



December 22, 2014

Via Electronic Mail: [comments-cwg-naming-transition-01dec14@icann.org](mailto:comments-cwg-naming-transition-01dec14@icann.org)

**Re: Cross Community Working Group on Naming Related Functions Draft Transition Proposal**

Google appreciates the opportunity to provide input into the Community Working Group on the IANA Transition Process (CWG) draft proposal.

The ultimate goal of the National Telecommunications and Information Administration (NTIA) stewardship transition is to preserve the security, stability, resiliency, and openness of the Internet. To accomplish this, Google recommends that ICANN continue to serve as the IANA functions operator. We recognize, however, that the IANA functions contract has served as a critical means of ensuring not only that the IANA functions were performed properly, but also that ICANN remained accountable to NTIA. Therefore, the key challenge is not to replicate the form of the current accountability mechanism (a contract), but to ensure that, post-transition, ICANN performs its responsibilities in such a way that it remains accountable to the ultimate beneficiaries of the Internet -- the multistakeholder community.

Rather than creating a new contracting entity to replace NTIA and simply transferring the current governance arrangement directly to a new entity, we propose that concerns raised in the CWG be addressed by a combination of two strategies: by adopting some of the CWG's proposals, and by requiring broader accountability improvements through the recently-constituted Community Working Group on Accountability (Accountability Working Group). A contract is neither a sufficient nor a necessary mechanism to ensure the community's ultimate goal -- accountability to the broader set of Internet stakeholders.

The current proposal is structurally complex but substantively facile: Because it was created in a vacuum without the input of the Accountability Working Group, it has created a complex rubric of committees and teams. But even as it designs these complex structures, it leaves open key questions regarding authority, accountability, and checks and balances. As such, it is extremely important that the work on accountability be conducted in parallel with the work of the CWG, and that the CWG's proposal be informed by broader recommendations that we hope the Accountability Working Group will develop. Below, Google sets forth its proposal for the post-transition structure of IANA and ICANN, and raises critical questions regarding the CWG's proposal.

- 1. The IANA functions should remain within ICANN, and the CWG's proposal to establish a separate contracting entity to replace NTIA should be rejected. Concerns regarding accountability should be addressed through process improvements within ICANN and through broader accountability improvements within the scope of the Accountability Working Group before the final transition of NTIA's stewardship role over the IANA functions.**

The IANA stewardship transition process represents a significant milestone in the evolution of the domain name system (DNS). Google strongly supports an approach that preserves operational stability in this time of change. This is especially important because members of the ICANN community, including direct customers of the IANA functions, generally believe that ICANN is performing well in its role as the IANA functions operator.

As a result, Google recommends that stewardship of the functions be transferred to the community without developing a separate contracting structure. Creating a separate contracting structure is fraught with peril for several reasons: (1) It is an ill-defined entity subject to capture. (2) It raises the potential for a power struggle between ICANN and the contracting entity at a time where stability is extremely important. (3) It creates unnecessary bureaucracy and complexity in performing a set of technical duties. (4) It simply shifts the accountability concerns frequently raised regarding ICANN to a different locus.

Today, the community often expresses concerns regarding the choices made by ICANN even though ICANN's staff reports to the ICANN Board, and the ICANN Board is selected by the multistakeholder community through a bottom-up, community-driven process. Nothing in the proposal suggests that the management of the proposed new structures (Contract Co., the Multistakeholder Review Team, or the Customer Standing Committee) would be more accountable to the community than the ICANN Board. Moreover, all of these risks are magnified because the proposal contains very few details regarding the contracting entity, including where it would be domiciled, who would serve as its officers, and how the structure would ensure that principal decisionmaking responsibility remains within the multistakeholder community.

In order to ensure that key IANA functions are performed properly, Google recommends that existing terms be explicitly stated, incorporated into the Affirmation of Commitments, and expanded in some cases. We detail some of these requirements below:<sup>1</sup>

- (1) A prohibition on subcontracting the naming functions:* The stakeholder community should have confidence that it knows the parties actually performing the IANA naming functions. Performance of the functions is too important to delegate to an unvetted, undefined third party.
- (2) Conflict of interest requirements:* Given the importance of ICANN's role, board members and staff must conduct themselves with utmost integrity.
- (3) Confidentiality and data protection requirements:* ICANN has access to significant amounts of sensitive data. It must take precautions to ensure that such data is securely held.

