upon request and reports to Congress.

¹³⁰ See Part One B. §12. at 22.

¹³¹ See Part One B. §13. at 22.

¹³² See Part One B. §15. at 23.

¹³³ See Part One B. §11. at 21.

¹³⁴ See Part One B. §10. at 19.

¹³⁵ See Part One B. §14. at 23.

vii. Regulators of particular activities. To the extent that a trustee engages in certain activities, regardless of its legal structure, it will be regulated like all others that engage in the same activities.

5b. International organizations¹³⁶

Foreign countries and international political organizations may exert regulation on a corporation that operates within their territories or under a treaty with other countries. Therefore organizations that function around the globe are subject to such regulation. In addition, there are international political organizations such as the United Nations and its numerous affiliates that may exert regulatory pressures on a corporation.

5c. Technical organizations

These organizations establish standards that are followed by all actors. These standards, like all rules, regulate the activities of corporations engaged in the area subject to the standards.

6. Protection of trustees

Trustees are not guarantors. They are protected when they have performed their duties without conflicting interest and with attention and deliberation, yet made a mistake. Further, some institutions, such as corporations, are designed to take risks, and if their trustees were exposed to the risk of very large claims they may not be willing to make risky decisions, although they are expected to make them.

These concerns are sometimes even greater with respect to public trustees. Legislators and judges are expected to be independent or else they could not perform their duties. Their decisions may not always be popular. Finally, able trustees may not be willing to undertake positions that would expose them to large claims. Therefore, corporate directors and officers as well as legislators, regulators and judges are protected from claims in various ways. This note is designed merely to emphasize the existence of limits on the enforcement of trustees' duties.

¹³⁶ See Part One B. §17. at 24.