

ICANN

Moderator: BRENDA BREWER

April 14, 2015

8:00 am CT

Coordinator: Recordings have started.

Grace Abuhamad: Okay. Thank you. Alright, this is the 39th meeting of CWG and we will do attendance in Adobe Connect. I have Seun on the phone line only. Is anyone else only on the phone line?

No, okay. Well, turning it over to the chairs.

Jonathan Robinson: Thanks everyone; thanks Grace. Welcome back from Lise and myself. I know this is proving to be a marathon session. We're on call 5 out of 6 if - those of you who are counting.

And we hope to make some further good process here. As you know, we've dealt with some significant issues with the design teams. And here, we're going to turn our attention back onto what we've been calling the structural issues and those key - elements of organization of the host-transition entity, for which we have relied, in part, and quite heavily on the input of the independent advice we've received from Sidley Austin.

The queue sheet for this is, in many ways, a punch list that we've touched - that we dealt with yesterday in running through, in a lot of detail, with Sharon on - primarily Sharon - from Sidley Austin in our call meeting Study 7 where we reviewed in detail the memorandum of April 4th and the subsequent punch list from a week later which arose out of the CWG's processing and questioning of the detail on that memorandum.

The - as I said to you yesterday, and we discussed, there are issues with the order of that punch list. It doesn't necessarily represent the most logical way in which to deal with the order of questions. So there's certainly - in going through that, we should not necessarily deal with it in chronological and alphabetical order.

But it does represent a very good - a memoir as to what some of the key issues we need to deal with are. In dealing with structural issues, it seems that the overarching question is almost certainly that which is referred to in Item 9, and that is to do with which variant will be recommended. Now, reminding you that in Istanbul, we essentially made a series of compromises and, again, reminding you of the spirit in which we did that.

And that was a willingness, on behalf of the group, having sat face-to-face, which is - always helps with these things - to try and come together and accept that no solution was going to be - absolutely meet all of the requirements of any given individual entity or it was extremely unlikely. And it was a very good spirit of compromise which agreed to satisfy key variants of the model and focus our and our advisor's attention on two variants of the internal model referred to as internal and internal hybrid from memory.

But, essentially, those dealt with variations of an internal model which had legal and structural separation. So in dealing with that, we agreed to focus in

on those two variants. And I do note that on the list in the last few hours - and Lise and I have talked about this in some detail - that on the list in the past few hours, there's been the emergence of a so-called - what's it - what's the name of it, Lise?

Lise Fuhr: A reverse hybrid model.

Jonathan Robinson: A reverse hybrid model. And this - there's been some sensible points made on that that it - that - well, for one, we did - we agreed we wouldn't kill or remove entirely any specific models. But we also agreed that if we were going to get to an endpoint, we really needed to focus our attention in on a limited subset.

So I think one of the - certainly, Lise and I have discussed the fact that for the present, we should not get involved in a detailed discussion on the reverse hybrid that's been introduced. Nevertheless, as I - one or more participants contributed on the list, there may well be some valuable components of that that can be woven into our work.

Notwithstanding that, we only really know that once we made some more progress on where we go with the variants that we chose to focus in on. And if, indeed, when we make that more progress, it - the critical questions or issues remain unanswered or undealt with, it may well be that we can say well, is there something we can take from one or other of the models that we have set aside.

But I must remind you that - of two things. First of all, we have to try and get to an endpoint. And whenever we reintroduce an issue, we run the risk of bringing up various complications that go into it, and, frankly, of some

members saying well, if you're going to reintroduce that, I'm going to reintroduce this, which I graciously set aside in my view.

So the - just have to remind you of the need to try and converge our thinking rather than produce divergent options. Thank you. So there's a couple of comments that appear to support that and let's tease this out in a little more detail.

So, really, the primary point in thinking about a structure of how to process the punch list and talking this through with Lise, we felt that the logical way to deal with this was, first of all, to deal with the overarching point of question 9 because some follow - some points naturally follow from that. We will be able to touch on elements - and some of the elements of the punch list we've dealt with via the design teams.

And so, we have a certain order that feels right to us to deal with and I'll try and walk us through that order. And I hope that the story that emerges from walking through that makes sense. Certainly, it's - question 9 deals with which variant -- legal or functional separation -- it seems to me, and in discussion with Lise, to ask that we work through 2, 4, and 8 at a very high level and cover off elements of those.

And 2, 4, and 8 are really the Periodic Review Functions Group -- the PRF -- or - 4 is the ICANN Board and 8 is the Triggers. Now, really, why I say high-level is because in order to deal with any form of separation, which inevitably we'll have to start to think about, we need to be sure that there is at least one mechanism by which that could happen. And that is touched on by 2 - in other words, a - an output of the Periodic Review, which goes to the board in the current flow.

And then, that touches on Triggers. But really, the primary focus I'd like to go into first of all is - (Matthew) asked if the document could be put on the screen. And yes, we can - let's put that up now.

The reason I'm hesitant to put it up is because there's a - I'll be absolutely frank with you. If we went through it systematically there's a (unintelligible) in the current order in which it's in. We could potentially go down all sorts of rat holes which may not be necessarily productive to making progress on the overall thing.

I'm not comfortable with the order, as I've said a couple of times. So we'll pull it up, but please, let's recognize that we're going to (unintelligible) un-sync, as (Grace) said. So when we make reference to points, you can, yourself, go to them.

So let's go, first of all, two Item 9 which deals with the variants which will be recommended -- legal or functional separation. Now, I have a sense that - of where I think the group is going on this and my feel is - and I'm going to go out on a limb on this and say that my sense is that there is a movement within the group towards the legal separation model.

And I'd like you to either agree with that or challenge that if you disagree with that - bearing in mind that we need to try and settle on that overarching point before we can go into some more detail. And there's a couple of comments that have immediately shot up, including from Chris saying that, in principle, he's happy to go with depending on the structure of that.

And Brenden acknowledging that that was his sense of the call, as does (Matthew). But let me deal with the hands in the queue for their comments. So

that's, first of all, Chuck, and then you'll be followed by Alan. Chuck, go ahead).

Chuck Gomes: Thanks, Jonathan. One of the things I picked up when I put it in the chat in our call earlier today is that the issue of a contract keeps coming up as having quite a lot of very important value. And so, with that in mind, and if my assessment is correct, that, to me, is a critical element of the legal separation versus the - just the functional separation.

And I'll leave it at that.

Jonathan Robinson: Well, Chuck, that's a very good point and conditional on where we end up in this discussion, I will expect that that's the next substantial discussion we have, which is in and around Item 6 on the punch list. But I won't go there yet because it's clear that there's more discussion to be had, first of all, on Item 9.

So, over to you, Alan.

Alan Greenberg: Thank you very much. I'll prefix my comment saying I - unfortunately - had to miss a good part of the discussion with (LURS) yesterday. So I don't - and I haven't had a chance to listen to the mp3 or read a transcript.

One of the main differences from my perspective was earlier discussions we had that legal separation might provide significantly better protection from ICANN's bankruptcy if we use - if we legally separate it. So I guess I have a question. Did that come up on the discussions yesterday and is that still relevant or is it now not a particularly relevant decision point in this discussion?

Jonathan Robinson: Alan, it did not come up specifically yesterday as far as I recall. But the - I know Sharon from Sidley is online. And I think we covered this in Istanbul; we certainly touched on it a couple of times.

So I don't know if, Sharon, you would like to respond in any sense to Alan's point here.

Sharon Flanagan: Sure. Let me go ahead and do that. So we didn't - as you said, we didn't talk about it on yesterday's call. We did discuss it in our memo from April 4th.

The distinction is that if we have a separate legal entity, then if there is ever a bankruptcy event that ICANN - it doesn't automatically throw the IANA entity into bankruptcy with it because there is a separation there. Now, ICANN's interest in the IANA entity could become part of a bankruptcy estate, but it doesn't automatically become a bankrupt entity just because ICANN may go into bankruptcy either voluntarily or involuntarily.

Alan Greenberg: Yes, and my recollection was - if I may interject - my recollection was it was unclear how the dust would settle -- whether it would be treated as an asset or left completely alone.

Sharon Flanagan: Alan, that's correct.

Alan Greenberg: Yes, okay.

Jonathan Robinson: (Unintelligible) sort of potentially subject to further work, but indications are debtor protection from the legally separate entity.

Alan Greenberg: But probably no guarantee until the actual event happened and we saw what courts decided or what various people decided. Thank you.

