Cross Community Working Group (CWG)

 On Naming Related Functions

Discussion Document for ICANN52 Singapore

February 2015

<u>Purpose</u>

This is a Discussion Document. The purpose of this document is:

1.   To inform the community of the work undertaken and progress to date

and

2.   To seek community input on key and intractable issues in order to assist the CWG in its deliberations

With input from the community, we hope to leave the ICANN 52 meeting in Singapore in a significantly improved position and so be able to move forward with the objective of developing a single transition proposal.

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Executive Summary

Since its first meeting on 6 October 2014, the CWG has been hard at work preparing a transition plan for the stewardship of the IANA Functions per the NTIA and ICG requirements. As of the end of January 2015, a span of 17 weeks which included the traditional holiday break, it had held 20 meetings of the CWG and over 25 meetings of its subgroups.

During this time the CWG produced a draft transition proposal which it put up for public consultation on 1 December 2014 for 21 days.

By its close on 22 December 2014, the public consultation generated responses from 48 parties, which included individuals, organizations (involved with ICANN or not), companies and governments. Overall there was very strong support for the current IANA operator (ICANN) and that the IANA functions should not be moved from ICANN, or tendered for, at the onset of the transition.

Respondents also strongly supported that the transition should not take place prior to the adoption of required accountability mechanisms (being developed by the CCWG-Accountability) by ICANN or at least guaranteed to be adopted in a timely manner and that there should be a Customer Standing Committee (CSC) as well as an Independent Appeals Panel (IAP) that can make binding decisions regarding IANA actions or inactions. Most respondents also noted that the proposal, as a whole, was too complex, did not provide enough details to properly evaluate it and that the time for submitting comments was too short.

In the weeks of 22 and 29 December, the CWG completed a detailed analysis of the written comments received in the public consultation and held several meetings to discuss these. As a result of these meetings, the CWG developed two internal surveys based on the questions and suggestions provided in the responses to the public consultation. The survey questions were organized along the same lines as the CWG draft proposal, with a section added on an "Internal-to-ICANN" solution as a replacement for the "Contract Co. option," and questions were included regarding the conditions for the separation of the IANA Function from ICANN. The surveys were distributed to the CWG participants during the week of 5 January 2015.

The CWG's intensive work weekend of 10-11 January 2015 allowed the participants to consider the results of both the public consultation and the surveys. The public consultation and the CWG survey were very similar with respect to showing very strong support for the creation of a multistakeholder MRT, a CSC and an IAP (as defined below). There was also very strong support for not moving the IANA function from ICANN unless ICANN materially breached the IANA functions agreement and failed to cure that breach. A majority of survey respondents agreed that if there were adequate accountability mechanisms in place that an ICANN Internal option would be acceptable or preferable. There was no strong agreement amongst survey respondents with the proposal to create Contract Co. as part of the transition and a slight majority of respondents felt that this option would likely be complex, costly and risky. It was also generally agreed when discussing the results of the surveys that a number of questions

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regarding key aspects of the proposals could only be answered by having a legal opinion on these matters.

When considering these results the CWG came to the following conclusions:

- There is not enough support for the Contract Co. option at this time to allow the CWG to continue developing only this option.
- Some of the key issues related to the Contract Co. option and an ICANN internal solution can only be properly resolved by obtaining qualified independent legal advice.
- The misalignment of the IANA CWG's and the Accountability CCWG's schedules created significant issues for both groups and has negatively impacted the CWG's ability to complete the development of a transition proposal.
- Because of the above issues, it became clear that it would be impossible for the CWG to meet its original target date of delivering a proposal to the CWG chartering organizations on 19 January 2015. As such, the CWG could not meet its objective of delivering a transition proposal on naming to the ICG by 30 January 2015.

In response to these conclusions, the CWG undertook the following actions:

- Participants of the CWG were invited to discuss and develop ICANN Internal option(s).
- A list of legal questions was developed so that independent legal advice could be obtained.
- The co-chairs have undertaken discussion with the ICG and the CCWG to revise the CWG schedule in order to present it at the Singapore meeting.
- Steps were taken to improve and further extend coordination of the work of the CWG and the work of the CCWG Accountability, in particular its work on work stream 1.

As of 29 January, the CWG had created a scoping document that provides background information and includes an initial list of questions for legal advice. A sub-committee of the CWG has also held meetings with ICANN staff and lawyers to complete the arrangements to retain counsel for the CWG. It is hoped that such counsel can be selected and begin work before the end of February 2015.

Greg Shatan 2/1/15 11:24 AM
Comment [1]: I think this is a reasonable timeframe.

At this stage of the process and until legal advice from an independent law firm has been received on the feasibility of various options and the associated risks, the CWG will continue to refine all reasonable options for a transition proposal.

