

MEMORANDUM

TO: Cross Community Working Group to Develop an IANA Stewardship
Transition Proposal on Naming Related Functions (“CWG”)

FROM: Sidley Austin LLP (“Sidley”)

RE: Preliminary Response to Integrated IANA Model Legal Questions
Initial Discussion Draft

DATE: March 24, 2015

Overview and Qualifications

You have asked that we respond to a list of questions set forth in the document entitled “Integrated IANA model - outline and legal questions” (the “Integrated Model Document,” attached as Annex A) that is self-described as an attempt to reconcile the previously proposed internal and external models (the “Integrated Model”).

Please note that the draft responses below are preliminary in nature and are provided on a general level in keeping with the general level of the questions posed in the Integrated Model Document. Our draft responses are tailored to the questions posed by the CWG and provided for the benefit of the CWG, to help facilitate its consideration of the transition proposals as outlined in the Integrated Model Document and should not be relied upon by any other persons or for any other purpose. These draft responses reflect Sidley’s preliminary independent reactions regarding the questions, and have not been reviewed by any third parties.

Unless otherwise expressly stated, the draft responses contained in this memo are based on California law, and in particular, the laws governing California non-profit corporations (*California Corporations Code, Title 1, Division 2*). In our effort to prepare these responses for the CWG under a very short and limited time frame, we have not completely and fully explored and researched all of the potential options and nuances posed by each of the questions. Also, please note that where we were uncertain as to underlying concerns reflected in a particular question, we have made certain assumptions about the focus of the question.

Questions for legal advice

Many of the existing questions in the Sidley draft response to the CWG Scoping Document are applicable to the integrated IANA model. For example, questions of jurisdiction, protection or immunity from litigation are also applicable when considering the creation of a Post-Transition IANA (“PTI”) entity. However, the co-authors of the Integrated Model have developed some additional questions for consideration (highlighted in blue below)::

Structure of PTI

Can a PTI that is a wholly owned subsidiary of ICANN have sufficient independence from ICANN’s DNS policy development process?

- **Sidley Response:** Yes. A wholly owned subsidiary of ICANN (an “affiliate”) may employ several mechanisms to create sufficient independence from ICANN’s policy development process.¹ For example, if the PTI were formed as a non-profit corporation, ICANN could be its sole member. The PTI, as an affiliate of ICANN, could:
 - Draft its governance documents (e.g., articles and bylaws, in the case of a corporation, or LLC operating agreement, in the case of an LLC) so as to create mechanisms of accountability and limitations of the approval rights of its member (to the extent permitted by statute);
 - Provide in its governance documents for the designation or selection of directors for PTI from persons or entities other than ICANN, as the sole member. Specifically, the governance documents may establish a Board made up of persons that are selected by and represent specific policy communities (as proposed, a “Community Board” with seven members: two from each of the three policy communities, and the “director of the PTI”). Additional qualifications for PTI can be defined to ensure that the six policy community representatives are otherwise free of conflict relationships with ICANN to help ensure objective (independent) judgment.
 - Require in the governing documents that the corporate formalities are observed, including that (a) the PTI board hire the officers for the entity

¹ Since there is no true “ownership” of a non-profit corporation, we refer instead to this entity as an “affiliate” rather than a “subsidiary”, although there is some overlap in structure.

without interference by ICANN, (b) employees are not shared as between ICANN and PTI, such that PTI has its own distinct employees, (c) PTI assets are segregated from ICANN assets, (d) PTI bank accounts and books and records are segregated from ICANN, (e) any services that ICANN provides to help lower overhead are provided in a shared services agreement between ICANN and PTI approved by the PTI Board, and (f) PTI is otherwise operated as a distinct entity. Further separation could be created by the physical separation of employees at some point, so that the IANA functions are based in a different office than ICANN.

Are there other examples of separate subsidiaries being created to provide coordinated but distinct services? What kind of governance structures have been used if so?

