Cross Community Working Group (CWG)

To Develop An IANA Stewardship Proposal

On Naming Related Functions

Discussion Document for ICANN52 Singapore

February 2015

<u>Purpose</u>

This is a Discussion Document. The purpose of this document is:

1.   To inform the community of the work undertaken and progress to date

and

2.   To seek community input on key and intractable issues in order to assist the CWG in its deliberations

With input from the community, we hope to leave the ICANN 52 meeting in Singapore in a significantly improved position and so be able to move forward with the objective of developing a single transition proposal.

Overview of CWG activities to date

Summary of CWG activities to 30 January 2015

Since its first meeting on 6 October 2014, the CWG has been hard at work preparing a transition plan for the stewardship of the IANA Functions per the NTIA and ICG requirements. As of the end of January 2015, a span of 17 weeks that included the traditional holiday break, it had held 20 meetings of the CWG, including a two day Face-to-Face meeting in November and an "Intensive Work Weekend" in January, and over 25 meetings of its subgroups.

Public consultation on the CWG draft transition proposal

During this time the CWG produced a draft transition proposal which it put up for public consultation on 1 December 2014 for 21 days (the submissions to the public comment can be seen at https://www.icann.org/public-comments/cwg-naming-transition-2014-12-01-en and the CWG's analysis of these can be found at https://community.icann.org/display/gnsocwgdtstwrdshp/Current+Drafts).

By its close on 22 December 2014, the public consultation generated responses from 48 parties, which included individuals, organizations (involved with ICANN or not), companies and governments. Overall there was very strong support for the current IANA operator (ICANN) and that the IANA functions should not be moved from ICANN, or tendered for, at the onset of the transition.

Respondents also strongly supported that the transition should not take place prior to the adoption of required accountability mechanisms (being developed by the CCWG-Accountability) by ICANN or at least guaranteed to be adopted in a timely manner. They also strongly supported that there should be a Customer Standing Committee (CSC) as well as an Independent Appeals Panel (IAP) that can make binding decisions regarding IANA actions or inactions. Most respondents also noted that the proposal, as a whole, was too complex, did not provide enough details to properly evaluate it and that the time for submitting comments was too short.

CWG internal surveys and intensive work weekend

In the weeks of 22 and 29 December, the CWG completed a detailed analysis of the written comments received in the public consultation and held several meetings to discuss these. As a result of these meetings, the CWG developed two internal surveys based on the questions and suggestions provided in the responses to the public consultation. The survey questions were organized along the same lines as the CWG draft proposal, with a section added on an "Internal-to-ICANN" alternative solution and additional questions regarding the conditions for the separation of the IANA Function from ICANN. The surveys were distributed to the CWG participants during the week of 5 January 2015 (the results, which should not be interpreted as

any type of consensus by the CWG, were meant to inform the work of the CWG and can be found at https://community.icann.org/display/gnsocwgdtstwrdshp/Current+Drafts)

The CWG's intensive work weekend of 10-11 January 2015 (4 teleconferences totaling more than 8 hours over the two days) allowed the participants to consider the results of both the public consultation and the surveys. The public consultation and the CWG surveys were very similar with respect to showing very strong support for the creation of a multistakeholder MRT, a CSC and an IAP (as defined below). There was also very strong support for not moving the IANA function from ICANN unless ICANN materially breached the IANA functions agreement and failed to cure that breach. A majority of survey respondents agreed that if there were adequate accountability mechanisms in place that an ICANN Internal option would be acceptable or preferable. There was no strong agreement amongst survey respondents with the proposal to create Contract Co. as part of the transition and a slight majority of respondents felt that this option would likely be complex, costly and risky. It was also generally agreed when discussing the results of the surveys that a number of questions regarding key aspects of the proposals could only be answered after receiving independent legal advice on these matters.

CWG conclusions following the public consultation, surveys and the intensive work weekend

When considering these results the CWG came to the following conclusions:

- Given the results of the public consultation and the surveys the CWG should develop alternative transition proposals which should include ICANN Internal type solutions.
- Some of the key issues related to the Contract Co. option and an ICANN internal solution can only be properly resolved by obtaining independent legal advice.
- The misalignment of the IANA CWG's and the Accountability CCWG's schedules created significant issues for both groups and has negatively impacted the CWG's ability to complete the development of a transition proposal.
- Because of the above issues, it became clear that it would be impossible for the CWG to meet its original target date of delivering a proposal to the CWG chartering organizations on 19 January 2015. As such, the CWG could not meet its objective of delivering a transition proposal on naming to the ICG by 30 January 2015.

