

October 29, 2003

Dr. Paul Twomey  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
Suite 330  
4676 Admiralty Way  
Marina del Ray, CA 90292-6601

Re: Applicability of Data Quality Act to ICANN

Dear Dr. Twomey:

I am writing to confirm with you that the Internet Corporation for Assigned Names and Numbers (ICANN) recognizes that the information disseminated by ICANN is subject to specific provisions of American law. These provisions to which ICANN is subject include the Data Quality Act, the government-wide data quality guidelines issued by the Office of Management and Budget (OMB), and the data quality guidelines issued thereunder by the Department of Commerce (DOC).

### ***About the Center for Regulatory Effectiveness***

The Center for Regulatory Effectiveness (CRE), a regulatory watchdog organization, was established in 1996 by former senior career officials from the White House Office of Management and Budget. CRE's mission is to improve the effectiveness of regulatory processes through increased transparency and accountability. The CRE was the key advocate supporting passage of the Data Quality Act, legislation requiring standards for the quality of virtually all data disseminated by federal agencies. For more information, please see, [http://thecre.com/fed times tozzi art.html](http://thecre.com/fed_times_tozzi_art.html).

### ***Background***

ICANN is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law (California Corporations Code, § 5110, *et. seq.*) to assume responsibility for overseeing the technical coordination of the Internet Domain Name System ("DNS"). On July 1, 1997, as part of the Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize the management of the DNS in a manner that increases competition and facilitates international participation in its management.

On November 25, 1998, the DOC entered into a Memorandum of Understanding/Joint Project Agreement with ICANN (“MOU”). The stated purpose of the MOU was to formalize an agreement between the DOC and ICANN to “jointly design, develop, and test the mechanisms, methods, and procedures to transition management responsibility for DNS functions [then] performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity.”<sup>1</sup>

The MOU between the DOC and ICANN has been amended six times, most recently on September 16, 2003 (“Amendment 6”).<sup>2</sup> Pursuant to the MOU, as amended, the DOC directs ICANN to disseminate information and continues to play a significant oversight role in the operations of ICANN.

As discussed further below, the OMB and DOC data quality guidelines apply to agency initiated or sponsored distributions of information to the public. Our analysis below demonstrates that information ICANN disseminates pursuant to the MOU are agency sponsored information disseminations and, thus, the Data Quality Act<sup>3</sup> and the OMB government-wide<sup>4</sup> and DOC<sup>5</sup> data quality guidelines do apply to such information.

### ***The Importance of Transparency and Accountability for ICANN***

In addition, we note in this context that Amendment 6, §II, to the MOU includes a provision in §V.C. not found in the original MOU, namely that:

“ICANN agrees to \* \* \* Continue to develop, to test, and to implement accountability mechanisms to address claims by members of the Internet community that they have been adversely affected by decisions in conflict with ICANN's by-laws, contractual obligations, or otherwise treated unfairly in the context of ICANN processes. (Emphasis added).

The DOC statement accompanying Amendment 6 emphasizes the importance of transparency and accountability mechanisms for the further development of ICANN:

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<sup>1</sup> Available on-line at <http://www.icann.org/general/icann-mou-25nov98.htm>, §II.B.

<sup>2</sup> Available on-line at <http://www.icann.org/general/amend6-jpamou-17sep03.htm>.

<sup>3</sup> 44 U.S.C. 3516, statutory and historical notes; P.L. 106-554 – Appendix C, §515; 114 Stat. 2763A-153.

<sup>4</sup> 67 Fed. Reg. 8452 (February 22, 2002). Available on-line at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html#iq>.

<sup>5</sup> The Data Quality Guidelines for the DOC Office of the Secretary are on-line at <http://www.osec.doc.gov/cio/oipr/OS%20Revised%20Info%20Qual%20Guidelines.htm>. The Data Quality Guidelines for the National Institute of Standards and Technology (NIST) are available on-line at [http://www.nist.gov/director/quality\\_standards.htm](http://www.nist.gov/director/quality_standards.htm).

The Department currently serves as the steward of critical elements of the DNS.  
\* \* \* [M]uch work remains for ICANN to evolve into an independent, stable,  
and sustainable DNS management organization. \* \* \*

To ensure steady progress throughout the renewed MOU term, the Department and ICANN agreed to the incorporation of numerous specific milestones into the agreement. These milestones are intended to ensure ICANN is a sufficiently stable, transparent, representative, efficient, and sustainable management organization capable of handling the important DNS tasks well into the future. These milestones cover the following areas: \* \* \*

*Transparency and Accountability* - - ICANN will continue to develop, test, and implement processes and procedures to improve transparency, efficiency, and timeliness in the consideration and adoption of policies related to technical management of the DNS. In conjunction with this effort, ICANN will take into account the need to accommodate innovation in the provision of DNS services. In addition, ICANN will continue to develop, test, and implement accountability mechanisms.<sup>6</sup>

As the Data Quality Act, as implemented by the OMB government-wide and DOC data quality guidelines, is an “accountability mechanism” to which DOC, one party to Amendment 6 to the MOU, is by law subject, we also presume this is one of the “accountability mechanisms” DOC intended when DOC signed Amendment 6.

### ***Scope of Data Quality Guidelines***

Under the OMB government-wide data quality guidelines, “ ‘Dissemination’ means agency initiated or sponsored distribution of information to the public (see 5 CFR 1320.3(d) (definition of ‘Conduct or Sponsor’).”<sup>7</sup> OMB’s government-wide guidelines further state:

Similarly, as used in [the definition of “dissemination”], “agency \*  
\* \* SPONSORED distribution of information to the public” refers to situations where an agency has directed a third-party to disseminate information, or where

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<sup>6</sup> Emphasis added. See, “Department of Commerce Statement Regarding Extension of Memorandum of Understanding with the Internet Corporation for Assigned Names and Numbers,” available on-line at [http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement\\_09162003.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm).

