

Comments of the Internet Governance Project

on the 2nd Draft Proposal of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

The Internet Governance Project is a group of independent academic scholars who both participate in Internet governance institutions and conduct research and policy analysis on the issues.

Noting that the April 22 CWG proposal is not complete, we interpret the call for comments at this time as a referendum on the basic model proposed, as well as a chance for the CWG to obtain guidance on the additional decisions it must make to complete the proposal. We therefore begin by expressing strong support for the basic idea of a legally separate Post-Transition IANA (PTI), and later on we propose specific ideas about which choices to make as the CWG finalizes the proposal in the next stage.

In our view, the goals of the IANA stewardship transition are:

- To complete the transition envisioned in the 1998 NTIA White Paper;
- To move the oversight and contracting authority (stewardship) over the IANA functions from the U.S. government to the global Internet community itself;
- To continue to keep ICANN's role as IANA functions operator under review, potentially non-renewable, and thus accountable;
- To clear up the confusion caused by ICANN's dual status as policy maker for domain name system and the IANA functions operator for domain names, numbers and protocols.

With these goals in mind, IGP believes that the basic model proposed by the CWG is an important step in the right direction. The essence of the proposal is to create a separate legal entity known as Post-Transition IANA (PTI) that would hold the staff, assets and capabilities that are now inside ICANN corporate's IANA department. The proposal would make ICANN the contracting authority for the names-related IANA functions, and PTI the contracted party to perform the names-related IANA functions. It would also create a Customer Standing Committee (CSC) that would continuously monitor the performance of IANA. Most important, it would create a periodic review process, rooted in the community, with the ability to recommend switching to a new operator of the names-related IANA functions if ICANN's performance was unsatisfactory. We strongly support these basic elements of the model proposed by the CWG.

We believe that to finalize its model, the CWG should be guided by the following principles:

- All IANA assets and functions should be moved to the PTI, not just those related to names

- CWG should propose forming the PTI as a Public Benefit Corporation rather than as a LLC, with its board composed of a mix of insiders and outsiders
- The rebidding or separation process should not be so onerous as to give PTI a de facto monopoly over the names-related IANA functions

PTI should perform all IANA functions currently done by ICANN

While not explicitly stated in the CWG proposal, we believe the PTI should include all IANA registry services currently provided by ICANN's IANA department. The IANA department within ICANN is relatively small, which means that it makes no sense to separate only the names-related functions. Further, given that these functions have been provided together for the past 18 years, there are some complementarities and economies in the provision of these services across names, numbers and protocols. Thus, it makes sense for all IANA-related operations, assets, and staff to be transferred to PTI. To break them apart arbitrarily as part of the transition would be needlessly destabilizing. In their comments in this proceeding, the numbers community (NRO) has said it does "not foresee any incompatibility between the CWG's proposal for formation of the PTI and our contracting with ICANN for its continuance as the IANA Numbering Services Operator." On the IANAPLAN list, some members of the protocols community have also expressed their willingness to accept the new arrangement as merely a reorganization; a few other members of the protocols community have expressed a preference for splitting the protocols functions away from names and numbers in order to keep them within ICANN. However, no significant reasons for this preference have been provided, and the proponents of this preference have admitted that "the protocol parameters registries could probably continue to work just fine if the resources and personnel were moved [to PTI]..." Therefore it is best to keep all the IANA functions together in PTI during the transition.

PTI's corporate governance should ensure its relative independence from ICANN

Unless the right choices are made regarding PTI's corporate structure and board, there is a danger that PTI would be so controlled by ICANN that many of the advantages of creating a separate legal entity would be lost. More specifically, we believe that PTI should be organized as an affiliated public benefit corporation (PBC) rather than a wholly owned subsidiary (i.e., a LLC). Furthermore, the PTI board should be composed of representatives from the names, numbers and protocol communities. PTI's board should be small and operationally focused; its governance should not be designed to mirror the multistakeholder policy community, as its focus should be on implementation of policy rather than re-litigating policy conflicts.

It is important to recognize that the combination of a legally binding contract, CSC oversight, periodic review and the possibility of non-renewal of the contract should be more than sufficient for PTI to remain completely accountable to the names-related Internet community that is supposed to govern ICANN. The idea that a more independent PTI could somehow

be “captured” and used to thwart the policies developed by ICANN is not grounded in any rational assessment of the proposal. Stewardship over the names-related IANA functions remains with ICANN and the PTI is merely a contractor with strong ties to ICANN community that implements the policies developed by ICANN. PTI has no funding and no authority other than as a contractor of ICANN. If it acted in a manner contrary to its contract it would be in breach and could be replaced.

Forming the PTI as a PBC will be easier to implement and more likely to ensure various measures of good corporate governance. For instance, a PBC that secures nonprofit status will by default be bound by a nondistribution constraint, prohibition of inurement and private benefit, and restrictions on transfers of its assets upon (possible) dissolution. If the LLC form was chosen, these constraints and other baseline responsibilities for the PTI board or management would not exist ex ante. To create them, the transition process would need to debate them, agree upon them and write them into PTI governing documents. It would be also necessary to identify a way to ensure that the PTI governing board or management could not simply amend the governing documents to circumvent the constraints. In short, the LLC form makes the implementation of PTI much more complex and risky.

The PTI board must have duty of loyalty, duty of care and duty of obedience including fiduciary responsibility to the PTI. Doing so will help ensure that the PTI board, while still complying with its various contracts with the names, numbers, and protocols communities and limited mission, remains focused on implementation of the IANA registries, and makes decisions in the best interests of the organization. This arrangement would best maintain the separation of IANA registry implementation from policy making currently required by the NTIA contract. Given this constrained role, the PTI board should be composed of a limited number of representatives from each of the supporting policy making organizations and the PTI itself. For example, the IETF liaison and Address Supporting Organization representative to the ICANN board, along with one representative from the Generic Names and ccTLD Supporting Organizations, in addition to the PTI Executive Director, should compose the PTI board or management. The selection and removal of these representatives should occur according to processes determined by the respective organizations (i.e., IETF, ASO, GNSO, ccNSO, PTI). In this manner, the PTI board would be directly accountable to the relevant stakeholders and not be self perpetuating.

Review and re-contracting process should be efficient

Just as pre-transition ICANN was held accountable by the possibility that NTIA would not re-award it the IANA functions contract, so the post-transition IANA should be held accountable by the possibility that ICANN, acting with the support of its broader community, would not re-award it the IANA contract. For this accountability measure to be effective, the review, re-bidding and selection process must be quick and efficient. We urge the CWG to simplify and expedite the IFR process and to develop a clearer, more efficient re-bidding and selection process.