In response to these conclusions, the CWG undertook the following actions:

- Participants of the CWG were invited to discuss and develop ICANN Internal option(s).
- A list of legal questions was developed so that independent legal advice could be obtained.
- The co-chairs have undertaken discussion with the ICG and the CCWG to revise the CWG schedule in order to present it at the Singapore meeting.
- Steps were taken to improve and further extend coordination of the work of the CWG and the work of the CCWG Accountability, in particular its work on work stream 1.

Current status

As of 29 January, the CWG had created a scoping document that provides background information and includes an initial list of questions for legal advice. A sub-committee of the CWG has also held meetings with ICANN staff and lawyers to complete the arrangements to retain counsel for the CWG. It is hoped that such counsel can be selected and begin work before the end of February 2015.

At this stage of the process and until legal advice from an independent law firm has been received on the feasibility of various options and the associated risks, the CWG will continue to refine all reasonable options for a transition proposal.

A revised timeline for the delivery of a CWG transition has been developed, coordinated with the CCWG and communicated to the ICG. The revised timeline can be found at (https://community.icann.org/download/attachments/52887763/ICG-CWG-CCWG_timeline_20150129.pdf?version=1&modificationDate=1422991643000&api=v2). Note that it shows a best case scenario that provides for delivering a proposal to the ICG in June 2015, assuming that the following risk factors can be minimized:
1. Legal advice can be obtained as shown in the timeline.
2. Consensus can be reached in the community on a proposal as shown in the timeline.
3. The chartering Stakeholder Organizations (SOs) and Advisory Committees (ACs) are able to approve the proposal in the 21 days shown in the timeline.

The CWG co-chairs are holding regular weekly meetings with the co-chairs of the CCWG on Accountability to ensure optimal coordination between their respective groups.

Summary of accomplishments to date

In summary, the CWG has accomplished the following in what is a very complex and sensitive process that directly touches on the security and stability of the foundations of the Internet's DNS:

- Developed a draft transition plan.
- Conducted a 21 day public consultation on this plan and analyzed all responses.
- Developed detailed survey questionnaires for the CWG participants that addressed all major components of the transition proposal and considered recommendations made in the public consultation.
- Continued to refine details of the original draft transition plan.
- Begun work on three alternative transition plans.
- Developed a scoping document including a comprehensive list of questions with respect to the transition plans that will be used to obtain legal advice.
- Begun the process to select a law firm in cooperation with ICANN to obtain independent legal advice on the comprehensive list of questions.

Going forward

The CWG will continue its work on all reasonable proposals for transition until legal advice is received that clarifies the risks and feasibility associated with each model. Then it will hopefully be able to quickly finalize a transition proposal that could include the recommendations of the CCWG Work Stream 1 recommendations and that has the strong support of all major components of the multistakeholder community.

Consistent with this objective, the CWG has included in this document overviews of the major transition proposals presently being worked on by CWG participants and will use these during the ICANN 52 meeting in Singapore to increase community awareness and obtain feedback from the multistakeholder community.

Overview of major transition proposals

Two types of models - external and internal options

There are currently two types of models currently being considered by the CWG – the "External to ICANN" models and the "Internal to ICANN" models. The fundamental difference between the "External to ICANN" solutions, like Contract Co., and the "Internal to ICANN" type solutions, like the "internal" Trust, essentially boil down to who replaces the NTIA as the body responsible for overseeing the performance of the IANA Functions and determining who will perform them. In the External to ICANN solutions, as the term suggests, the replacement entity cannot be ICANN (but ICANN would be granted the contract for the IANA functions post-transition by this entity). In the Internal to ICANN type solutions the NTIA would transition its functions, including the right to determine who performs the IANA Functions, to ICANN, which would also continue to operate the IANA Functions (without a contract) subject to the community's right to require ICANN to transfer the authority and the IANA Functions to another operator.

Common points between the two models

Although there are fundamental differences in who performs the oversight role in the Internal to ICANN vs the External ICANN type solutions, there are many points which are common to both types of approaches:

- The IANA Function would not be transferred from ICANN as part of the transition from NTIA. The MRT (or equivalent) could only initiate the mechanisms for the separation of the IANA functions from ICANN if ICANN materially breached the IANA functions agreement (or equivalent undertakings) and failed to cure that breach. Both External and Internal models include mechanisms to insure that the IANA functions can be separated from ICANN (separability) but these can vary significantly between models.
- Multistakeholder Review Team (MRT) – A group of stakeholder representatives responsible for completing the new IANA Functions "requirements" documentation (a contract under the external solutions), deciding, under certain limited circumstances, if the IANA functions should be moved from ICANN and how to select a new operator should this be the case. The MRT would also be responsible for addressing and resolving IANA performance issues escalated by the CSC.
- Customer Standing Committee (CSC) – A small group of representatives responsible for overseeing IANA performance on a regular basis. The CSC would be predominantly, but not entirely, composed of registry representatives. The CSC would take up any performance related issues directly with IANA. If issues could not be resolved, the CSC could escalate the issue to the MRT. Members would be selected by their respective communities.
- Independent Appeals Panel (IAP) –All decisions and actions (including deliberate inaction) of the IANA Functions Operator that affect the Root Zone or Root Zone WHOIS database would be subject to an independent and binding appeals panel. The appeals mechanism should also cover any policy implementation actions that affect the

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execution of changes to the Root Zone File or Root Zone WHOIS and how relevant policies are applied. Note that the appeals mechanism for ccTLDs, if any, may look very different than for gTLDs.

