

**ICANN**

**Moderator: Brenda Brewer**

**May 14, 2015**

**6:00 am CT**

Woman: The recording has now been started. Please go ahead. Thank you.

Marika Konings: Thank you very much. Hello everyone. This is Meeting #47 of the CWG INS Stewardship. It is the 14th of May today.

Is there anyone that's not in Adobe Connect and only on the phone line for the moment?

Avri Doria: Yes, this is Avri. I am not on the Adobe Connect yet, and I'm not sure I'll get on it. Thanks.

Marika Konings: Thanks Avri. We'll report your attendance. Anyone else?

Greg Shatan: Greg Shatan - I'll be in Adobe Connect eventually.

Marika Konings: Thanks Greg. I think that's all, so I'll hand it over to Jonathan and he's set to chair this meeting.

Jonathan Robinson: Thanks Marika. It's Jonathan Robinson speaking. Welcome everyone, in particular those that have had to get up very early or at some odd hour for this meeting and/or who have had to join us when it's a national vacation.

We have a lot to deal with in this meeting. And I think we can make some really breadth of progress. I'm a little worried about the turnout. So it may be that we have to deal with some of these items...

Josh Hofheimer: This is Josh from...

((Crosstalk))

Jonathan Robinson: ...today that we'll have to deal with at a subsequent meeting as well next week. Let's see how we get on.

Thanks for joining us - the Sidley people. It's great to have you. And Sharon, I know it's really early for you. But I think your memos have provided some really important information for us. And I look forward to discussing those under Item 3.

A couple of other brief remarks in the interim, then I think we'll get going straight away. We do have a form of timetable for you to talk about later in the agenda. It isn't as well populated as I'd like. We could do some more work on there in detailing that out, but we'll talk to you about that. And I think Lisa will lead you through that later.

It continues a coordination work with the Crisp Team, and had a productive meeting with them earlier this week - just starting to understand what they may - what might be submitted in relation to our work by the public comment

and assisting them with clarifying their understanding of the proposal as they start to prepare that work.

Right, let's get straight on with the agenda unless there are any questions or issues related to the structural content of the agenda. Okay.

So obviously we have under Item 2 a public comment period underway. And there is a series of public comments being generated. I don't see Bernie on the call. I do - sorry Bernie. I do see you there. Thanks. Bernie, I know you put out - you've been working on a form of summary of the comments. And we shared that format I think the other day.

Has anything changed since Tuesday on that? Can you just confirm if we still are on this - same with this being any additional or changes that have come in in the interim? There that is shared with you the tool - the public comment tool for the rest of the group.

And Bernie, my understanding is that you'll continue to populate this as comments come in. And we agreed at the last meeting that staff would prepare an initial draft of the CWG response for the CWG to then review and comment on. Is there an update since Tuesday? Go ahead Bernie.

Bernie Turcotte: Thank you sir. As far as the form is concerned, I don't think we have had any significant comments. So we're working on it and looking forward to a draft on some of the points next week. And there have been a few additional comments since our last meeting in the CWG, including one from Outa. And that's my report sir. Thank you.

Jonathan Robinson: Thanks Bernie. So to confirm, we can expect to see this form populated with the comments to date, plus perhaps some of the draft responses prepared by staff to assist the CWG at the Tuesday 19th call?

Bernie Turcotte: That is correct as far as I'm aware.

Jonathan Robinson: Thanks Bernie. Okay. I'm not going to dwell on this then unless anyone has any comments on this. There is something else that Bernie helped us with, and that is the FAQs. Now as you know, we published one set of FAQs that were really a very focused and specific set of FAQs that were at the - answers to which were derived from the Sidley memo.

That's not what you see in front of you on the screen now. That's linked to it from the public comment site. And we specifically provided a set of key responses to FAQs that we anticipated in and around the PTI and the legally separate PTI.

Here you have in front of you a collation of the responses to the questions that we received during the two webinars and two subsequent webinars that dealt with Q&A that are responses by the chairs to those Q&As. And then they've been pulled together as per Bernie's covering note into a set of FAQs. My idea and our intention that we discussed was to publish these FAQs very shortly such that they were useful to inform public comment.

Having reviewed them and looked at them, I would feel - I don't feel particularly comfortable publishing them. There are some answers that I agree with completely, some answers I have - I think could do with polishing and further work. I think they essentially represent off the cuff answers to questions asked in the webinars.

So I, on the basis of a few factors really - probably three. One, where we are in terms of timing in the public comment period, two, the further time it would take us to refine these, and three, the likelihood of public commenters actually referring to these. My latest position that I discussed together with Lisa this morning is that we should probably hold off from publishing these FAQs.

They may be very useful as an ongoing discussion document within the CWG, and potentially something we could publish - we could work up towards publishing as part of an FAQ support to our final publication, which we propose to publish, you know, that two weeks or so before the Buenos Aires meeting.

So it feels to me like that's the direction of where this document should go to, rather than be made - rushed into publication now where it may not receive adequate attention. And there's a risk that the answers are sufficiently well considered - that they could cause potentially more harm than good.

Thanks Milton. I see you have some support for that thinking in the Chat. Would anyone else like to comment on the usefulness or otherwise of these FAQs? I realize it's probably feared. It's a 12 page document. You may not have had a chance. And I see (Eduardo) is also - recognizes or highlights that we're very close to the public comment deadline.

So (Eduardo), clearly the thinking was that in publishing these they would potentially inform those that were still midway through preparation of public comments. But as I say - and as you seem to agree - not only are we late in the process, these answers also - I don't feel they've been given a proper airing in front of the group. And they could be subject to further discussion.

We're still tracking a little bit what's going on in the Chat. I'm not seeing any advocacy for these actually being published now. And there are some support for issues or concerns that it may raise. So I'm going to encourage you all to read through these. And nevertheless, I wonder (unintelligible) staff we need to put this on line. It's possible we could put this on line as a dynamically editable document.

But in any event I'd encourage you to look through it. And if there's anything - I mean if there's a word or two wrong - these were answers given spontaneously to questions during the webinars. I'm less worried about sort of less material points, you know? If you - or feel free to flag anything of course.

But if you feel something is substantially misrepresented, or you have real concerns over the chair's interpretational response in response to these questions, and if that doesn't accord your understanding of where this group is at, I think we need to have that discussion. So I'd really encourage all of you to read through these. I don't think it's been a waste of time to prepare them.

And as I say, they may well end up being FAQs that we publish alongside our final document. I just feel uncomfortable rushing them into publication right now. Thanks. I note a couple of other comments from Brenden and Greg indicating - essentially support for that approach as does Martin Boyle. So thanks for that.

I won't dwell on it then. And I think we have a way forward there. So perhaps it's worth capturing that which you've sort of done anyway Marika, as continue to review FAQs - perhaps post on the Wiki page as you've said. Continue to review FAQs and consider publishing as part of final proposal - the 14 documents.

All right, good. Well I'm going to keep us ticking over because I think we've got more than enough to talk about in other areas of the agenda. And it seems to me that under Item 3 we now have an opportunity for an update from Sidley. The client committee on the basis of discussions with the group as a whole instructed Sidley to undertake two key pieces of work.

And I think we should deal with them in this order. I suggest we deal with them in this order unless Sidley feels otherwise. The first was to look at a series of stress tests if you like, and examine how the post transition entity stood up to - and in particular thinking about the legal structure, a public benefit corporation versus an LLC - stood up to areas post transition scenarios.

And then the second was to look at the nature of - sorry. And then the second was to look at actually the detail - the public benefit corporation versus the LLC. So it's kind of - it's more board and then LLC. It feels to me like it really makes sense to look at. My reading of these memos - and I won't anticipate anything other than this - was that Sidley were fairly unequivocal on the first point and on the second.

So I'd very much like Sidley to talk us through those two memos - the key points - and any points they would like to highlight, and then run a Q&A on those in order to inform the group on our decisions in particular on the post transition IANA board issues, and make sure the corporation and any other related points.

So I'm not sure who from Sidley is willing or able to do this. But I'd like to invite you now to talk us through Memo 1 and then Memo 2. I'm calling Memo 1 the one that deals with the post transition IANA board stress tests.

Sharon Flanagan: Hi Jonathan. This is Sharon. I've lost my ability to raise my hand right now, but I can speak to both memos.

Jonathan Robinson: Thank you Sharon. Please go ahead. It would be great to hear from you on one, and then possibly we'll do Q&A on that, and then move to the second.

Sharon Flanagan: Okay. So I'll start with the stress test memo. And I know we circulated that yesterday, but I'm not sure if everyone has had full time to review. So I'm happy to kind of walk through it at a high level and just recap as well.

So what we looked at is we were looking at the way to structure the PTI board, whether it would be a so called insider board or an outsider board. And just to remind people, when we were saying insider board, what we meant was a board - a PTI board that was made up of a majority of directors who were employees of ICANN. And those could be the members of ICANN management who are responsible for oversight of the IANA function. So that would be the insider board.

And then there's the outsider board. And the outsider board - when we look at that what we mean is a PTI board in which a majority of the directors are not employees of ICANN. And who those outside directors could be - they could be interested stakeholders or they could be totally independent and have no ties to ICANN or the ICANN community.

So those were the two structures we looked at. And we had separately engaged before writing this memo and just - we just talked internally and just, you know, tried to walk through the scenarios we could think of and how those might play out. And we took an agnostic approach. We really just, you know, talked and walked through it and tried to flush it out.



