**Public Comment Review Tool – CWG-Stewardship 2nd Draft Proposal –** Version 10 June 2015

This document incorporates all (55) submissions received. Responses to the comments reflect CWG-Stewardship deliberations as of the end of the high-intensity meetings where the public comments were reviewed. Therefore, this document reflects the status of the CWG-Stewardship deliberations as of 1 June 2015.

**DISCLAIMER**: Submissions have been broken out into the relevant subject headings to facilitate review and discussion by the CWG-Stewardship. Note that in certain cases comments may have been summarized and/or references made to other comments from the same author to avoid duplication. You are encouraged to review the full submissions that can be found here: <http://forum.icann.org/lists/comments-cwg-stewardship-draft-proposal-22apr15/> and report any omissions or errors that may have unintentionally occurred.

| **#** | **Who / Affiliation** | **General Direction (supportive of the mechanism or not) / Suggested Changes** | **Concerns/ considerations/ rationale/ new issues** | **CWG-Stewardship Response (which may include new information as a result of the continued discussions) / Recommended action** |
| --- | --- | --- | --- | --- |
| **1.** | Richard Hill | Proposal is incomplete / None (or see PTI section) | Since details concerning the separation between ICANN and PTI are not provided in the draft proposal, it is not possible to say at this stage whether or not the proposal provides for sufficient separation of the IANA function from ICANN. That is, the proposal is incomplete. (Note, see also comments in PTI section) | ***The CWG-Stewardship appreciates your feedback and as a result has made available an FAQ that provides further details on PTI (see*** [***https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf***](https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf)***).*** |
| **102102**  **102.** | Richard Hill | Lack of details / further information on nature of separation and rationale | As noted above, I don't understand how PTI would be really separate from ICANN if it is fully controlled by ICANN, which is what the description above appears to imply. Nor do I understand how, in such a setup, an agreement between ICANN and PTI would be construed as a real contract between two independent entities, rather than an internal arrangement between ICANN and one of its subsidiaries. | ***The CWG-Stewardship appreciates your feedback and as a result has made available an FAQ that provides further details on PTI (see*** [***https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf***](https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf)***).*** |
| **103.** | Richard Hill | Lack of details / clarity on PTI incorporation | I don't see any references to where PTI would be legally resident/incorporated, nor to the jurisdiction that would apply to PTI and to agreements between PTI and ICANN. As I've stated before, this is a key issue. If PTI is resident in the USA, it would be subject to US law, which has significant implications, in particular if, as is proposed, PTI has full authority over changes to the root zone file. For example, the US Congress could pass a law that would force PTI to delete some particular ccTLD from the root zone. | ***The CWG-Stewardship is still deliberating whether PTI should be a California nonprofit Public Benefit Corporation or a Limited Liability Corporation. The CWG-Stewardship notes that the scenario put forward by the commenter would be applicable to any jurisdiction and as such does not seem a particularly relevant scenario to consider.*** |
| **143.** | Richard Hill | Lack of details / clarity on PTI Board and relationship with ICANN | If ICANN designates the PTI Board, then how is PTI independent from ICANN? For sure it is legally separate, but, as noted above, that does not necessarily result in "real" separation. Again, consider that FOO SA (a Swiss corporation that is wholly owned by FOO, Inc., a US corporation), is not really separate from FOO, Inc. Especially if (as is commonly the case in the real world) the board of FOO SA is named by the board of FOO, Inc. | ***As outlined in the FAQ on PTI (see*** [***https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf***](https://www.icann.org/en/system/files/files/legal-counsel-memo-post-transition-structure-faq-08may15-en.pdf)***), the CWG-Stewardship is of the view that a separate legal entity is necessary to:***   * ***Allow for a formal contract between ICANN and the IANA Functions Operator, which further evidences and supports functional separation.*** * ***Without a contract, other means of establishing expectations regarding performance levels and related terms would need to be identified, which would likely be less formal and less enforceable than through a contractual relationship. Recourse for a “breach” of those terms and conditions would be limited to internal redress mechanisms such as through the IFR team and the CSC***. * ***If there were ever an ICANN bankruptcy, with legal separation of the IANA functions into PTI, an ICANN bankruptcy filing in the U.S. would not result in PTI also becoming a debtor in a bankruptcy proceeding. ICANN’s “interest” in PTI will, however, become part of ICANN’s bankruptcy estate and its ability to use and dispose of this “interest” will be subject to any applicable restrictions under bankruptcy law.*** * ***If there is a future need to separate or divest ICANN of the IANA functions, the work of identifying and segregating assets will have already been done. This should enhance the separability of the IANA functions.***   ***The CWG-Stewardship notes that other factors that enhance independence are: a separate board (though “insider”); separate staff; separate budget (although approved by ICANN), and, clearly defined PTI functions.*** |