- Note -– The current proposals do not yet make any recommendations regarding replacing the NTIA Authorization Function. Additionally the CWG charter task of providing a replacement for NTIA's accountability role with regard to the RZM function is one that will need to be considered once more direction is given by NTIA.

Overview of external models

A working group (RFP3) was established to further develop the CWG draft proposal for Contract Co. This approach seeks to have the NTIA's role of overseer of the IANA Functions Operator transferred to an entity that is not ICANN. This entity would sign a contract with ICANN to perform the IANA Functions at the time of transition and would retain the power, subject to the terms of the contract, to transfer the IANA functions to another operator. Currently this group is considering two variations based on either creating a non-profit corporation (Contract Co.), as per the original CWG proposal, or establishing a trust.

Summary of the Contract Co. model

- Authority – In the Contract Co. model the multistakeholder community would establish a non-profit corporation, which would assume the NTIA's IANA Functions responsibilities. Contract Co. would be a small, "lightweight" company whose main responsibility is holding and entering into the IANA Functions Contract. Upon transition it is expected that Contract Co. would enter into an IANA Functions Contract with ICANN. Should ICANN materially breach the IANA functions Contract and fail to cure that breach, Contract Co., after exhausting its escalation options under the contract, could select a new operator for the IANA functions. Because Contract Co. is a legal entity and it would have a legally binding contract with ICANN, it would be able to enforce the agreement against ICANN, up to and including pursuing legal action against ICANN.
- MRT – The Contract Co. option would have an MRT as described in the common points section. Its composition and status are to be determined but it may be a committee of Contract Co. The MRT would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would be responsible for providing instructions to Contract Co. regarding the IANA Functions Contract.
- CSC – The Contract Co. option would have a CSC as described in the common points section. Its composition and status are to be determined but it may be a committee of Contract Co.
- IAP - The Contract Co. option would have an IAP as described in the common points section.

Summary of the External Trust model

- Authority - Contract Co. would be replaced by a Trust established under U.S. law. The Trust would be registered with a state court to ensure an avenue for compliance. The Trust would have a Board of Trustees, which would likely be incorporated as a legal entity. Trustees would be selected from, and represent, the global multistakeholder community. The Trust would receive an assignment and/or conveyance from the NTIA of all of the U.S. Government's rights and duties included within its "stewardship" role over the Internet and DNS, including the right to issue the IANA Functions Contract. The Trust's primary purpose and duty would be to select and contract for an IANA Functions Operator (presently ICANN). The IANA Functions Operator would be under contract for a term of years (subject to termination for cause and other necessary or appropriate terms and conditions).
- The MRT, CSC and IAP could be the same as under the Contract Co. model, or some or all functions could be moved internally into ICANN.

Overview of Internal Models

A working group (RFP3B) was established to develop an "internal-to-ICANN" proposal and is currently considering two variations, based on suggestions by the ALAC and the auDA registry. This approach seeks to have NTIA transition all its responsibilities for the IANA functions to ICANN at least at the time of transition.

Summary of the ICANN Internal Bylaw model

- Authority - The NTIA would transfer the rights for contracting the IANA functions to ICANN, but only after it had amended its Bylaws to create a "Golden Bylaw" (i.e., a Bylaw that cannot be unilaterally amended by the Board). The Golden Bylaw would guarantee that ICANN would relinquish the right to perform the IANA functions to a third party if required to do so by to a multistakeholder MRT. Separation of IANA (If there is no other option) the MRT, under very specific conditions, could initiate (but not unilaterally approve) separation procedures (taking the IANA functions out of ICANN) as per the "Golden Bylaw". Separation could possibly require the creation of Contract Co. or a Trust.
- MRT - ICANN would implement additional Bylaw modifications that would create a standing committee in ICANN to be the MRT described in the draft CWG proposal (or similar). These bylaws would codify the membership, responsibilities and operating procedures of the MRT. Its exact composition is to be determined but would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would in many ways be as described in the common points but would also prepare the IANA "requirements" documentation (instead of an IANA Functions contract).
- CSC - The CSC would be as described in the common points section but could be merged with the MRT to varying degrees depending on the requirements.
- ICANN would implement additional Bylaw modifications which would specify the IAP procedure as described in the draft CWG proposal.