Jonathan Robinson: Chris, just noting your point on structure; noting (Guru)'s point on a poll. And I think it would be quite helpful to take a poll after the more discussion. We - this is really tricky - what you push down further in discussion what you have up front.

I think the discussion that Lise and I had was that we felt that the advice we had received is that, ultimately, LLC or not-profit could work. And we feel it's important to get the decision in and around legal or not and then some of the other key points under our belt first. And, indeed, it may even be that this is something which goes out unresolved in the public comment because this is a detail point.

But we can come back to that if you feel strongly that we need to, but that's where we're at, at the moment. Olivier.

Olivier Crepin-LeBlond: Thank you, Jonathan. (Unintelligible) of not speaking. And my question - and I know it's been asked before; I just want to be clear on this. So if we have a legal separation as we've just heard now, there would be - that would be some kind of protection from bankruptcy of ICANN or at least it may not be affected in some cases.

Would there be the possibility of suing that entity's (separaty) from ICANN?
Just want to make sure I got this one right or not.

Jonathan Robinson: Yes, and Sharon's put her hand up in response. So let's hear the response.

Sharon Flanagan: Yes, there would be. If there is a separate legal entity, then that is a - an entity that can be sued, presumably, if the - whatever the cause of action is will drive

a lawsuit either against ICANN or if there's an entity to the subsidiary. But you're correct that it is a different entity and could be sued separately.

Olivier Crepin-LeBlond: But - and just as a follow-up, then, if I may, please.

Jonathan Robinson: Go ahead, Olivier.

Olivier Crepin-LeBlond: Thanks, Jonathan. As a follow-up, could ICANN sue that entity?

Sharon Flanagan: Yes, ICANN...

Olivier Crepin-LeBlond: So could ICANN sue if...

Sharon Flanagan: ICANN - yes, ICANN could sue that entity unless we constrained that in some way. So if there're, for example, parties to a contract, each party could, theoretically, unless we take the right away, each party could have recourse to sue the other party for a failure to perform.

Olivier Crepin-LeBlond: Okay, thanks.

Jonathan Robinson: Thanks, Olivier; thanks, Sharon. One of the things I intend to come back to Sidley on in a - depending on where we go - but is to, before we close this off completely, is to have a - I think it's worth a kind of plastic risk warning; these are the issues. And, Olivier, you've helpfully highlighted one that we should be at least aware of.

Of course, there's - with most of these things - there's a risk in both directions. Eduardo Diaz:.

Eduardo Diaz: Do you think you've - this is a (unintelligible). I just want to go back to the question about our legal separation model and the functional separation model. On the - in the perspective of complexity versus simplicity, I believe the general functional separation would be, in my mind, more simple to propose mostly because, in the legal separation, we'll have things like another governance bodies that we have to deal with. Thank you.

Jonathan Robinson: I understand that point. And Eduardo Diaz:, at face value, it would seem simpler. But whenever we have used this point simpler on the e-mail and so on this, it seems to be a relatively inflammatory point in that it seems that it's not necessarily agreed that any given structure is simpler. The minute somebody advocates that one solution is simpler, there's always someone else pointing out a variation. Seun.

Seun Ojedeji: (Unintelligible). Hello.

Jonathan Robinson: Hi, Seun. We can kind of hear you. Go ahead and talk, Seun, and we'll confirm that whether we hear you accurately or not.

Seun Ojedeji: Yes, I'm actually talking. Can you hear me?

Jonathan Robinson: Seun, we hear you.

Seun Ojedeji: Oh, good. Thank you. This is Seun, for the record. I just want to get some clarification on the ICANN going bankrupt and the legal separation. So Sidley, you're saying in order to secure IANA, it's better to go the legal option in case there's a situation whereby ICANN goes bankrupt.

Is that what you're saying on the - if (unintelligible) that IANA is actually a set of functions - so you are (unintelligible) that the current source - which we

all know that is ICANN source of funding - we all know that in ICANN, we are (unintelligible) that if that organization goes bankrupt, a legal distance is what will enable the function to continue.

I'd like to get some clarification about that because I know that these organizations go bankrupt. They usually take (unintelligible) a set of ways and a process by which their activities can be transferred or taken over - can actually also fix - make that thing (unintelligible). So I'm thinking if ICANN goes bankrupt, which is something that may probably not happen, would it just be that we just indicate in text a process by which the IANA gets transferred to another (unintelligible) literally to go out (unintelligible) organization enforced in that sense? Thank you.

Jonathan Robinson: Seun, this audio is a little bit indistinct there, so I'm hoping that Sharon managed to get that. But essentially, let me hand over to Sharon to see if you were able to get the gist of that, Sharon.

Sharon Flanagan: Thanks, Jonathan. I think I've got the gist of it. I think the first question is, is do we think it's a better legal option, you know, to have legal separation from a bankruptcy standpoint, if ICANN were to go bankrupt. And the answer to that is yes, we do.

Obviously, if there's an ICANN bankruptcy, that is a very serious, significant problem, regardless of the structure. But there is a marginal benefit. If there's legal separation, at least the IANA entity isn't automatically part of the bankruptcy proceeding.

Now, if ICANN were to go into bankruptcy - or for that matter, if the IANA entity were to go into bankruptcy - there is a lot of power of a trustee in bankruptcy, at least in the United States. And one of the powers of a trustee in

bankruptcy is to take a contract and decide whether to reject the contract or to assume the contract or do both -- you know, reject, in part, and assume, in part.

So if there were a bankruptcy event of either ICANN or the IANA entity - if we have legal separation - there will be a question about whether the contract will be maintained because there is the power of a court in bankruptcy to reject the contract.

Jonathan Robinson: Thanks, Sharon. Chris.

Chris Disspain: Jonathan, thank you. I - I'm conscious that you're not looking - and I understand why - so it's a sort of, you know, to and - to and the fro. But you - if it's alright with you, I have a couple of sort of questions which I think require me to ask the question, have Sharon respond and then me respond.

So I'll try - I don't want to monopolize things but I do want to try and get to a particular point. Sharon, is it correct that your - the point you made about a non - a not-for-profit not being owned by ICANN, the - there's a difference in respect to an LLC? In other words, if it's an LLC, is that effectively what I would consider to be a real subsidiary, whereas in respect to a non-profit, it would be more just ICANN as the sole member?

Sharon Flanagan:: That - Chris, that's right. I think when - if it were an LLC, there would be ownership in the sense that we think of equity ownership as opposed to simply control. And so, if it's a non-profit corporation, there's no ownership -- there's not equity ownership -- but there is control. So that would be a distinction.

Chris Disspain: Right. And that would mean that ICANN could not, then, sue (unintelligible) subsidiary, would it?

Sharon Flanagan: I'm not sure if that's right. I think it would be very odd and unusual for related companies to sue one another, but I don't know that there's any reason - any legal reason - they couldn't. I don't - I'm not aware of any case law that says they can't; it just is - would be very unusual.

Chris Disspain: Right. So what - my question, then, would be what would you see as being the advantages to this - to the affiliate model being a non-profit rather than an LLC and what would you see as the disadvantages, given that we are going to have to, at some point, make that decision if we follow this model?

Sharon Flanagan: Jonathan, you want me to take that one too?

Jonathan Robinson: Yes, go ahead. I mean, it is something, as I said, I'd like to keep - not get too involved in now because we haven't yet even made the decision.

Chris Disspain: John, I'm happy to reserve that question. I don't have - we don't have to deal with it now. I just...

Jonathan Robinson: (Unintelligible).

Chris Disspain: It was just that we've been talking about it, so I've raised it. But I'm more than happy for you put it to one side as long as we put it in the car park and get back to it.

Jonathan Robinson: Yes, well, it's absolutely on the list. And I noticed that (Josh) has put his hand up and including flagging the issue of the matter of funding. So, (Josh), if you weren't going to deal with funding, it'd be great if you could deal with whatever question or point you had.

And I'd also, perhaps, make some remarks as to how we might, you know, secure the funding both through - with various - via, I guess, contract, if we're talking about an - a legally separated entity, any remarks or points you could make.

So I note in the chat that (Josh) has the made the point of the matter of funding would be something that requires further consideration, and, moreover, that the prior memo did discuss the advantages and disadvantages of LLC versus non-profit. So that's something we could easily refer back to as well.

Josh Hofheimer: Yes, did you - I don't know - Jonathan, sorry; I was on mute. Did you want me to make any comment about the funding piece or not?

