

CWG-Stewardship Frequently Asked Questions – May 2015

QUESTION	RESPONSE
CATEGORY 1: LINKAGE WITH THE PROTOCOL PARAMETERS AND NUMBERS COMMUNITIES	
<p>1.1 [Webinar 1]</p> <p>It seems that the CWG is very different from the other two communities about setting up a new entity and several Americanisms. Will (unintelligible) deal with the inconsistency or would the CWG try to sell this concept to the other two communities?</p>	<ul style="list-style-type: none">• The CWG-Stewardship proposal is to be submitted to the ICG alongside the two other proposals.• The CWG-Stewardship had to walk a very delicate line between not presuming any influence on those other proposals, but nevertheless, being aware of those proposals and making all reasonable efforts to ensure that its proposal was coherent with those other proposals.• If there are any substantial incompatibilities between the proposals of the three communities the ICG has indicated that they may return the proposal(s) to any of the communities and seek modifications or changes such that they can be reconciled.• In its recent proposal the CWG-Stewardship has not proposed anything that materially impacts on the proposals of the other communities. The CWG has made best efforts to not interfere with the other communities' existing relationships with ICANN.

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CATEGORY 2: LINKAGE WITH THE CCWG-ACCOUNTABILITY	
<p>2.1 [Webinar 1]</p> <p>Would it be possible to give an overview of all the areas in the proposal where work from the CCWG-Accountability is essential to complete this proposal?</p>	<p>Key Dependencies of the CWG-Stewardship on the CCWG-Accountability include: CSC escalation mechanisms; ICANN accountability in the IFR process; IANA budget accountability.</p>
<p>2.2 [Webinar 2]</p> <p>As accountability mechanisms being developed by the CCWG-Accountability are being relied on, which the ICANN board needs to approve, is the CCWG-Accountability considering independent accountability mechanisms in the event that the CCWG-Accountability recommendations are not for one reason or another adopted?</p>	<ul style="list-style-type: none">• One of the key considerations for the legal counsel is how to lock in this dependence with the CCWG-Accountability.• It is expected that the CWG-Stewardship proposal would be contingent and dependent on one or more of the accountability mechanisms to be put in place.• Legal counsel have been asked how best to structure that dependency and conditionality to ensure that this is accurately described and clearly articulated. The CWG-Stewardship can build in that conditionality such that it is clear that the validity of its proposal is dependent on certain key accountability measures being in place.