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<sup>1</sup> This list highlights a number of key recommendations but is not meant to be exhaustive.

(4) *A United States local presence requirement for ICANN*: Google believes that it is important for ICANN to retain a presence in the United States because many existing contracts between ICANN and other entities are governed by U.S. law. Retaining a local presence in the United States does not preclude ICANN from opening offices elsewhere.

(5) *Annual program reviews and monthly performance progress reports*: These progress reports allow stakeholders to ensure that the functions are performed properly.

(6) *Complete transparency of all decision making processes within ICANN, including the recording and publishing of all Board meetings and minutes and a prohibition on the redaction of any Board minutes*: An entity with such significant responsibility to the Internet community must operate with the highest degree of accountability and transparency possible. One way of achieving this is for ICANN to require all decision-making by its board and executive officers to be a matter of public record, including matters such as contracting, board, executive, and senior staff compensation, and performance reviews of both the policymaking and implementation functions. While unusual for an organization, ICANN's unique role warrants a unique commitment to full transparency.

Google understands the CWG's principal purpose in proposing a separate contracting entity is two-fold: "to provide the possibility of replacing ICANN as the IANA Functions Operator at a later date"<sup>2</sup> and to "ensure effective replacement of NTIA," including NTIA's role in ensuring that the IANA functions are performed effectively. We believe that the first goal is merely a means for ensuring second, more-important goal of replacing NTIA's stewardship function is met. Nevertheless, both of these goals can be effectively met without creating a separate contracting entity.

First, the community can and should put in place a number of broader accountability mechanisms to guard against individual Board member negligence or malfeasance, such as strengthened review of Board actions, independent audit, and more explicit conflict-of-interest reviews. For example, the Accountability Working Group should explore creating a process to rapidly replace all of ICANN's leadership in the event of gross negligence, malfeasance, or abandonment of the multistakeholder model. The process should include but need not be limited to the possibility of recalling the entire Board en masse.<sup>3</sup> Such measures will not automatically transfer performance of the IANA functions out of ICANN, but -- if designed properly -- they will both serve as a preventative measure to guard against negligence and malfeasance and enable rapid restructuring of ICANN in the event of a crisis.

Second, the transition proposal should explore the possibility of ICANN entering into a contract with an emergency back-up provider wherein the second entity would agree to

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<sup>2</sup> ICANN Cross Community Working Group (CWG) On Naming Related Functions, *Draft Transition Proposal* 61 (Dec. 1, 2014), available at <https://www.icann.org/en/system/files/files/cwg-naming-transition-01dec14-en.pdf>.

<sup>3</sup> For a fuller discussion of the improved accountability measures proposed by Google, see Google, *Comment on Enhancing ICANN Accountability* (May 28, 2014), available at <http://forum.icann.org/lists/comments-enhancing-accountability-06may14/msg00018.html>.

perform the IANA functions only in the event of an emergency.<sup>4</sup> This entity would need to demonstrate the technical competence to perform the functions and commit to perform the functions in a way that is consistent with the open, multi-stakeholder process. The precise parameters of emergency could be defined to include a vote of no-confidence of the Board, but they should be very limited. In the event of a recall, for example, a new Board could temporarily transfer the functions to the back-up entity while it addresses the issues that led to a recall. The concept of requiring an emergency provider is well-established in the ICANN context: new generic top-level domain (gTLD) registry operators are required to specify an emergency back-end registry operator to be temporarily activated if a registry operator is at risk of failing to sustain five critical registry functions.<sup>5</sup> Taken together, strengthened accountability improvements and the option to invoke an emergency IANA functions operator should effectively replace the stewardship function performed by NTIA today.

Google recognizes that this proposed approach puts significant pressure on the Accountability Working Group and requires that the community reach agreement on key accountability improvements before the transition moves forward. We do not view this requirement as a flaw. As a procedural matter, the groups have recognized their work is linked from the start. The interdependencies have also been recognized by the community, by NTIA, and by ICANN staff.<sup>6</sup> As a substantive matter, if the CWG puts language in its proposal requiring key accountability proposals to be agreed before the transition occurs, this recommendation will ensure that NTIA will not relinquish stewardship of the IANA functions until those recommendations are agreed and a timeline for their implementation is in place.<sup>7</sup>

## **2. Google supports a number of the process improvements proposed by the CWG.**

Google supports a number of suggestions in the draft proposal, each of which could be incorporated into the framework discussed above.