Jonathan Robinson: I think it would be helpful if you could just indicate, you know, perhaps, if there's any in particular - if there's, perhaps, either how - any comment on how funding, you know, what the - what shape the funding discussion -- Point 1. And Point 2, if there's any significant difference in, you know, protection and stability with a legally separated - or in any advantages to legally separated versus not legally separated.

Josh Hofheimer: Sure. So if - and the funding question is something that Sharon and I had been discussing as well and I don't think it's a settled issue, if - by any means. I pointed out because I think the parties - or the working group will need to consider how the budget for IANA, if it's a separate legal entity, is developed, you know, presumably, you know, it would be that it would become the company that is entering into downstream agreements with various IANA or other Root Zone administrators.

And so it could - can potentially peel off, you know, if you will, some of the funding or its revenue from some of the revenue that ICANN was receiving so that there was direct, you know, privity there between the subsidiary and other third parties. Or it could be something that the money flows into ICANN and then it's allocated via budget allocation to, you know, the IANA sub.

So I think that, you know, we raise it to make the point that as a sort of a process detail, it's something that needs to be considered and worked out. And I think it was to Chris's question, it's one of the reasons, you know, a dispute over funding over - or over fees or one party retaining fees versus the other could give rise to, you know, some sort of lawsuit over damages or some action, in that regard.

So that's just a comment on the funding piece via the - the advantages and disadvantages, as we said, we did go into some of those in the memo. One advantage of the LLC is that it would not need to reapply for tax-exempt funding status. It would be able to rely on the non-profit's (unintelligible) benefits corps number. So it'd be able to rely on ICANN's established exempt status and would not have to obtain its own.

So that we can sort of be an advantage just because you avoid the unpredictability of that process. Which although is a ministerial process it still has the potential for unpredictable results because you're dealing with the IRS. There are other things that can be considered un-governanced but I'm just pointing this out. I'm just pointing that out as one examination. I'll lower my hand at that point.

Chris Disspain: Thanks, Jeff; that's helpful. That's useful.

Jonathan Robinson: I wondered if there are questions or comments and in relation to -- I think, Chris your point on staff transferring or losing any benefit. This was coming off in an earlier conversation. In fact, with the understanding was that in essence the transfer of obligations or benefits could be made to the subsidiary. I think that was answered previously. Giving time for questions in the chat. I'm happy that we can put the poll, at this point and get an indication of where the group is at.

We could have just asked for non-objections but the poll gives us an opportunity for people to be anonymous which, of course, isn't transparent but my confidence and ability to confidently express where others might feel less confident to do so if the checks were on audio. I think it could be useful and I don't think -- let's just see where the groups are at in terms of legal subsidiary or functional separation and get a flavor of where that's at as far as the groups is concerned by a poll. And just for the record, just like to let the group know, the Chairs will not participate in this poll so we will not be - and I expect the same will be said of the professional advisors and staff. Grace, go ahead.

Grace Abuhamad: Jonathan, the question I have right now for the poll is which variant would you prefer and the question being functional separation or legal separation.

Jonathan Robinson: Legal or functional separation. Go ahead mind from the Sidley memo. Which variant is preferred, legal or functional separation? Chris makes the point that he finds the polls as long as it depends on the structure of to be discussed. Well, yes and no. I mean the structure is legal or functional separation but then the devil is in the detail and it is clear that we will go through that detail and that ultimately having gone through that detail we will flesh out many other elements that are captured within the Sidley memo. So, sorry, the Sidley punch list. Thanks, Chris. Alan.

Alan Greenberg: Chris's comment, I think raises the issue of, for those of us from the devil is in the details. It's not clear which way we should vote to -- clearly if everyone votes saying if you might consider legal separation then tick off that box. If legal separation doesn't win given that most favorable view of it then clearly it's off the table. But if people are randomly going to pick one or the other because they're not sure how the details discussion will go out, I'm not sure the poll tell us anything.

Jonathan Robinson: I think the key point here, Alan Greenberg: I think that's a good point but the key point here is if we don't split the discussion at this point and go into one variant in detail, every time we try and answer a question it potentially says it depends on which model. So we kind of have to go keep driving down a route and it may be that you would change your mind later or advocate for a variation to that variant but sooner or later we have to deal with the detail and that's now, I think.

And so in order to deal with the detail, this is the overarching question. So I think it's with that in mind that we have to make some form of split between these two variants that we've ended up with and had on the table for quite some time, and had quite some additional discussion, external input and so on.

(Man): Jon, I would suggest we say legal separation presuming the details are done to your satisfaction.

Jonathan Robinson: I think that's given that it's on record. So it's not visible what the variant is preferred so we're going to hold off for a minute and I encourage you to cast your position in the poll. And then we will close the poll and display the results. The idea being to not influence the outcome by demonstrating the point dynamically. So let's hold it open for another 60 seconds to give you an opportunity to make a position in the poll and then we will close it. So please

if you haven't put in position in the poll now which should be very simple in front of you to just click on either no vote functional or legal separation.

That's the point.

Olivier Crepin-LeBlond: Jonathan, it's Olivier.

Jonathan Robinson: Olivier, go ahead.

Olivier Crepin-LeBlond: Yes. Thank you very much, Jonathan. I'm just concerned here with the poll that we have here. Maybe could I suggest that we have three or four choices here? Legal separation, functional separation, undecided, and no vote because at the moment the no vote is effectively anyone who hasn't made -- voted on this and, of course, as you said, you will not be voting and others on the call will not be voted so that will -- yeah. But better to see of those that are voting when we get the undecided. Thanks very much.

Jonathan Robinson: So with that change it is very important that you understand all participants. Please note you need to reenter your choice now. This is effectively a new poll. So please reenter your choice. Whether you have any preference for legal separation, subject to all of the details being ironed out, a clear preference to functional separation, subject to detail are being ironed out or you remain undecided.

And, in fact, I think the no vote is primarily intended to cover our position for participants who are either staff, Chairs or professional advisors. But should you feel that you would like to make a no vote I don't think you are prohibited from doing so.

Yeah. I think Chuck's point is a good one. Let's not over analyze this. Let's try and get some direction for the group and move down that direction and see

when we flush that out whether that remains concerned or whether it starts to build on a convergence of views.

Right. So we'll give a minute of open poll from now. Please cast your votes right away and then we'll close the poll and display the result.

(Mark): Excuse me Jonathan, Mark (unintelligible). Is this for members only or all members and participants?

Jonathan Robinson: I think it's for everyone on the call at present. It's really just to get a direction from the group and we are not specifically excluding participants.

(Mark): Thank you.

Jonathan Robinson: Okay. We're going to close the poll now and display the outcome. And so now you've got a pretty clear sense of direction in the sense of legal separation but it's quite clear that there are quite a few of you who are undecided and perhaps that's not surprising. So I would like to take this as direction to now pursue the detail of this legal separation route. And go on now to understand what the impacts are on some of the further detail in the punch list. If we could remove the poll. Alan, is that a new hand that you'd like to talk with?

Alan Greenberg: I don't know why it's up or how it got up.

Jonathan Robinson: All right. So once we have the sense of direction on there -- Eduardo, go ahead.

Eduardo Diaz: Yes Jonathan. This is Eduardo. If I look at the poll there's about half -- there's a functional separation and there's some people on the side that think that it's half, like 50 percent of the people, once they said it's not a clear direction here

but if we want to move forward we should go legal separation or functional separation and deal with that. Then we have really clear direction of which way we should go. Thank you.

Jonathan Robinson: Eduardo, I mean, that's what we had and Olivier argued for why we should get the option for some to be undecided which is why we created that supplement.

Eduardo Diaz: Jonathan I understand that. It's just what does that mean. I mean, we are going to take one direction now and you are undecided. Does that mean that at the end you will not support that direction? That's my point.

Jonathan Robinson: We have to get out some -- I'm not sure I understand. We have to get some sense of direction. There is we had about 56 percent supporting pursuit over legal separation. We had about 21, 22 percent supporting functional separation at 21, 22 undecided. What I suggest we do is go further down the detail on the legal separation and then we can perhaps we can reassess at that point.

Eduardo Diaz: Okay. Thank you so much, Jonathan. Thank you.

Jonathan Robinson: Thank you Eduardo. So when we look at this -- you've got this legally -- assuming you've gone down the root of this legally separated entity. You then go to the question of in the event of some form of final separation you've got to say that, well, what might be the trigger for that? How might the Board react to such a trigger?

