

__ August 2016

Samantha Eisner
Deputy General Counsel
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Draft PTI Bylaws - Comments from the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship)

Dear Ms. Eisner,

We write in response to ICANN's recent publication of the draft bylaws for Post-Transition IANA ("PTI") dated as of 12 July 2016 (the "[Draft PTI Bylaws](#)"). We have prepared this comment letter on behalf of the CWG-Stewardship in our capacities as its co-chairs. We kindly request that ICANN address the CWG-Stewardship's comments in the revised version of the PTI bylaws, which we understand will be shared with the CWG-Stewardship for final review following the public comment period.

The formation of PTI as a separate legal entity is a critical component of the CWG-Stewardship final transition proposal that was submitted for approval to the chartering organizations on 11 June 2015 (the "[Final Transition Proposal](#)"). As a result, the CWG-Stewardship has had significant involvement in the drafting process for the PTI formation documents. The CWG-Stewardship is firmly committed to finalizing these fundamental governance documents, and we look forward to working with ICANN to resolve the remaining open issues.

Our substantive comments on the Draft PTI Bylaws are discussed in detail below. We have also attached, as [Exhibit A](#), a mark-up of the Draft PTI Bylaws, which includes some additional minor comments in the nature of conforming edits.

1. Principal Office (Article 2)

- **Text from Draft PTI Bylaws:** Article 2 of the Draft PTI Bylaws addresses the Corporation's principal office as follows:

"The principal office for the transaction of the business of the Corporation may be established at any place or places within or without the State of California by resolution of the Board. The Board may at any time establish branch or subordinate offices at any place or places where the Corporation is qualified to transact business."

- **CWG-Stewardship Comment:** The CWG-Stewardship notes that the ICANN Bylaws take the following approach with respect to ICANN's principal office:

"The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may

also have an additional office or offices within or outside the United States of America as it may from time to time establish.”

The CWG-Stewardship proposes following this approach in the PTI bylaws by replacing Article 2 with the following text:

“The principal office for the transaction of the business of the Corporation shall be in the County of Los Angeles, State of California, United States of America. The Corporation may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”

2. Purpose (Article 3, Paragraph 2)

- **Text from Draft PTI Bylaws:** Consistent with Article 3 of the draft PTI articles of incorporation dated as of 1 July 2016 (the “[Draft PTI Articles](#)”), the second paragraph of Article 3 of the Draft PTI Bylaws describes the “specific purpose” of PTI as follows:

“The specific purpose of the Corporation is to operate exclusively for the benefit of, to perform the functions of, and to carry out the purposes of the Internet Corporation for Assigned Names and Numbers (“ICANN”).”

- **CWG-Stewardship Comment:** Consistent with the CWG-Stewardship’s comments on Article 3 of the Draft PTI Articles, and as discussed with and agreed to by ICANN legal, the CWG-Stewardship proposes that the second paragraph of Article 3 of the Draft PTI Bylaws be modified as follows:

“The specific purpose of the Corporation is to operate exclusively ~~for the benefit of, to perform the functions of, and~~ to carry out the purposes of the Internet Corporation for Assigned Names and Numbers (“ICANN”) [by performing the IANA functions on behalf of ICANN.](#)”

3. Board Chairperson (Section 5.4)

- **Text from Draft PTI Bylaws:** Section 5.4 of the Draft PTI Bylaws provides, in part, that the Chairperson “should be selected from among the Nominating Committee Directors.”
- **CWG-Stewardship Comment:** The CWG-Stewardship agrees with concerns that requiring a Nominating Committee Director to serve as the Chairperson could impose unintended limitations on the selection of the Chairperson. Therefore, given that the President may not serve as the Chairperson and given the other requirements in the Draft PTI Bylaws that will ensure appropriate representation of Nominating Committee Directors in PTI Board activities, the CWG-Stewardship proposes removing this requirement from Section 5.4, as provided below.

“A chairperson of the Board (the “**Chairperson**”) shall be elected annually ~~and should be selected from among the Nominating Committee Directors~~ by a majority of the Directors then in office. The President shall not be the Chairperson. The Chairperson shall preside at meetings of the Board and exercise and perform such other powers and duties as may from time to time be assigned to him or her by the Board or prescribed by these Bylaws.”

