

Proposed PTI Articles and Bylaws – Open Items

Proposed PTI Articles (as posted for public comment on 1 July 2016)					
Row #	Subject of PTI Articles	ICANN Draft	Flagged by ICANN in Governance Chart ¹	Sidley Comments	CWG Response
1	Purpose (Article 3)	Article 3 describes the “specific purpose” of PTI as follows: “The specific purpose of the Corporation is to operate exclusively for the benefit of, to perform the functions of, and to carry out the purposes of the Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“ICANN”).”		CWG has advised that the PTI purpose should be modified to be more closely tailored to the anticipated role of PTI. We understand that CWG will propose language. The current PTI purpose language should also be retained because these particular words are required in order for PTI to qualify as a tax-exempt entity under IRC §509(a)(3) as a “supporting organization.” As a result, we would recommend that the CWG tailored language be included, followed by the required tax language (e.g., “[tailored PTI purpose inserted], in so doing, PTI shall be operated exclusively for the benefit of, to perform the functions of, and to carry out the purposes of ICANN”).	

¹ ICANN legal has indicated that these items are not directly addressed in the CWG Final Proposal and have been flagged for further discussion with the ICANN board. See the governance chart from ICANN legal, annotated with Sidley’s comments (attached below).



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2	<i>Amendments</i> (Article 13)	Consistent with ICANN's edits to the PTI Bylaws, ICANN has proposed adjusting the threshold of approval so that Articles amendments require approval by four-fifths (4/5) of the directors and the approval of ICANN, and ICANN has proposed deleting the requirement that the threshold include at least two ICANN Directors and two Nominating Committee Directors (or such lesser number of Nominating Committee Directors who are then in office and entitled to vote on the matter).	This threshold requirement is also flagged in the governance chart (attached at footnote #1, above).	<p>We recommended a higher threshold of four-fifths (4/5) of the directors, because this would require approval from at least one ICANN Director and at least one Nominating Committee Director. We support removing the requirement that this threshold include both Nominating Committee Directors, because we believe it gives too much power to one Nominating Committee Director to block a vote.</p> <p>CWG further comment to change to 80% in lieu of 4/5. We think either is workable so long as it is clear it is 80% of the full 5 director positions even if certain of those positions are vacant (i.e., 3 of 3 seated directors is not enough although 100% of the then seated directors).</p>	

Proposed PTI Bylaws (as posted for public comment on 12 July 2016)					
Row #	Subject of PTI Bylaws	ICANN Draft	Flagged by ICANN in Governance Chart ¹	Sidley Comments	CWG Response
1	<i>Principal Office</i> (Article 2)	<p>With respect to PTI's principal office, Article 2 provides:</p> <p>"The principal office for the transaction of the business of the Corporation may be established at any place or places within or</p>		<p>One approach would be to track the approach taken in the ICANN Bylaws which provides:</p> <p>"The principal office for the transaction of the business of ICANN shall be in the County</p>	

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		<p>without the State of California by resolution of the Board. The Board may at any time establish branch or subordinate offices at any place or places where the Corporation is qualified to transact business.”</p> <p>ICANN did not make additional edits to the text of this provision; however, this item has been flagged for further review, because the approach taken here is different from the approach taken in the ICANN Bylaws.</p>		<p>of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.” See Section 24.1.</p> <p><u>Notes:</u></p> <ul style="list-style-type: none"> • Under California law, the corporation is required to designate an agent for service of process in California, but is not required to establish its principal office in California. 	
2	Purpose (Article 3, Paragraph 2)	<p>Removed brackets from Article 3, Paragraph 2, which describes the “specific purpose” of PTI as follows:</p> <p>“The specific purpose of the Corporation is to operate exclusively for the benefit of, to perform the functions of and to carry out the purposes of the Internet Corporation for Assigned Names and Numbers (“ICANN”).”</p> <p>ICANN also deleted a footnote to this provision with a Sidley comment that provided that the purpose here and in the PTI Articles is under review by CWG.</p>		See comments in row #1 of the PTI Articles chart, above.	

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3	Purpose (Article 3, Paragraphs 4-5)	<p>Removed brackets from Article 3, Paragraphs 4-5, which address certain principles from Annex C of the CWG Final Proposal as follows:</p> <p>“The Corporation shall treat the IANA functions with equal priority. The Corporation shall make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular customer for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different customers).</p> <p>The Corporation shall respect the diversity of customers of the IANA functions and shall provide service to its customers in conformance with technical norms and in support</p>		The Proposed PTI Bylaws do not include the specific Annex C language. Instead, ICANN legal included these two paragraphs in Article 3 to address certain principles from Annex C. CWG to advise. ²	

² See the chart from ICANN legal (attached below) highlighting their concerns with incorporating the Annex C provisions of the CWG Final Proposal into the PTI Bylaws.