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<p>2.3 [Webinar 1]</p> <p>...because the CWG and the CCWG are working in a parallel way, so I just wonder what will happen if CCWG is not ready to submit their proposal by June 25th? Because that's the ICG is going to submit the final proposal.</p>	<ul style="list-style-type: none">• The CWG will continue to work closely with the CCWG-Accountability and ensure that we very clearly articulate our dependencies and make sure that we are confident those are enshrined in the work of the CCWG-Accountability. Our timelines do not have to match exactly for the CWG to be able to depend on that work completely.
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<p>2.4 [Sidley memo on draft legal structure (3 May)]</p> <p>What are the community empowerment mechanisms that are being proposed by the CWG?</p>	<p>The CWG-Stewardship requires community empowerment mechanisms for the ICANN Board and the IANA functions, which are more specifically addressed below. These requirements have been integrated into the CCWG-Accountability Work Stream 1:</p> <ul style="list-style-type: none">• Ability to appoint and remove members of the ICANN Board or to recall the entire Board;• Ability to exercise oversight with respect to key ICANN Board decisions. In a statutory membership structure, this would be the ability to approve or veto certain key ICANN Board decisions. For the purposes of the CWG-Stewardship recommendations, the stakeholder community or member group must, at a minimum, have the ability to review and approve:<ul style="list-style-type: none">○ ICANN Board decisions to reject recommendations coming out of a periodic or special review of the IANA function by the IFR or a Separation Review; and○ The ICANN budget, according to requirements for transparency for the comprehensive costs of the IANA Function, and itemization to the project level and below as needed; and• Ability to approve amendments to fundamental bylaws (whether as statutory members or designators of ICANN), with the ICANN Board specifically blocked from amending such fundamental bylaws.
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CATEGORY 3: ABOUT THE PTI	
<p>3.1 [Webinar 1]</p> <p>Is PTI going to be a separate legal entity?</p>	<p>The intention is that PTI will be a separate legal entity, but it would be a wholly owned by ICANN, so it can stay within ICANN while having a legal separation.</p>
<p>3.2 [Webinar 1]</p> <p>Originally ICANN got a contract from NTIA, so I just wonder post-transition there is still contact there, but who should be entered this contract? Because NTIA is just gone. So who is the contract with ICANN in the PTI?</p>	<p>The contract becomes an internal contact between ICANN and the PTI board. Oversight of this contract will be provided by the CSC and the IFR.</p>
<p>3.3 [Webinar 4]</p> <p>Will the initial (SOW) for PTI be a copy of the current one with the NTIA, and if not who will decide on it as the (IFR) team only meets every two years."</p>	<p>It seems fairly obvious that the SOW cannot be identical to the ICANN/NTIA contract given the changes that are being considered by the CWG.</p> <p>Given the transition cannot occur without a clear SOW the CWG will have to develop a SOW as part of its final proposal.</p>
<p>3.4 [Webinar 1]</p> <p>Could you explain again the makeup of the PTI? Did you say a wholly owned subsidiary of ICANN? Will the board members of the PTI be a subset of the ICANN board or independent?</p>	<p>The composition of the PTI Board has not yet been determined, so it is still an open issue. What is important is that the CWG recommendations not create new accountability issues. If the PTI Board were to consist of parties external to ICANN this would create new accountability issues. To avoid this the PTI Board should be a lightweight Board that is subject to the accountability measures that are currently in place or planned by the CCWG.</p>

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<p>3.5 [Webinar 2]</p> <p>The question is the CSC seems mainly to conduct monitoring to react to operational situations, so how is oversight conducted?</p>	<p>The oversight of PTI is performed by the CSC and the IFR. Additionally PTI is also a subsidiary of ICANN and it is ICANN's responsibility to ensure that this subsidiary and all of its obligations are operationally reliable. ICANN itself is overseen by its own board, and the CCWG on accountability is bringing in new accountability mechanisms by which the ICANN Board, and therefore ICANN, are accountable to the community.</p>
<p>3.6 [Sidley memo on draft legal structure (3 May)]</p> <p>What are the strengths and weaknesses of the proposed structure</p>	<p>The external legal counsel memorandum identifies the strengths of this proposed structure are as follows:</p> <ul style="list-style-type: none">• The proposed structure allows for a formal contract between ICANN and the IANA functions operator, which further evidences and supports functional separation.• Without a contract, other means of establishing expectations regarding performance levels and related terms would need to be identified, which would likely be less formal and less enforceable than through a contractual relationship. Recourse for a “breach” of those terms and conditions would be limited to internal redress mechanisms such as through the IFR team and the CSC.• If there were ever an ICANN bankruptcy, with legal separation of the IANA functions into PTI, an ICANN bankruptcy filing in the U.S. would not result in PTI also becoming a debtor in a bankruptcy proceeding. ICANN's “interest” in PTI will, however, become part of ICANN's bankruptcy estate and its ability to use and dispose of this “interest” will be subject to any applicable restrictions under bankruptcy law.• If there is a future need to separate or divest ICANN of the IANA functions, the work of identifying and segregating assets will have already been done. This should enhance the separability of the IANA functions.

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The weaknesses of the proposed structure are as follows:

- It would require forming a new entity and, on an ongoing basis, attending to a set of associated corporate formalities, although legal counsel to the CWG-Stewardship advises that those are not likely to be significant.
- Depending on the structure of the PTI Board, it could introduce a new layer of governance and need for additional accountability mechanisms.
- The proposed structure would require additional work now to separate out IANA assets and address and resolve potential shared assets.

It may have some negative impact on operational efficiency due to the functional separation, and the separate legal status will introduce some additional costs. Legal counsel advises that the legal costs of the separate legal entity would not be significant, though CWG-Stewardship's counsel has not explored this issue with ICANN directly. ICANN Finance should advise on estimates of other costs of maintaining a separate legal entity.

