

Comments on CWG's Draft Transition Proposal

1. First, the CWG needs to stop and "do its homework" i.e., complete its research and study before proceeding any further with the drafting of a proposal to submit to ICG, *e.g.*, obtain and study all information (and make public), within the knowledge and possession of the NTIA office, records and personnel at the U.S. Department of Commerce, which formed the basis for **the NTIA decision finding ICANN unqualified to "run" the Internet Assigned Numbers Authority (IANA) in 2012:**

[Ethics Fight Over Domain Names Intensifies - March 18, 2012 -](#)

[NYTimes.com](#): "... the **United States government, reproached the group [ICANN] for governance standards said to fall short of "requirements requested by the global community."** The Commerce Department said this month that while it was temporarily extending a contract with the Internet Corporation for Assigned Names and Numbers to manage the allocation of computers' Internet protocol addresses — and the .com and .net names of Web sites associated with them — it warned the organization that it needed to tighten its rules against conflicts of interest or risk losing a central role. Icann, as the company is known, has filled that role since 1998. **The Commerce Department said it had received no suitable bids for the contract,** and was temporarily extending Icann's services for six months. After the department's announcement, the soon-to-depart chief of Icann, Rod Beckstrom, went on the offensive, taking an unusual public swipe at his own organization's 21-member board ... the United States government is also dissatisfied with Icann. **The Commerce Department said it had canceled a request for proposals to run the so-called Internet Assigned Numbers Authority [IANA] because none of the bids met its requirements: "the need for structural separation of policy-making from implementation, a robust companywide conflict of interest policy, provisions reflecting heightened respect for local country laws and a series of consultation and reporting requirements to increase **transparency and accountability to the international community.**" ...**" (emphasis added)

<http://www.nytimes.com/2012/03/19/technology/private-fight-at-internet-naming-firm-goes-public.html>

See also: [Notice - Cancelled Internet Assigned Numbers Authority \(IANA\) Functions - Request for Proposal \(RFP\) SA1301-12-RP-IANA | NTIA](#)

<http://www.ntia.doc.gov/other-publication/2012/notice-internet-assigned-numbers-authority-iana-functions-request-proposal-rf> **and IANA Functions Contract**
<http://www.ntia.doc.gov/page/iana-functions-purchase-order>

If the CWG will take the time necessary to talk to the NTIA and obtain all the information upon which the US government questioned ICANN's competence and/or

integrity in 2012 to be the "IANA functions operator," the CWG will begin to understand the fundamental problems, issues, and concerns that are certain to arise (unless taken into account in IANA transition plan) in the future once the U.S. government is no longer involved, including in its role as "Root Zone Maintainer." ["ICANN, as the IANA functions operator, in cooperation with Verisign as the Root Zone Maintainer and the National Telecommunications Information Administration (NTIA) as the Root Zone Administrator, together known as the Root Zone Management (RZM) partners" source: [ICANN.](#)]

2. Second, deal with the issue of “Authority.” It may be easy (and possibly politically expedient) in the short-term, although hardly responsible, for the US Department of Commerce to just “walk away” from its role and duties as “steward” of a free, open, secure, and stable internet, which today forms the basis for trillions of dollars of commerce annually, world communications, and online content for the entire global internet community, by NTIA’s announced intention to simply not renew its IANA contract with ICANN. But the situation today is far different than in the 1990s when the white paper (<https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>) and green paper (<http://www.gpo.gov/fdsys/pkg/FR-1998-02-20/pdf/98-4200.pdf>) were published. **16+ years of experience with ICANN have shown it to be a troubled organization** (see, *e.g.*, New York Times article cited above), unrepresentative of the full global internet community, with systemic problems of accountability, transparency, conflicts of interest, as well as lacking meaningful redress from its own errors, bad decisions, poor policy-making, and “horrible” implementation and follow-up (see *e.g.*, [ICANN, Dysfunctional, Sick Organizational Culture, Warped Values](http://www.domainmondo.com/2014/12/icann-dysfunctional-sick-organizational.html) <http://www.domainmondo.com/2014/12/icann-dysfunctional-sick-organizational.html>).

All of this is hardly surprising given that ICANN is a California corporation, with no membership, whose governance and authority lies solely with its own Board of Directors (not the so-called ICANN “stakeholders”), in accordance with its articles, bylaws, and California law. Further, the ICANN Board of Directors is essentially self-selected by ICANN insiders. The Board of Directors’ fiduciary duty is primarily to the corporation itself, and its survival, not what is in “the public interest” nor “in the best interests of the global internet community.”

From where does ICANN get its authority? Make no mistake, ICANN currently receives its authority from its agreements with the U.S. government, *i.e.*, not only the IANA contract but also the 2009 “Affirmation of Commitments” -- <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> - which can be terminated at any time by ICANN upon just 120 days written notice to the U.S. Department of Commerce.)

The IANA contract and the Affirmation of Commitments afford some protection to internet users worldwide (via U.S. oversight) from ICANN malfeasance and breach of its duties and covenants as contained within those aforesaid instruments.