4. Initial Directors (Section 5.2.2)

- **Text from Draft PTI Bylaws:** The Draft PTI Bylaws do not currently describe the process for selecting the initial Nominating Committee Directors.
- **CWG-Stewardship Comment:** The CWG-Stewardship recognized that the Nominating Committee process for selecting the PTI Nominating Committee Directors would not be in place prior to the transition and therefore recommended that the two directors be identified prior to the transition to serve in the interim until the election of PTI directors selected by the Nominating Committee in 2017. It was proposed that the Co-chairs of the CWG-Stewardship, Lise Fuhr and Jonathan Robinson, serve as the initial Nominating Committee Directors until the 2017 election. The CWG-Stewardship supports this proposal. Should these individuals be unable to serve, the CWG-Stewardship would select qualified alternate nominees, and election of these alternate nominees would be subject to ICANN’s approval (not to be unreasonably withheld, conditioned or delayed). The CWG-Stewardship proposes that the following provision be added as Section 5.2.2.2 of the Draft PTI Bylaws to describe the process for selecting the initial Nominating Committee Directors to be in place at the time of transition:

“5.2.2.2 Notwithstanding Section 5.2.2.1(b), because the Nominating Committee will not be available to nominate the Nominating Committee Directors at the time of the election by the Member of the first slate of Directors (the “**Initial Directors**”), the Member shall elect as Initial Directors the two candidates recommended by the Cross-Community Working Group to Develop an IANA Stewardship Proposal for Naming Related Functions, without reference to Section 8.1 of the ICANN Bylaws, which candidates shall serve as the Nominating Committee Directors until the term of such Directors ends in accordance with Section 5.5.1 or such position otherwise becomes vacant.”

5. Terms of Directors (Section 5.5.1)

- **Text from Draft PTI Bylaws:** With respect to the term length for PTI directors, Section 5.5.1 of the Draft PTI Bylaws provides as follows: “Other than Directors initially appointed by the incorporator of the Corporation (which Directors shall hold office until the first election of Directors) and the President of the Corporation, the Directors shall be elected by the Member at the annual meeting of the Corporation for two-year terms as follows....” The two-year terms are staggered as further described in Section 5.5.1.

- **CWG-Stewardship Comment:** The CWG-Stewardship agrees with concerns that on-boarding and re-electing directors on staggered two-year terms could be burdensome and proposes increasing the term length for PTI directors from two to three years, which the CWG-Stewardship notes is consistent with the term length for ICANN directors, while retaining the requirement of a maximum of two consecutive terms for Nominating Committee Directors. The CWG-Stewardship also proposes modifying Section 5.5.1 of the Draft PTI Bylaws to reflect that (i) the Nominating Committee process for selecting the PTI Nominating Committee Directors will be in place for the election of PTI directors in 2017, at which time one ICANN Director and one Nominating Committee Director will each be elected for a two-year term, to set the cycle for staggered three-year terms moving forward, and (ii) the term for the initial PTI directors will end upon the election of the PTI directors in 2017. To incorporate these changes, the CWG-Stewardship proposes the following modifications to Section 5.5.1 of the Draft PTI Bylaws:

“5.5.1 ~~Other than~~ The Initial Directors ~~initially appointed by the incorporator of the Corporation (which Directors elected by the Member~~ shall hold office until the end of the annual meeting of the Member in 2017. ~~first election of Directors.~~ Other than the Initial Directors and the President of the Corporation, the Directors shall be elected by the Member at the annual meeting of the Member Corporation for the two-year terms set forth as follows:

5.5.1.1 One Nominating Committee Director shall sit in Seat 1. The ~~first initial~~ term for such Director shall begin upon the ~~first~~-election of Directors at the annual meeting of the Member in 2017 and shall end at the end of the annual meeting of the Member held in ~~2018~~2019, and subsequent terms shall begin upon the conclusion of each annual meeting of the Member held in ~~2018-2019~~ and every ~~second~~third year thereafter.