And I think our conclusion is that in some cases it breaks even. There's no benefit one way or the other. But then in other cases we felt that the insider board would be more appropriate or would fit better for the types of stress tests that we were looking at. And I can walk through them.

But that was primarily because - I think for two reasons. One is because the best way to hold ICANN accountable - and we have through the CCWG all of these mechanisms to hold ICANN accountable. And it seemed to us the best way to hold ICANN accountable is to have it have some role in controlling PTI, so that the decisions are ultimately - can be tracked back to ICANN, and ICANN can be held accountable for what's happening at the PTI board level.

If you have a totally outsider board or a majority outsider board, in effect although maybe technically this entity exists within ICANN, in effect it's really external because you've got the control is no longer at ICANN ultimately. And there's no real way to hold ICANN accountable. It's really an independent entity.

And so as we were looking at these different, you know, say stress tests, we started to see that at least in our view it seemed that the outsider board created kind of more issues than it solved for. I see Avri has a hand up. And so I can pause kind of as we go along, or I can just try to walk through the memo in total and then come back for questions. Jonathan, you have a preference in terms of how you want to organize this?

Jonathan Robinson: Sharon, I don't have a strong feeling. I think if Avri's got a point right now, let's hear it. And we can see how you go.

Sharon Flanagan: Okay.

Avri Doria: Okay. Thank you, this is Avri speaking. And I'm in a semi noisy place, so I'll try not to speak too much. I guess I have a question on that because we've also talked about there being a contract between ICANN the parent and the PTI affiliate. So that's one degree of accountability.

There's also the accountability between the PTI and ICANN owning company in terms of the approval of budgets - that that part does not go away. So I don't quite understand. So we have a situation where ICANN as the owning entity has all of the accountability that it has to - that's being set up CWG accountability. And then we have the PTI's accountability to the owning company, ICANN - visa vie the contract, visa vie the SLA and such as that.

So I'm not quite sure I understand your point of if it doesn't have an insider board, then there is no accountability. It seems that there's an associative accountability via the contract and the SLA and ICANN the parent accountability. Thanks.

Sharon Flanagan: Thanks Avri. That's right. The contract does provide a measure of accountability between ICANN and PTI. But for the conduct of what's happening at PTI, you know, the contract then, you know - yes, ICANN could sue. And that's one of the stress tests we looked at. ICANN could sue PTI if it were not performing under the contract.

But we viewed that as maybe suboptimal. Lawsuits aren't really the ideal way to solve things. And so in that example - and I can walk through that - but in that example we thought that it would be easier or more straightforward if you had a PTI board that was connected to ICANN that could, you know, message back and try to address the problems without having to resort to litigation.

Litigation would still be possible. And whoever - no matter who is sitting on the PTI board, whether they're ICANN employees or not, those individuals will owe fiduciary duties to the PTI. So they still have to act in the best interest of the PTI. But our view is that there was more of a connection back to ICANN if those insiders were also people at ICANN who were overseeing the contract.

So I think, you know, I think we saw the contract could serve one purpose. But there still needs to be a board making decisions at the PTI level. Alan?

Alan Greenberg: Yes, just a quick question. When you say ICANN employees, are you - do you mean sort of interchangeably ICANN proper or PTI employees? Or are you focusing explicitly on true ICANN employees?

Sharon Flanagan: Thanks Alan. For purposes of this analysis, we're talking about true ICANN employees. You could always still have on the PTI board, you know, the most senior - for example it would be common to have a CEO or the most senior person at the subsidiary on the board. But we were focused - when we think of control and the majority - we're focused on ICANN employees.

Alan Greenberg: Thank you - just wanted clarity on that.

Sharon Flanagan: Yes, okay. Milton? Milton, is that - do you have your hand up?

Jonathan Robinson: Milton, you're very faint. We just hear you, but very, very...

Milton Mueller: How is that?

Sharon Flanagan: We still can't hear you.

Jonathan Robinson: Only a little.

Milton Mueller: I just want to say (unintelligible).

Jonathan Robinson: Unfortunately we don't hear you Milton. So I'm going to encourage Sharon to go ahead with, you know, through the memo, and then we'll come back to you.

Sharon Flanagan: Thanks Jonathan. Okay, so let me walk through the scenarios. And then I think it might be helpful just - for me to just go through them and then come back for questions because I think some of the topics will be covered in the scenarios that we looked at.

So the first one we looked at was relatively, you know, straightforward issue of just who has the authority to make decisions about hiring and compensation for the management of the IANA functions team. So the individuals - and this would be the actual PTI employees - the management at PTI.

So in either case that is really a core board function - is the decision making over hiring and compensation of senior management at an entity. So the PTI board should have that power. As we looked the two models - the insider board or the outsider board - in the insider board you would have - at the board level you would have the ICANN senior personnel who are currently overseeing the IANA functions.

And so there was, we thought, some logic to those individuals then also having the decision making over hiring and monitoring the team. They have experience with that. They've already been doing that. If instead you had an outsider board, that board could, you know, could do the same thing. You

would just - that board would need to gain experience, wouldn't have that experience at least initially.

And then if - and if there were issues or concerns, those issues are all dealt with exclusively at the PTI level. There's no ability to give feedback through ICANN because ICANN's not responsible really for this entity anymore if it's a true outsider board.

We also looked at a variance of this which is just what if there was a performance issue at the IANA functions team? So in addition to hiring and compensation, it's also a core board function to make decisions to terminate and replace individuals if there were performance issues. And again that's, you know, core board function.

Similar to the hiring and compensation, the "insider board" - if it were comprised of ICANN personnel responsible for the IANA function oversight, then those people, you know, have experience and arguably would be the logical candidates to determine whether performance is occurring or not. So that's the decision on just individuals.

I see in the Chat there's reference to IFR. And I agree that that would be another check on performance. But this would be more of an individual issue, not a systemic issue. There's no issue, you know - for this scenario they're not talking about their systemic issues happening.

Maybe there's just one person if there's, you know, the things you face in an organization. An individual for whatever reason is not doing the job, but others are picking up the slack. So there's not a systemic issue in that example. And systemic issues are dealt with through the IFR of course.

So the second thing we looked at were oversight of the PTI budget. And so as Avri mentioned earlier, the budget is something that is CCWG dependency. And this group has been clear that in addition - while the CCWG is looking at overall budget input and having some ability for a membership body or a community to veto the budget, this group has been clear that there is also a need for that to happen if there be an IANA functions budget in particular, rather than just an overall budget.

So there is a piece of that that's happening at the ICANN level. But particularly if PTI is a nonprofit corporation, as a statutory matter the board would still need to approve the budget for PTI. So looking at that scenario, the insider board - our view is that again seemed more of a logical candidate because the ICANN personnel will already be dealing with the budget.

They'll already be creating the overall budget including the IANA piece of it. And that would be subject as I said to membership or community input. So that budget will be kind of prebaked at the ICANN level. And then it should be a matter of simply implementing or approving the aspects of the budget that are PTI specific. But those would already have been fully vetted.

So in that scenario we thought the ICANN insider model made more sense because that process would have already taken place. And really you're just trying to implement what already occurred at the ICANN level with the community input.

If it were an outsider board, an outsider board could also be effective in doing that. But again we have this issue of the outsider board is not controlled then by ICANN, and could do whatever it wants. So it could pick a totally different budget that's not consistent with what has been agreed to at the community level.

And there would be ways you could address that. You could put in accountability at the PTI level. But what you've done is you've now created a need to replicate all of the complexity of the ICANN CCWG work at the PTI level, and risk potentially conflicting guidance between those two accountability mechanisms.

So you don't have one clear place where accountability resides. So for budget right now it would be at the ICANN level. You would now have two places, and potentially some confusion as to who is really in charge of this and who is accountable. I'm just looking at the Chat here. Okay. So that's budget.

And then let me turn next to #3 on our list. It's just oversight of the contract itself. So we would have this contract between ICANN and PTI. And how would you deal with - and I say you, PTI. How would PTI deal with a lawsuit by ICANN for a breach of contract? It says, you know, PTI is into performing under the contract, and needs to remedy that breach.

If there is an insider board, we view that as a - we say a false hypothetical because there really isn't a scenario or likely scenario where if the PTI board is majority ICANN, there won't be breaches. I mean there could be an unintentional breach. But there would be presumably a fairly easy remedy and a clear incentive for it all to get back in line because it's in effect a parent subsidiary type relationship. And PTI would just, you know, do what needed to be done, and would be directed to do so by the board.

So we see that as, you know, really a better assurance of PTI not breaching the contract if there is a connection between the two. If there is an outsider board model and PTI is in breach, then ICANN's only real recourse would be to sue PTI or to pursue some other kind of alternative dispute resolution against PTI.

Or potentially if it had retained the power as a member, replace the PTI board with new individuals.

So that's the scenario where PTI would breach. What if ICANN breaches? Then what? So in either scenario - either board model - the PTI would have the power to bring suit against ICANN if ICANN were in breach of the contract.

In the insider board model, I think as a practical matter the PTI board may be less likely to bring suit because those people are also employees of ICANN. So the way to address that would have to be through the overall ICANN accountability mechanism if ICANN is not behaving or performing under that contract.

Then there are mechanisms at the ICANN level to say well ICANN, you need to do that. And if you don't do that, we're going to pursue the various accountability mechanisms in place that include for example a replacement of the board with board members who will insure that the ICANN staff is complying with that contract. Okay, so that's the contract.

