



## Comments of the Intellectual Property Constituency on the CWG-Stewardship Second Draft Proposal

### CWG-Stewardship 2nd Draft Proposal Input Template

The CWG-Stewardship has developed a template to facilitate your input on the 2nd Draft Proposal as well as subsequent review by the CWG-Stewardship. Use of the template is strongly encouraged, but not required. This template provides the opportunity for general input on the proposal as well as specific comments per section. Please note that there is no obligation to complete all of the sections – commenters may respond to as many or as few as they wish. Following your completion of the template, please save the document and submit it as an attachment to the public comment forum ([comments-cwg-stewardship-draft-proposal-22apr15@icann.org](mailto:comments-cwg-stewardship-draft-proposal-22apr15@icann.org)). The CWG-Stewardship looks forward to receiving your feedback.

1. Please provide your name: **Greg Shatan**
2. Please provide your affiliation: **President, Intellectual Property Constituency**
3. Are you providing input on behalf of another entity (e.g. organization, company, government)? Yes/No: **Yes**
4. If you answered ‘yes’ to the previous question, please list the entity on whose behalf you are submitting these questions: **Intellectual Property Constituency**

#### General Comments

5. If you have any general comments you would like to provide on the CWG-Stewardship Proposal, please provide these here.

The CWG Stewardship Proposal is a reasonable and appropriate method for oversight of the IANA Functions, a critical but technical aspect of the overall functionality of the Internet. We give the CWG credit for improving its proposal after the first public comment period. We have concerns regarding certain specific aspects of the Proposal, which are detailed below, but these concerns are not so substantial as to render the proposal unacceptable or unworkable. Nonetheless, we do hope that the IPC’s concerns are taken into account and the Proposal revised to reflect these concerns.

However, the CWG Proposal cannot be viewed or reviewed in a vacuum. This is not merely a proposal for oversight of a small but critical technical function. This is a watershed moment for ICANN, as the stewardship and influence of the NTIA and the US Government over ICANN matters (and not merely IANA matters) is vastly reduced. The CWG's Proposal must be considered as part of a conjoined whole along with the proposal of the CCWG on Enhancing ICANN's Accountability. Without meaningful and material changes to the multistakeholder community's ability to hold ICANN accountable and to have a voice in ICANN's decisions, the quality of this Proposal is of little consequence.

If ICANN cannot truly be held accountable for its actions, it is not ready for the "post-transition" world. This is true both with regard to IANA Function oversight and accountability and to ICANN oversight and accountability. It would be inappropriate for the IPC to endorse this Proposal without full consideration of the CCWG proposal, which is still under review. Thus, the IPC's overall view that the CWG Proposal is reasonably acceptable and could be made far more acceptable with the adoption of changes detailed below should only be seen as a critique of this work product. This positive view should not be seen as an indication that the IPC believes that ICANN is ready for the plan in the Proposal to be put into action. That can only take place when the IPC – along with the rest of the multistakeholder community – is confident that real, significant and enduring change will be brought about pursuant to the proposals on enhancing ICANN's accountability. For that, we need to wait, at least until we have reviewed and considered the CCWG's companion proposal.

Finally, we thank the CWG and its Co-Chairs, members, participants and staff for the immense effort and thought that went into preparing this Proposal. This focus and devotion is truly a credit to the ICANN community and the multistakeholder model. We are cautiously confident that all of this hard work will ultimately be rewarded when this Proposal, ICANN and the community are ready to put the plan into action.

### **Section I - The Community's Use of IANA**

6. Do you have any specific comments or input you would like to provide with regards to section I - The Community's Use of the IANA? Section I lists the specific, distinct IANA services or activities the naming community relies on.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

### **Section II - Existing Pre-Transition Arrangements**

7. Do you have any specific comments or input you would like to provide with regards to section II - Existing Pre-Transition Arrangements? This section describes how existing IANA-related arrangements work, prior to the transition.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

### **Section III - Proposed Post-Transition Oversight and Accountability**

8. Do you have any specific comments or input you would like to provide with regards to section III.A - Elements of this Proposal? This section describes in short the main elements of the proposed post-transition oversight and accountability.

Yes.

If so, please provide your comments here.

The IPC strongly supports the overall structure and functions set forth in Section III.A. This will be discussed in more depth below.

If applicable, please reference the sub-section your comment relates to.

9. Do you have any specific comments or input you would like to provide with regards to section III.A.i - Proposed Post-Transition Structure. This section provides an overview of the different elements of the proposed post-transition structure.

Yes.

If so, please provide your comments here.

