

## **NCSG comments on the Post Transition IANA Articles of Incorporation.**

The Non-Commercial Stakeholder Group (NCSG) is pleased to submit the following comments to the public consultation on the Post Transition IANA Articles of Incorporation (Aol).

Comments (by article number):

*3. 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").*

While concerns relating to the purpose of the corporation (PTI) being drafted in a vague and broad manner have been addressed by outside counsel and the CWG and new language has been agreed, we note that the membership of PTI might change/evolve in the future and consideration should be given as to whether the language related to the purpose should reflect that possibility. Currently the numbers and protocols Operating Communities (OCs) contract with ICANN for the IANA services (which in turn contracts with PTI) and ICANN is the sole member of PTI. However, it is not inconceivable that in the future this arrangement may change and that there may be additional members. Given this it may be prudent to replace "... on behalf of the Internet Corporation for Assigned Names and Numbers" with "its members."

We also note that any changes to purpose and other key aspects of the Aol should be similarly addressed and carried over to the PTI Bylaws and governance documents.

*9. Upon the dissolution or winding up of the Corporation, any assets remaining after payment, or provision for payment, of all debts and liabilities of the Corporation shall be distributed to ICANN, unless ICANN no longer qualifies as a tax-exempt organization under Section 501(c)(3) of the Code in which case such assets shall be distributed for charitable or educational purposes within the meaning of section 501(c)(3) of the Code to one or more other organizations that lessen the burdens of government and promote the global public interest in the operational stability of the Internet and that are exempt from tax under Section 501(c)(3) of the Code.*

While recognizing that this Article refers to physical assets and how they should be distributed upon the dissolution up of PTI, it raises two key related issues. Given the ongoing discussion among some interested parties as to whether or not the IANA functions should be considered an asset, it may be prudent to specify that the IANA functions themselves are not considered an asset for the purposes of this article and the Aol. We also note that there are agreed processes that are part of the CWG Stewardship proposal that address how the IANA functions may be moved from PTI to another IANA functions vehicle/operator, and therefore could not/should not be

distributed to “one or more other organizations” as proposed in Article 9. It may be prudent to insert a sentence that addresses this particular matter.

*10. “In no event shall the Corporation be controlled directly or indirectly by one or more “disqualified persons” (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.”*

The reference to § 4946 of the Code is focused on private foundations. The lawyers recommended deleting this reference in the ICANN Aol or changing it to § 4958 of the Code, which addresses public charities like ICANN. We request an explanation as to why § 4946 of the Code, rather than § 4958 of the Code, applies to PTI, which as stated in Article 2 of the draft PTI Aol is also “organized under the California Nonprofit Public Benefit Corporation Law for public and charitable purposes.”

If the reason for different Code references being applicable to ICANN and the PTI is because the PTI is to be established as a subsidiary organization of ICANN, we also request clarification on whether this reference would need to be amended or deleted if the PTI separation occurs in the future.

Finally, we request clarification as to whether the Code reference in Article 10 is required by law or if Article 10 could be deleted to preclude the need for amending the PTI Aol in the future if separation occurs.

*11. The Corporation may engage in any activities that are reasonably related to or in furtherance of its stated purposes, or in any other charitable activities, provided that the Corporation will not carry on any activities not permitted to be carried on (i) by a corporation exempt from federal income tax under Section 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Code. The Corporation shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*

As per the comment on Article 3 above the very narrow and agreed purpose of PTI is to undertake the IANA functions for the members of PTI. Any other activities, including those that might be “reasonably related to or in furtherance of its stated purposes” would be out of scope and outside the narrow purpose and mission of PTI. The IANA functions are critical to the functioning of the Domain Name System and the purpose of PTI is to undertake those functions for the OCs, nothing more, nothing less. While it is understandable that PTI/the PTI Board could have some operational discretion, discretion over the activities and scope of PTI as stated in Article 11 would not be appropriate.

General question for clarification:

To what degree can the PTI Board/management prevent, stall or ignore the findings of an IFR, SIFR or SCWG? According to the [IANA Naming Function Agreement](#) 6.3 (c) the “Contractor agrees that ICANN may unilaterally amend this Agreement and the SOW in accordance with an approved IFR Recommendation, an approved Special IFR Recommendation or an approved SCWG Recommendation (as such terms are defined in ICANN’s Bylaws), subject to the limitations set forth in ICANN’s Bylaws.” Is this sufficient a guarantee that PTI/the PTI Board is not able to ignore the findings of an IFR, SIFR or SCWG? And, can the PTI Aol in any way be used to prevent a separation as foreseen in the CWG IANA Stewardship proposal?