A revised timeline for the delivery of a CWG transition has been developed and coordinated with the CCWG and the ICG. The revised timeline can be found at (insert URL). Note that it shows a best case scenario that provides for delivering a proposal to the ICG in June 2015, assuming that the following risk factors can be minimized:
1. Legal advice can be obtained as shown in the timeline.
2. Consensus can be reached in the community on a proposal as shown in the timeline.

3. The chartering SOs and ACs are able to approve the proposal in the 21 days shown in the timeline.

The CWG co-chairs are holding regular weekly meetings with the co-chairs of the CCWG on accountability to ensure optimal coordination between their respective groups.

In conclusion, the CWG has accomplished the following in what is a very complex and sensitive process that directly touches on the security and stability of the foundations of the Internet's DNS:

- Developed a draft transition plan.
- Conducted a 21 day public consultation on this plan and analyzed all responses.
- Developed detailed survey questionnaires for the CWG participants that addressed all major components of the transition proposal and considered recommendations made in the public consultation.
- Continued to refine details of the original draft transition plan.
- Begun work on two alternative transition plans.
- Developed a scoping document including a comprehensive list of questions with respect to the transition plans that will be used to obtain legal advice.
- Begun the process to select a law firm in cooperation with ICANN to obtain independent legal advice on the comprehensive list of questions.

The CWG will continue its work on all reasonable proposals for transition until legal advice is received that clarifies the risks and feasibility associated with each model. Then it will hopefully be able to quickly finalize a transition proposal that includes the recommendations of the CCWG Work Stream 1 recommendations and that has the strong support of all major components of the multistakeholder community.

Consistent with this objective, the CWG has included overviews of the major transition proposals presently being worked on by CWG participants and will use these during the ICANN 52 meeting in Singapore to increase community awareness and obtain feedback from the multistakeholder community. All proposals include some version of a Multistakeholder Review Team (MRT), a Customer Standing Committee (CSC) and an Independent Appeals panel (IAP). Overall, the CSC and IAP are similar in all options. The details of the MRT can vary significantly in some of these options but its core responsibility for launching the process of moving the IANA functions from ICANN is similar across all of these.

Two types of models - Internal and External options

There are currently two types of models currently being considered by the CWG – the "External to ICANN" models and the "Internal to ICANN" models. The fundamental difference between the "External to ICANN" solutions, like Contract Co., and the "Internal to ICANN" type solutions, like the "internal" Trust, essentially boil down to who replaces the NTIA as the body responsible

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for allocating and overseeing the IANA Functions Contract. In the External to ICANN solutions, as the term suggests, the replacement entity cannot be ICANN (but ICANN would be granted the contract for the IANA functions post transition by this entity). In the Internal to ICANN type solutions the NTIA would transition its functions, including the right to allocate the IANA contract, to ICANN, which would also continue to operate the IANA Functions subject to the community's right to force ICANN to transfer the authority and the IANA Functions to another operator.

Common points between the two models

Although there are fundamental differences in who performs the oversight role in the Internal to ICANN vs the External ICANN type solutions, there are many points which are common to both types of approaches:

- Multistakeholder Review Team (MRT) – A group of stakeholder representatives responsible for completing the new IANA Functions definitions (a contract under the external solutions), deciding, under certain limited circumstances, if the IANA functions should be moved from ICANN and how to select a new operator should this be the case. The MRT would also be responsible for addressing and resolving IANA performance issues escalated by the CSC.
- Customer Standing Committee (CSC) – A small group of individuals responsible for overseeing IANA performance on a regular basis. The CSC would be predominantly, but not entirely, composed of   registry representatives. The CSC would take up any performance related issues directly with IANA. If issues could not be resolved, the CSC could escalate the issue to the MRT. Members would be selected by their respective communities.
- Independent Appeals Panel (IAP) –All decisions and actions (including deliberate inaction) of the IANA Functions Operator that affect the Root Zone or Root Zone WHOIS database would be subject to an independent and binding appeals panel. The appeals mechanism should also cover any policy implementation actions that affect the execution of changes to the Root Zone File or Root Zone WHOIS and how relevant policies are applied. Note that the appeals mechanism for ccTLDs, if any, may look very different than for gTLDs.
- Note - NTIA Authorization Function – The current proposals do not yet make any recommendations regarding replacing this function.

Overview of External Models

A working group (RFP3) was established to further develop the CWG draft proposal for Contract Co. This approach seeks to have the NTIA's role of overseer of the IANA Functions contract transferred to an entity that is not ICANN. This entity would sign a contract with ICANN to perform the IANA Functions at the time of transition and would retain the power, subject to the terms of the contract, to transfer the IANA functions to another operator. Currently this group

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is considering two variations based on either creating a non-profit corporation (Contract Co.), as per the original CWG proposal, or establishing a trust.