As noted above, the IPC strongly supports the overall structure and functions proposed by the CWG. In particular, the use of a contract to define the IANA Functions, the community's oversight of performance of the IANA Functions and the ways in which ICANN will be held accountable for its performance or lack thereof, is a time-tested, transparent and straightforward way to set out these elements and to secure ICANN's binding and enforceable agreement to perform pursuant to the terms and conditions of the agreement. We consider that the creation of "Post-Transition IANA" (PTI) is necessary, so that a legally cognizable third party exists for ICANN to contract with. This also provides a clear way to create additional separation between the IANA Functions group and the policy-making functions of ICANN.

The Customer Standing Committee and resolution mechanisms seem appropriate, at least at a conceptual level, as does the periodic IANA Function Review.

We do have some concerns about removing the external approval and oversight role as regards changes to the Root Zone. These will be discussed below.

If applicable, please reference the sub-section your comment relates to.

10. Do you have any specific comments or input you would like to provide with regards to section III.A.i.a. - Post-Transition IANA (PTI). This section describes the proposed post-transition IANA.

Yes.

If so, please provide your comments here.

The IPC is generally in favor of the creation of PTI. We note that technically, PTI cannot be a “wholly owned subsidiary” if a non-profit corporation is used as the vehicle, since (as noted) such an entity cannot have owners. We assume that the intention is that PTI would be a membership public benefit corporation where ICANN would be the sole member. If that is the case, the IPC supports that formulation.

If applicable, please reference the sub-section your comment relates to.

11. Do you have any specific comments or input you would like to provide with regards to section III.A.i.b. - Post-Transition IANA Board. This section describes the proposed Board for the post-transition IANA.

Yes.

If so, please provide your comments here.

We note that the PTI board would be designated by ICANN and have only the minimum statutory powers. We support this formulation, but stress the importance of keeping the PTI board as “boring” as possible so that it does not become a separate power base, with associated accountability issues.

If applicable, please reference the sub-section your comment relates to.

12. Do you have any specific comments or input you would like to provide with regards to section III.A.i.c. - IANA Statement of Work. This section describes the proposed IANA Statement of Work, including proposed carryover provisions.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

13. Do you have any specific comments or input you would like to provide with regards to section III.A.i.d. - IANA Function Review. This section describes the proposed periodic as well as special review of the IANA Function.

Yes.

If so, please provide your comments here.

It is particularly important that the composition of the IFR Team be multistakeholder and not be dominated by registries. We recognize that the members of the IFR Team

need to be capable of conducting an operational and performance review, but we believe that the varied skill sets required in this regard are not the exclusive province of registries. Indeed, fluency in contract review and compliance can be found in various stakeholder groups, not least the IPC. On a related note, we view favorably the statement that the IFR Team will be open to “participants” as well as “members.” As with the CWG, it is important that these participants are not “second class citizens,” and that they are able to participate fully in the work of the IFR Team, except as to votes or formal consensus calls (which should be rare).

If applicable, please reference the sub-section your comment relates to.

14. Do you have any specific comments or input you would like to provide with regards to section III.A.ii.a. - Customer Standing Committee (CSC). This section describes Customer Standing Committee that is expected to oversee performance of the IANA Functions as they relate to naming services.

Yes.

If so, please provide your comments here.

The IPC acknowledges that the remit of the CSC is narrowly focused on operational performance of the IANA Function operator. However, it is still important from a governance perspective that the composition of the CSC be sufficiently “multistakeholder” so that the CSC is not essentially run by and for the benefit of registries. For similar reasons, it is important that the work of the CSC be open and transparent. The IANA Function is a critical resource used by every person or thing that interacts with the Internet. As such, it is quintessentially a public resource, and its oversight should reflect that. The fact that the registries are nominally its “customers” is not dispositive. There may be times when the needs of the “customers” are not aligned with the global public interest. The CSC needs to be able to act in that higher interest, and not merely as a “special interest.” As with the IFR Team, the CSC should be open to “participants” as well as “members,” able to participate fully in its work.

If applicable, please reference the sub-section your comment relates to.

15. Do you have any specific comments or input you would like to provide with regards to section III.A.ii.b. - Service Level Expectations. This section describes the proposed service level expectations post-transition.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

16. Do you have any specific comments or input you would like to provide with regards to section III.A.ii.c. - Escalation mechanisms. This section describes the different proposed escalation mechanisms as they relate to the naming services.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

17. Do you have any specific comments or input you would like to provide with regards to section III.A.ii.d. - Separation review. This section describes the separation review that can be triggered by an IANA Function Review if needed

Yes.

If so, please provide your comments here.

The IPC suggests that the IFR Team should make a recommendation regarding separation or other measures to be taken if intermediate remediation steps are unsuccessful. These recommendations should then be subject to GNSO/ccNSO approval, Board approval and, if ICANN is reconfigured as a membership organization, Members approval. This should then trigger a separation process (rather than a separation review), with a multistakeholder cross-community group (similar in composition to the IFR Team) running that process.