The next example or scenario we looked at, #4 is just generally lawsuits, so not ICANN specific. But let's just assume PTI is sued by some other third party. Or let's assume PTI has some need to sue a third party. Who would control that litigation and how would that shake out?

In either case, you know, the board should have that responsibility. That is a fairly clear board responsibility. But we don't think one model or the other is better in that scenario. We think both would work equally well.



And then #5 is this separation of PTI from ICANN. So if there ever were a situation where the IANA function review or whatever the separation process resulted in a recommendation that ICANN divest PTI, what's the best way to insure that PTI does what it needs to do to separate, because that will be really important.

And just a slight, you know, technical point here, it will matter a little bit how the divestiture is structured. If it's simply a transfer by ICANN of its membership interest in PTI, then the PTI board doesn't need to do anything. It just would happen the owner, you know, ICANN would make that change.

If it were structured in a different way - so if it were structured as an asset sale or if it were a merger, so a combination of PTI with some other new company - then the PTI board as a statutory matter would need to approve the separation. Under an insider model we think the PTI board will be highly motivated to do what is being asked by the community to be done because ICANN would have a very clear mandate in a fundamental bylaw to allow for the separation, should the separation be triggered.

The outsider board model, you know, in that situation where the PTI board needs to act, has to exercise its own fiduciary duties in reviewing that, and presumably could conclude that that's not in the best interest of PTI. So if there were an outside board model, then we would need again new accountability mechanisms at the level of detail that are occurring at CCWG at the ICANN level would need to be replicated down at the PTI level. And again, some risk that you have conflicting mechanisms that are not working in harmony, and a question of whether there's a benefit from having to replicate all those accountability mechanisms.

And then the last item we looked at, #6 is what happens if there is a policy decision at the ICANN level, and ICANN says yes we agree that's what the community wants. That's what we will do. But there is a failure to implement at the PTI level. They just won't do whatever the technical issue, you know, technical item is that needs to be done in order to affect it. What would that look like?

Under the insider board model, if ICANN were reluctant to implement, then again accountability mechanisms at the ICANN level could be used to insure implementation. And if ICANN weren't doing that, then the community, membership - whatever that body is at the top level would hold ICANN accountable.

Under an outsider board model, the PTI board could also insure that any directives were implemented. There is a risk though if it's a true outsider board that the PTI board takes an independent view and doesn't agree with the policy decision that's been agreed to at the ICANN level, and simply refuses to implement the directive. So we think there is a risk there. Now it can be addressed. But again the way to address it is through recreating new accountability mechanisms at the PTI level.

Those are the scenarios we looked at. And I see there's been a bunch of Chat, although I haven't been - I still haven't mastered your all amazing ability to read and speak at the same time. But so let me just pause there. And Jonathan, if there's anything in the Chat you think I should address or if there are other questions, we can talk about those.

Jonathan Robinson: Sharon, thank you very much. I think the ability to read and talk and type at the same time means one or more functions are compromised. So I think it's great that you compromised on going through the memo as best prepared. I

certainly found it very useful. And it's helpful to have your summary of it. I found it somewhat unequivocal, and to my purposes it's helpful that it has implicit in it having put the stress - put things to the stress test as a form of recommendation.

There was one point - I guess the critical thing that I would just highlight for me - the thing that struck - and I know you said this very, very clearly. It's evident throughout is that by definition an insider board has a majority ICANN, and an outsider board has a majority outside. That said, an insider board could have influence from others.

And one of the things I was thinking about is whether we seek to - as a variant - we don't necessarily invoke up front is an - if we went down the route of an insider board which as I say, this memo seems to drive us to and reasonably strongly, is that we have the capacity to introduce influence at the board level should we see fit or should it become appropriate in the future.

That may open it and make it too wide open. But it would still - I think the key point is that an insider has the majority. And if we go down that route, it's not whether there is influence at the board level. It's whether there is power, and the power is by the insider or the outsider.

So by that I'm wondering whether this accommodates for example a suggestion that was made some time ago, that there is a possibility in the future of introducing board seats for names, numbers and protocol communities. But if that was the case, we certainly don't have anywhere near agreement to do that at the moment. And it could be that that was introduced in such a way that it retained but didn't tip the balance of power outside, while we still retained a non-separate entity or an integrated entity.

Okay, there's a couple of hands gone up then. I see from both Sidley - have Josh first and then Sharon. Let's go to you.

Josh Hofheimer: Hi. Yes, I was going to emphasize or agree with - to clarify what you had pointed out in that comment Jonathan, that you can - and this has been a thread that seems to have emerged in the Chat. When we were talking about an insider board, we were envisioning, you know, at least initially that it be ICANN employees. But as we noted in the beginning of the memo, it could be ICANN could choose to put some independents on, or some people, you know, recommended by one of the SOs or ACs on the board.

The key distinction from our perspective is that ICANN controls the designation of a majority of the board members. And then ICANN is directly responsible as a result for controlling the makeup of the board - the majority voting power of the board. So that's how we differentiated between insider versus outsider for the purposes of the memo.

So you may still be able to allow for some independent voices to be present on the board. But under the ICANN controlled scenario, ICANN would designate either directly or indirectly, you know, a majority of those members or the board directors.

And I did want to agree with the comment that was sort of starting to emerge at the end that you have a scenario where you have the independent board. And you have to in effect recreate some of the accountability mechanisms that are imposed to CWG or CCWG imposes now have to be recreated at the PTI level.

Or you'd have to increase the reservation of rights by ICANN as a member of PTI in order to bring about the same level of control that is being established

directly through the CCWG mechanisms when you have ICANN being the inside board - sorry, PTI being the inside board.

Jonathan Robinson: Great. Thanks Josh. Sharon?

Sharon Flanagan: Thanks Jonathan. And I agree with the comment in the Chat that when we say ICANN is picking or designating, we mean that indirectly it's probably the ICANN board. Ultimately it's probably the ICANN board making those decisions.

But we could even in the insider model provide guidelines through an ICANN bylaw as to what the composition should like. So for example some of the logic in our memo on why the insider board we thought made sense was because you would have ICANN personnel responsible for IANA oversight on the board.

Well so if people thought that was a good idea, you could actually direct and mandate that yes, ICANN picks but ICANN must pick whoever, you know, whether it's a CEO or whoever is managing that. So you can give ICANN the ability to select, but you can also (unintelligible) that a bit or give guidelines as to what the composition would look like even as designated by ICANN.

Jonathan Robinson: Thanks Sharon. I'm mindful that we have always got the balance between moving things forward and giving proper discussion, but also trying to make some forward progress in decision making. So I would suggest that given that the memo is fairly clear in recommending an inside board, we ask two questions really.

One, does anyone have a significant problem with that, and two, if not - assuming not - can we try and build clarifying questions or add to for the

shape on that in the discussion that we have? For example along the lines of what we just heard from Sharon now about which is, you know, the possibility of making some recommendations. So we might recommend - and I heard this discussed before - something along these lines. I'm not saying this is the exact answer.

But the board - and assuming it is an insider board - the board is comprised of at minimum the most senior operational employee of the IANA function plus for example the board members - ICANN board members as one - as put in place on the board by the GNSO and the ccNSO. And again I'm not proposing that as a solution - just giving ideas about how we might start to - if we're going to put any sort of any guidance on this over and above an insider board, those are the kind of things we might want to give guidance on.

So we knew that - one of the things I looked up when people were talking about this was appropriate qualifications. You know would - are all say ICANN board members really qualified and relevant to sit on a PTI board? And then there's also been reference to in some discussions I've seen - to the fact that one of the senior ICANN employees that happens to be the head of the Generic Domains Division I think or whatever it's currently called - (Acrym Teller) is normally responsible at a functional level for the operation of the IANA function.

So in many ways you would think (Acrym) was someone you'd want on the board as well, not because of reasons of accountability and responsibility and operational familiarity. And so those are the kind of things we might think about once we start to think about guidance.

Maybe I'll sort of put it to the question. Has anyone - would anyone like to speak fundamentally against the sort of - in essence what appears to be the

recommendation of this that we work around an insider board and start to build up any detail around - any relevant detail around an insider board?

Chuck, go ahead.

Chuck Gomes: Thanks Jonathan - Chuck Gomes. I don't know if this is a response to your request or not. But as I'm looking through the two memos and listening to the presentation and looking at the Chat and so forth, I come to the conclusion - my own personal conclusion - that the insider board or excuse me, an outsider board creates added complexity in several ways.

And so the key question we have is the added complexity, and does it add enough value to warrant the additional complexity? My first impression is a no. But it's obviously - I'm just looking at this the first time like most everybody else. So I think I would personally lean towards pursuing an insider board type approach.

I guess the question comes - that also presumes that we're going with the not for profit public benefit corporation rather than the LLC. Is that an assumption then that we're ready to make? Or do we need to make that decision before we go too far down the path of talking about an insider board? I'll stop there.

Jonathan Robinson: Chuck - thanks Chuck. Those are good points. I think to my mind, we come to that point on LLC or public benefit next. There may be an implication of an insider board driving one solution over another. I haven't taken that to be the case at this stage.

So I think my understanding is we talk at least semi-independently on LLC versus public benefit corporation next. And we should move on to that in relevant order second.

Milton Mueller: Hello?

Jonathan Robinson: (Unintelligible) deals with life up to the point of potential separation.