***Public posting of all IANA change requests:*** ICANN's current contract with NTIA requires it to carry out the IANA functions in a transparent manner, including publishing of user instructions, technical requirements, and an explanation of the processes and

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<sup>4</sup> Because the emergency provider would need to be established in advance of an emergency, and ICANN would not be able to delegate the functions to the emergency provider at its own general discretion, we do not view this recommendation as conflicting with a general prohibition on subcontracting the naming functions.

<sup>5</sup> See ICANN, Emergency Back-end Registry Operator, <https://www.icann.org/resources/pages/ebero-2013-04-02-en> (last visited Dec. 15, 2014).

<sup>6</sup> On December 4, Assistant Secretary of Commerce for Communications and Information Lawrence Strickling expressly stated that “[t]he two work streams on the IANA transition and enhanced accountability are directly linked and NTIA has repeatedly said that both issues must be addressed before any transition takes place.” Assistant Secretary Lawrence Strickling, Remarks at the PLI/FCBA Telecommunications Policy & Regulation Institute (Dec. 4, 2014) (as prepared for delivery), *available at* <http://www.ntia.doc.gov/speechtestimony/2014/remarks-assistant-secretary-strickling-plifcba-telecommunications-policy-regula>.

<sup>7</sup> The Accountability Working Group has identified two separate streams of work -- one addressing to improvements that must take place before the transition can take place, and one addressing improvements that can be addressed either during or after the transition. In this discussion, we refer only to the first workstream.

procedures that are used to develop policies related to the IANA functions.<sup>8</sup> Google supports adding an extra layer of transparency to the process by requiring the public posting of all IANA change requests. However, posting the change requests should not be regarded as an invitation to re-litigate any underlying policy decisions that led to these changes; the process should be largely informational in nature. Moreover, the public posting of each IANA change request should not delay the implementation of requests.

***Periodic random audit:*** Rather than creating an independent certification process for each delegation and re-delegation request, Google supports a more streamlined process which takes into account the sensitive nature of these requests, especially for ccTLDs. As such, we recommend the following modifications to the CWG's proposal to require independent evaluation for *every* delegation and redelegation request: First, a certifier should only review the processing of change requests for compliance with a limited, pre-determined set of requirements to be agreed by the Generic Names Supporting Organization (for gTLDs) and by the Country Code Names Supporting Organization (for ccTLDs). Second, the certifier should not have the authority to review every delegation and redelegation request; instead, it should be called upon to review a designated number of changes at random over the course of the year. This approach will minimize the possibility of the certifier unilaterally and unfairly revisiting change requests to alter the outcome in a particular case while at the same time ensuring agreed policies are being followed.

### **3. The community will have to address significant concerns if it adopts the proposed new structures.**

The new structures proposed by the CWG could introduce significant instability and uncertainty in the supervision of the DNS. Here we highlight specific concerns with all four of the proposed new structures.

#### ***Issues Related to the Establishment of a Contract Co.***

Creating a separate contracting entity replicates the form of the current arrangement without addressing the ultimate question of how to ensure accountability to stakeholders. Moreover, a contracting arrangement works best when there are two discrete contracting entities -- such as one institution (ICANN) and one government (the U.S. Government). It is not a structure well-suited to the current situation, wherein an institution must remain accountable to a vast and diverse set of stakeholders. These accountability mechanisms are best discussed in the Accountability Working Group, which has a broad remit to consider a variety of new mechanisms, including changes to the governance structure of ICANN's Board, improvements to the reconsideration and independent review processes, incorporating the Affirmation of Commitments into the Bylaws, and strengthening the role of the ombudsman. Each of these changes has a much greater possibility of ensuring accountability than merely forming a shell corporation.

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<sup>8</sup> NTIA, IANA Functions Contract, §§ C.2.6, C.2.7, *available at* [http://www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf) (last visited Dec. 22, 2014).