If applicable, please reference the sub-section your comment relates to.

18. Do you have any specific comments or input you would like to provide with regards to section III.A.ii.e. - Framework for transition to successor IANA Operator. This section describes the proposed framework for a transition to a successor IANA Operator to ensure continuity of operations.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

19. Do you have any specific comments or input you would like to provide with regards to section III.A.iii.a. - Proposed changes to root zone environment and relationship with root zone maintainer. This section describes the proposed changes to the root zone environment and the relationship with the Root Zone Maintainer.

Yes.

If so, please provide your comments here.

The IPC is concerned by the elimination of the NTIA's approval and validation function. First, this eliminates a helpful check on the accuracy of information being transmitted from the IANA Function Operator to the Root Zone Maintainer (currently, Verisign). Second, with regard to gTLD delegations, this eliminates a key NTIA validation – that ICANN's processes leading up to a delegation were consistent with ICANN policy. The IPC believes that this provided NTIA with the opportunity for oversight over ICANN's actions leading up to delegation. We understand that, in practice, this was a "self-validation" by ICANN, and that the NTIA did not

investigate the delegation of each gTLD for compliance. Nevertheless, with the elimination of the validation step, an opportunity for oversight and accountability is lost. This underscores the interdependence between the CWG-Stewardship and the CCWG-Accountability and the importance of enhancing ICANN's accountability prior to the transition of IANA stewardship and oversight.

If applicable, please reference the sub-section your comment relates to.

20. Do you have any specific comments or input you would like to provide with regards to section III.A.iv.a. - ccTLD Delegation Appeals. This section describes the proposed recommendation in relation to a ccTLD delegation appeals mechanism.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

21. Do you have any specific comments or input you would like to provide with regards to section III.A.iv.b. - IANA Budget. This section describes the recommendations in relation to the IANA Budget.

Yes.

If so, please provide your comments here.

We note that, if PTI is a separate entity, it will, by definition, have an itemized budget. This should alleviate some concerns regarding granularity of the ICANN budget. However, budget transparency is a means to an end – ensuring that PTI is adequately funded and that expenditures are appropriate. It is not entirely clear how the community will be able to express concerns regarding these issues. We urge the CWG to clarify this matter.

If applicable, please reference the sub-section your comment relates to.

22. Do you have any specific comments or input you would like to provide with regards to section III.A.iv.c. - Regulatory and legal obligations. This section describes the regulatory and legal obligations post-transition and how these are expected to be met.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

23. Do you have any specific comments or input you would like to provide with regards to section III.B. - Implications for the interface between the IANA Functions and existing policy arrangements. This section describes the expected implications for the interface between the IANA Functions and existing policy arrangements as a result of the proposed transition arrangements.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

#### **Section IV - Transition Implications**

24. Do you have any specific comments or input you would like to provide with regards to section IV. - Transition Implications. This section is expected to describe the CWG-Stewardship views as the implications of the changes it proposed in Section III.

Yes.

If so, please provide your comments here.

The IPC finds Section IV to be significantly underdeveloped and as such, not adequately responsive to the ICG's RFP. This section should not be given short shrift. It would not be useful to comment on what currently has been put forth in this section, although we do note the reference to the "Stress Tests" developed by the CCWG, and see this as indicating the potential for a step in the right direction.

We understand that the CWG recognizes that this section needs further work. We urge the CWG to give this Section of the response substantial attention, since the implications (positive or negative) and potential issues arising from acting to implement the proposal are critically important to any judgment about whether to endorse the proposal as a practical matter. We look forward to seeing an appropriate response when the chartering organizations are asked for their approval.

If applicable, please reference the sub-section your comment relates to.

#### **Section V - NTIA Requirements**

25. Do you have any specific comments or input you would like to provide with regards to section V. - NTIA Requirements. This section is expected to describe how the proposal community's proposal meets these requirements and how it responds to the global interest in the IANA functions.

Yes.

If so, please provide your comments here.

As with Section IV (but to an even greater extent), there is nothing here to comment on, other than the absence of a response. We look forward to seeing an appropriate response when the chartering organizations are asked for their approval.

If applicable, please reference the sub-section your comment relates to.

#### **Section VI - Community Process**



26. Do you have any specific comments or input you would like to provide with regards to section VI. - Community Process. This section should describe the process the community used for developing this proposal.

**Yes.**

If so, please provide your comments here.

**See response to Section V.**

If applicable, please reference the sub-section your comment relates to.

## **Annexes**

27. Do you have any specific comments or input you would like to provide with regards to section Annex A - The Community's Use of the IANA - Additional Information.

**No.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

28. Do you have any specific comments or input you would like to provide with regards to section Annex B - Oversight mechanisms in the NTIA IANA Functions Contract.

**Yes.**

If so, please provide your comments here.