What it doesn't do is say what happens at or post separation including to the board. So to my mind there's a ringed fence separate problem to do with separation that we need to come to still. So yes, those are the thoughts. And I know Milton's been keen to have a voice for some time. So let's hope we can hear Milton.

Milton Mueller: Yes, can you hear me now? Hello?

Jonathan Robinson: We hear you loud and clear Milton.

Milton Mueller: Okay. So yes, I think we are really rushing to judgment on the - I don't think the issue is entirely insider versus outsider board. I could be comfortable with a board that was in some sense appointed by ICANN. But I don't think we're understanding the point of the separation which is that the PTI would be governed primarily by contract.

And the idea that minor problems with PTI or even major problems with PTI would be handled by accountability pressures on the entire ICANN board which spends 95% of its time and energy on policy, just seems to me to be not a very well thought out concept.

You know the - yes, you want an independent board of PTI, not independent in a sense that it can refuse to implement the community policies. Not independent in a sense that it could, you know, fight against what they're supposed to be doing by contract. But independent in a sense that they - you've separated out the responsibility for the performance of the IANA



functions to some degree, and that you are controlling it primarily through, you know, the SLA and the contract.

And that's actually much simpler than having a bunch of new mechanisms for appointing or removing board members, or asking the entire community to try to remove, you know, six board members from the, you know, the NomCom or the GNSO to handle some problem in IANA. I'm just not getting the point here about how we get something simpler by having the PTI be entirely a creature of the ICANN board.

Jonathan Robinson: I'm going to respond to that. I know Sharon's put up her hand, and I'm going to let her respond to that before we go back to the queue.

I don't see it in that way. I think the board - the ICANN board is to all intents and purposes very distant from the PTI in my reading of the situation. There are numerous ways in which the IANA - the PTI is held to account to perform.

One, it's simply run. We trust in it at least initially by professional and competent staff who are managed by professional and competent ICANN managers, who are themselves supervised and held to account on SLEs by a customer based - a customer focused CFC, and who are themselves all subject to IANA functions review.

So it feels to me there's a - this doesn't just set examples of some. But I worry - I think that the ICANN board is very distant from all of this. And it's only in some extreme scenario where the CFC failed to get it what it wants. And management has failed to perform as they should. A number of dominos have fallen over, at which finally we invoke these new accountability principles to say enough is enough. We've really got to escalate this to the ICANN board.

So perhaps we're talking of trust first, but I thought it would help to the team to be at that point to clarify. That's certainly my understanding of where we're at. And I don't know if that's a satisfactory response. But I should certainly let others come in the queue, and Sharon also respond there as well.

So let me hand over to Sharon. And then I'll come to you Alan and Greg.

Sharon Flanagan: Thanks Jonathan. In terms of the contract, I agree with Milton that there is a lot that can be put into the contract. And I think we will, you know, put as much as we could into the contract to govern the relationship between ICANN and PTI.

But at some point there is a need for some governance body to act. So for example you can have a contract that has all kinds of remedies. But someone - some individual or group of individuals needs to decide to enforce for example.

And so the contract can do a lot, but it can't do everything. And so at any point under the contract where decisions need to be made or discretion has to be exercised, there has to be some body that's capable of exercising that discretion.

Milton Mueller: But of course that's ICANN, isn't it? I mean ICANN enforces its own contract.

Sharon Flanagan: Well but what if ICANN is in breach, and PTI is saying, you know, ICANN is not performing? We need to hold them accountable, and we want to sue - that example. Who's making - who makes that decision? There has to be some body to make that decision.

Milton Mueller: What would PTI sue ICANN for? I'm not understanding that.

Sharon Flanagan: Well for example let's say that the contract provides a requirement for funding. You know that's...

Milton Mueller: Okay, payment - yes.

Sharon Flanagan: They need to fund PTI. And ICANN stops funding. Now you can deal with that through the ICANN - at the ICANN level because there's a budget and it's approved and ICANN wouldn't be living up to that budget either. But you would want - usually you would want the party to the contract - the PTI to have some ability to enforce.

Milton Mueller: Right. And if it's independent board, it has that. If they're not getting paid, they're going to be very motivated to sue. If they're just put there by ICANN and ICANN isn't paying them, I don't see the motivation for them to do something.

Sharon Flanagan: My point though was that the idea that the contract can kind of be the place where everything is answered. I don't think it can be. I think at some point you need some body, and then you can talk about what does that body look like. But it can't be the end all, be all.

I think it should have as much as possible to avoid any need for exercise that discretion. But there will be some moments when that discretion will have to be exercised.

Milton Mueller: I will shut up after this, I promise. But I think if - yes, of course the contract doesn't govern everything. But if PTI is in breach, then ICANN enforces based on ICANN's board. And if ICANN is in breach, then PTI enforces

based on its board. And I don't see the need for ICANN to be in control completely of the PTI board.

Jonathon Robinson: Okay, so thanks Milton. I'm conscious to move to the others in the queue. But come back in the queue if you'd like to. Just noting one other point which has been mentioned a couple of times, and that's the prospect of having - whilst it - an insider board could have others on the board. But it's still not - the insider board is defined by ICANN controlling or designating the majority of board members.

Alan Greenberg, go ahead.

Alan Greenberg: Thank you very much. First of all, just in listening to this discussion, it strikes me that the one real anomaly is if there would be a situation where PTI would want to sue ICANN, then you have a situation where the suit is essentially taken by ICANN employees against their parent. And that one, you know, is one that doesn't quite hold water. But I'm also having trouble identifying exactly what the details of that kind of suit are.

My question was, as you were looking at an insider versus an outsider board, were you looking at - and this was just inferred to a little bit or implied a little bit. Are you looking at including either as board members or as liaisons, representatives of the direct customers? So that if there is a problem the discussion on the board can actually be informed directly instead of doing everything, you know, with documents tossed to it or other second hand information?

Jonathon Robinson: Sharon, would you like to...

((Crosstalk))

Jonathon Robinson: ...try and answer that question directly?

Sharon Flanagan: Thanks. Alan, is the question who would be on the board? I mean was that the question?

Alan Greenberg: Well it's partly who would be on the board. Obviously the direct customers could not have votes and be the majority of the board, or it's no longer an insider board. But have you looked at that as partially to address - and I'm not sure who would address the issues Milton was raising. But at least it also has a component of the alternative of the outsider board who likely in our environment would have been - at the very least include representatives of the customers and, you know, maybe a larger multi stakeholder component as well.

It also strikes me that if we end up with the scenario where the addressing and protocol people have a direct relationship with PTI - that is they actually signed their memorandum of understanding with PTI as opposed to with ICANN and pass through - that if there are any issues that have to be raised to address...

Jonathan Robinson: We could in some ways recommend...

((Crosstalk))

Alan Greenberg: Excuse me?

Jonathan Robinson: Sorry Alan. We heard earlier where there was a possibility of recommending certain board appointments or influencing how those might be made. So there's first of all at the highest level - there seems to be the

definition between an insider and an outsider board - in other words majority appointed by it or not.

But that doesn't stop the board - us making a recommendation that the board for example had two direct customers and/or had some potential appointment from other communities should they choose to take initial first transition IANA.

((Crosstalk))

Alan Greenberg: Jonathan, as I understood it...

Jonathan Robinson: ...alter that?

Alan Greenberg: What are - Jonathan, just to be clear - what I was asking is did Sidley consider the impact of that which essentially merges the two concepts together to get the best of both worlds? That was the substance of my question. Thank you.

Jonathan Robinson: Okay, Sharon.

Sharon Flanagan: Okay, thanks Jonathan. We did consider - when we talk about the insider board, we note in our memo - we talk about a majority. So we did consider that while even in the insider model, while you could have a majority of the insiders, that doesn't mean you couldn't have any seats reserved for other constituents.

So you could still have others on the board. And, you know, you can exercise a fair amount of influence, even in a minority position on a board through the power to sit through meetings and express your opinion, and the desire

typically to get to consensus. So we thought you could have some minority board members who would not be ICANN employees.

Can I answer - there was a question in the Chat that's just too hard to type up an answer too. I can - I think I understand the question from (Seone) which is the - he asked if you can - if you had an ICANN board member who was sitting both at the ICANN board level and the PTI level, and then he or she resigned or was recalled off the ICANN board, you know, what would happen at the PTI level?

You could, you know, you could link them up. You could have that individual deliver some kind of conditional resignation letter that says that if he or she resigns from ICANN, he or she also resigns from PTI. And that would be pretty common in a multinational complex structure to do that.

I think the question is what about the reverse. If someone is asked to resign off the PTI board, would they also resign off the ICANN board? And I think, you know, it could be any way you'd want it to be. But I don't think there's the same logic in saying if there is - and I think if ICANN is designating, it just wouldn't happen.

But if someone is pulled off the PTI board, should they also be pulled off the ICANN board? I don't think so. I mean the ICANN board is being constituted in a very particular way. And there is a lot of complexity at that level. And I don't think there should be an automatic removal - if there's a removal at the subsidiary level that there should be an automatic removal from the parent level.

Jonathan Robinson: Okay, thanks Sharon. Greg, you've been very patient for a voice at the mic. Go ahead.

Greg Shatan: Thank you Jonathan, it's Greg Shatan for the record. Going back to the - or maybe we never really left the discussion of outsider board versus insider board. It seems to me that - well first off, as I think has been said, an insider board could have outsiders on it as long as it's not a majority, and presumably vice versa.