However, if a consensus develops around maintaining a contractual relationship between ICANN and a contracting entity, then the following issues require further evaluation.

**Benefits and risks of the Contract Co. as a shell entity.** As currently designed, the Contract Co. would be a shell organization that would only have a meaningful role in the ICANN ecosystem if the multistakeholder review team decided to transfer the contract to a new entity. Creating a shell entity limits its attractiveness as a target for potential capture. On the other hand, it may hamper the contracting entity's leverage in negotiations. NTIA, the predecessor entity to the Contract Co., could invoke the power and resources of the United States Government to withstand external pressures, lawsuits, and other challenges to its role as contractor. The CWG should engage in further discussion and conduct additional legal analysis, which is needed to identify and mitigate any risks associated with moving the contracting role currently played by the NTIA to the new Contract Co. Further, a legal analysis will be required to assess where the Contract Co. should be incorporated and the implications of deciding upon that legal jurisdiction.

**Risks associated with rebidding process.** Historically, the rebidding process was carried out by NTIA at the end of each roughly seven-year contract term.<sup>9</sup> It was a predictable, open, and transparent process that assured the continued stability of the IANA functions. Thus far, no parameters have been suggested for the timing of any potential rebidding. Google opposes the introduction of very short contract terms with frequent rebidding processes because such an approach would be costly, time-consuming, and disruptive to the naming community.

**Level of discretion accorded to the Contract Co. in revoking IANA contract.** The model proposed by the CWG does not establish much-needed guidelines or limitations on the circumstances under which the IANA Functions could be transitioned to a new operator. The circumstances for re-awarding the IANA functions contract should be limited to issues of non-performance, such as a failure to execute against established Service Level Agreements or non-adherence to contract terms. Transitioning the IANA Functions outside of ICANN would be costly and disruptive not only to registry operators but to all parties that rely on a smoothly functioning DNS. Such an option should only be exercised if ICANN fails to perform the functions adequately.

### ***Issues Related to the Creation of a Customer Standing Committee***

Under the current contracting arrangement, NTIA is responsible for monitoring the IANA functions operator to ensure that the functions themselves are being carried out in an accurate and efficient way. We agree that this role should continue after the transition as it provides important oversight over the technical performance of the IANA functions. However, we believe that creating a new structure to perform these tasks could create complexity, bureaucracy, and further obfuscates issues of authority, governance, and dispute resolution. In that vein, we support the CWG and/or the Accountability Working Group

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<sup>9</sup> The IANA functions contract typically has a base period of performance of three years with two, two-year option periods. IANA Functions Contract § I.70 (2012), *available at* [http://www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf).

further exploring ways in which technical oversight over the IANA functions can be maintained and strengthened without creating a separate structure.

However, if the community decides to move forward with the creation of the Customer Standing Committee (CSC), this committee's scope should be strictly technical and include only: (1) monitoring the performance of the naming functions for any technical irregularities or issues; (2) ensuring that the IANA functions operator maintains appropriate service levels for services associated with naming; and (3) raising and addressing any performance deficiencies on an ongoing basis related to naming. Our recommendation to limit the CSC's scope to naming issues only is informed by the fact that ICANN maintains a contract with IETF for protocol parameter table maintenance and that ICANN and the Numbering Resource Organization have a memorandum of understanding that addresses numbering issues.

Because the CSC's remit should be technical and it should have no role in setting or re-evaluating policy, its composition should be limited to direct customers of the IANA naming functions (gTLD and ccTLD operators) and related experts as that group sees fit. As a result, registry operators, as well as liaisons from the Security and Stability Committee (SSAC), the Root Server System Advisory Committee (RSSAC), the Regional Internet Registries (RIRs), the Internet Society (ISOC), the Internet Engineering Task Force (IETF) among others, could be invited to participate to ensure a seamless coordination among impacted parties of the IANA functions.