CWG Final Proposal
Sections 7 and 8 Anne

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		of the global security, stability and resilience of the DNS.”			
4	Director Qualifications (Section 5.3.6)	<p>Section 5.3.6 provides:</p> <p>“In carrying out its responsibility to nominate the Nominating Committee Directors for election by the Member, the Nominating Committee shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience and perspective, by applying the criteria set forth in Section 5.2 and Section 5.3.”</p> <p>ICANN did not make additional edits to the text of this section, but deleted Sidley’s footnote suggesting that the CWG consider the approach proposed here with respect to the diversity criterion.</p>		CWG to advise whether it’s acceptable to have the Nominating Committee consider diversity when nominating the two Nominating Committee Directors in light of the overall composition of the Board (as opposed to having a separate review of the Nominating Committee Directors and the ICANN Directors).	
5	Board Chairperson (Section 5.4)	The Proposed PTI Bylaws provide that the Chairperson “should be selected from among the Nominating Committee Directors.”	ICANN’s comments on this issue are addressed in the governance chart (attached at footnote #1, above).	CWG to advise whether it would be acceptable to remove the requirement that the Chairperson should also be a Nominating Committee Director, given the other requirements in the Proposed PTI Bylaws that will ensure Nominating Committee Director representation (i.e., quorum requirements; 4/5	

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				voting threshold for certain actions).	
6	Terms of Directors (Section 5.5)	The Proposed PTI Bylaws provide that the “Directors shall be elected by the Member...for two-year terms.”	ICANN’s comments on this issue are addressed in the governance chart (attached at footnote #1, above).	While we note that the default term for directors under California law is one year, we agree with ICANN’s comment that on-boarding and re-electing this frequently could be burdensome. CWG to advise whether a three-year term would be acceptable. <u>Notes:</u> <ul style="list-style-type: none"> • The ICANN Bylaws provide for staggered three-year terms for directors. <i>See</i> Section 7.8(a). • Under California law, for public benefit corporations with statutory members, the maximum term for elected directors is four years. 	
7	Term Limits (Section 5.5.2)	The Proposed PTI Bylaws provide that “no Nominating Committee Director may serve more than two consecutive terms.”	ICANN’s comments on this issue are addressed in the governance chart (attached at footnote #1, above).	CWG to advise whether the value of additional years of experience on the PTI Board would warrant allowing for more than two consecutive terms. <u>Notes:</u> <ul style="list-style-type: none"> • The ICANN Bylaws provide that directors may not serve more than three consecutive terms, and a person designated to fill a vacancy in a term shall not be deemed to have served that term. <i>See</i> Section 7.8(e). • Under California law, the number 	

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				of times a director may be reelected is not limited.	
8	Supermajority Board Approval for Certain Board Actions (Section 5.11.3)	Adjusted the threshold of approval so that the actions listed in this section require approval by four-fifths (4/5) of the Directors and the approval of the Member to be effective. Deleted the proposed requirements that (i) the threshold include at least two ICANN Directors and two Nominating Committee Directors and (ii) if there are not two Nominating Committee Directors in office and entitled to vote on the matter, four-fifths of the Directors must still approve the action.	This threshold requirement is also flagged in the governance chart (attached at footnote #1, above).	See comments in row #2 of the PTI Articles chart, above.	
9	Board Fees (Section 5.16)	The Proposed PTI Bylaws provide for expense reimbursement for <i>both</i> ICANN Directors and Nominating Committee Directors.		CWG to advise if parity among all directors on expense reimbursement is acceptable (rather than only reimbursing the Nominating Committee Directors).	
10	Establishment of Board Committees (Section 6.1)	Adjusted the threshold of approval so that the creation of Board committees requires approval by four-fifths (4/5) of the Directors. Deleted the proposed requirements that (i) the threshold include at least two ICANN Directors and two Nominating Committee Directors and (ii) if there are not two Nominating Committee Directors in office and entitled to vote on the	This threshold requirement is also flagged in the governance chart (attached at footnote #1, above).	See comments in row #2 of the PTI Articles chart, above.	

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		matter, four-fifths of the Directors must still approve the action.			
11	Annual Budget and Strategic Plan (Sections 9.2 and 9.3)	Noted in footnote #1 that the DT-O will be reviewing the sections on the Annual Budget and Strategic Plan. Removed brackets on the 270-day timeframe for the Annual Budget, but noted in footnote #1 that there will need to be a small modification in the timing requirements to allow time for PTI Board action.	The process for development and review of the Strategic Plan is also flagged in the governance chart (attached at footnote #1, above).	Further input on these two sections to come from the DT-O during the public comment period.	
12	Amendments (Article 12)	Adjusted the threshold of approval so that Bylaws amendments require approval by four-fifths (4/5) of the Directors and the approval of the Member, and deleted the proposed requirement that the threshold include at least two ICANN Directors and two Nominating Committee Directors. However, in this section, the following requirement was retained: “If there are not two Nominating Committee Directors in office and entitled to vote on the matter, four-fifths of the Directors must still approve of the action in order for the Board approval to be effective.”	This threshold requirement is also flagged in the governance chart (attached at footnote #1, above).	<i>See</i> comments in row #2 of the PTI Articles chart, above. We believe the requirement highlighted in yellow was retained by ICANN in error, because this requirement was deleted in the other sections of the Proposed PTI Bylaws where the same threshold is addressed.	