

5 August 2016

Samantha Eisner
Associate General Counsel
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Draft PTI Governance Documents - Comments from the Cross Community Working Group
to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-
Stewardship)

Dear Ms. Eisner,

We write in response to ICANN's recent publication of the draft conflicts of interest policy for Post-Transition IANA ("PTI") dated as of 8 July 2016 (the "Draft PTI Conflicts of Interest Policy"), the draft board of directors' code of conduct for PTI dated as of 8 July 2016 (the "Draft PTI Board Code of Conduct") and the draft expected standards of behavior for PTI dated as of 8 July 2016 (the "Draft PTI Expected Standards of Behavior") (together, the "Draft PTI Governance Documents"). We have prepared this comment letter on behalf of the CWG-Stewardship in our capacities as its co-chairs. We kindly request that ICANN address the CWG-Stewardship's comments in the revised versions of the PTI conflicts of interest policy, PTI board of directors' code of conduct and PTI expected standards of behavior, which we understand will be shared with the CWG-Stewardship for final review following the public comment period.

The formation of PTI as a separate legal entity is a critical component of the CWG-Stewardship final transition proposal that was submitted for approval to the chartering organizations on 11 June 2015. We note that the CWG-Stewardship will also be submitting comments on the draft PTI bylaws dated as of 12 July 2016 (the "Draft PTI Bylaws"). Given the different timelines for these interrelated governance documents, to the extent changes to the PTI bylaws impact provisions in the PTI governance documents, the CWG-Stewardship reserves making additional comments on the PTI governance documents.

The CWG-Stewardship is firmly committed to finalizing the PTI governance documents, and we look forward to working with ICANN to resolve the remaining open issues. Our substantive comments on the Draft PTI Governance Documents are discussed in detail below. We have also attached, as Exhibit A, a mark-up of the Draft PTI Conflicts of Interest Policy, as Exhibit B, a mark-up of the Draft PTI Board Code of Conduct and, as Exhibit C, a mark-up of the Draft PTI Expected Standards of Behavior. We also note that a number of the CWG-Stewardship comments reflected in the attached exhibits have already been incorporated in further revised drafts of the Draft PTI Governance Documents prepared by ICANN legal. For completeness, we include a cumulative set of comments, but recognize that many of these have already been accepted and resolved.

A. Comments on Draft PTI Conflicts of Interest Policy

1. Duty to Disclose (Section 2.1)

- **Draft PTI Conflicts of Interest Policy:** Section 2.1 (Duty to Disclose) of the Draft PTI Conflicts of Interest Policy provides that certain disclosures relating to conflicts of interest or potential conflicts of interest be made to the Secretary.
- **CWG-Stewardship Comment:** The CWG-Stewardship proposes that disclosures provided to the Secretary pursuant to the PTI conflicts of interest policy should also be provided simultaneously to the Chair of the Board, so long as the Chair is Disinterested (as defined in the Draft PTI Conflicts of Interest Policy).

2. Procedures for Addressing a Conflict of Interest (Section 2.3(d))

- **Text from Draft PTI Conflicts of Interest Policy:** Section 2.3(d) (Procedures for Addressing a Conflict of Interest) of the Draft PTI Conflicts of Interest Policy provides as follows in relation to approving a Conflict of Interest (as defined in the Draft PTI Conflicts of Interest Policy):

“If a more advantageous transaction, contract, arrangement, policy, program or other matter is not reasonably available to PTI under circumstances not producing a Conflict of Interest, or the transaction, contract, arrangement, policy, program or other matter cannot be modified to alleviate or mitigate a Conflict of Interest, the Disinterested Directors shall determine by a majority vote whether the transaction, contract, arrangement, policy, program or other matter creating the Conflict of Interest is in PTI’s best interest, for its own benefit, and whether it is fair and reasonable to PTI. In conformity with those determinations, the Disinterested Directors shall make its decision as to whether PTI should enter into the transaction, contract or arrangement or approve the policy, program or other matter.”

- **CWG-Stewardship Comment:** The CWG-Stewardship proposes that Section 2.3(d) be modified as provided below to conform with the required threshold of directors needed to approve a Conflict of Interest where a Director has a material Financial Interest (as defined in the Draft PTI Conflicts of Interest Policy) pursuant to the Draft PTI Bylaws. Section 5.11.3 of the Draft PTI Bylaws provides in relevant part that the vote of any interested Director is not counted in the approval of contracts or transactions in which a Director has a material financial interest.

“If a more advantageous transaction, contract, arrangement, policy, program or other matter is not reasonably available to PTI under circumstances not producing a Conflict of Interest, or the transaction, contract, arrangement, policy, program or other matter cannot be modified to alleviate or mitigate a Conflict of Interest, the Disinterested Directors shall determine by (i) a majority vote or (ii) as required by the Bylaws where a Director has a material Financial Interest, by a vote of (A) all of the Disinterested Directors and (B) ICANN, whether the transaction, contract, arrangement, policy,

program or other matter creating the Conflict of Interest is in PTI’s best interest, for its own benefit, and whether it is fair and reasonable to PTI. In conformity with those determinations, the Disinterested Directors shall make its decision as to whether PTI should enter into the transaction, contract or arrangement or approve the policy, program or other matter.”