#### ***Issues Related to the Establishment of the Multi-Stakeholder Review Team***

**Concerns regarding the Multi-Stakeholder Review Team's (MRT) ability to limit its mandate to truly technical concerns.** In the current proposal, the MRT retains discretion over contracting decisions related to the IANA functions, including deciding when a rebidding process should be opened, as well as managing and determining the outcome of that resulting request for proposal process. Granting this much power over a set of technical and implementation functions to the MRT could allow for capture and re-litigation of already decided non-technical policy decisions. In particular, including a broad variety of technical and non-technical stakeholders on a review team that is supposed to supervise purely technical functions could detract from the focus on operational performance and expose the IANA functions to the possibility of interest capture and policy reformulation. Though the exact composition has yet to be determined, a large body that includes a variety of interests could also be susceptible to external lobbying by entities that want the body to play a role in influencing or enforcing policies developed within the GNSO and ccNSO and implemented by the IANA functions operator.

**Concerns regarding the accountability of the MRT.** It is clear that the MRT could operate as a successful check on over-reaching or negligence by the ICANN Board. However, the proposal does not make clear how the power of the MRT would itself be checked in the event of an overreach by that group. Without an answer to this question, the proposal merely displaces, rather than solves, a key issue regarding accountability.

**Concerns regarding the mandate of the MRT.** Before agreeing to establish an MRT, the community should require a clearer explanation of the MRT's mandate and composition, including bylaws or other organizational documents.

***Issues Related to the Development of an Independent Appeals Panel***

As described in the proposal, the Independent Appeals Panel (IAP) will allow review of all actions which affect the Root Zone or the Root Zone WHOIS database. It also appears that the panel could review implementation of policies developed through ICANN's bottom-up processes. Google agrees that decisions and actions of the IANA Functions Operator that affect the content of the Root Zone File or Root Zone WHOIS Database should be open to independent review via a clearly defined and narrowly scoped review process. Moreover, a discussion of how to improve the review of ICANN actions -- whether related to the performance of the IANA functions or not -- should be addressed holistically through the Accountability Working Group.

**Concerns regarding bifurcation of appeal mechanism.** First, the discussion regarding appeal mechanisms should take place in a holistic fashion. The ability of aggrieved parties to seek review of ICANN's actions should be improved across the board -- not just with respect to the IANA functions. As such, this discussion should take place in the Accountability Working Group. A broader review mechanism with binding outcomes and appropriate redress should be implemented through the accountability process, and this mechanism could and should also cover the appeals referred to in the draft proposal for as long as ICANN continued to act as the IANA Functions Operator. Separation of these mechanisms could lead to unnecessary duplication of processes, forum shopping, and a risk of inconsistent adjudications on the same topic.<sup>10</sup>

**Concerns regarding the scope of review, standing to bring claims, and frivolous claims.** A number of issues regarding the scope of the review and the appeals process need to be better defined. First, the review process should be limited to arguments that established technical procedures have not been properly applied or adhered to by the IANA Functions Operator. Parties should not be able to make claims regarding the merits of such policies. Allowing this independent appeals process to challenge the policies governing delegation and re-delegation of top-level domains themselves could create a secondary nexus for policy development, undermining the role of the multistakeholder model for policy development for the naming community. Second, standing to invoke the review process should be defined and limited: only direct customers of the IANA functions (e.g., ccTLD and gTLD registry operators, regional Internet registries, IETF) should be able to ask for review of IANA functions operator decisions. Finally, parties bringing an appeal should be required to post a bond to establish their bona fides, but should be entitled to some level of fee-shifting if their claims are validated. The requirement to post a bond will limit frivolous claims, while the ability to seek fees will ensure that meritorious claims are pursued even if the claimant does not have an unlimited litigation budget.

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<sup>10</sup> If the CWG believes that any improvements to the independent review process recommended by the Accountability Working Group do not suffice to ensure adequate performance of the IANA functions, the CWG could revisit this question at that time.



## Conclusion

Google recognizes that the CWG has undertaken a difficult challenge in putting together a draft proposal for community review. The path forward should reflect true accountability to the broad community of Internet stakeholders. To that end, we urge the community to adopt a proposal that retains the stability of the current arrangement and does not introduce the complexity, bureaucracy, and risk of creating a new contracting entity. At the same, in order to ensure accountability to stakeholders, a range of structural improvements should be considered in the broader Accountability Working Group, and those structural improvements should be linked to the stewardship transition. We look forward to engaging with the CWG and all stakeholders in meeting the task ahead of us -- and ensuring the stability, resiliency, security, and openness of the Internet for years to come.

Sincerely,



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