But with an outsider board it seems that we lose kind of essentially the ICANN as manager function, except to the extent that a manager - that one contractual party manages another, which is typically fairly hands off in terms of day to day, month to month management. You don't reach inside your contractual party and move the pieces around. You deal primarily with their output and their deliverables. And you, you know, work kind of across the garden wall so-to-speak.

It seems to me that we've gone beyond kind of mere structural separation and kind of extended structural separation. As a model if we go to an outsider of the Board, (unintelligible) that's what we intended, I don't.

Poorly (sic) these are possibilities -- all of them. But they, you know, if we have a kind of independently managing PTI Board, then the PTI Board would come to a whole set of issues unto itself that we have not begun to solve for. I don't want to say it's impossible,

I don't like these arguments, but if you think this road is impossible, but it adds another layer of independence of complexity that I don't think is necessary and I don't think (unintelligible).

Jonathan Robinson: Thanks Greg, that's useful input. Just note that your audio is a little muffled from you. It's perfectly loud but not quite as clear as it could be. So if



you could just check your mic position root to wherever you are whatever the case is.

Milton has his hand up so I think we should go to him. But I'd also like to move us on to look at the - as I said earlier, as I saw it, it seemed that Sidley's position was rather unequivocal on Memo 1 and much more equal or less as clear on a recommendation on LLC versus PDC.

But I'd really like us to look at that Public Benefit Corporation (unintelligible) because some have also highlighted that for them in considering the Board structures, that may be a factor as well.

So Milton let's go to you and then I'd like to think about moving us on to look at the other memo.

Milton Mueller: Right. Jonathan, thank you. I just think in response to Greg, I think there probably was a pretty fundamental lack of I guess coordination or agreement on what we were doing by proposing to create PTI because from my point of view it was indeed to move it as close to a contractual arrangement analogous to that of the Numbers and Protocol community as possible.

And that of course we did not want the entire ICANN Board which again is dealing with a very complex political and policymaking environment to be considered the manager of the IANA Functions. We wanted separation of Policy and Implementation. And we got it by having a legally separate entity.

But I think - the reason I'm really concerned about this is because I'm working in those other communities, and I'm hearing again and again what is the point of having a separate legal entity.

And if there is no, you know - if you're thinking that ICANN is still the manager of the IANA Functions, not the PTI, and that primarily the governance mechanism is primarily that instead of the contract, I can't answer that question, I cannot give a satisfactory and convincing answer as to why we need to do this at all. So bear that in mind as we head towards the May 20 comment deadline because I think you're going to get a lot of that.

Jonathan Robinson: Thanks Milton. I think it's important not to leave that completely hanging. Whether or not we have to continue on this discussion another time is also relevant.

But to my mind what we did hear was there was a clear three point advantage to the separate legal entity which we deal with in the FAQs and which we were helped by the work of Sidley's memo to assist with answering those FAQs.

But in essence, we maintain the status quo while preparing for any eventuality such that that eventuality of potential separation could take place so that was my understanding.

We retained many elements, we didn't change anything that wasn't necessary to be changed. But we did our adequate homework that should there be a need for change, all of the mechanisms were in place to do so. And moreover that at the ICANN Board level, we had a significantly empowered community to take over from any perceived or actual lack of - a perceived or actual that was left in the absence of the oversight of the US Government.

So it felt to me like we had plugged all the gaps. And so I think we really have to have that conversation more if there is a fundamental misunderstanding of the adequacy of which we've plugged those gaps, that is important.

But with (unintelligible) permission, I would like to move on to hearing about the second memo and see if that's more difficult or easier to answer than this first.

I see a new hand from Chuck. So before moving on, I'll take that hand and then move us on.

Chuck Gomes: Thanks Jonathan, Chuck. And just a quick addition to the reason for the current model even though you still have the parent entity and control and that is the issue of the contract.

To me that was the turning point. I mean the value of having a contract that defines the relationship is really important. And even though out the gate you still have the parent entity and control, like you said we have the ability to do that separation, but we also have the ability to have a contract that clearly defines the requirements and relationships. Thanks.

Jonathan Robinson: Thanks for that reminder. All right, Sharon, I'm going to hand over to you or a colleague that you designate to deal with now the second memo which dealt with the corporate entity that is to say PBC Public Benefit Corporation or Limited Liability Company.

Sharon Flanagan: Thanks Jonathan.

So let me walk through that memo. I think there was some questions do you have to - does one type of board lead you to one or the other of these entity structures? I don't think necessarily, I think there's still flexibility. But let's just walk through the pros and cons of the two types of entity structures.

So at a high level, the Public Benefit Corporation, you know, the California Public Benefit Corporation which is what ICANN is, requires a fair amount of formality and provides much less flexibility than an LLC. We have certain statutory requirements that we would have to comply with and there's just no real work around, and we'd have to just live with whatever that structure requires.

The LLC on the other hand allows for a great deal of flexibility and is largely governed by a contract which would be the operating agreement that would exist at the LLC level, and that would be a contract between the member and the LLC itself. And that could, as I said, provide a great deal of flexibility.

In terms of the composition of the board, for a California Public Benefit Corporation you must have at least one director but you can only have - you can have as little as one or you can more than one.

And then there is this other requirement that no more than 49% of the directors be interested persons, and that means individuals compensated by PTI, so employees of PTI. But it doesn't sound like that's going to be an issue so I'm not hearing anyone suggest that the PTI that the IANA Functions Team is in some way in control of the PTI entity.

On the other hand, an LLC wouldn't even require a Board at all. You could just have it be member managed meaning managed by ICANN. Now just because there is that flexibility doesn't mean that's how you would need to structure it, there are lots of LLCs that have a board, a board of managers, who operate exactly as a Board of Directors would operate, and outline all the responsibilities for that board in the operating agreement.

So while the LLC allows for a lot of flexibility, you can always decide to make it look just like a corporation and, you know, include a lot of the types of structures and formalities that you would have in a corporation and plenty of entities do just that.

In terms of the fiduciary duties of the board, that's another place where the two structures differ quite a bit. Public Benefit Corporation each director has a fiduciary duty and has duties of care and duties of loyalty and also a duty of obedience to the mission.

An LLC on the other hand, you don't need to have fiduciary duties of the board of the LLC. So you don't need too. You still can, and I think this community probably would still want that to exist if you had an LLC, but you don't need too. So you have, again, flexibility.

The responsibilities of the board, that's another place where the Public Benefit Corporation would give a list of items that there would be no flexibility, it simply has to be a decision for the board, it can't be taken away. And the list is set forth in the memo but includes things like adopting an annual budget for example.

In an LLC, you don't need to have the Board weigh in on any of these things, but you could have the board weigh in on all of these things. So you could choose. You could pick and choose among these responsibilities in an LLC, you could replicate them exactly and have the same type of governance you would have in a Public Benefit Corporation if that's what was desired, or you can have very little. So it would really be just a choice.

I think one of the biggest differences between the two structures is item five of our memo which is the tax exempt status of the two entities. And I know that's

not the most exciting thing to weigh in, it's not a governance issue. But it's important.

And that is that the PTI, if it were incorporated into a California Public Benefit Corporation would need to get its own tax exempt status from the IRS. And there is a risk that the IRS may not grant that non-exempt status or exempt status rather, and may instead view the activities of the PTI as commercial rather than serving some kind of tax exempt purpose.

So there is a piece of it that would be in the hands of the IRS, United States IRS, and not only could it be an issue at the PTI level but there's also theoretically a risk that it causes the IRS to revisit ICANN's exemption.

So from a tax standpoint I think it's very clear that an LLC is a preferred structure because an LLC is so-called disregarded entity, it's not looked at for tax purposes. And so the tax exempt status that ICANN currently has would also then exist at the PTI level. So I think that's one place where there is a strong advantage of the LLC.

But not to make things too easy, on the bankruptcy side, there's actually a good advantage to the Public Benefit Corporation as opposed to the LLC. So these are counter - these go against each other. Tax favors LLC, bankruptcy has a preference for a non-profit corporation.

And the reason is that, at least under the US bankruptcy laws, the corporation, the non-profit corporation, has some protection from being into some kind of involuntary bankruptcy proceeding that may not exist with an LLC. So it's clearer that there's a safe harbor for a corporation that's not a money business or commercial corporation, and it's clearer that that would protect non-profit than it is, you know, whether it would protect an LLC.

So those are, as I said, the bankruptcy and the tax kind of go against each other.

I would say on - just kind of stepping back again on the LLC, while we note a number of places where there is tremendous flexibility for the LLC and that's typically why it's such a favored structure, it doesn't mean you can't replicate all of the things you would have in a corporation -- a non-profit corporation. You can still replicate many of the fiduciary duties and approval mechanisms and the like. It's all open, you could do any of that.

But if there were parts of the non-profit corporation that didn't exactly work, you wouldn't have to implement those in the LLC, you wouldn't be stuck with all of what comes with a non-profit.

So I think from our perspective, this one kind of breaks a bit both ways and I don't think we have a strong recommendation here one way or the other. And maybe I'll pause there and just see if there were any questions or if anyone else or Josh or Holly want to weigh in on this one.

Jonathan Robinson: There is - it's Jonathan. I certainly have a few for you and I wouldn't mind checking a couple of clarifying points with you while we see if anyone else wants to come up in the queue.

