

Attached is an update to the summary of the IANA transition legal structure under consideration by CWG – Stewardship provided by Sidley Austin LLP on April 18, 2015.

## **Summary of Legal Structure**

### **Structure**

Under the proposed structure, a new legal entity would be formed (the Post-Transition IANA or PTI) as a non-profit corporation or a limited liability company. The existing IANA naming functions staff and related resources, processes, data and know-how would be legally transferred into PTI. This will ensure that the IANA naming functions is both functionally and legally “ring fenced” from the ICANN entity. In the case of any existing ICANN contracts, MoUs or other arrangements that relate to the IANA functions, those contracts, MoUs or other arrangements could be assigned to and assumed by PTI, replaced with new arrangements at the PTI level or remain at ICANN with a subcontract to PTI.<sup>1</sup>

PTI would have as its sole member, ICANN. PTI would be a “wholly owned subsidiary” of ICANN—in legal terms, an “affiliate” of ICANN if PTI is a California public benefit corporation without owners. ICANN would provide funding and administrative resources to PTI through an agreed upon budget. The IANA portion of the ICANN budget relating to naming would be subject to approval by the multistakeholder community.

A contract would be entered between PTI and ICANN which would give PTI the rights and obligations as the IANA Functions Operator, further evidencing and supporting the functional separation from ICANN. The contract would provide for automatic renewal, but subject to potential non-renewal by ICANN if recommended by a periodic review or separation review of PTI conducted by a multistakeholder body, as described below. The automatic renewal term could coincide with the periodic review periods contemplated below (i.e., every five years). The matters currently addressed in the NTIA-ICANN functions contract and related documents would be addressed either in the ICANN-PTI contract or in ICANN bylaws and governance documents. Policy making responsibilities would continue to reside within ICANN, subject to accountability mechanisms developed by the CCWG Accountability work stream.

As a separate legal entity, PTI would have a board of directors or managers. The PTI Board could be an ICANN-designated board and have the minimum statutorily required responsibilities and powers. This would avoid the need to replicate the complexity of the multistakeholder ICANN Board at the PTI level, and would maintain primary accountability at the ICANN level and issues concerning the PTI and the PTI Board would be addressed through the overarching ICANN accountability mechanisms. Alternatively, the PTI Board could be comprised of non-ICANN individuals or a combination of ICANN individuals and non-ICANN

---

<sup>1</sup> Note: The IETF MoU would requires IETF’s consent to assign to PTI.

individuals, such as designees of the supporting organizations or advisory committees of ICANN, and the mandate of the PTI Board could then be broader. However, consideration would then need to be given as to the associated need for accountability mechanisms at the PTI level.

If PTI is organized as a California nonprofit public benefit corporation, the PTI Board would be responsible for managing and directing the affairs of PTI. Each director of the PTI Board would owe fiduciaries duties to PTI (regardless of whether that director is also affiliated with or employed by ICANN). The directors of PTI would also have statutorily-imposed obligations, including: 1) keeping minutes of their proceedings; 2) electing officers; 3) issuing annual reports to the member; 4) responding to member requests for inspection of records; and 5) bringing and defending legal actions on behalf of PTI. If PTI is organized as a limited liability company, the responsibilities of the board of managers would be determined almost entirely by an operating agreement. The most flexible structure for PTI would be a Delaware limited liability company. Few responsibilities are mandated by the Delaware statute, and as a result, a limited liability company organized under Delaware law allows for significant governance flexibility.

The proposed structure contemplates a Customer Standing Committee (CSC). (See Section III.A.ii.a and Annex G of the CWG draft proposal for details). The CSC would be an independently organized group of customer representatives. The CSC would not need to be a legal entity. The CSC would receive reports from PTI, as the IANA Functions Operator. The CSC would be authorized to escalate un-remediated performance issues to the ccNSO and GNSO, which would have the power to trigger an ICANN accountability mechanism, which could include a special periodic review function or an Independent Review Panel (IRP). ***[Discuss whether review function is sufficient.]*** The CSC could be provided for under the ICANN governance documents and could also be provided for in the ICANN-PTI IANA Functions Contract.

The proposed structure also contemplates a multistakeholder review team that would exercise a periodic IANA function review (IFR) of the performance of PTI, as the IANA Functions Operator, including against the Statement of Work. (See Section III.A.i.d. and Annex F of the CWG draft proposal for details). The IFR would not need to be a legal entity. The IFR could be convened periodically (first review at year two, thereafter every five years). It could also be convened for a special review under certain circumstances. The IFR would be provided for under the ICANN governance documents and could also be provided for in the ICANN-PTI IANA Functions Contract.

