

MEMORANDUM

TO: CWG-Stewardship
FROM: Sidley Austin LLP
RE: CSC - Governance Best Practices
DATE: April 20, 2015

Qualifications

The CWG has requested our advice on how to implement governance best practices and address conflicts of interest in structuring the role of the Customer Standing Committee (CSC). Please note that our legal analysis is based on our understanding of the facts and the goals and priorities of CWG, and is provided on a general level in keeping with the level of the discussions to date. Our legal analysis is provided for the benefit of CWG, to assist in consideration of the role of the CSC and should not be relied upon by any other persons or for any other purpose. Unless otherwise stated, the legal analysis contained below is based on California law, and in particular, the laws governing California nonprofit corporations (*California Corporations Code, Title 1, Division 2*), as well as U.S. antitrust laws.

CSC Governance Best Practices

We understand that the CSC will be comprised of a relatively small number of representatives from top level domain registry operators, some of whom are competitors of one another. While the scope of CSC responsibilities remains under discussion, it is contemplated that those responsibilities will include monitoring the performance of the naming functions operator, analyzing reports provided by IANA, undertaking remedial action to address poor performance and escalating performance issues through the ccNSO and GNSO. We understand that the CSC will not become involved in a direct dispute between customers and IANA, although it could be involved indirectly in its review function and escalation role for systemic issues.

The prospect of having representatives of top level domain registry operators involved in handling their competitor's complaints raises concerns about potential conflicts of interest. These concerns could be mitigated and managed from a governance perspective by requiring that:

- A customer must first direct its complaints of unsatisfactory performance to the IANA function operator, who should be given a reasonable opportunity to remediate the issue. This routing of complaints to the IANA function operation would allow the CSC's focus to remain on the resolution of systemic and persistent technical issues raised by customers.
- CSC should avoid direct involvement in individual disputes between customers and IANA and instead having CSC focus on systemic issues of poor performance.
- To the extent that CSC's work involved particular complaints – for example, because a particular complaint becomes part of an overall performance review – members of the CSC should disclose any conflicts of interest adverse to the particular complainant they may have in addressing the particular issue.
- In circumstances where the CSC is considering an issue that involves a direct competitor of one of the CSC members, and the issue is one that could pose a conflict for the CSC member due to competition between the entities, the CSC member be recused from the CSC's discussions and decisions relating to the matter. A decision to recuse a CSC member from a particular matter would be upon the member's voluntary recusal or upon a vote of the majority of the CSC not including the subject member.
- There should be transparency regarding the processes used to reduce the influence of a potential conflict, as well as the decisions outcome with respect to CSC decisions.

The ICANN bylaws currently provide that policies be applied consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.

In addition to general governance issues, because the CSC will include members who may be competitors of one another, and because the work of the CSC will affect non-member entities that may be current or potential competitors of member entities, attention to the antitrust laws is also warranted with respect to the CSC's duties and operation. We believe that the establishment of the CSC and its operation, as contemplated, are permitted under the antitrust laws. The CSC's contemplated responsibilities, goals and mission are pro-competitive in their focus on helping to ensure the continued satisfactory performance of IANA naming functions.

The primary antitrust risk for members of the CSC would be from decisions that:

- Make it more difficult for a non-member entity to compete with the member entity, and
- Are not supported by pro-competitive or efficiency enhancing justifications.

Such decisions could lead to charges that the CSC is engaged in a sort of anticompetitive "group boycott." Decisions that do not fit those criteria, however, and that are legitimately and reasonably aimed at promoting the mission of the CSC to ensure continued satisfactory

performance of the IANA function for the direct customers of the naming services is low risk from an antitrust perspective across the spectrum of roles being considered. Of course, any risk is lowered further for the CSC to narrow its with final decision-making left to other entities (although this may shift the risk without necessarily reducing it). Because the most likely genesis of an antitrust complaint, regardless of its merit, is from a disgruntled individual customer, if the CSC avoided the functions having to do with individual customer complaints and focused instead on systemic issues it would further insulate the CSC from antitrust allegations.

The CSC should follow the policies and procedures previously provided to the CWG to mitigate antitrust risk. Those policies and procedures include:

- Adopting and abiding by a stated antitrust policy;
- Being careful in oral and written communications in order to avoid misinterpretation;
- Having open and transparent processes;
- Following an agenda at group meetings and taking minutes; and
- Ensuring transparency and avoiding informal or “off-the-record” meetings.