One of the things that struck me, of a number, was that you talk about the risk of a loss of tax exempt status. Why is that a big deal? I mean if we went down the Public Benefit Corporation route and we failed to secure tax exempt status for the subsidiary, what is the consequence of that? I'm not sure I'm seeing it.

I can see that the secondary risk which is that in some way ICANN's status was challenged, that's a different issue all together and a different order of magnitude. But just first of all on PTI, what's the consequence there?

And I have a couple of more I see and then we'll go to Alan.

Sharon Flanagan: Thanks Jonathan. You know, we...

Jonathan Robinson: Sharon, perhaps you want to deal with that first and then...

Sharon Flanagan: Yes, I'm sorry. Yes, let me quickly just answer that question.

You know, we don't have perfect insight into what PTI will look like in terms of revenue generating kind of going forward if there's ever going to be any revenue there. But if there is then, you know, paying taxes is not usually viewed as a good thing.

So we assume that people would prefer to maintain that status just to give flexibility. And as you said, the revisiting of the ICANN tax exempt status I think would be, you know, would be problematic too.

Jonathan Robinson: I asked that question specifically because I didn't see in my view or my perspective on it, I didn't see PTI as being - I think it's not revenue, it's profit. I don't see it as a profit generating entity.

I imagine it will be run on more or less a cost basis, and therefore it's profitability or not, and therefore it's tax exempt status doesn't seem to me to be any shoe. So that's why I wanted to check that.



There was one other one where you talked about - I mean one of the things that's appealing to me about a Public Benefit Corporation is that it's precisely the prescriptive nature of it. It's very tempting so flexibility is attractive. But on the other hand, something which is largely prescribed has some attractions.

And in particular, one of the things which kind of relates to the thread that Milton has been talking about and this insider board issue, if we had the fiduciary duties as they are prescribed by a Public Benefit Corporation, that would in essence force the board to perform with a primary loyalty, notwithstanding the fact that they were appointed by ICANN, with a primary loyalty to the subsidiary.

So providing they weren't I guess board members of ICANN, the corporation - well in which case they may have a conflict that's harder to resolve. But they would - so I think that to me struck me as quite an interesting point.

And I guess a corollary to that is the way we could fix that (unintelligible). If it was an LLC (unintelligible) is along the lines of an (unintelligible) that we need (unintelligible) Public Benefit Corporation gives (unintelligible) some semblance of an outsider type behavior.

And what are your thoughts on that? So that's the question (unintelligible).

Sharon Flanagan: Well and that's absolutely right Jonathan. So having the PTI board members have fiduciary duties is helpful because even in an insider board situation they are obligated to consider from a fiduciary standpoint what's in the best interest of the PTI.

You could still - you know, I said you don't have to have fiduciary duties at an LLC, you still could create them at an LLC. So you could still impose those types of obligations.

But there's clearly a lot less case law out there in terms of fiduciary duties in an LLC context as compared to fiduciary duties in a corporate context where there is a very clear long history of case law that articulates what the standard is.

So although we could contractually replicate in an LLC, we may not have the same benefit of all of the developed case law that we would have in a corporation.

Jonathan Robinson: Sorry Alan. So bottom line Sharon is that if we wanted to obligate an insider board to be significantly responsible to the PTI, we would have some advantage to it being a benefit (sic) corporation.

Sharon Flanagan: Jonathan, I think that's right.

Jonathan Robinson: Sharon, let me pass over to Alan, and apologies Alan for keeping you waiting. I prepared those questions, I thought they were perhaps useful to you and others in the group. Go ahead Alan.

Alan Greenberg: Yes, no problem at all.

It strikes me that the potential bankruptcy protection and for IANA to be able to have or PTI to be able to have assets set aside to allow it to continue running for N years during a bankruptcy proceeding is a pretty large asset. I'm not (unintelligible) the size of the money but I'm saying the assurance that

IANA will keep on operating and will not be subject to the bankruptcy courts while the process is going on is something that is a really major asset.

And I think that's something that we should cherish. We could clearly live without it and hope that we would never need it.

It strikes me that with the exception of the scenario where by applying for tax-free status for PTI, they relook at ICANN itself and reassess ICANN, the optimal course is to apply or presume that we're going to have a corporation apply for tax status if we don't get it the LLC as a fallback. Or as Jonathan said, paying tax if you never make a substantive profit is not a real issue either.

So I see the corporation as the strong one, and having a fallback if for some reason the scenario is necessary as the way to go forward. I think the situation of a huge lawsuit against ICANN launched because of some gTLD issue is the worst case scenario and I think IANA needs to be protected against that -- at least on the short term while a bankruptcy is proceeding. Thank you.

Jonathan Robinson: That's an interesting point Sharon. (Unintelligible) ICANN input on the tax exempt status and how the PTI finances would look. But again, I would just reiterate that I would (unintelligible).

Alan Greenberg: I'm hearing nothing. Has everyone else got off?

Woman: I'm still here.

Lise Fuhr: I can see Jonathan has been cut off. It's Lise for the record. I'll take over until he's back online. Thank you.

Josh, you're next in line. Go ahead.

Josh Hofheimer: Just wanted to respond to one of Alan's comments or questions about bankruptcy.

We have looked at if there were a lawsuit against, you know, by a gTLD against ICANN, you know, we have looked at the situation of whether or not the LLC would be - could keep its assets separate or could it be forced into bankruptcy by virtue of a bankruptcy proceeding against ICANN - or a bankruptcy proceeding I shouldn't say against but involving ICANN.

And because you have the separate structure the LLC does have the ability to - it doesn't necessarily - it isn't necessarily automatically drawn into that bankruptcy proceeding either. So it isn't necessarily a risk that it would automatically be attached to the bankruptcy proceeding against or proceeding involving ICANN just because it is connected through it being ICANN being the member of PTI.

Lise Fuhr: Thank you Josh. I can see there's also some questions in the Chat regarding if it's been considered as well that the PTI may also go bankrupt. And I see that Sharon has answered that.

Josh, your hand is still up or is that an old hand or you want to reinterject?

Josh Hofheimer: Old hand. I'm trying to get it down.

Lise Fuhr: Okay, Jonathan is back on. I'll hand it back to Jonathan. Go ahead.

Jonathan Robinson: Thanks Lise. Just confirm Lise that you can hear me okay.

Lise Fuhr: I can loud and clearly.

Jonathan Robinson: There seemed to be a glitch in my connection and I'm not sure what that was, what the (unintelligible) were.

I'm very reluctant to force a premature conclusion but I'm very mindful that we've got to somehow get out of this conundrum.

I know that - my sense here is that - and I'd like you to challenge this if you do. What I'm sensing is that there are some advantages to a Public Benefit Corporation that has value. It doesn't have the flexibility of the LLC but it does have certain key advantages.

And to my mind, that linked with the insider board. And I must acknowledge that Milton has expressed considerable, you know, he's expressed concern throughout this about elements of the insider board. So I'm not sweeping those under the carpet in evident throughout the conversation.

But if there was somewhere where we were headed, it's possibly that. So I'd like you to challenge my interpretation if you do feel that that should be challenged. But, you know, that it starts to feel like, notwithstanding some questions that might need to be asked like, you know, what is ICANN - you may be asking ICANN about the finances. Well I don't know what answer we'll get from that.

But maybe you could challenge that or say what questions or clarifying points we would need to resolve if we went down that route, and that could come from anyone in the CWG or Sidley if we went down the route of a Public Benefit Corporation with an insider board. And that insider board was clearly defined earlier.

And bear in mind that point that I made which is very keen to understand from Sharon is that in affect the enhanced responsibilities of a board that go with the Public Benefit Corporation and those fiduciary -- strong fiduciary duties -- that the directors would owe to the corporation. And I've got of course the bankruptcy protections that go with the PBC.

Sharon, go ahead.

Sharon Flanagan: I wanted to add one more comment in terms of the difference between these two structures. And again, I don't think this decision is as critical in terms of the path forward as some of the other decisions as to whether it's an LLC or non-profit.

But one other consideration is that - and we talked about this in Istanbul. Remember that if it is a non-profit corporation, if PTI is a non-profit corporation, it is not a subsidiary of ICANN, it's an affiliate. ICANN doesn't own PTI.

So, you know, to take, you know, the logical - if you just extend the logical conclusion of well we want this to - you know, if you want this to continue to be internal to ICANN with separation -- some separation -- then the LLC makes it more internal because it would be a true subsidiary.

So I wanted to just throw that out there as just one other considering. The non-profit would be an affiliate, but it is not a subsidiary, it is not owned by ICANN.

Jonathan Robinson: That's a really interesting (unintelligible) Sharon, and you've clearly, at a kind of technical sense, made the point at least from that all along that we

while we might conveniently call it a subsidiary if it was a not-for-profit would be an affiliate.

Maybe - I wouldn't mind just a little bit more comment on that. So here you've got this affiliate. The affiliate has a member which is ICANN. That member has the ability to appoint the majority of Board members.

The affiliate is - the integrity of the affiliate is protected by the board members having a duty and an obligation to that affiliate.

Are there any other remarks or comments you would like to make to try and make sure we've thought this through thoroughly or as properly as we could?

Sharon Flanagan: Jonathan, let me just say one more thing. And that is if you were to have a non-profit corporation with an outsider board, there's very little indicia left of this being internal to ICANN.

So I do, you know, what I have heard through this process is consensus around this hybrid model which is, you know, somewhat of a compromise between those two views. If you were to - and that's the one place where I think the entity structure and the board do kind of meet up which is if you had a non-profit and you had an outsider board, as I said, it's very little indicia left of this being part of ICANN.