After conducting a periodic or special review, the IFR team would make recommendations to the ICANN Board regarding any necessary changes to the IANA functions. These recommendations could include, for example, recommendations to:

- (a) enhance the resources available for certain IANA functions,
- (b) replace one or more members of PTI management or the PTI Board,
- (c) seek remediation of breaches by PTI of the IANA Functions Contract, or

- (d) initiate a Separation Review the outcome of which could include a recommendation to:
  - i. terminate or not renew the IANA Functions Contract,
  - ii. initiate an RFP for the IANA Functions Contract, or
  - iii. transfer the PTI entity to a new entity that is approved by the multistakeholder community.

***[Note to CWG: What is the intent of having the IFR recommend a “Separation Review” rather than having separation be one of the many recommendations the IFR may make? Meaning what is the benefit of a separate Separation Review process that is incremental to the IFR? This memo does not yet discuss the Separation Review and mechanism as that is pending further CWG discussion.]***

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.

If the ICANN Board did not substantially adopt the IRF [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 a designator structure, this mechanism could be a request by the designators for a reconsideration of 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. Ultimately, the designators (or members) would have the power to recall the ICANN Board. This power would enable the designators (or members) to replace the ICANN Board with directors who will implement the IFR recommendations, consistent with the desire of the multistakeholder community.

The strengths of this proposed structure are as follows:

- (a) 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.
- (b) The proposed structure allows for a formal contract between ICANN and IANA, 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 PRF group and the CSC.

- (c) 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.

The weaknesses of the proposed structure are as follows:

- (a) It would require forming a new entity and, on an ongoing basis, attending to a set of associated corporate formalities, although legal counsel advises that those would not be significant.
- (b) Depending on the structure of the PTI Board, it could introduce a new layer of governance and need for additional accountability mechanisms.
- (c) The proposed structure would require additional work now to separate out IANA assets and address and resolve potential shared assets.
- (d) 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. ICANN Finance should advise on estimates of other costs of maintaining a separate legal entity.

## Dependencies

CWG’s proposed legal structure and overall proposal is highly dependent and expressly conditioned upon the implementation by the CCWG of appropriate accountability mechanisms to support the model. Specifically, the proposed legal structure and CWG’s overall proposal requires ICANN accountability in the following respects:

1. **ICANN Budget.** Ability for the community to approve or veto the ICANN budget. In addition, the following would be requirements relating to the budget:
  - (a) IANA Function’s comprehensive costs should be transparent; and
  - (b) Operating plans and budgets to include itemization of all IANA operations costs to the project level and below as needed. Prefer beginning in FY

'16, required beginning in FY '17. An itemization of IANA cost includes “Direct Costs for the IANA department”, “Direct Costs for Shared resources” and “Support functions allocation”. Furthermore the aim is to have these cost itemized into more specific costs related to each specific function.

2. **Community Empowerment Mechanisms.** The multistakeholder community would be empowered to have certain rights with respect to ICANN Board and the IANA functions, which are more specifically addressed below.
  - (a) Ability to appoint and remove members of the ICANN Board, either as statutory members or designators, and to recall the entire Board;
  - (b) 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. In a designator structure, this may be the ability to request a reconsideration by the ICANN Board, with the ultimate enforcement mechanism being an IRP process and/or the potential for a Board recall. For the purposes of the CWG recommendation, the stakeholder community or member group must, at a minimum, have the ability to review and approve:
    - i. 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
    - ii. ICANN budget (see #1 above); and
  - (c) 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.
3. **IANA Function Review (IFR).** An IFR should be created and empowered to conduct periodic and special reviews of the IANA functions. The IFR should be contemplated by the ICANN bylaws.
4. **Customer Standing Committee (CSC).** A CSC should be created and empowered to monitor the performance of the IANA functions and escalate non-remediated issues to the ccNSO and GNSO. The CSC should be contemplated by the ICANN bylaws. If not currently within the mandate, the ccNSO and/or GNSO should be empowered to address matters escalated by the CSC. This should be contemplated by the ICANN bylaws.
5. **[Separation Review.]**

6. **Appeal mechanism.** An appeal mechanism, for example in the form of an Independent Review Panel, will be required for issues relating to the IANA functions. For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC would have access to an Independent Review Panel.
7. **Fundamental bylaws.** All of the foregoing mechanisms are to be provided for in the ICANN bylaws as “fundamental bylaws” with a higher than majority vote by the community (whether as statutory members or designators of ICANN) to amend, and a prohibition on ICANN Board amendment of these bylaws.