- **Sidley Response:** Affiliates may be created to hold specific assets, house intellectual property, engage in activities that the affiliate has particular expertise in or engage in activities that the parent finds undesirable to engage in itself. For example, a public benefit corporation, such as a hospital, may establish a subsidiary nonprofit corporation for a specific purpose, such as research. Or a nonprofit corporation may establish affiliates in different regions to carry out the parent's policy in specified areas. An assortment of governance structures also have successfully been used. For example, parents have used overlapping directors, officers and facilities to exert more control over their affiliates. Moreover, when acting as members, parents often will reserve powers (in the governance documents), that would otherwise be held by the board of directors. This again allows the parent to exert more control. The opposite may occur as well, and the governance documents may be drafted so as to restrict parent/members influence, for example, by providing for independent directors. The assignment of future intellectual property to the PTI may also provide it with financial independence as new technologies continue to be created.

How would a shared services arrangement (SSA) be legally established (bearing in mind the three parties to the agreement ICANN, the IETF and the RIRs) and where?

- **Sidley Response:** Whether an SSA could be established largely depends on whether the contemplated counterparties to the arrangement, i.e., IETF and the Regional Internet Registries (RIRs), are legally recognized entities that may enter into contracts that bind themselves and others. We would need to know more about the existing SSAs as well as the legal status of the IETF and the RIRs. It

appears that at least some of the RIRs are corporations or other legally recognized entities, but the legal status of the IETF is not clear.² Assuming the entities may enter into contracts, an SSA could be established by either bilateral contracts between the PTI and the applicable counterparties, or by a multiparty contract.

What corporate governance structure could make the PTI co-owned by the IETF, RIRs and ICANN?

- **Sidley Response:**
 - The PTI could be “co-owned” by the IETF, RIRs and ICANN by making the PTI a nonprofit public benefit corporation, of which the IETF, RIRs and ICANN are the only members. Note that if the PTI were a nonprofit corporation it would not be “owned” since nonprofit corporations are not technically owned, but could be affiliated with the three entities/groups through its membership. Alternatively, ICANN could be the sole member of the PTI, but the governance documents could provide that the Board of the PTI be comprised of representative directors of each of ICANN, IETF and RIRs.
 - An LLC could be established as one form of unincorporated association, again where those three entities are the only members.
 - However, the unincorporated association construct has more uncertainty in terms of liability of the members of the association, as discussed in Sidley’s preliminary draft response to the CWG Scoping Document Legal Questions. For this reason, it would be useful if the member entities were corporations, which would provide a stronger shield against individual liability.

Can an SSA be established as a membership organization (as elaborated on in the detailed model description document)? Can a membership organization be established with a single charter member?

- **Sidley Response:** Response deferred pending additional information on status of current SSAs.

² The IETF website states that: the “Internet Engineering Task Force (IETF) is an organized activity of the Internet Society (ISOC)”. The ISOC is described as a non-profit corporation.

Is it possible to devise a PTI where one or more policy organizations could join the PTI over time?

- **Sidley Response:** As a general matter, yes. Non-profit corporations and unincorporated associations may add new members over time. The process for adding new members could be contemplated in the governance documents or addressed later in amendments to the governance documents approved by the Board and the members. The specifics of this process can be explored further once the model for transition is determined. Limits could also be established so that no single group of policy organizations is able to exert undue influence.

If ICANN were to initially own the PTI, are there any legal impediments to ICANN partially divesting itself from the PTI in order to create the SSA governance arrangement?

- **Sidley Response:** If ICANN were to initially “own”, or be the sole member, of the PTI, there are no specific legal impediments to ICANN partially divesting itself. This could be accomplished by the admission of additional members to the PTI (which would “dilute” ICANN’s governance rights) or by a withdrawal or transfer of ICANN’s membership in the PTI (assuming the PTI is organized as an entity with members). Contractual provisions also could be established to facilitate transfer or divestment. For example, if the PTI had multiple members, a “drag along” type provision could be implemented requiring that if two of the three members wished to transfer membership to a third party, the third member be required to transfer as well.

How should the Community Board be structured? How should the relationship between the Community Board and the IANA functions team be structured?