Overview of the Contract Co. Model

- Authority – In the Contract Co. model the multistakeholder community would establish a non-profit corporation which would assume the NTIA's IANA Functions responsibilities. Contract Co. would be a small, "lightweight company whose main responsibility is holding and entering into the IANA Functions Contract. Upon transition it is expected that Contract Co. would enter into an IANA Functions Contract with ICANN. Should ICANN materially breach the IANA functions contract and fail to cure that breach, Contract Co., after exhausting its escalation options under the contract, could select a new operator for the IANA functions. Because Contract Co. is a legal entity and it would have a legally binding contract with ICANN, it would be able to enforce the agreement against ICANN, up to and including pursuing legal action against ICANN.
- MRT – The Contract Co. option would have an MRT as described in the common points section. Its composition and status are to be determined but it is likely to be a committee of Contract Co. The MRT would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would be responsible for providing instructions to Contract Co. regarding the IANA Functions contract.
- CSC – The Contract Co. option would have a CSC as described in the common points section. Its composition and status are to be determined but it is likely to be a committee of Contract Co.
- IAP - The Contract Co. option would have an IAP as described in the common points section

Overview of the External Trust Model:

- Authority - Contract Co. would take the form of a Trust established under U.S. law. The Trust would be registered with a state court to ensure an avenue for compliance. The Trust would have a Board of Trustees, which would likely be incorporated as a legal entity. Trustees would be selected from, and represent, the global multistakeholder community. The Trust would receive an assignment and/or conveyance from the NTIA of all of the U.S. Government's rights and duties included within its "stewardship" role over the Internet and DNS, including the right to issue the IANA Functions Contract. The Trust's primary purpose and duty would be to select and contract for an IANA Functions Operator (presently ICANN). The IANA Functions Operator would be under contract for a term of years (subject to termination for cause and other necessary or appropriate terms and conditions).
- The MRT, CSC and IAP would be the same as under the Contract Co. model.

Overview of Internal Models

A working group (RFP3B) was established to develop an "internal-to-ICANN" proposal and is currently considering two variations, based on suggestions by the ALAC and the auDA registry. This approach seeks to have all functions inside ICANN, essentially replacing Contract Co. with ICANN at least at the time of transition.

Overview of the ICANN Internal Bylaw model

- Authority - The NTIA would transfer the rights for contracting the IANA functions to ICANN, but only after it had amended its Bylaws to create a "Golden Bylaw" (i.e., a Bylaw that cannot be amended by the Board). The Golden Bylaw would guarantee that ICANN would relinquish the right to perform the IANA functions to a third party if required to do so by to a multistakeholder MRT. Separation of IANA – If there is no other option, the MRT, under very specific conditions, could initiate (but not unilaterally approve) separation procedures (taking the IANA functions out of ICANN) as per the "Golden Bylaw". Separation could possibly require the creation of Contract Co. or a Trust.
- MRT - ICANN would implement additional Bylaw modifications that would create a standing committee in ICANN to be the MRT described in the draft CWG proposal (or similar). These bylaws would codify the membership, responsibilities and operating procedures of the MRT. Its exact composition is to be determined but would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would in many ways be as described in the common points but would also prepare the IANA "requirements" documentation (not a contract).
- CSC - The CSC would be as described in the common points section but could be merged with the MRT to varying degrees depending on the requirements.
- ICANN would implement additional Bylaw modifications which would specify the IAP procedure as described in the draft CWG proposal.
- Note: Some variations of this model propose a significant flattening of the structure to keep the addition of resources and costs to a minimum. There also have been discussions that the separation of IANA from ICANN could be initiated by the MRT but would require the formal approval of the relevant ICANN SO's and AC's.

ICANN Internal Trust model

- Authority - The transition from the NTIA would require ICANN to enter into a "Declaration of Trust" that it will hold the rights to the IANA function in trust for, and perform the names IANA functions for the benefit of, the multistakeholder community – as defined by clearly identified mechanisms. Specifically:

- o The Declaration of Trust itself does not necessarily create a separate company – it is a specific set of undertakings by ICANN with respect to holding the authority for the IANA Functions that is a legally valid instrument (meaning courts can order ICANN to perform according to the trust requirements if it is refusing to do so).
- o There would be a "Guardian" (or protector or "Appointor") of the trust, which would be a cross-community group similar to the MRT.
- o The Declaration of Trust would prescribe how it could be modified and the Guardian would be the sole entity empowered to make relevant changes to the document and, if appropriate, move the role of trustee to a third party using the process contained in the trust.
- o In particular, the Guardian's role is to respond to identified catalysts for significant change to the management of the IANA function. These triggers may come in two forms:
    - Systemic failings of the IANA operator, as identified by the periodic reviews; or
    - Out-of-cycle and uncurable "urgent" failings (such as gross negligence or financial failure)
- o While the Guardian has the authority to initiate an escalation process, it cannot decide to execute the transfer. Action would only be taken with the input and agreement of the multistakeholder community, through pre-defined mechanisms.
- o Within the trust document, ICANN would commit to implementing the results of regular reviews regarding the performance of the IANA functions, as identified by the community. These reviews would address not only operational matters and Service Level Agreements, but also broader issues such as whether due process has been followed and policy guidance from the community has been adhered to.
- o The trust document will also commit ICANN to take all necessary steps to transfer its role as Trustee to a new trustee and/or its role as IANA Functions operator to a new operator on the instruction of the Guardian pursuant to the escalation process.
- o In order to facilitate "urgent" reviews or the rebid processes, ICANN would prescribe funding in the Declaration that will be held in escrow, should such circumstances arise.

- MRT/Guardian - The Declaration of Trust would codify the membership, responsibilities and operating procedures of the MRT. Its exact composition is to be determined but would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would in many ways be as described in the common points but would also prepare the IANA 'requirements' documentation (not a contract).
- CSC - ICANN would implement additional Bylaw modifications that would create a structure akin to the concept of the CSC as described in the draft CWG proposal. The CSC would be a standing committee and would perform a strictly operational and

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administrative role, setting and reviewing metrics for IANA and its performance against them. While ICANN would be the Trustee for the IANA naming functions, the CSC will be the active mechanism that represents the customers of this service. The Guardian would represent the larger multistakeholder community.

- ICANN would implement additional Bylaw modifications that would specify the IAP procedure as described in the draft CWG proposal.

Additional Considerations

At the 27 January 2015 State of the Net conference in Washington, DC Larry Strickling (Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce) gave a presentation in which he addressed the CWG's draft proposal directly with the following questions:

We (USG/NTIA) have taken a look at the December 1 proposal and the ensuing comments and discussion it has engendered. As the CWG on the naming-related functions continues its work to finalize its draft proposal, NTIA would like to offer the following questions for the stakeholders to consider:

1. *The draft proposes the creation of three or four new entities to be involved in the naming related processes. Could the creation of any new entity interfere with the security and stability of the DNS during and after the transition? Given that the community will need to develop, implement and test new structures and processes prior to a final transition, can it get all this done in a timeframe consistent with the expectations of all stakeholders?*

2. *Does the proposal ensure a predictable and reliable process for customers of root zone management services? Under the current system, registry operators can be confident of the timing of review and implementation of routine root zone updates. If a new committee takes up what is currently a routine procedural check, how will the community protect against processing delays and the potential for politicization of the system?*

3. *In response to the December 1 draft, other suggestions have emerged. Are all the options and proposals being adequately considered in a manner that is fair and transparent?*

4. *How does the proposal avoid re-creating existing concerns in a new form or creating new concerns? If the concern is the accountability of the existing system, does creating new committees and structures simply create a new set of accountability questions?*

All of these questions require resolution prior to approval of any transition plan.

Questions for the community:

(The leadership is looking for suggestions of questions from the participants of the CWG which would provide useful input to the work of the CWG)

Annex A: Summary of results

	Y	N	Comment
Too complex	89%	11%	Major agreement (75%+)
No contract Co	43%	57%	
Not enough detail	100%	0%	Major agreement (75%+)
Not enough time	100%	0%	Not a major agreement due to low # of responses
IANA perf satisfactory	91%	9%	Major agreement (75%+)
Transfer IANA at start of transition	8%	92%	Major agreement (75%+)
Stronger separation of IANA from ICANN	100%	0%	Not a major agreement due to low # of responses
Applicable acct. in place before transition	100%	0%	Major agreement (75%+)
External org. needed	64%	36%	
Support for CSC	90%	10%	Major agreement (75%+)
Support for multistakeholders in CSC	37%	63%	
Support for multistakeholders in MRT	68%	32%	
MRT needed for major issues	61%	39%	
Binding IAP	78%	22%	Major agreement (75%+)
NTIA auth. role needs to be replaced	64%	36%	

Annex B

	CWG Surveys	Public Consultation	Delta
Support for Contract Co. at transition	40%	57%	-17%
Support for ICANN Internal with accountability	78%	N/A	N/A
Support for multistakeholder MRT	78%	68%	10%
Support for CSC	89%	90%	-1%
Support for IAP	85%	78%	7%
Limited conditions for re-awarding the IANA contract	91%	92%	-1%
Need for accountability mechanisms (link to CCWG)	100%	90%	10%

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