5.5.1.2 One Nominating Committee Director shall sit in Seat 2. The ~~first initial~~ term for such Director shall begin upon the ~~first~~-election of Directors at the annual meeting of the Member in 2017 and shall end at the end of the annual meeting of the Member held in ~~2017-2020~~, and subsequent terms shall begin upon the conclusion of each annual meeting of the Member held in ~~2017-2020~~ and every ~~second~~third year thereafter.

5.5.1.3 One ICANN Director (other than the President) shall sit in Seat 3. The ~~first initial~~ term for such Director shall begin upon the ~~first~~-election of Directors at the annual meeting of the Member in 2017 and shall end at the end of the annual meeting of the Member held in ~~2018~~2019, and subsequent terms shall begin upon the conclusion of each annual meeting of the Member held in ~~2018-2019~~ and every ~~second~~third year thereafter.

5.5.1.4 One ICANN Director (other than the President) shall sit in Seat 4. The ~~first initial~~ term for such Director shall begin upon the ~~first~~-election of Directors at the annual meeting of the Member in 2017 and shall end at the end of the annual

meeting of the Member held in ~~2017-2020~~, and subsequent terms shall begin upon the conclusion of each annual meeting of the Member held in ~~2017-2020~~ and every ~~second~~third year thereafter.”

6. Supermajority Board Approval for Certain Board Actions (Section 5.11.3)

- *Text from Draft PTI Bylaws:*

Introductory sentence of Section 5.11.3: The introductory sentence of Section 5.11.3 sets forth the following approval requirements for the actions listed in this section to be effective:

“The following actions shall require approval by four-fifths (4/5) of the Directors, and the approval of the Member in order to be effective.”

Section 5.11.3(a): Section 5.11.3(a), set forth below, addresses interested director transactions, one type of action that requires the higher threshold of Board approval described in the introductory sentence of Section 5.11.3 above.

“(a) Approval of contracts or transactions in which a Director has a material financial interest (provided that the vote of any interested Director is not counted); provided, that, a Director shall not be deemed to have a financial interest if the source of such financial interest is solely based on such Director’s employment with ICANN, service on ICANN’s board of directors or any compensation related to such employment or service;”

- *CWG-Stewardship Comment:*

Introductory sentence of Section 5.11.3: The CWG-Stewardship proposes that the introductory sentence of Section 5.11.3 be modified as provided below to clarify that the required threshold of directors needed for Board approval of the actions listed in this section is in reference to the full number of Board seats regardless of the number of directors then-seated.

“The following actions shall require approval by ~~four-fifths (4/5) of the~~ at least four of the five authorized Directors except as otherwise provided in Section 5.11.3(a); and the approval of the Member in order to be effective.”

Section 5.11.3(a): Consistent with the CWG-Stewardship’s comments on the PTI conflict of interest policy, the CWG-Stewardship proposes the following modification to Section 5.11.3(a) to clarify the required threshold of directors needed for Board approval of interested director transactions:

“(a) Approval of contracts or transactions in which a Director has a material financial interest (provided that such action must be approved by all of the disinterested Directors and the vote of any interested Director is not counted); provided, that, a

Director shall not be deemed to have a financial interest if the source of such financial interest is solely based on such Director’s employment with ICANN, service on ICANN’s board of directors or any compensation related to such employment or service;”

7. Unanimous Written Board Consent (Section 5.15)

- **Text from Draft PTI Bylaws:** The first paragraph of Section 5.15 of the Draft PTI Bylaws sets forth the following requirements for Board action by written consent:

“Any action required or permitted to be taken by the Board may be taken without a meeting, if all members of the Board, individually or collectively, consent in writing to the action. Such written consent shall have the same force and effect as a unanimous vote of the Board taken at a meeting. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.”

- **CWG-Stewardship Comment:** The CWG-Stewardship notes that board action by written consent is permitted under California law, as long as (i) all directors consent in writing to the action and (ii) the number of directors then in office constitutes a quorum. *See* Section 5211(b) of the California Corporations Code. Accordingly, the CWG-Stewardship proposes the following clarifying changes to the first paragraph of Section 5.15:

“Any action required or permitted to be taken by the Board may be taken without a meeting, if (a) all Directors ~~members of the Board~~, individually or collectively, consent in writing to the action and (b) the number of Directors then in office constitutes a quorum as set forth in Section 5.11.1, which, for the avoidance of doubt, requires a majority of Directors then in office including at least one ICANN Director and at least one Nominating Committee Director. Such written consent shall have the same force and effect as a unanimous vote of the Board taken at a meeting. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.”