And are there any other triggers for such an event? Well, we know from our work yesterday that one such trigger might be a recommendation from the periodic review team. Should they make such a trigger as it's currently constructed that would be referred to the board, and we would then have the

question is, should there be any other triggers? Are there any other triggers, and how would such as separation be implemented? If you look at the document that those are really where there's a lot of detail gone into Sections 2 - Periodic Review Function. Section 4 - The Board and some of the issues there. And indeed, on Section 8 which is essentially looks at triggers and implementation.

What I'd like to do is just ask take a hypothetical scenario because I think really where we want to go into some detail is now envisioned of the contract is in place and really look at number six in some detail as the next point I'd like to go to. But prior to going to six to just understand from Sidley. Perhaps, Sharon you could comment on -- assuming we had a trigger from the recommendation from a periodic review functional on separation, how that might cascade through the board and to the point where implementation details had to be dealt with. And then I think we'll go onto six for detailed discussion by the group.

Sharon Flanagan:: Thanks Jonathan. This is Sharon. So in terms of the just taking that example of the periodic review function. So if we have a periodic review function in reviewing the IANA functions and then coming back with some recommendations. Something needs to be changed whether it's an issue on renewal of the contract or there's some kind of operational issue. And so the periodic review function - that team would report to the ICANN board and would make recommendations. And then the ICANN board has to make a decision. Will it accept the recommendations for the periodic review function? Will it modify their recommendations or will it reject the recommendations?

Now, if it's the first example, where the ICANN Board just accepts the recommendations that sort of the end of the process. There is no recommendation. The ICANN Board agrees that it will be implemented and

there is resolution. If instead the ICANN Board decides to modify the recommendation or reject it altogether, then that would be, in this model, that would be a scenario where that decision to modify or reject would go up to the multi-stakeholder community. That empowered member group that the CCWG is working on. And that group would have some ability to vote, veto the decision of the board and then send it back down. If there was disagreement as to how the ICANN Board handles the recommendation of periodic review functions.

Then ultimately that could be the recommendation could be anything; right? The recommendation could be don't renew the contracts or divest of the IN entity to a new entity. There's a whole host of scenarios. But the idea is that ultimately it's going through the ICANN Board and then up to the multi-stakeholder community to pass on yay or nay. Is that something that the community would agree with?

Jonathan Robinson: Thanks Sharon. And that's clearly all subjects of the detailed work of the CCWG. So I'd like to direct us to look at Section 6 now of your punch list -- of the Sidley Austin punch list. Before that I see your hand is up Chris. So I'll come to you.

Chris Disspain: Yeah. It's about that. So whenever you're ready.

Jonathan Robinson: Okay. Great. So it feels, if you note, six says accountability on ICANN PTI contracts (in legal separation). So taking that direction of preference to go down the legal separation, we absolutely have to learn unpack some of these issues. Now, Chris, you had a question, Sidley may want to remark, and I'm sure the group might want to comment on this. Highlight is on 6A is how do we address what is required through the contract and how do we address

what's required potentially through PRF and/or CSC. So let's go to you Chris, and then to Sidley, and then open it up to group.

Chris Disspain: Thank you, Jonathan. I have suggestion to try and deal with this point. It seems to me that there are two ways that you would trigger that divestiture mechanism. I'm not saying that there necessarily aren't any others but certainly two that I can think of. One is that as we've already said, it's the five-year new review or a review that happens between those five years because of some emergency mechanism recommends that the function be moved somewhere else. Or it's the CSC, after going through it's escalation mechanisms were also to recommend that the function be moved somewhere else.

There will then be a process by which the constituent parts of ICANN would take that recommendation and vote on it. And we discussed this to some extent and talked about whether it would be a super majority of the SO's and AC's or whatever. But that's a detail. But let's assume for the moment that either the review body or the CFC has got to a point where it has decided that it wants to recommend that there should be a divestiture of the function.

It would make our recommendation and then it would be in process under which the SO's and AC's would agree, vote, etc., to do that. At that point, it seems to me, that one would be able to craft a fundamental bylaw that said in the event that X percent (unintelligible) of the SO's and AC's whatever we agree, vote to divest ICANN of the IMO function. The board is required to do so and that there is a process by which that occurs. And in the unlikely event that the board were to refuse to obey the fundamental bylaw, then one is spun into the overarching CCWG accountability mechanism that enables the community to spill the board and replace them with the board that is actually going to do with the bylaws say that the board should do.

Jonathan Robinson: Chris, I think that I understood that to be a description of an understanding rather than the question (unintelligible).

Chris Disspain: I was hoping to provide some color and depth to the discussion on how this might work within number six that you've got up on the screen, Jonathan.

Jonathan Robinson: Yeah. Thanks Chris. And I confirmed that what you describe is consistent with what I understand to be the case at this stage. And the reason for moving over some of the other points covered in two and eight which triggers an implementation is to say, that we know we've got at least one new highlighted potentially to triggers so there may be others that we flesh out as we go back and deal with their triggers and some but for the moment we have the potential triggers. We know that we have the potential for separation and extremists. And so now it's a question of what is covered in the contracts assuming we've gone down this legal separation route.

Sharon would you like to make any additional remarks or remarks to supplement to what Chris has said about how the kind of scope of the contract, and the kind of things that might be included there, and the issues the group should be thinking about in and around six.

Sharon Flanagan:: Yeah. Sure. Let me just comment on Chris's recap and I agree with Chris, what you described. I think the only thing and I it's probably more in detail, the only is the SO, AC approval mechanism. At least I heard you describing that as separate from the ultimate CCWG mechanism and the only point I would make there is that I think at least potentially those could be one in the same. That will be the multi-stakeholder community having a say at some point. So you could go through another process so periodic review function

then SOs, ACs ultimate accountability or you could just roll up the second and third into one. But that's probably more of a detail.

So in terms of the contracts to number six on the punch list if there's legal separation and there's the contract and I think that's one of the advantages that the groups been discussing of the legal separation is the ability to have a contract between ICANN and the IANA entity. And, so one question is, how are the two parties held accountable to performance under that contract? And, so, one obvious choice is through a contract. That's what contracts do. Contracts outline the rights and obligations of parties and if the parties don't perform the contract sets forth a set of mechanisms to address that.

Whether it's any process to deal with a breach and the remediation or it's the ability to potentially have recourse in the court although as we talked about that would be, I think, probably an unusual outcome if there actually needed to be litigation between the parties. I think more likely it would be a mechanism of breach and resolution remediation. So the contract itself can be the vehicle for the accountabilities. We talked earlier today about the transition plan on one of the design team works, and how that could be part of the contract itself. So the contract could be the place.

There is also the possibility that the periodic review function or the CFC is the place where there is accountability and that those two groups could be also evaluating performance under the contract and so you wouldn't need to actually have ICANN or PTI trying to enforce laws was sue to enforce the contract but rather the two groups are reviewing and providing feedback and dealing with it through that mechanism. So there's two ways then you could theoretically do both for different types of issues.

And then the contract itself, obviously that needs to be something that is flushed out in more detail in terms some kind of turns or heads of terms would be decided upon. And lots of things to think about there but think about one example of an item to consider is how does the contract - what's the term of the contract and how does it renew. So you could envision a scenario where the contract maybe has an auto renewal provision and it just renews automatically every X number of years.

And that renewal could be co-terminus with the periodic review cycle so potentially every five years, for example. You could provide that it's automatic on the part of PTI. So PTI just automatically renews each time. And that the discretion is with ICANN. The benefit there would be that if we want to keep a PTI function kind of to a minimum, keep it more legal and administrative but keep the accountability up to the ICANN level then that would we would may be argue that the contract would give less flexibility for PTI to terminate more flexibility at the ICANN level to terminate. But obviously, that decision subject to all of the accountability mechanisms that are being discussed. So I'll stop there.

Jonathan Robinson: Thanks Sharon. And you raise a very good point there because there's a sort of linkage it seems to me that if you open up the discretion at the PTI level you have to open up accountability at the PTI level. So you may argue that it is critical to have effective accountability at the ICANN level and that's the community recourse regardless of the issue.

Are there any questions or comments or points? I mean, there's Donna's points about the contract and who gets to decide that contract. I think that will be very important to flesh out at some point if we go down this route it will be at minimum at a heads will turn level subject to detailed negotiation. And clearly that links into things like the CFC because the contract will need to

encompass a commitment to meet the - that will be the device by which the service level expectations will be turned into service level agreements, which one, I mean, I'm just speculating here but I expect those would become an annex to the contract that could be updated from time to time.