- Note: Some variations of this model propose a significant flattening of the structure to keep the addition of resources and costs to a minimum and to streamline the effectiveness of the model to the maximum extent possible, while maintaining appropriate levels of accountability. There also have been discussions that the separation of IANA from ICANN could be initiated by the MRT but would require the formal approval of the relevant ICANN SO's and AC's.

Summary of the ICANN Internal Trust model

- Authority - The transition from the NTIA would require ICANN to enter into a "Declaration of Trust" that it will hold the rights to the IANA function in trust for, and perform the names IANA functions for the benefit of, the multistakeholder community – as defined by clearly identified mechanisms. Specifically:
  - The Declaration of Trust itself does not necessarily create a separate company – it is a specific set of undertakings by ICANN with respect to holding the authority for the IANA Functions that is a legally valid instrument (meaning courts can order ICANN to perform according to the trust requirements if it is refusing to do so).
  - There would be a "Guardian" (or protector or "Appointor") of the trust, which would be a cross-community group similar to the MRT.
  - The Declaration of Trust would prescribe how it could be modified and the Guardian would be the sole entity empowered to make relevant changes to the document and, if appropriate, move the role of trustee to a third party using the process contained in the trust.
  - In particular, the Guardian's role is to respond to identified catalysts for significant change to the management of the IANA function. These triggers may come in two forms:
    - Systemic failings of the IANA operator, as identified by the periodic reviews; or
    - Out-of-cycle and incurable "urgent" failings (such as gross negligence or financial failure)
  - While the Guardian has the authority to initiate an escalation process, it cannot decide to execute the transfer. Action would only be taken with the input and agreement of the multistakeholder community, through pre-defined mechanisms.
  - Within the trust document, ICANN would commit to implementing the results of regular reviews regarding the performance of the IANA functions, as identified by the community. These reviews would address not only operational matters and Service Level Agreements, but also broader issues such as whether due process has been followed and policy guidance from the community has been adhered to.
  - The trust document will also commit ICANN to take all necessary steps to transfer its role as Trustee to a new trustee and/or its role as IANA Functions

operator to a new operator on the instruction of the Guardian pursuant to the escalation process.

  o In order to facilitate "urgent" reviews or the rebid processes, ICANN would prescribe funding in the Declaration that will be held in escrow, should such circumstances arise.

- MRT/Guardian - The Declaration of Trust would codify the membership, responsibilities and operating procedures of the MRT. Its exact composition is to be determined but would consist of representatives of different stakeholder groups in the multistakeholder community. The MRT would in many ways be as described in the common points but would also prepare the IANA "requirements" documentation (instead of an IANA Functions contract).

- CSC - ICANN would implement additional Bylaw modifications that would create a structure akin to the concept of the CSC as described in the draft CWG proposal. The CSC would be a standing committee and would perform a strictly operational and administrative role, setting and reviewing metrics for IANA and its performance against them. While ICANN would be the Trustee for the IANA naming functions, the CSC will be the active mechanism that represents the customers of this service. The Guardian would represent the larger multistakeholder community.

- ICANN would implement additional Bylaw modifications that would specify the IAP procedure as described in the draft CWG proposal.

- Note: Some are proposing that the Guardian could also launch the transfer process even if ICANN is not in breach of its undertaking under the trust as long as there is adequate community support for this. Such an option has not yet been discussed by the CWG.

Questions for the community:

1. Do you believe that the transition from the NTIA should happen (Please provide the reasons for your answer)?

2. Are you comfortable with ICANN as policy-maker also being the IANA operator without the benefit of external oversight?

3. Should registries, as the primary customers of the IANA functions, have more of a say as to which transition proposal is acceptable?

4. What does functional separation of IANA from ICANN mean to you? (this is not referring to having another operator than ICANN performing the IANA functions but rather the internal separation between ICANN and IANA in the context where ICANN is the IANA operator)

5. Do you believe the IANA function is adequately separated from ICANN under the current arrangements (internal separation)?

6. In considering the key factors (such as security and stability, ease of separating the IANA function from ICANN, quality of services, accountability mechanisms etc.) for evaluating the various transition proposals what importance would you give to the ability to separate IANA from ICANN (separability) vs. the other factors?

7. Given the IANA functions could be separated from ICANN do you believe it would be important for the community to obtain from ICANN on an annual basis the costs for operating IANA including overhead costs?
    o Would it be important to separate out the costs associated with address and protocol functions?
8. Could there be unforeseen impacts relative to selecting a new operator for the IANA functions vs the ICANN policy role (should ICANN determine that there will be another round of new gTLDs, how could it ensure that the new operator would accept this)?
9. Are there other transition models which the CWG should be exploring?