**We urge the CWG to replicate these oversight mechanisms to the greatest extent appropriate in any new agreement or other documentation controlling ICANN and/or PTI's activities in connection with the IANA Function.**

If applicable, please reference the sub-section your comment relates to.

29. Do you have any specific comments or input you would like to provide with regards to section Annex C - Principles and criteria that should underpin decisions on the transition of NTIA Stewardship for names functions.

**Yes.**

If so, please provide your comments here.

**We believe that the Principles and Criteria adopted by the CWG are reasonable and appropriate, and clearly reflect the harmonization of viewpoints among diverse stakeholders that is a necessity for the functioning of the multistakeholder model.**

If applicable, please reference the sub-section your comment relates to.

30. Do you have any specific comments or input you would like to provide with regards to section Annex D - Xplane Diagram.

**No; there is no "Xplane Diagram" in the document under review.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

31. Do you have any specific comments or input you would like to provide with regards to section Annex E - IANA Contract provisions to be carried over post-transition.

Yes.

If so, please provide your comments here.

As a general matter, the sections appear to be appropriate. However, without a review of the actual text accompanying these section headings, it is not possible to give any kind of meaningful comments or input. We look forward to reviewing the proposed Term Sheet for the post-transition IANA Contract, which will allow us to provide substantive comments.

If applicable, please reference the sub-section your comment relates to.

32. Do you have any specific comments or input you would like to provide with regards to section Annex F - IANA Function Reviews.

Yes.

If so, please provide your comments here.

Overall, the proposal regarding IANA Function Reviews seems appropriate. The IPC does take exception to the “Composition of Review Teams,” where the IPC is not accorded a seat at the table. The proposed IFRT has a single seat denoted as the “Commercial Stakeholder Group” (CSG) seat. The CSG is merely a container used for internal governance purposes within the GNSO. It has no existence independent of the three disparate constituencies that were placed in the CSG. Thus, as a practical matter, the views and experiences of each constituency will be absent from the IFRT, replaced by a single individual who will have to bring forth a homogenized and synthetic compromise that is only a shadow of three robust and diverse organizations. Hopefully, “participants” from the IPC will be able to participate in the work of the group on an equal footing, enabling the IPC to bring its unique strengths and viewpoints to the table.

If applicable, please reference the sub-section your comment relates to.

33. Do you have any specific comments or input you would like to provide with regards to section Annex G - Proposed charter of the customer standing committee (CSC).

Yes.

If so, please provide your comments here.

We repeat with even greater emphasis our concerns expressed regarding the composition of the IFRT, and are dismayed at the marginalization of the IPC in the composition of the CSC. Here, the IPC will be represented (to the extent such a thing is possible) by a single individual representing the Registrar Stakeholder Group, the Non-Commercial Stakeholder Group and the CSG. This problem is compounded by

the absence of any “participant” concept, or even an “observer” concept. We urge the CWG to rethink this, so that the global multistakeholder community can participate in the oversight role being handed on from the NTIA.

If applicable, please reference the sub-section your comment relates to.

34. Do you have any specific comments or input you would like to provide with regards to section Annex H - Service level expectations.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

35. Do you have any specific comments or input you would like to provide with regards to section Annex I - IANA Customer Service Complaint Resolution Process for Naming Related Functions.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

36. Do you have any specific comments or input you would like to provide with regards to section Annex J - IANA Problem Resolution Process (for IANA naming services only).

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

37. Do you have any specific comments or input you would like to provide with regards to section Annex K - Root Zone Emergency Process.

No.

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

38. Do you have any specific comments or input you would like to provide with regards to section Annex L - Separation Review.

Yes.

If so, please provide your comments here.

We understand that this section has been significantly reworked by the CWG after the draft proposal was released for comment. The IPC will therefore reserve comment until such revised section has been released.

If applicable, please reference the sub-section your comment relates to.

39. Do you have any specific comments or input you would like to provide with regards to section Annex M - Framework for transition to a successor IANA operator.

**No.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

40. Do you have any specific comments or input you would like to provide with regards to section Annex N - Proposed changes to root zone environment and relationship with root zone maintainer.

**No, but see related comments above in responses to Section III.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

41. Do you have any specific comments or input you would like to provide with regards to section Annex O - ccTLD Appeals Mechanism Background and Supporting Findings.

**No.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

42. Do you have any specific comments or input you would like to provide with regards to section Annex P - IANA Operations Cost Analysis.

**No.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

43. Do you have any specific comments or input you would like to provide with regards to section Annex Q - IANA Budget.

**No, but see related comments above in responses to Section III.**

If so, please provide your comments here.

If applicable, please reference the sub-section your comment relates to.

### **Other Comments**

44. Are there any other comments or issues you would like to raise for the consideration of the CWG-Stewardship? **No.**