I realize people are tired and it's - but it's - it'd be good if there are any other questions or issues in and around Item 6 and what - the scope of what could be addressed through the contract if you feel there are particular issues or you would like to be explained what you think could be covered.

There's some obviously healthy discussion going on in the chat, and it's an interesting point about who would have oversight of the - of - and sign off. Even though it's a wholly owned subsidiary contracting with its parent entity, there's a question of who would have sign off on that - those key contract terms. Sharon go ahead.

Sharon Flanagan:: Yes I think on that question I think on who decides on the renewal - and again these are all variables. You could do it a lot of different ways. But if the decision is to keep the PTI structure as lean as possible and so you say, "Well that's an automatic renewal," then the decision is being made to renew really at the ICANN level and that I think could dovetail in with the periodic review function.

And so that's why I was saying, you know, maybe the review function and the term of the contract are the same every five years, whatever it is and that then allows the periodic review function the - a multi-stakeholder body to make a recommendation to ICANN, "We think you should renew the contract," or, "No we think you should let it lapse and do an RFP."

And then that decision by the ICANN Board ultimately has - is vetted through the multi-stakeholder community up - sitting above, whatever that ultimate CCWG group is, can say, "Yes we agree with the ICANN Board.

It should be renewed," or, "We disagree," or, "We think an RFP should occur."

Jonathan Robinson: That's a really interesting point Sharon and I must say at face value it has an elegance of being - having a sort of continuity, but yet it's not so continuous that it can't be interrupted when there are points of serious concern so it's interesting point. Olivier?

Olivier Crepin-LeBlond: Thank you Jonathan. Olivier Crepin-LeBlond speaking. And with the accountability process being within ICANN and not with the PTI or in fact in either way or if it was through the PRF or CSC, if ICANN was to go rogue how would that affect the PTI?

Jonathan Robinson: Who are you addressing that point to Olivier? And it might be an example of what you mean by go rogue.

Olivier Crepin-LeBlond: Oh. That's an interesting one. No specifics on ICANN going rogue. I mean, for whatever reason ICANN goes rogue, I don't know, the directors departs to go and - on a worldwide holiday somewhere and decide that at the end of the day running the DNS is not something that they're interested - I don't know.

Some - whatever you can think of ICANN going rogue at but I'm just saying if the ICANN Board and ICANN was to go rogue, how would that affect the PTI itself since there appears to be a contract there but it's - the only thing is the accountability is through the contract.

Then would that mean that you might have a PTI also being subjected to not having any accountability measures? I don't know. I'm just thinking out loud here and I - so my question was aimed at Sharon on...

((Crosstalk))

Jonathan Robinson: Okay so thanks Olivier. Sharon and (Josh) have both put their hands up so I'll leave them to respond in that order unless there's a difference. So Sharon go ahead and then - or (Josh) I see your hand. Sharon did you drop your hand in order to...?

((Crosstalk))

Sharon Flanagan:: Yes. No I only dropped it in anticipation of you turning it over to me so...

Jonathan Robinson: Okay go ahead.

Sharon Flanagan:: Yes in terms of the scenario of the ICANN goes rogue, I think that can be addressed through the accountability mechanisms at the ICANN level, in particular the ability to - if it - if it's adopted the ability to recall the Board.

So if there comes a time when the - when ICANN is not operating to the satisfaction of the community, the ability to recall the directors and put in place directors who understand the mission and will support what the community believes is important to ICANN, that can be remedied in that way through the Board recall mechanism.

And then of course the, you know, the contract would or could - I should say could have mechanisms. It would have rights and obligations and if PTI is not

getting what it bargained for from ICANN could invoke a breach, and potentially also bring some kind of suit if there weren't a - an adequate remedy.

Jonathan Robinson: Thanks Sharon. (Josh)?

Josh Hofheimer: So I think there also had been some, you know, in our memo we had included some notes on the governance of PTI. And although we were envisioning that it would be - would have as its - ICANN as its sole member, whether it was a nonprofit corp. or an LLC, that the governance of PTI - that you - the organizational documents for PTI would provide that the Board had some independence and so that ICANN couldn't through its member status control the activities at PTI.

And this is something that helps sort of preserve kind of stability by having a separate legal entity because you bring some independent oversight in. You know, the governance documents could specify certain groups that get to, you know, like we do now with ICANN could specify certain groups that get to select members to be put on the Board for PTI.

And by that means, you know, PTI which would have its own purpose statements, et cetera would be, you know, acting in accordance with those and ICANN if it quote unquote went rogue wouldn't be able to exert too much control or undue influence on PTI.

Jonathan Robinson: Thanks (Josh).

Lise Fuhr: Yes and (Josh) I'd like to add here this is a bit premature to discuss this. We haven't really come to this part of the discussion yet, so we're trying to kind

of look at the accountability on the contract issue and not as much the PTI Board. That's going to be dealt with later. Thank you.

Jonathan Robinson: Okay Lise fair point. I mean, that is something where I guess the - that's one of the critical questions here is will the community - will we be satisfied with our post-transition structure and the accountability in it?

Will that be sufficiently met by the new ICANN accountability plus the contract between ICANN and the post-transition IANA such that it is not necessary to build in additional accountabilities at the PTI level, given that that will add another layer of complexity that we'll need to then deal with?

Okay let's park that for the moment and go to Donna who's been patiently waiting. Donna.

Donna Austin: Thanks Jonathan, Donna Austin. So I guess this is a question that relates to the contract. So currently we have the contract between NTIA and ICANN and within that there are SLAs.

This contract - and I'm not sure whether I understand this correctly or not but there would be a contract - so there's a separate legal entity that is established under ICANN, and then there's a contract between ICANN and that entity that would cover off SLAs and those types of things.

I'm just trying to understand in my mind whether we're talking - I guess I got a little bit confused that we're - potentially we have a contract to create a separate entity, but I think this is a contract between the separate entity and ICANN itself and within that contract we would have SLAs.

But - and starting to go through my mind the complication as I see it is how do you take into account - it will be the CSC that actually monitors those SLAs or performance requirements and then how is - manage upward to the ICANN Board?

I'm just trying to get this in my mind because the current arrangement is between two entities and the - and it's NTIA that monitors the performance. But in this arrangement it will be a little bit more complicated and there will be other entities involved in that monitoring and performance, so I'm just trying to understand how that would work.

Jonathan Robinson: So Donna at a philosophical level clearly we want to make this as simple as we reasonably can. My understanding -- and I see Sharon's hand's up so I'll defer to her in just a moment -- is that we have a - constructed a legal entity with whom ICANN can contract to perform the functions - the IANA functions including having an SLA, which is one element of the contract that the CSC would monitor. Sharon?

Sharon Flanagan:: Yes so I think - Donna I think you are thinking about it the right way. I mean, it's - IANA would be the service provider, you know, in effect to ICANN.

And then - and would have obligations and then ICANN would need to decide if the services were being met, if the levels were being met. Now how ICANN decides that - that could certainly - that decision could certainly involve the CSC and that could be mandated in the governance documents as a fundamental bylaw that CSC is tasked by ICANN with review of the service levels and is the function being performed adequately.

And then CSC reports up to ICANN and then you follow - that same chain that I described for periodic review function could be followed for the CSC work.

If CSC sends it up to the ICANN Board, ICANN Board either agrees or disagrees. If it agrees that's fine. If it disagrees it goes up to the multi-stakeholder group for a potential veto.

Donna Austin: Just a follow up question if that's okay.

Jonathan Robinson: Yes Donna, go ahead.

Donna Austin: Thanks Jonathan. So does the ICANN Board in that situation or does ICANN in that situation - what control if any does it have over the CSC?

Sharon Flanagan:: I would view the CSC while technically maybe tasked by or contemplated by the ICANN governing documents just like the SOs are or the ACs are. So while it's a creature of ICANN governance it is making recommendations to ICANN, and because of the ultimate accountability in some respects the CSC is directing, you know, the - what needs to happen at the IANA entity.

So it's - it is a group committee task force of ICANN but ultimately through the accountability mechanisms at the top level there is a need to - a need by ICANN to respond to the CSC work and ensure that the community is satisfied that that is being implemented properly.

Lise Fuhr: Thank you Sharon. It's Lise for the record. I think it's a very important point that you're making here and that links up to the accountability team's work on how the ICANN Board is responsible to the community.