Now if it is an insider board and it's a non-profit, I think you still keep - you still maintain some of that internal aspect still with legal separation, but there is an affiliation there.

But, you know, if there is a desire for this to be truly owned and part of ICANN, then an LLC does that better. I'm not saying that that's what the goal

is of the group, I just want to make that point that that is just one more overlay on the choice between the two structures.

Jonathan Robinson: Okay thanks Sharon. To my mind, I think the operating term here has always been separable, the ability to separate rather than separate.

Milton, go ahead. Milton, we're looking forward to hearing from you.

Milton Mueller: Good thing. I think that...

Jonathan Robinson: (Unintelligible).

Milton Mueller: You make it sound as if the...

((Crosstalk))

Milton Mueller: Hello? Yes? Start again?

Jonathan Robinson: Could you start again? The first phrase was good thing or I got. And it may be my connection but if you could start again that would be great.

Milton Mueller: Okay. So I think what we may be losing site of was did want a middle ground. In other words we didn't want - we wanted it to be the existing IANA department, we wanted it to be an affiliate of ICANN, that was what I understood anyway.

Inside or outsider board, that's something that's negotiable in the sense of being, you know, where we move ourselves on the spectrum. That's something we have to sort out.



But when we are sorting it out, I don't think we can lose of the fact of all these ties between - even if you take the most independent option -- a non-profit Public Benefit Corporation and an outsider board -- that there are huge numbers of ties to ICANN and ICANN's community including the review process, the customer standing committee, the contract, and the possibility of having ICANN appoint, you know, some of the board members even if it's not all of them.

So when we talk about independence, I don't think we should lose sight of those, the degree to which this PTI would be completely nestled within ICANN's eco-system and very much a part of it.

Jonathan Robinson: Thanks Milton. Any responses, comments or other reactions to that? Josh?

Josh Hofheimer: Yes, I think Milton, I mean you make a good point but I think it also cuts both ways.

Right now, there are a lot of, you know, the CSC and the IANA Function Review have been articulated as means to hold to create greater accountability. But those all - ultimately the enforcement of the views of CSC and the IANA Function Review, that enforcement of their views or of their recommendations is accomplished through ICANN and through ICANN acting as the member and in control of the board.

If you move to a situation in the future - if you move to a situation in which PTI is a non-profit Public Benefit Corporation which as Sharon made clear is not a subsidiary of ICANN, if you move to that situation and you have an independent controlled board of PTI so that ICANN doesn't appoint a majority, then the only way that you could - you've lost the ability to enforce the views or recommendations for CSC and the IFR to make their views or

their recommendations enforceable unless you add some further accountability on which is to say unless you either reserve some controls in the PTI bylaws to ICANN as the member of PTI even if it doesn't control all of the board. And we'd have to make sure that actually works.

Milton Mueller: But excuse me Josh.

((Crosstalk))

Milton Mueller: I just don't - are you saying that recontracting is not a form of enforcement?

Josh Hofheimer: Let me finish. The other thing that you'd have to do is you'd have to have - the other way you'd do it and it goes to exactly what you're saying is that you'd have to have some contractual agreements between PTI and CSC or IFR that would that you'd have to have some contractual agreements that would be enforceable. And so you perhaps have to have CSC or IFR be organized as legally cognizable or legal persons that could enforce those contracts.

Yes you have the contract with ICANN, but then, you know, you potentially would be having to establish a breach. There may be some recommendation changes but there may not be an actual breach or one that could be determined in a court of law or through an appeal to be a breach. So you either have to wait until the contract was up for renewal and decide to go to a different party or a different entity or you'd have to be able to establish that the contract, which is a performance based contract, not a policy-based contract, that the contract itself was breached, which PTI would be free obviously to defend itself against such claim.

Milton Mueller: Well I appreciate your advocacy of that particular solution but I think it seems...

Josh Hofheimer: I'm not advocating necessarily, I'm just...

Milton Mueller: ...the kind of - it seems like that's what we were trying to achieve by having the separation was most of the weight of the governance would be put on the ICANN PTI contract. And the oversight mechanisms that are supplementing that do not need to be contractually enforced.

You know, if the CSC is telling the post-transition IANA, "We're dissatisfied with this and that, and oh by the way, a review process is coming up," I don't think they're going to be - you know, whether ICANN controls the board or not doesn't really make any difference. What matters is whether this entity is responsive to the service concerns of its customers and there's all kind of mechanisms to make that happen.

But anyway, I have spoken my peace.

Jonathan Robinson: Thanks Josh and thanks Milton. Let's move things on.

I'm a little conscious of where we are in the call. It seems significant, substantial and worth going into and it's been really useful to do so, but there are other issues to try and cover and some of them are linked to this of course.

Chuck.

Chuck Gomes: Thanks Jonathan, Chuck Gomes.

I understand and in the case of the Public Benefit Corporation PTI would be an affiliate and not a subsidiary, and for an LLC it would be a subsidiary. And

I understand that ICANN does not own the PTI in the case of the affiliate approach, but I don't understand what the significance of that is.

What is the significance of ownership versus affiliation as far as we're concerned and what we're considering?

Jonathan Robinson: Good question. Go ahead Sharon.

Sharon Flanagan: Thanks. It's a good question Chuck and I don't have a good answer for you which is I think the answer is there isn't a tremendous amount that ownership gives that's different, so I don't think ownership is critical.

I really more wanted to point out that on the spectrum that as you consider both the structure and the board, those things can move you along the spectrum of internal and external. And I view ownership as the most internal on the spectrum.

But, you know, what does it mean legally? It doesn't mean a whole lot that's different from being the sole member of the PTI. You know, it may have some impact on the finances and, you know, the finance people would have to weigh in on that whether you, you know, consolidate. I assume you'd consolidate with the LLC and maybe not with the Public Benefit Corporation.

But it may not be from a governance standpoint a tremendous difference between the ownership and, you know, the affiliation through the membership.

Jonathan Robinson: Okay thanks Sharon. Lise?

Lise Fuhr: Thank you Jonathan.

I'm a little mindful of time and I think we've had some very good and interesting discussions on both the PTI board and the structure and the choice of company.

But I think we could, I would like to suggest that we make a provisional conclusion on anyway the board should be an insider board for now. And I know and I'm also mindful of Milton's arguments against this, but it seems that there is pretty much consensus regarding having an insider board from most of the group.

Then we could move on and maybe try and dig into the Public Benefit Corporation too. It seems like this the road that many people would like to go too. Thank you.

Jonathan Robinson: Okay Lise, thanks. I know Alan has had his hand up for some time so let me just get straight to Alan and then to pick that up, and then we'll try to move on to other items in the agenda.

Alan Greenberg: Okay thank you Jonathan, I'll be quick.

There was a comment made earlier that if PTI is completely independent, then we've lost the "internal" aspects that we were looking at when we moved from a completely external model.

I don't agree. I think virtually any of the models we're talking about could work, and based on the various considerations that Milton has raised and other people have raised we need to pick one.

The internal versus external model discussion that we had in December was the stewardship itself, and that right now we're talking about is ICANN. If ICANN chooses through the IFR terminate the contract with PTI and go to someone else, it's still ICANN that decides to go to someone else, and that was the critical part of the internal versus external.

So I think we need to make the best business decisions we can. Like any in business, we don't have all the facts and we're going to have to wing it to some extent. But I think we're on sound ground as we go forward regardless of which ones we pick, and we should pick the one that we think accrues the most benefits overall. Thank you.

Jonathan Robinson: I'd certainly agree with you. There's a point where you never have all the information.

We've taken two comprehensive pieces of information and had them presented to us and discussed them on both the Public Benefit Corporation versus Limited Liability on the insider versus outsider board. It's pretty clear that not everyone agrees, but it feels to me like Lise wasn't far off saying that if we're going to settle somewhere and ultimately we have to make some choices, it looks like we at least we're heading down the route of Public Benefit Corporation with insider board.

I'm sure this discussion isn't going to conclude completely at this point, but that feels as far as we can get for now.

So I'm conscious that there is only 12 minutes until the top of the hour and there's a few things we could cover.

Another substantial item is dealing with the work that is normally covered - well various Design Team work frankly including that from the Design Team on the separation review. And there are various separation mechanics that are being discussed by this, and know that we need to bring this back to the group to have a proper discussion.

There's been three or four people that have worked on it including Avri to try and get it to a point. And it was felt that there was some fairly fundamental questions on that.

So I wonder whether we can make some useful progress on that now. I looked at some questions earlier and need to bring those up.

Avri, would you like to make any remarks about what those - I mean you were rightly said when I asked you on Tuesday that you had presented key questions and points. Would you like to share any of those?

Avri Doria: Sure assuming I can be heard, this is Avri.

I think one of the issues that's left pending is if the separation process is triggered whether it's triggered by an IFR recommendation or by some other mechanism, is it the IFR group that does it or is it a cross-community SO/AC/ICG type of group that does it? So that's one of the - and pardon me that I'm in a noisy place. That's one of the fundamental decisions that needs to be made.

The other issue that's very open are the triggers for a separation review. We started out with the possibility that the IFR could be the one that triggered it. That then prompts the question of if the IFR triggers it, does it need to be, you

know, is it approved by the board, and if it's not approved by the board does it go through the Accountability mechanism?