- **Sidley Response:**
 - The Community Board could be structured as the Board of the PTI. Selection mechanisms for board members can be myriad and can be placed in the governance documents of the PTI.
 - The Community Board also could be a special committee within the PTI, charged by the PTI board with overseeing a discrete set of functions and tasks by IANA staff. The Community Board’s autonomy in this function would be linked to the type of legal entity that is PTI. If a non-profit corporation, the Community Board generally would report to the PTI’s board of directors. If an LLC or other unincorporated association, the

governance documents could delegate greater autonomy to the Community Board in respect of its defined role.

How difficult would it be for the names, numbers or protocol communities to terminate their contracts with ICANN's IANA department if IANA is not separated from ICANN in the manner proposed here?

- **Sidley Response:** The difficulty of termination of contracts with ICANN's IANA department would depend on the terms of the contracts and should not depend on whether the IANA department remains within ICANN or is legally separated, either as a "subsidiary" or a standalone entity. This is largely a matter of contract law, which gives significant freedom in crafting termination provisions.

Separation of policy and registry implementation

Which variation(s) of the model provides the clearest delineation between policy making activities and IANA registry implementation?

- **Sidley Response:** The clearest delineation between policy making activities and IANA registry implementation would be in the model with a free standing IANA administrator (complete structural separation), along with a clear, well-defined articulation of the mission of the entities formed through the separation. The model with the second clearest delineation would be the SSA model with tripartite "ownership" of a new IANA entity by ICANN, IETF and RIRs.

Do any variations undermine or support 1) the ability of the Community Board to act independently, 2) the ability of the policy organizations to have their adopted policies implemented?

Sidley Response: See below for integrated response to this and the next question.

How might the above mutual objectives be achieved in either the PTI's corporate governance structure, or the contract(s) between the policy organizations and the PTI?

- **Sidley Response:**
 - The SSA model (functional separation) provides for some degree of independent action by the policy making organizations represented as the

Community Board. However, the shared control over the IANA function by multiple stakeholders could lead to public perception of potential capture *within* the Community Board by the different policy making organizations represented. As such, this model raises potential concerns regarding the accountability of the Community Board itself.

- Corporate governance mechanisms could provide controls to mitigate this risk, for example requiring unanimous agreement by the Community Board prior to setting policy could allow the IANA functions operator to increasingly implement its own policy on a day-to-day basis and eventually operate in a manner resembling complete separation.
- The IANA wholly “owned” subsidiary of ICANN model provides for the lowest degree of public perception of independence. However, even an IANA subsidiary that has ICANN as a sole member, could still provide in its governance documents for a Board of independent directors, designated by third parties who are not ICANN (e.g., IETF, RIRs, etc.).
- It is unclear to us how the third model differs from the second model. Would ICANN have no membership interest in the third model? If so, the free standing IANA administrator model (complete structural and functional separation) would ensure the greatest separation of ICANN policy making and the IANA functions. However, the independent nature of the IANA administrator leaves it potentially open to capture and therefore potentially unaccountable to the policy directives of the Community Board. It is also in some ways a “reshuffling of the deck” With different control of IANA – replacing ICANN with IETF and RIRs, but still with a limited group controlling.

Strong accountability mechanisms could be designed and implemented that ensure that the IANA administrator is accountable to the Community Board. The work of the CCWG with respect to ICANN will be instructive on this as well.

Accountability

Which variation of the model provides the clearest lines of accountability between 1) the PTI department operations and the Community Board, and 2) between the Community Board and policy organizations?

Assuming clear lines of accountability, does this effectively mitigate risks of “capture” of the PTI?

- **Sidley Response:**
 - A model where the Community Board is also the PTI governance Board provides the greatest level of accountability between the PTI department and the Community Board because management (i.e., the PTI department leads) reports directly to the PTI entity Board, with the Board having ultimate authority.
 - The greatest level of accountability between the Community Board and the policy organizations is a model where the policy organizations have representatives on the Community Board, and as such have direct control and influence over the Community Board and the PTI department. See also above for integrated response to this question.