And I think that's ultimate - also the answer to Staffan Jonson's - is ICANN just assuming the former role of NTIA? No it's not. We're actually creating a new role and you'll have a new - CSC's going to play a different role than the NTIA did but still having the oversight of part of the contract. So I think it's not assuming the NTIA's role. Thank you.

Jonathan Robinson: Yes Lise, Chris is next so let's go to...

Lise Fuhr: Oh.

Jonathan Robinson: ...Chris after that. Go ahead Chris.

Chris Disspain: Thank you. Thank you Jonathan. I want to take us back to basics because I think we're in danger of losing sight of our goals here. Those of us who favored the internal model set up sort of the structure of that on the basis that there would be a series of escalation mechanisms that would be in the hands of the CSC.

There would be a review mechanism - all of the stuff that we've talked about. And one of the reasons why we say that the internal mechanism - one of the reasons was because there was a feeling amongst us that there - if you passed control outside of ICANN then that created the gaps that Larry Strickling referred to when he was talking about how would you manage accountability and so on.

Now the introduction of having the - having an affiliate or subsidiary with a separate legal contract has distinct advantages to me personally as somebody who favors the internal model.

And those specific advantages are, one, that there is a contract and you can write in to the contract things like the service level expectations or the service level agreements, and secondly, one has done the work of the - of separating out the assets, et cetera.

So - but in the future should the option to move the function somewhere else be exercised by whatever mechanism we agree, the vast majority of the work to make that happen has been done.

What I'm concerned about is that in discussing this model of having a separate entity as a subsidiary of ICANN with a contract, we're in danger of losing sight of the advantages of the internal mechanism.

And one of those advantages is that we can rely upon the internal accountability mechanisms of ICANN be they IANA specific built by us, by the CWG for the purpose of dealing with IANA specific problems, and/or be they the greater mechanisms being put together by the CCWG such as spinning the Board.

And I'm concerned that we are massively overcomplicating this by trying to build a PTI that is in effect going to be exactly the same as what ICANN would be doing and therefore having to create those mechanisms all over again, which defeats the whole purpose in my view of, A, having the internal model and negates the advantages of having a subsidiary where you have a contract and you have the ability to do the work of possible future separation now.

Jonathan Robinson: Well thanks Chris. I mean, that's an important point and I don't think we've - and I think you're kind of warning us of a potential danger. And I think it very much helps to bring us back to the potential elegance of the

model and make sure that we don't go down the route of adding any unnecessary complications and we test at any time whether what our desired outcome, our motivation for recourse - whether that is met by the currently proposed structure.

One very small detail where I don't think I'd disagree with you but just to make sure we're clear on that, you talked about IANA specific accountability mechanisms.

I guess although they might be being derived from this group, many of those will be passed on to the CCWG and that's - we're building a list over these two days and we intend to transmit those requirements to the CCWG as they've repeatedly asked us to in detail.

So I take your point that there will be IANA specific or points related to this group, but in many instances we'll expect to sort of contract with the CCWG to provide those services.

But I think you're right. Let's make sure we don't build in any - and that's my mantra is that we shouldn't build in any layers that does a specific purpose or function that isn't covered by something else, for example in this case that can't be incorporated in the contract. Alan?

Alan Greenberg: Thank you very much. I have a lot of the same worries as Chris did and interesting for completely different reasons. I believe if we do functional separation properly that as we put the delineations in so that we can identify what's IANA and what isn't and what is shared and what isn't and that includes both physical infrastructure and people and whatever, we have done enough so that should future separation be necessary I don't envision the kind

of battles that the lawyers have said would come up at that point at a time of unrest.

So I don't believe the legal separation really is a major enhancement on the physical separation for future separation should it be needed. Also the - I don't believe the existence of a contract changes things.

I've spent a lot of my life managing internal organizations, and the lack of a contract does not mean there are not well-defined expectations and well-defined processes and things like that between different parts of the internal entity.

And my question before was the trigger one for me. In the worst-case scenario of bankruptcy being forced on ICANN, might this protect the IANA function?

And the answer is maybe yes, but I really worry that to get that level of protection we're starting to build a relatively complex and messy organization to provide that.

So I - I'm worried about how we're - I ticked off legal separation in the poll but I'm starting to worry that it's becoming a rat hole. Thank you.

Jonathan Robinson: Alan I think we have to be mindful of that point. It's - you articulated it well and it's clear. I'm not yet worried that we are making something sufficiently overcomplicated or it's that much of a rat hole.

And I'll note Chris' point to the small advantage of a contract, which was something which we discussed earlier. I don't know if any - if there are any other responses to that theme and bearing in mind that where we are at the moment is doing a deeper dive into the legally separated variant.

And Alan brings us back to the point of reminding us that he hasn't let go of the functional separation. So I'm open to any other comments or points around that.

I suppose the other point I'm mindful of is twofold. What - but really the other point I'm particularly mindful of is that it's that one I made earlier about can you live with, you know, if you happen to be - this isn't your optimal solution.

Is it a tolerable solution? And in the end there will have to be some give and take. So whilst that point that Alan makes well about some advantages to an internal model may be that there's sufficient numbers in the group who are - feel unwilling to live with a internal model with only functional separation.

If we do go down the legal separation the next logical point to talk about which seems to cascade very neatly and Greg actually flagged it in - a moment ago in the chat.

We will need to discuss Item - just checking the number here on the - it happens to be Number 1 of the punch list, which is having described the structure we did which is a PTI enveloped in a subsidiary or affiliate structure with a contract between itself and ICANN.

The other entities we've talked about, the CSC, the PRF and so on. The question is what - the question turns then to what is the - what about the Board of such an entity and does the Board have a unique function?

Or given the level of accountability that is now in the newly engineered ICANN if you like or reorganized or improved accountability ICANN, what role is there for a PTI Board?

I wonder if there are any comments or thoughts on that. Well I'm going to say something which may or may not be provocative, but in the absence of any other hands going up I'll venture a point.

As I've said I've kind of blown my own mind and my personal view on various directions on this. I'm very familiar with subsidiaries which have a largely - which have now what we would call here an ICANN Board, members of the Board made up of either - of a combination of operational management and/or directors of the parent corporation.

And that subsidiary model I'm personally very familiar with and then familiarity often breeds comfort. I haven't - what I've heard from the group so far is that our requirements for holding the post-transition entity to account, for framing its performance in the form of a contract, for periodically reviewing it and for ultimately potentially either - for a series of ultimate potential sanctions we have a sketch, something along the lines of what is indicated on Page 3 of the Sidley memo that covers our requirements.

So personally I'm not hearing anything that persuades me that we need to go down the route of inserting a Board with independence and with an additional layer of Board capability in there.

What I would say is - and this is really important is the vehicle, the legal structure, creates the opportunity for that - such a Board to be created in future should it be required either within or without or as a separate entity.

But right now it appears that many of the problems or the motivations that are for why - for solving issues are dealt with by other mechanisms. So having a

low - a limited Board - a classic subsidiary Board seems to not cause me a problem.

I'll defer now to the hands that have come up having said that, which is Chris followed by Greg. Chris.

Chris Disspain: And Jonathan I agree with you. My support for a separate entity as a subsidiary is based on the principle that it is a subsidiary and that the Board would be as you have described with the possibility that I would be quite comfortable with of having perhaps a couple of Board members appointed by the customer base of IANA to the Board, because I don't think that that would be a harmful thing and may actually be a sensible thing. But the - but your fundamental point I'm in complete agreement with.

Jonathan Robinson: Thanks Chris. Greg are you responding to this or something new?

Greg Shatan: It's Greg Shatan. I'm responding to this as well. I think - and I agree with you. I think that if we have a smaller, less independent or not independent - kind of an insider Board is another term that's used for what you're getting at, that certainly leads us away from the rat hole of the robust multi-stakeholder Board that itself could go rogue or at least rogue differently from ICANN itself.

Wholly owned subsidiaries or controlled affiliates don't have to have boards that are prepared to charge off in different directions and really only need to be, you know, minimal to satisfy statutory requirements for the board to exist.

So there's a certain intoxication with the idea of using the subsidiary board as a second or as an additional accountability mechanism - as an additional community empowerment mechanism. At the same time that opens up a lot of

additional choices and additional work, not that we should avoid work if it's good work. But it certainly, you know, adds a layer of complexity.

