

FAQ ON EXTERNAL LEGAL COUNSEL MEMORANDUM PROPOSED POST-TRANSITION STRUCTURE

8 May 2015

The following FAQ is based on the external legal counsel memorandum, “Summary of Legal Structure” that was delivered to the CWG-Stewardship on 3 May. Please note that the legal analysis is based on the external legal counsel’s (engaged to provide advice to the CWG-Stewardship) understanding of the facts and the goals and priorities of CWG-Stewardship, and specific issues relevant to the CWG work and is provided on a general level in keeping with the level of the discussions to date. This memorandum was provided at the request of and for the benefit of CWG-Stewardship, and should not be relied upon by any other persons or for any other purpose.¹

Questions included in this FAQ:

1. What are the strengths and weaknesses of the proposed structure?
2. What are the community empowerment mechanisms that are required by the CWG-Stewardship?
3. After conducting a periodic or special review what recommendations would the IFR make to the ICANN Board regarding any necessary changes to the IANA functions?
4. How would the ICANN Board process the IFR recommendations?
5. What would happen if the ICANN Board did not substantially adopt the IFR recommendations?

1. What are the strengths and weaknesses of the proposed structure?

The external legal counsel memorandum identifies the strengths of this proposed structure are as follows:

- If there is a future need to separate or divest ICANN of the IANA functions, the work of identifying and segregating assets will have already been done. This should enhance the separability of the IANA functions.
- The proposed structure allows for a formal contract between ICANN and the IANA functions operator, which further evidences and supports functional separation.
- Without a contract, other means of establishing expectations regarding performance levels and related terms would need to be identified, which would likely be less formal and less enforceable than through a contractual relationship. Recourse for a “breach” of those terms and conditions would be limited to internal redress mechanisms such as through the IFR team and the CSC.

¹ Nothing within the memo or FAQs has been provided to ICANN as legal advice, and the statements within have not been considered by ICANN nor its external counsel.

- If there were ever an ICANN bankruptcy, with legal separation of the IANA functions into PTI, an ICANN bankruptcy filing in the U.S. would not result in PTI also becoming a debtor in a bankruptcy proceeding. ICANN's "interest" in PTI will, however, become part of ICANN's bankruptcy estate and its ability to use and dispose of this "interest" will be subject to any applicable restrictions under bankruptcy law.

The weaknesses of the proposed structure are as follows:

- It would require forming a new entity and, on an ongoing basis, attending to a set of associated corporate formalities, although legal counsel to the CWG-Stewardship advises that those are not likely to be significant.
- Depending on the structure of the PTI Board, it could introduce a new layer of governance and need for additional accountability mechanisms.
- The proposed structure would require additional work now to separate out IANA assets and address and resolve potential shared assets.
- It may have some negative impact on operational efficiency due to the functional separation, and the separate legal status will introduce some additional costs. Legal counsel advises that the legal costs of the separate legal entity would not be significant, though CWG-Stewardship's counsel has not explored this issue with ICANN directly. ICANN Finance should advise on estimates of other costs of maintaining a separate legal entity.

2. What are the community empowerment mechanisms that are required by the CWG-Stewardship?

The CWG-Stewardship requires community empowerment mechanisms for the ICANN Board and the IANA functions, which are more specifically addressed below. These requirements have been integrated into the CCWG-Accountability Work Stream 1:

- Ability to appoint and remove members of the ICANN Board or to recall the entire Board;
- Ability to exercise oversight with respect to key ICANN Board decisions. In a statutory membership structure, this would be the ability to approve or veto certain key ICANN Board decisions. For the purposes of the CWG-Stewardship recommendations, the stakeholder community or member group must, at a minimum, have the ability to review and approve:
 - ICANN Board decisions to reject recommendations coming out of a periodic or special review of the IANA function by the IFR or a Separation Review; and
 - The ICANN budget, according to requirements for transparency for the comprehensive costs of the IANA Function, and itemization to the project level and below as needed; and
- Ability to approve amendments to fundamental bylaws (whether as statutory members or designators of ICANN), with the ICANN Board specifically blocked from amending such fundamental bylaws.

3. After conducting a periodic or special review what recommendations would the IFR make to the ICANN Board regarding any necessary changes to the IANA functions?

These recommendations could include, for example, recommendations to:

- Enhance the resources available for certain IANA functions,
- Replace one or more members of PTI management or the PTI Board,
- Seek remediation of breaches by PTI of the IANA Functions Contract, or
- Initiate a Separation Review the outcome of which could include a recommendation to:
 - Terminate or not renew the IANA Functions Contract,
 - Initiate an RFP for the IANA Functions Contract, or
 - Transfer the PTI entity to a new entity that is approved by the multistakeholder community.

4. How would the ICANN Board process the IFR recommendations?

Upon receipt of the IFR team recommendations, the ICANN Board would be required by the ICANN bylaws to review the recommendations and either adopt, modify or reject those recommendations. The process for the ICANN Board's review of the IFR recommendations would be articulated in the bylaws. These bylaws would be "fundamental bylaws" (i.e., subject to a high threshold for amendment by the empowered multistakeholder community outside of the ICANN Board's powers). This requirement has been integrated into the CCWG-Accountability Work Stream 1.

5. What would happen if the ICANN Board did not substantially adopt the IFR recommendations?

If the ICANN Board did not substantially adopt the IFR [or Separation Review] recommendations, an ICANN accountability mechanism would provide for input by the empowered multistakeholder community. In the membership structure currently being recommended by the CCWG-Accountability in its draft proposal, this mechanism would be an approval or veto over the ICANN Board decision. In addition or alternatively, an IRP mechanism could be instituted to review an ICANN Board rejection of an IFR [or Separation Review] recommendation.