Annex A
Scoping Document

[Attached]

Integrated IANA model - outline and legal questions

The Integrated IANA model¹, proposed immediately after the Singapore meeting, attempts to reconcile the internal and external models. The model enhances separation between policy making and IANA registry implementation activities, and creates parity between all of the policy making communities (based in ICANN for names, the RIRs for numbers, and IETF for protocol parameters) with regard to the operation of the IANA functions.

The model proposes the creation of a Post-Transition IANA (PTI) entity that would:

- be comprised of ICANN's existing IANA functions department resources and processes, in order to ensure continuity, stability, security and resiliency;
- respond to Customer Standing Committees (or the equivalent) established within the policy making communities, which would develop and monitor service level expectations of the PTI;
- be contracted by the policy making organizations (ICANN, RIRs, IETF²) to maintain the respective IANA registries according to policies approved by those organizations, thereby being consistent with existing numbers and protocol communities approaches to the transition, and maintaining portability of the registries if ultimately needed;
- overseen by a small Community Board (e.g., 7 seats) or similar body, representing the three policy communities equally along with the director of the PTI. The respective policy making communities would determine the selection mechanism(s) for their representatives to this body, thereby ensuring that each community had a clear understanding of powers delegated to their representatives, and maintaining direct accountability to each policy community.
- be responsive to any independent appeals mechanism that may be set up as part of the transition process.

It is envisioned that the model could be implemented in one of several variations with increasing levels of vertical separation (all include accounting separation):

- IANA subsidiary, wholly-owned by ICANN, providing operational separation;
- IANA shared services arrangement³ (SSA), jointly controlled by the policy making organization(s), providing functional separation;

A third option, which would not involve ICANN ownership per se, is:

- free standing IANA, providing complete structural separation.

¹ A more detailed, working description of the Integrated model is [available](https://docs.google.com/document/d/1ZpCjh4hoRJ1CaYpw30f3zB0gogGa7ZS1eKyum-rJvCI) at <https://docs.google.com/document/d/1ZpCjh4hoRJ1CaYpw30f3zB0gogGa7ZS1eKyum-rJvCI>

² The IETF uses the IAOC to execute its current contract with ICANN.

³ This variation is supported by the co-authors.

Questions for legal advice

Many of the existing questions in the legal scoping document are also applicable to the model. E.g., questions of jurisdiction, protection or immunity from litigation are also applicable when considering the creation of a PTI. However, the co-authors have developed some additional questions for consideration. In the opinion of the legal analysis team:

Structure of PTI

Can a PTI that is a wholly owned subsidiary of ICANN have sufficient independence from ICANN's DNS policy development process?

Are there other examples of separate subsidiaries being created to provide coordinated but distinct services? What kind of governance structures have been used if so?

How would a shared services arrangement (SSA) be legally established (bearing in mind the three parties to the agreement ICANN, the IETF and the RIRs) and where?

What corporate governance structure could make the PTI co-owned by the IETF, RIRs and ICANN?

Can an SSA be established as a membership organization (as elaborated on in the detailed model description document)? Can a membership organization be established with a single charter member?

Is it possible to devise a PTI where one or more policy organizations could join the PTI over time?

If ICANN were to initially own the PTI, are there any legal impediments to ICANN partially divesting itself from the PTI in order to create the SSA governance arrangement?

How should the Community Board be structured? How should the relationship between the Community Board and the IANA functions team be structured?

How difficult would it be for the names, numbers or protocol communities to terminate their contracts with ICANN's IANA department if IANA is not separated from ICANN in the manner proposed here?

Separation of policy and registry implementation

Which variation(s) of the model provides the clearest delineation between policy making activities and IANA registry implementation?

Do any variations undermine or support 1) the ability of the Community Board to act independently, 2) the ability of the policy organizations to have their adopted policies implemented?

How might the above mutual objectives be achieved in either the PTI's corporate governance structure, or the contract(s) between the policy organizations and the PTI?

Accountability

Which variation of the model provides the clearest lines of accountability between 1) the PTI department operations and the Community Board, and 2) between the Community Board and policy organizations?

Assuming clear lines of accountability, does this effectively mitigate risks of "capture" of the PTI?