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Category 4: IFR	
<p>4.1 [Sidley memo on draft legal structure (3 May)]</p> <p>After conducting a periodic or special review what recommendations would the IFR make to the ICANN Board regarding any necessary changes to the IANA functions</p>	<p>These recommendations could include, for example, recommendations to:</p> <ul style="list-style-type: none">• Enhance the resources available for certain IANA functions,• Replace one or more members of PTI management or the PTI Board,• Seek remediation of breaches by PTI of the IANA Functions Contract, or• Initiate a Separation Review the outcome of which could include a recommendation to:<ul style="list-style-type: none">○ Terminate or not renew the IANA Functions Contract,○ Initiate an RFP for the IANA Functions Contract, or○ Transfer the PTI entity to a new entity that is approved by the multistakeholder community.
<p>4.2 [Sidley memo on draft legal structure (3 May)]</p> <p>How would the ICANN Board process the IFR recommendations?</p>	<p>Upon receipt of the IFR team recommendations, the ICANN Board would be required by the ICANN bylaws to review the recommendations and either adopt, modify or reject those recommendations. The process for the ICANN Board’s review of the IFR recommendations would be articulated in the bylaws. These bylaws would be “fundamental bylaws” (i.e., subject to a high threshold for amendment by the empowered multistakeholder community outside of the ICANN Board’s powers). This requirement has been integrated into the CCWG-Accountability Work Stream 1.</p>

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<p>4.3 [Sidley memo on draft legal structure (3 May)]</p> <p>What would happen if the ICANN Board did not substantially adopt the IFR recommendations?</p>	<p>If the ICANN Board did not substantially adopt the IFR [or Separation Review] recommendations, an ICANN accountability mechanism would provide for input by the empowered multistakeholder community. In the membership structure currently being recommended by the CCWG-Accountability in its draft proposal, this mechanism would be an approval or veto over the ICANN Board decision. In addition or alternatively, an IRP mechanism could be instituted to review an ICANN Board rejection of an IFR [or Separation Review] recommendation.</p>
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Category 5: CSC	
5.1 [Webinar 4] Where is the CSC sitting? PTI? ICANN? Who provides support?	This has not yet been determined. A simple solution would be to have it inside ICANN which would help lower the complexity of the solution.

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Category 6: Multi-stakeholder participation

<p>6.1 [Webinar 1]</p> <p>There has been a part of the request from NTIA was mentioning the world's multi-stakeholder and to basically say there needs to be a (unintelligible) from the multi-stakeholder community. Could you identify in the post-transition model where that multi-stakeholder component would have any kind of oversight or involvement?</p>	<ul style="list-style-type: none">• IANA clearly provides a service to the operational communities. To that extent, this proposal is designed to allow the operational communities that use these services and to have oversight of those services through the CSC and as such there is limited multi-stakeholder participation in the CSC.• However, the periodic review which is a key oversight mechanism clearly involves the multi-stakeholder community. These reviews will take place in the first instance after two years and every five years thereafter, and on special occasions, should it be required.• In addition to this, the IANA function is envisaged by this proposal to sit within and contracted to ICANN which has significant multi-stakeholder involvement and input and participation.• Finally the overarching accountability mechanisms of the CCWG envisage that there will be an empowered community with full multi-stakeholder participation that has ultimate oversight of the ICANN function itself.
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Category 7: Other sections of the CWG-Stewardship proposal

7.1
[Webinar 1]

There was a significant component of - in the request from NTIA that the solution should be stress tested. I don't see in the diagram here or in the process how will these - because I'm not quite sure the stress testing has done, but I understand that it's in the accountability thread, how will that feed back into this?

This is contained in section 4 of the ICG proposal format and is entitled Transition Implications. The CWG will be working on ICG RFP sections 4 and 5 during the CWG public consultation. Cheryl Langdon-Orr, who is also helping to lead the stress test efforts of the CCWG, is leading the CWG efforts on RFP4. This work will rely significantly on the stress test work done by the CWG and the SSAC.