There was another possibility on either a super-majority or a majority recommendation of either the GNSO or ccNSO. But there has also been a comment in it that, you know, as opposed to being a supermajority recommendation of both the GNSO and ccNSO that it be a majority recommendation of the Registry Stakeholder Group and the ccNSO Council, certainly something I consider controversial but that's one of the recommendations.

And then there was on a possibility of supermajority recommendation of and then there was several varieties of at least, you know, one SO and two ACs, or of one of the GNSO and ccNSO. And basically we've been going sort of back and forth.

If you look at the document we have, you know, you can see that there's a lot of stuff crossed out, there's a lot of edits. And actually that's a very open issue at the moment and it runs all the way from its Registries that decide where the separation process versus it's the general community that somehow decides that. So that's a very open question.

Yes, so those are really - I think almost everything else falls out of that. One of the other possible issues there are is what are the range of possible outcomes of the separation review. And I don't know that that's as controversial at the moment as how it's initiated and who does it. Thanks.

Jonathan Robinson: Thanks Avri for that summary. And before going to the queue, I'd like to touch on that last point because there's a point in the memo from Sidley - and



maybe while we've got Sidley on the phone this is quite important to also think about this.

When we come to what we call separation, I'd like to be really clear what separation means. And in Sidley's memo, they talk about divestiture -- the possibility of divestiture -- either by the transfer of ICANN's membership interest or some form of asset sale.

I guess there's a third scenario and I don't know whether this is covered. But somewhere we need to cover this and it may not be in a separation review is the point at which ICANN may decide that it would like someone else to perform those technical functions.

Avri Doria: Yes.

Jonathan Robinson: You might get someone coming in instead of saying ICANN. And so I don't think that SO of document has yet contemplated that third (unintelligible).

((Crosstalk))

Avri Doria: I think so. If I can interject again and I'm echoing and I don't think it's me.

If you look at the range of possible outcomes, it was from no action needed, introduce operational sanctions relevant to the identified deficiency, create an RFP with possible outcome of selecting a new entity to perform the IANA Naming Function, so that's finding a new SO.

Then there was that got (unintelligible) because of the discussion on the list, initiate discussions with new operational communities to share ownership of

the PTI, and then there was initiate full separation of the IANA affiliate into a free-standing entity.

So I think includes all of them. And of course that said header said including but not limited to. That basically once you went into this process, there was any number of things that group could do.

That's one of the reasons why I -- and this is me going into my personal view - - that's one of the reasons why I had argued that it takes almost something that's the equivalent of this group or even of the ICG to actually do that level of separation review. Thanks.

Jonathan Robinson: Avri, that's helpful. And I note a couple of comments in the Chat including from, and I draw your attention to those including from Sharon, suggesting that the circumstances under which divestiture might happen or termination of contract in RFP.

Lise let me go to you next.

Lise Fuhr: Thank you Jonathan.

I'd just like to underline that when we talk about customers we need to see the customer is not only as the ccNSO and the GNSO since we also have customers that are not members of those two groups. So we need to make sure that these groups are also a part of any voting or any process of having separation on some kind of process.

I'm not sure how this could be done. It's important that we see the group as members and non-members. Thank you.

Jonathan Robinson: That's a good point. Thanks Lise.

So I'm going to go to Chuck and Alan in just one moment but it does feel to me like we're not going to have this discussion in full here, so there's a place mark we're going to have to go in for everyone to do homework on this and read Avri's document and the points she's made on the list and in the call.

Go ahead Chuck.

Chuck Gomes: Thanks Jonathan, Chuck Gomes. And Jonathan, you kind of raised the question I was getting at. I really think we need to be clear on what we mean when we say separation.

It seems to me, and Avri's comments may kind of confirm that if I understood it correctly, there's really different things that we mean in terms of separation. One of them is if the PTI doesn't do a good job, we might want to move that somewhere else. There's also the issue of separation from ICANN.

And I guess my question is are there various possibilities all part of the separation issue, or do we mean just one of them? And we don't have to answer that right now, but I do think very quickly we need to get common definitions of what we mean by separation.

Jonathan Robinson: Absolutely Chuck and that's a really good point. So we should - I think we should capture that as an action. We need clear definitions of what we need to the extent they are not already, there may be but we need to make sure they are clear.

And I do note Sharon's point in relation to that around certain types of separation. The question is what is in-scope and out-of-scope for this particular group's work.

Alan, go ahead.

Alan Greenberg: Yes, thank you very much. And yes I agree, we need clarity.

And I'm a little bit worried that there were some words in the legal memos which implied a type of separation that I thought was off the table. So yes, we do need clarity on that.

I just wanted to confirm with Lise when she said there are customers who are not parts of the GNSO and ccNSO. I think she was talking about registries who do not belong, but we also do have the other two communities all together out of the naming community that would be impacted by a change in PTI and change where the IANA Function is performed, and they will have to be factored in as well. Thank you.

Jonathan Robinson: Lise, before we go to Avri, would you like to respond or any comment or response to Alan's point?

Lise Fuhr: Well I can agree that I was referring to registries and he's wanting to include the other communities too. So you're right Alan, I was specifically thinking of the Registry. Thank you.

Jonathan Robinson: Okay Avri, go ahead.

Avri Doria: Okay, yes. Thank you, this is Avri speaking again. I keep walking away from noise.

I think part of the issue I've got in terms of finding exactly what kind of separation was that really that a decision more for the time at which we have fallen into the abyss that causes us to invoke this process. And that at this point what should be included are any of the possibilities that are legally viable, that those are the inter-(unintelligible) or included but not restricted to list of possible things that group could then initiate.

I don't think it's reasonable for this group to decide what the possible further steps in separation would be at this point because that's a decision that's kind of beyond us.

What we need to do is set up a process. And that process would be then the one that was empowered at that point to find the right solution. And I don't think we should either limit it or decide that no, spinning out the PTI which is one way of putting one of the situations that (unintelligible) versus just ignoring it and hiring somebody new that we only, you know, set this process up to do one or to set this process up to do others.

And we have kinds of scenarios. For example, we could have a scenario where the Naming Community, us at ICANN says, "We want someone new to do it." But if the Protocol and Numbers people have remained as ICANN clients and we're happy with the service, they could sort of say, "But we're happy, we don't want to change."

So at that point you'd have the Names people saying, "We're going to a new provider," whereas ICANN with its two customers, Protocols of Numbers, would keep using the PTI.

I mean that's not something I'm advocating, but just looking at the test of what could be the possible decisions and what could be the possible outcomes. I think that's too broad an area for us to get into. And what we really need to do is set up the proper kind of process to figure that out should that ever need to be done and hopefully it won't be. Thanks.

Jonathan Robinson: Okay Avri, good points but nevertheless, it never does any harm to test a process as you advocate setting up an appropriate and thought-through process by the scenarios -- one or more scenarios -- that we can envision now.

They may not be all encompassing, there may be other scenarios that the process recommends. But it's not a bad idea to have one or more...

Avri Doria: Of course, I just did that.

Jonathan Robinson: I agree. Yes, I'm just confirming that that's the purpose.

Okay, look. I would have liked it if we could have gone further into this. It's been helpful to have a bit of discussion and there's a point that (Ed Water) makes that will need some more clarification on this issue of separation of stewardship and what again it's definition of separation.

So we need to do some more work on list on this. And then this is going to be a substantive point to come back to next time.

We did do very well in spending the time on dealing with these Sidley memos which are substantial issues that have been bubbling under the surface for some time, choice of legal entity and/or nature of board. So it does feel like we made significant progress in discussing those and provisionally concluding on those, but there's clearly more to follow.

We have no time to go through the punch list but I think we can update it. And I will highlight that Design Team C in particular has provide some updates to the punch list based on their work. I think M is about to meet soon.

So and then we will share with you the forward planning. Lise had planned to go through the forward planning documents with you, but frankly it's not fully populated yet. So we'll share the draft document which highlights the forward planning with you on the list and then start to populate that for further review on Tuesday.

Had to rush at the end a little, we're just past the top of the hour and so we'll pick up the hours.

I'll just quickly defer to my co-chair in case, but Lise, don't feel you need to respond but feel you have the opportunity to if you would like too. And anyone else who feels there's something urgent or critical that needs to be covered now, please let us know.

Alan, go ahead.

Alan Greenberg: Thank you. Just to let you know, there's a DTF meeting earlier on Tuesday. There's a chance, but not a certainty, that we'll have a proposal. So maybe we could tentatively put a small item on the agenda for the Tuesday meeting to cover that in case we are ready.

Jonathan Robinson: Thanks Alan. And I should share with the group that next Thursday's meeting -- I think Tuesday is the 19th, Thursday is the 21st -- is under some threat because Lise and I both have availability issues there. So unless we

have someone else stepping up to chair the meeting, that is under some threat, but we'll come back you on email.

All right, good. Well I am mindful of the time, we've sailed past the top of the hour which is something we've been pretty disciplined about not doing.

So thanks very much, that was a high-quality discussion. I'm sure not everyone got what they wanted in terms of results, but we certainly shared ideas and substantive views so that's very useful.

And thanks again in particular to those of you (unintelligible). This was a significantly anti-social hour. It's very - hope you'll feel it was useful you coming on the call.

Lise Fuhr: Thanks Jonathan, thanks everybody.

Jonathan Robinson: Well we'll stop recording. Thank you and we'll stop the recording at this stage and look forward to picking things up in the near future.

Lise Fuhr: Thank you and bye.

END