8. Establishment of Board Committees (Section 6.1)

- **Text from Draft PTI Bylaws:** The introductory sentence of Section 6.1 of the Draft PTI Bylaws sets forth the following approval requirements for the creation of Board committees:

“Subject to Section 5.11.3, the Board may, by resolution adopted by four-fifths (4/5) of the Directors, create one or more committees of the Board (“**Committees**”), each consisting of two or more Directors with at least one ICANN Director and one Nominating Committee Director, to serve at the discretion of the Board.”

- **CWG-Stewardship Comment:** The CWG-Stewardship proposes that the introductory sentence of Section 6.1 be modified as follows to clarify the required threshold of directors needed for Board approval of the creation of Board committees:

“Subject to Section 5.11.3, the Board may, by resolution adopted by ~~four-fifths (4/5) of the~~ at least four of the five authorized Directors, create one or more committees of the Board (“**Committees**”), each consisting of two or more Directors with at least one ICANN Director and one Nominating Committee Director, to serve at the discretion of the Board.”

9. Annual Budget (Section 9.2)

- **Text from Draft PTI Bylaws:** Section 9.2(a) of the Draft PTI Bylaws provides that the proposed Annual Budget will need to be submitted to the Board “[a]t least 270 days prior to the commencement of each fiscal year.”
- **CWG-Stewardship Comment:** With respect to timing for the Annual Budget, the Final Transition Proposal provides that “PTI should submit a budget to ICANN at least nine months in advance of the fiscal year to ensure the stability of the IANA services.” See paragraph 163 of the Final Transition Proposal. Based on input from the CWG-Stewardship’s IANA budget design team (the “DT-O”), the CWG-Stewardship proposes the following change to the time frame set forth in Section 9.2(a), to allow sufficient time for PTI Board approval prior to submitting the Annual Budget to ICANN:

“(a) At least ~~270~~ [– to come from the DT-O] days prior to the commencement of each fiscal year, the Corporation shall submit to the Board a proposed annual operating plan and budget for the Corporation’s next fiscal year (“**Annual Budget**”).”

10. [Strategic Plan (Section 9.3)]

- **Text from Draft PTI Bylaws:** Section 9.3 of the Draft PTI Bylaws sets forth the process for development and review of the PTI Strategic Plan.
- **CWG-Stewardship Comment:** Based on input from the DT-O, the CWG-Stewardship proposes the following modifications to Section 9.3:

“[Any proposed edits to come from the DT-O]”

11. Amendments (Article 12)

- **Text from Draft PTI Bylaws:** The first two sentences of Article 12 of the Draft PTI Bylaws set forth the following approval requirements for bylaws amendments:

“These Bylaws may only be adopted, amended, or repealed in whole or in part with the approval of (a) four-fifths (4/5) of the Directors then in office, and (b) the Member. If there are not two Nominating Committee Directors in office and entitled to vote on the

matter, four-fifths of the Directors must still approve of the action in order for the Board approval to be effective.”

- ***CWG-Stewardship Comment:*** The CWG-Stewardship proposes that the first sentence of Article 12 be modified as provided below to clarify the required threshold of directors needed for Board approval of bylaws amendments. The CWG-Stewardship also proposes deleting the second sentence of Article 12, because this requirement was removed from the other sections of the Draft PTI Bylaws that address the same higher voting threshold and appears to have been retained in this section in error.

“These Bylaws may only be adopted, amended, or repealed in whole or in part with the approval of (a) ~~four-fifths (4/5) of the~~ at least four of the five authorized Directors ~~then in office,~~ and (b) the Member. ~~If there are not two Nominating Committee Directors in office and entitled to vote on the matter, four-fifths of the Directors must still approve of the action in order for the Board approval to be effective.~~”

Thank you for your consideration of the CWG-Stewardship’s comments on the Draft PTI Bylaws. We look forward to working with you to address these PTI governance matters.

Best regards,

Lise Fuhr and Jonathan Robinson
Co-chairs, CWG-Stewardship

Attachment

Exhibit A