<sup>7</sup> § V.8.. 67 Fed. Reg. 8452, 8460 (February 22, 2002).

the agency has the authority to review and approve the information before release.’<sup>8</sup>

Significantly, with respect to whether DOC “sponsors” the information dissemination of ICANN under the MOU, the OMB regulation cited and incorporated into the OMB definition of “dissemination” provides:

A federal agency is considered to “conduct or sponsor” a collection of information if the agency ... contracts or enters into a cooperative agreement with a person to collect the information, or requires a person to provide information to another person, or in similar ways causes another ... partner in a cooperative agreement, or person, ... to obtain, solicit, or require the disclosure to third parties or the public of information by or for an agency.<sup>9</sup>

The Department of Commerce adopted the OMB terminology essentially verbatim in issuing its own guidelines. The data quality guidelines for the DOC Office of the Secretary state:

Dissemination means agency initiated or sponsored distribution of information to the public. \* \* \*

Agency sponsored distribution of information to the public refers to situations where the Agency has directed a third party to distribute or release information, or where the Agency has the authority to review and approve the information before release.<sup>10</sup>

### ***Applicability of Data Quality Act and Guidelines to ICANN Activities***

The above definitions clearly appear to cover the information dissemination activities of ICANN undertaken in furtherance of the MOU. The original MOU required ICANN to: “Collaborate on the development of additional policies and procedures designed to provide information to the public.”<sup>11</sup> In Amendment 6, §II, this provision has been replaced with several more detailed provisions:

ICANN agrees to \* \* \*

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<sup>8</sup> 67 Fed. Reg. 8452, 8454 (Feb. 22, 2002) (left column, preamble) (emphasis added).

<sup>9</sup> 5 CFR 1320.3(d) (emphasis added). Available on-line at [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/5cfr1320\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/5cfr1320_03.html).

<sup>10</sup> DOC Office of the Secretary, pp. 2&3 (emphasis added). See also, NTIA Data Quality Guidelines, p. 2.

<sup>11</sup> §V.C.7.

3. Continue to develop, to test, and to implement processes and procedures to improve transparency, efficiency, and timeliness in the consideration and adoption of policies related to technical management of the DNS. In conjunction with its efforts in this regard, ICANN shall take into account the need to accommodate innovation in the provision of DNS services.

4. Continue to develop, to test, and to implement accountability mechanisms to address claims by members of the Internet community that they have been adversely affected by decisions in conflict with ICANN's by-laws, contractual obligations, or otherwise treated unfairly in the context of ICANN processes. \*  
\* \*

9. Continue to develop, to test, and to implement appropriate mechanisms that foster informed participation in ICANN by the global Internet community, such as providing educational services and fostering information sharing for constituents and promoting best practices among industry segments.

The above amendments contemplate and provide for ICANN dissemination of information, clearly sought by the Department of Commerce as part of its oversight responsibilities.

In addition, other provisions of the MOU indicate that DOC retains significant oversight responsibilities, as well as supports ICANN in carrying out its work, which is a form of “sponsorship” under the above definitions. Amendment 6, §I, revises §V.B. of the MOU to have the Department of Commerce agree, in part, to:

8. Work collaboratively within ICANN to encourage the creation of stable agreements between ICANN and the Regional Internet Registries (RIRs). \* \* \*

10. Provide general oversight of activities conducted pursuant to this Agreement.

11. Maintain oversight of the technical management of the DNS functions currently performed either directly by, or subject to agreements with, the U.S. Government, until such time as further agreement(s) are arranged as necessary for ICANN to undertake management of specific DNS technical management functions.

12. Consult with foreign governments to promote increased and more effective governmental participation in the GAC.<sup>12</sup>

The MOU’s escape provision allowing either party to terminate the agreement on 120 days notice<sup>13</sup> provides further evidence of the DOC’s ongoing control over ICANN. The brief periods of effectiveness for

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<sup>12</sup> Emphasis added.

<sup>13</sup> See, e.g., Original MOU, § VII. See MOU Amendment 6, § III.

the MOU and its six amendments emphasize the Department's underlying authority over ICANN and the DOC's ongoing right to "take back" whatever limited independence ICANN does enjoy. In this same vein, the parties to the MOU expressly provided, in Amendment 3, for the assignment of contract rights in the event that the DOC chooses to terminate the agreement:

If the DOC withdraws its recognition of ICANN or any successor entity by terminating this MOU, ICANN agrees that it will assign to the DOC any rights that ICANN has in all existing contracts with the registries and registrars....<sup>14</sup>

### ***Conclusion***

The above provisions demonstrate that the information dissemination activities of ICANN undertaken pursuant to the MOU, as amended, are subject to the Data Quality Act and the OMB government-wide and DOC data quality guidelines.

### ***Request***

In light of ICANN's duty to comply with the Data Quality Act, we respectfully request that ICANN expeditiously publish its data quality standards and correction procedures, consistent with the OMB government-wide and DOC guidelines, to allow affected parties to seek and obtain correction of ICANN-disseminated information.

Expedient publication by ICANN of its data quality standards and correction procedures, consistent with the OMB government-wide and DOC guidelines, would improve the transparency of ICANN's procedures to consider and adopt policies. Moreover, publication of such data quality standards and correction procedures would constitute adoption of an accountability mechanism with which both DOC and ICANN, as an organization whose information disseminations are sponsored by DOC, must by American law comply.

Sincerely,

Jim Tozzi  
Member, Board of Advisors

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<sup>14</sup> MOU Amendment 3, new § 5 of Amendment 1. Available on-line at <http://www.icann.org/general/amend3-jpamou-25may01.htm>.