And the question is whether that really is giving us something that we don't get any other way, and that gives us, you know, a structure that is less prone to some of the foibles of the firm structures. So it's really a matter of trying to decide whether there's something truly worthwhile in creating more of an arm's length multi stakeholder board that would be more governance and more decisions to be made around. Thanks.

Jonathan Robinson: Thanks Greg. I'll just note a comment reflecting that if we did start to build out a board, we should be mindful of the fact that this is a post transition entity, not just names.

Sharon, go ahead.

Sharon Flanagan:: It sounds like what I'm hearing is there's a desire to avoid additional complexity if it can be avoided, and then that would argue for keeping the PTI board as more of the insider board as it was described. And I think that that will work if it's really just more of kind of satisfying the legal administrative requirements.

I'll point out one place where having an insider board might leave a little bit of a gap, and that is if the contract between ICANN and IANA has an aspect of it that is to allow for lawsuits for breaches of the contract. And I know that seems like an unlikely outcome.

But let's just say that, for the sake of argument, that that's a remedy that people would want to see. Then I think it's a little hard to envision that an

insider PTI board is going to take steps that would involve suing ICANN, which is probably the employer of the people sitting on the board.

Now that gap I think can be addressed through the work of the periodic review function and the CSC, because those groups will be coming in and reviewing the performance of the contract, and making those recommendations up the chain to ICANN and then ultimately to the multi stakeholder member group.

So I think there's another way at it. I just wanted to point out for completeness that that is I think the one place you would be giving something up in terms of having just more of a true insider board. Thanks.

Jonathan Robinson: Thanks Sharon.

Lisa, did you want to make a comment? And then I'll come in.

Lise Fuhr: Yes. Well I just want to make a short comment regarding - well the public comments, and also some of the feedback we've gotten from the community is that an actual solution that we choose is - has to be as simple as possible - lightweight and not too complex. And also that well, during the public comment we're not detailed enough in our proposal.

So we need to have that delicate balance of finding a model that covers as much of the needs we're having as a naming community, and at the same time not making things too complex. Thank you.

Jonathan Robinson: Clear Lisa. It feels to me like a principle - whether or not it's exactly what's elucidated in our formal principles of the group - is emerging. And that is to say we shouldn't introduce something that isn't necessary. So it feels to me that if this becomes necessary in further discussion, that's a different point.

But right now we need to fully explore whether either the other structures that are in place - CSC, PRF, ICANN board accountability contract - meet the needs of the group. To the extent that they don't, we need to work at improving them. And to the extent that they can't, then we reconsider the need for beefing up, if you like, that board.

That feels to me where this is going. It's not - doesn't close it off completely because there's some - and in - but in the event that we do, we'll need to consider the composition of that board from more than just - well, the question is, what is accomplished in that board?

But it does open up all sorts of other points as many have pointed out. So I'll stick to what I said what I said a moment ago.

Alan.

Alan Greenberg: Thank you very much. A question - on the bits I did hear yesterday, there was the discussion of two options for a legally separated IANA. One was the cooperation with the board. The other was with an LLC. And I admit I didn't fully understand that, and couldn't - didn't hear the whole part of the talk.

Is the LLC still on the board - still on the board - still on - one of the considerations? And does that simplify any of the things we've been talking about today?

Jonathan Robinson: Alan, it hasn't been - it is not off the table. It exists as a question - on Question 7 on the punch list. What Lisa and I discussed in trying to simplify the discussion was to put that aside - well certainly subject to deciding whether we were going to go down the route of a separate legal entity or not.

But the other advice we received was that that's more of a subtlety. Either could accommodate our requirements. But it's not a necessary condition to know that - to deal with almost everything we have to deal with, which is why we were keen to set that aside as not a primary gating factor.

Sharon, feel free to add to that. I did see your hand flash up and down. You may feel that I gave sufficient information there. But if you would like to add, by all means, come in.

Alan Greenberg: Jonathan, just for clarification, the reason I raised it is a lot of our concern seems right now - seems to be focusing on the board aspects. So if the LLC is a similar variation without that problem or without that complexity, that's why I raised it now. Thank you.

Jonathan Robinson: Okay. So Alan, to the best of my knowledge, the considerations that we were talking about with the board are that those consideration - the conversation we've just had is independent of whether it's an LLC or - well largely independent of whether it's an LLC or a not for profit. But I'll defer to the lawyers.

Alan Greenberg: I got a different impression yesterday, so thank you.

Jonathan Robinson: Sharon?

Sharon Flanagan: Yes. So I think - Alan, I think you're right in the sense that LLCs provide a much greater degree of flexibility, so you don't even need to have a board at an LLC. It could just be member managed - just managed by ICANN.

So but I don't think it solves the more philosophical question, which is what is the level of governance and accountability you want at the PTI level. So I think whether it's an LLC or it's a nonprofit corporation, that still needs to be addressed or determined.

Alan Greenberg: Thank you.

Jonathan Robinson: Thank you. So I think that gives us a position then to start to move - I mean I'm conscious we've probably got 25 minutes, and we could probably make a little bit more progress on other elements of the punch list, although we've made very good progress, better than I might have expected. I hope that's not just because you're all very tired.

But certainly there's - we could go into - I think Area 10 might be one we could consider next. But let's hear from you Chuck, if you want to add something.

Chuck Gomes: Thanks Jonathan. And by the way, I'm fine with going to 10. But to maximize our chances for getting closer towards a possible consensus position in our last call today, it seems to me that it would be helpful if we can somehow between now and two hours from now, come up with a condensed version of what we have in front of us, with a lot of the thoughts kind of compared side by side maybe for the two models in terms, you know, the functional versus the legal separation.

If I, you know, we took the poll, and I'm not advocating taking another poll right now. If we did, I'm not sure we would be any closer. We could be, you know, it could be more split based on what I've heard. You know the first - a large part of our early conversations were in favor of the - of having a contract and the legal separation. And more recently we've been talking about the need

to avoid complexity and the internal, you know, functional separation only model.

So I guess what I'm suggesting - maybe what I'm asking is, what can we create between now and our meeting in two hours and 25 minutes to maybe help us all look at what has happened in this meeting - and I agree with you that it's been very productive - so that we can help put it all together in our heads, and maybe get closer to one direction than the other than we were when we took the poll an hour or so ago?

Jonathan Robinson: Chuck, I'm grappling with that a little bit. And I'll need your - maybe yours or someone else's help. Because what I think we did at the outset was, you're right, we took a poll relatively early on in order to take a route on either direction of - in and around nine - legal or functional separation.

It's clear that there was a decent portion of the group - a substantial fraction - that were either not committed to legal separation or undecided. We had in excess of 40% in that position. But if you remove the undecided, you had a pretty clear direction to at least explore in detail a legal separation, which we've gone on to do.

I guess another way of looking at it might be to test whether having explored the detail of that legal separation and try to - I mean I can certainly see how - what I thought you were going to ask for is some form of summary of where we got to. I feel we could do that. And we could even go further and take some sort of poll and see whether views have shifted during the course of this call. Or we could prepare a summary for the start of the next call.

What we haven't done in as structured a way - it's kind of been implicit. But what we haven't done in as structured a way is explore the issues of the other

internal variant - that is to say without legal separation. It's been there throughout as a thread. So I don't know that a table or cross comparison emerges.

But maybe someone else can help me see the wood for the trees on that one, and see if there is a realistic way of doing it or - I feel like we're in a good place as far as exploring the detail in and around the legal separation. My sense was that for some, they got sufficient detail that made them more comfortable.

But I don't know how those that were in the functional separation - apart from Alan, who spoke up - I don't know how others feel, whether they feel they've now got greater confidence, having a greater detail on legal separation, or are more firmly entrenched. So it's challenging. I'm not quite sure what Lisa or others in the group think - if there's a way forward.

And I'll just pause for people to think a moment.

So Donna, your hand's gone up, having had a moment to think. Please go ahead.

Donna Austin: Thanks Jonathan. So I guess it's just an observation that while there were 50% - more than 50% in the poll that were leaning towards legal separation, you still had 21% undecided. So if you put functional in 21 and the undecided together, you still - I kind of think that there seems to be some logic to having some discussion around the functional as well, because then you know what you're comparing the two things to.

I just - I don't know. I mean we've gone down the route of having a discussion about a subsidiary but, you know, where are the commonalities

where the - with the functional separation, and what are the big differences? I think there's value in doing that. We're that close to it now. If there's some way to get that discussion, it would be useful I think.