3. Compensation (Section 4.1)

- **Text from Draft PTI Conflicts of Interest Policy:** Section 4.1 (Compensation) of the Draft PTI Conflicts of Interest Policy provides as follows in relation to Director compensation:

“A Director who receives Compensation, directly or indirectly, from PTI for services may not vote on matters pertaining to the Director’s Compensation.”

- **CWG-Stewardship Comment:** The CWG-Stewardship proposes that Section 4.1 be deleted to be consistent with Section 5.16 of the Draft PTI Bylaws, which prohibits PTI Directors from receiving compensation for services rendered to PTI as a Director.

4. Duality of Interest - Common Director Transactions (Article II and Section 7.1)

- **Text from Draft PTI Conflicts of Interest Policy:** Section 7.1(h) of the Draft PTI Conflicts of Interest Policy defines “Duality of Interest” as follows:

“A “Duality of Interest” arises when, with respect to a transaction, contract, arrangement, policy, program or other matter, a Covered Person or a member of a Covered Person’s Family has a fiduciary relationship with another party to a proposed transaction, contract or arrangement which gives rise to a circumstance in which the fiduciary duties of the Covered Person to PTI and the fiduciary duties of the Covered Person, or the fiduciary duties of the Family member of the Covered Person, to the other party may be in conflict. ***A Duality of Interest does not constitute a Conflict of Interest if (i) PTI and all other parties to the transaction, contract or arrangement being in possession of all material facts, waive the conflict in writing or (ii) the source of such Duality of Interest is a Cover Person’s fiduciary relationship with ICANN.***” (emphasis added)

- **CWG-Stewardship Comment:** Under California law, certain Board approval requirements need to be met for “common director” transactions, which arise when one or more of a corporation’s directors are also directors of another party to a proposed transaction. See Section 5234 of the California Corporations Code. However, as the policy is currently drafted, if a “common director” transaction falls within the carve-outs in Section 7.1(h) (highlighted in the text above), it would not constitute a “Conflict of Interest” under the policy and the mitigating procedures in Article II of the policy would not apply. As a result, the requirements for “common director” transactions under California law would not be addressed. To address this issue, the CWG-

Stewardship proposes the changes set forth in Article II and Section 7.1 of the mark-up of the Draft PTI Conflicts of Interest Policy attached hereto as Exhibit A.

B. Comments on Draft PTI Board Code of Conduct

5. Loyalty (Section A)

- ***Text from Draft PTI Board Code of Conduct:*** The paragraph headed “Loyalty” in Section A of the Draft PTI Board Code of Conduct provides as follows:

“Directors should not be, or appear to be, subject to influences, interests or relationships that conflict with the interests of PTI or PTI’s ability to operate for the benefit of the Internet community as a whole. Directors shall act so as to protect PTI’s interests and those of its employees, assets and legal rights, and Directors shall serve the interests of PTI over those of any other person or group.”

- ***CWG-Stewardship Comment:*** The CWG-Stewardship proposes that the paragraph headed “Loyalty” in Section A should be modified to reflect the description of PTI’s purpose as revised pursuant to the [CWG-Stewardship comment letter on the draft PTI articles of incorporation dated 29 July 2016](#) (the “CWG-Stewardship PTI Articles Comment Letter”):

“Directors should not be, or appear to be, subject to influences, interests or relationships that conflict with the interests of PTI or PTI’s ability to operate [to carry out the purposes of the for the benefit of Internet Corporation for Assigned Names and Numbers \(“ICANN”\) by performing the IANA functions on behalf of ICANN](#)~~the Internet community as a whole~~. Directors shall act so as to protect PTI’s interests and those of its employees, assets and legal rights, and Directors shall serve the interests of PTI over those of any other person or group.”

C. Comments on Draft PTI Expected Standards of Behavior

6. Fifth Bullet

- ***Text from Draft PTI Expected Standards of Behavior:*** The text included in the fifth bullet of the Draft PTI Expected Standards of Behavior provides as follows:

“**Act** in a reasonable, objective and informed manner when participating in PTI-related processes. This includes regularly attending all scheduled meetings and exercising independent judgment based solely on what is in the overall best interest of Internet users and the stability and security of the Internet’s system of unique identifiers, irrespective of personal interests and the interests of the entity to which an individual might owe their appointment.”

- ***CWG-Stewardship Comment:*** The CWG-Stewardship proposes that the text included in the fifth bullet should be modified to, among other things, reflect the description of

PTI's purpose as revised pursuant to the CWG-Stewardship PTI Articles Comment Letter:

“Act in a reasonable, objective and informed manner when participating in PTI-related processes and activities. This includes ~~regularly~~ attending ~~all~~ scheduled meetings and exercising independent judgment based solely on what is in the overall best interest of PTI or PTI's ability to carry out the purposes of the Internet Corporation for Assigned Names and Numbers (“ICANN”) by performing the IANA functions on behalf of ICANN~~Internet users and the stability and security of the Internet's system of unique identifiers~~, irrespective of personal interests and the interests of the entity to which an individual might owe their appointment.”

Thank you for your consideration of the CWG-Stewardship's comments on the Draft PTI Governance Documents. We look forward to working with you to address these PTI governance matters.

Best regards,

Lise Fuhr and Jonathan Robinson
Co-chairs, CWG-Stewardship

Attachments

Exhibit A

Exhibit B

Exhibit C