Without an assignment of the U.S. government's rights and duties under those agreements, including the IANA contract and Affirmation of Commitments, to the **new entity** being contemplated by the CWG draft proposal-- **Contract Co.** (together with its MRT, CSC, IAP), I fail to see where either ICANN presently, or together with the CWG proposed entities, have the authority to continue exercising ICANN's current functions (including IANA functions), or the future functions of Contract Co./MRT/CSC/IAP under the CWG draft proposal. In other words, if the U.S. government simply abdicates its present role, by what sovereign or other authority(ies) is ICANN continuing to exercise its powers and duties over the global DNS and Internet Root Zone? Also, **once the US government "abdicates," there is nothing to stop ICANN from doing whatever it wants—change or amend its Articles and Bylaws, reincorporate in another nation, create and enforce whatever rules and policies it wants--all it needs is the requisite votes of its own non-accountable Board of Directors.**

Therefore the BIGGEST mistake the CWG or the ICG could make would be to have all "NTIA responsibilities transferred to ICANN."

3. Specifics of the CWG proposal--I agree that there needs to be a separate entity apart from ICANN, holding contract authority now exercised by NTIA on behalf of the global internet community (which is much broader than just ICANN's "stakeholders groups"). That entity would choose **the IANA functions operator** (presently ICANN), by entering into a contract (for a term of years and containing other necessary terms, conditions, and covenants), and having the power and authority to choose another IANA functions operator in the future, should the need arise. However **as to the specifics of the CWG proposal--Contract Co./MRT/CSC/IAP--I would prefer a much simpler, more elegant solution,** than what the CWG proposes. Instead, I would suggest a Trust under American or English law, or an international organization formed under Swiss law, with nine Trustees (or Directors), independent of ICANN, nominated and elected (3 each) by three identifiable groups: 1) the technical community (IETF/IAB *et al*); 2) ccTLD registry operators; and 3) gTLD registry operators.

The 9 trustees or directors (hereinafter "Trustees" and "Trust") would serve without pay, and under normal circumstances, meet only once a year via the internet (*e.g.*, Adobe Connect, open to public observers), receive electronically (stored in the Cloud and open to public view) reports and audits of the IANA functions operator, including a copy of all complaints filed with IANA functions operator relating to IANA functions and an annual

report of the disposition or status of those complaints. In addition, all contracts entered into between the IANA functions operator (now ICANN) and the independent Root Zone Maintainer (now Verisign) would require approval by the Trustees and be subject to termination by the Trustees should the IANA functions operator contract be terminated or not renewed by said Trustees.

With no staff, no office (just an agent for service of process in the chosen domicile and necessary annual filing fees), and full indemnification by the IANA functions operator (as required in the contract), the Trust would have a minimal operating budget funded either by the IANA functions operator, or alternatively, by direct assessments paid by each TLD registry authorized to use the DNS. For those who doubt whether such a “lightweight” solution is viable, I would point to the successful administration of the oldest international sporting trophy and series--the America’s Cup sailing regatta—operated successfully since 1857 (without government oversight) by the terms of a [Trust document](#) registered in the New York Supreme Court in Manhattan, New York City, New York, which is a (first instance) trial court. An interpretation of the Trust document, when contested, can be taken before that Court for clarification on whether the Trust’s terms and conditions are being met.

The day-to-day operations of “IANA functions and the Root Zone” should be left to the IANA functions operator (ICANN) and Root Zone Maintainer (Verisign) with periodic reports and audits filed electronically with the Trustees in the Cloud, open for public inspection via the internet. The Trustees could, should the need arise, communicate concerns and questions about the operation of the IANA functions and Root Zone, but the Trustees’ remedies would be limited to either terminating the IANA functions operator contract “for cause,” or not renewing it at the end of its term.

In contrast to the “lightweight” solution suggested above, the CWG draft proposal has chosen an unnecessarily complex structure (Contract Co./MRT/CSC/IAP). Such complexity in this case is really not needed, and is burdensome and problematic.

The “devil is in the details,” and the complex CWG draft proposal currently has too many specifics that either have not been “thought through” or are “missing.” I asked a question at the December 3rd Webinar as to **how Contract Co. would pay for legal representation in the event of litigation with ICANN**—there is nothing in the draft proposal addressing this. The webinar response was that some members of the CWG had “talked about that” and there would be a requirement in the IANA functions operator contract requiring the contractor (ICANN) to fund all litigation expenses (including litigation expenses against ICANN) of Contract Co.—again, these kinds of details need to be thought through and “spelled out.”

4) Finally, please disregard the *faux* deadline of the ICG—there is no need to “rush” this process, if anything, *slow down*— these things take time – ignore the ICG time table. Larry Strickling of the NTIA has said, repeatedly, there is **no deadline** for this process to be complete by September, 2015, as the present contract can be extended. The ICG, for whatever reason, has decided to put *meeting a false deadline* as a priority over developing a transition proposal that has substance and merit. Please do not fall for the trap set by those with ulterior motives who wish to manipulate this process for their own selfish agendas. This process should not be taken lightly. Resist having the IANA stewardship transition devolve into another ICANN-like groupthink policy-making process, incomplete, not fully thought through, that ends up being a [“fiasco with horrible implementation.”](#)

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