Jonathan Robinson: Donna, thanks. That's a good point. So just to - a couple of quick things. One, I did recognize obviously that there were 40% who weren't - more than 40% who weren't in favor of the legal at the outset. But we must be very careful with that. It was a straw poll of those on the call at that point. It was to give us a direction to go down and develop in more detail.

That said, we have just under 20 minutes. And it seems like a perfectly sensible suggestion for anyone having heard the discussion to speak for or against functional separation. But instead of all the discussion being focused on legal, and perhaps in and around those points we've discussed, to try and flesh out, you know, someone might for example be prepared to say well at the outset I voted for functional, and I feel much more strongly that that is the case now. Or having heard all of the discussion which has touched on both, I'm much more satisfied with what's being proposed.

So, you know, let's have a discussion around that, and hear from others how this discussion has left them feeling. It's not quite as systematic as going through in exactly the same way. But it certainly allows - permits the opportunity to air the thoughts about internal model functional separation having gone in detail through internal model legal separation.

Chris?

Chris Disspain: Thank you Jonathan. I'm prepared to nail some of my colors to a mast. I voted - having listened to everything on the provision that we end up with what you

described as an internal board or a true subsidiary board. And subject to the possibility of having some customer representation on that board.

And on the - I'm persuaded that there are some distinct advantages to having in place a contract. And I'm persuaded that the work of creating the subsidiary separating out the stuff - the would be IANA, were it to be spun off at a later stage - is valuable. Because doing so at the end of a crisis, and having to work out amongst ourselves - and do we form, shall we say, a group to figure out how to do that may not be sensible.

So on that basis and on the basis that we are not going to create a whole heap of new accountability mechanisms, but rely on the accountability escalation mechanisms that the design teams are working on - which I call the IANA specific accountability mechanisms - and the overarching ICANN accountability mechanisms, I would be prepared to move my vote from undecided to the concept of having a subsidiary.

Jonathan Robinson: Thanks Chris. That's helpful and constructive thinking. I just want to not refer too much as a vote. We took a poll of those on the call, and, you know, you've clearly indicated a shift in thinking, and that's useful.

Chris Disspain: Yes, I change my poll.

Jonathan Robinson: A shift in thinking. All right, any other comments along those lines? It would be really good to hear from people, you know, either advocates of functional separation or, you know, Chris did a great job there I felt of summarizing what he was uncomfortable with, what changed, what he got comfortable with, and why he's supportive of a position at the moment.

If anyone else has got similar types of views and thoughts, it would be great to hear them. Olivier?

Olivier Crepin-LeBlond: Thanks very much Jonathan - Olivier Crepin-LeBlond speaking. And I also was undecided. And I still am grappling with a couple of questions that are going around my mind, the primary one being the accountability of the PTI board.

And I understand that there is an option of having an insider board, which would therefore make sure that the accountability of the PTI board would be close leading to the ICANN accountability. But the current concern I have is if we are in a situation where ICANN sues PTI, or if something breaks between ICANN and PTI, how would this work?

The PTI board at that point is not covered by ICANN accountability, unless I'm mistaken. And I - so I'm not sure. I'm still undecided.

Jonathan Robinson: Okay Olivier, thanks - fair point.

Sharon's put up the hand, so I'll go straight to her.

Sharon Flanagan:: So to answer the question if ICANN sues PTI what would happen, I think if the PTI board is largely an insider board, they still have duties to the PTI entity. So arguably they would need to respond in the interest of PTI. But let's just assume that for some reason they're not able to - they're serving two masters, and that's too difficult.

I think what you'd need to do then to address that is again have some mechanism like the CSC or the periodic review function that would spring into action, and then, you know, require some action by the PTI or by ICANN.

So you'd have to have some external source putting that pressure - external meaning not the board - putting that pressure on the PTI to act and defend the suit.

Jonathan Robinson: Thanks Sharon. And I just - there was one other point that occurs to me, and that's that of course I've been thinking personally about, you know, what that board could, having created the capability to have a board, that board could change an agreement quite substantially in a future scenario and, you know, in a spun off scenario or any other myriad future potential scenarios.

And one thing we should be aware of is, on the back of yesterday's discussion, the review group - DTN - recommended a review after two years. So there is a relatively short order comeback on all of this. And you could imagine that an IANA review team after two years might say great, this is all working well. Congratulations to that fantastic CWG. Or, you know, everything is working well, but we think you need a more robust PTI board.

So it's not - we're not closing the door forever. I just remind people that this isn't locking down a structure forevermore. But we are trying to get a decent coherent proposal that people can live with, and that stands up on its own two feet for the moment.

Eduardo?

Eduardo Diaz: Jonathan, thank you so much. This is Eduardo for the record. (Unintelligible) want to talk about the functional separation. And by the way, the discussion that we have had so far is very enlightening and very interesting.

You know the way I see it is, I remember - I don't remember two meetings ago. Yesterday there - before that, you know, the functions that ICANN is

doing now - the IANA function that ICANN is doing now - it can be good in a functional vision with their own budget, their own people and, you know, with all the items that you need to, as far as you can go to separate it in the future is necessary.

So what I'm hearing now with the affiliates, you know, it won't stand up there. It's the contracts that will be easier to understand. And, you know, when I look at it, you know, we do have functional revision within ICANN, and you have (unintelligible) in place, what I see is the CSC being a PTI board type like board in that sense.

So, you know, that's my point of view, if anybody wants to comment. Thank you.

Jonathan Robinson: Thanks Eduardo. That's helpful and interesting perspective on, you know, seeing the role of the PTI as - sorry, the role of the CSC and its sort of keeping things in check, which of course it does as do other critical elements of this emerging proposal.

Alan?

Alan Greenberg: Thank you. My understanding or presumption maybe was the IANA we're talking about is the complete IANA, performing all of the functions. And I don't think that would sit really well having the two thirds of it responsible for the IATF standards parameters and the RIR data to be overseen by a board which is largely registries. Somehow I think that might not sit well.

Jonathan Robinson: I haven't heard anyone say the board is registries. To be clear, this is either - the discussion has been centered around whether it's a, if you like, a diverse board or a insider board. And that's really the crux of the point.

Alan Greenberg: The last comment I just heard was CSC, which I thought we decided is to a large extent the customer - direct customers.

Jonathan Robinson: Yes. That was nothing to do with CSC being a board. It was just in response to Eduardo saying he felt the CSC had a role in keeping, you know, he - my understanding of what he said was he said the CSC. He was more comfortable with an insider board, given the role of the CSC in keeping the performance of the IANA function on check. It was - that was the way I interpreted or understood his comment.

Alan Greenberg: Perhaps I misunderstood.

Eduardo Diaz: This is Eduardo. Jonathan is correct. Thanks.

Alan Greenberg: My apologies.

Jonathan Robinson: Thank you Eduardo. All right. Well I'm not seeing a whole lot of other hands. I realize we aren't - this isn't an absolutely conclusive discussion. But it has been a very fruitful and actually quite substantial discussion. And I'm minded to say we put a hold on things now, and just absorb what's been covered.

I do understand Chuck's point earlier about trying to do some sort of comparison. And I'll talk with Lisa and see if we can do something there, and Olivier, your most recent point about stress test scenarios for this. But I think that's exactly right. I mean certainly this structure - this emerging nascent structure that's coming out will certainly have to be subject to the stress test.

And in my thinking what happens is, if you see sufficient gaps emerging that in this very specific example we're talking about now, the gap exists and could be fulfilled by a different - a variant on the configuration of the board. Of course there's many other ways in which a gap could be fulfilled. It could be filled - well then so be it.

But nevertheless, at this stage we have a relatively simple structure which seems to answer many of the questions being asked of us and by us, so that's attractive. And we haven't introduced a significant new layer of accountability which - and all of the ramifications that that produces. So a very productive conversation - very helpful.

Lisa, are you happy to call it a wrap at that stage?

Lise Fuhr: I'm happy to call it - well I see that Olivier's head hurts. Mine hurts too. So I think we need a break.

Jonathan Robinson: So in the interests of stopping people's heads hurting, thank you very much everyone. I realize this is a very grueling session. And thank you in particular to those for whom this is substantially unsociable hours. I know that our colleagues at Sidley - at least Sharon - is doing - pulling an all-nighter as they say. And I suspect others of you have already done so.

So wherever you are, from Australia to the west coast of the United States or somewhere in between, thank you very much. And we'll talk to you in a couple of hours.

END