| **285.** | Richard Hill | Concerned about concentration of power | PTI would decide on all changes to the root zone file. If PTI is a wholly-owned subsidiary of ICANN (which is what is proposed), then that means that, in effect, ICANN is in control of the root zone file.  In my view, this creates a dangerous concentration of power. In particular if ICANN and PTI are legally resident in the USA, because they would be subject to US private law, meaning to US Congress and US court interpretations of US laws. | ***PTI would only be authorized to direct changes to the root zone file if appropriate policy has been followed and communicated according to the processes in place. Should PTI not follow those directions and/or make up its own directions existing accountability measures as well as those created by the CCWG-Accountability would be available to provide redress. As noted above, the CWG-Stewardship does not agree that a jurisdiction in the US would make the scenario outlined by the commenter anymore likely than any other jurisdiction.*** |
| **342.** | Richard Hill | Unknown / Add principles on jurisdiction and intellectual property | I don't see anything in that Annex regarding jurisdiction and intellectual property rights. As indicated above, I think that these are very important issues that should be reflected in Annex C. For example, it should be explicitly stated that the intellectual property rights regarding the IANA function should be transferred to an independent entity, as proposed by the numbers community.  And it should be explicitly stated that the IFO should be granted immunity of jurisdiction (but subject to suitable binding arbitration) or, failing that, be incorporated/registered/resident in an a neutral jurisdiction, such as Switzerland. | ***The CWG-Stewardship has recommended that ICANN remain the IANA Functions Operator. The jurisdiction of ICANN is not under consideration for the IANA Stewardship Transition. The CCWG-Accountability has committed to addressing the question of ICANN’s jurisdiction in Work Stream 2 of their work. Please refer to the CCWG-Accountability to submit feedback on this issue directly.***  ***The CWG-Stewardship has recommended that the issue of IANA intellectual property rights (IPR) be dealt with through dialogue with other operational communities, as the issue is not limited to the naming community. Should there be an IPR issue that is naming specific, the CWG-Stewardship would obtain input from its legal counsel.*** |
| **346.** | Richard Hill | Unknown / Add provisions on intellectual property and data rights | The existing provisions on intellectual property rights and data rights should be added. | ***The CWG-Stewardship has recommended that this issue be dealt with through dialogue with other operational communities, as the issue of IANA intellectual property rights (IPR) is not limited to the naming community. Should there be an IPR issue that is naming specific, the CWG-Stewardship would obtain input from its legal counsel.*** |
| **348.** | Richard Hill | Not supportive / IFR should include stakeholders outside of the ICANN community | The proposed review team consists entirely of stakeholders from ICANN. This is not representative of the global multistakeholder community, which is broader than ICANN.  The NTIA's intent is "to transition key Internet domain name functions to the global multistakeholder community". The current proposal is not consistent with that intent, because it proposes to transition a key element, the review process, to the ICANN community, which is much narrower than the global multistakeholder community. | ***The IFR specifically foresees input from anyone interested through public comment. Furthermore, even though existing ICANN stakeholders would be responsible for appointing review team members, this does not exclude the possibility of ‘external’ stakeholders being appointed for those seats.*** |
| **363.** | Richard Hill | Unknown / provide further information concerning IANA trademark | I don't see any references to who would own the IANA trademark (currently owned by ICANN) and the IANA.ORG domain name. Nor any references to who (if anybody) owns the rights to the IANA databases. | ***The CWG-Stewardship has recommended that this issue be dealt with through dialogue with other operational communities, as the issue of IANA intellectual property rights (IPR) is not limited to the naming community. Should there be an IPR issue that is naming specific, the CWG-Stewardship would obtain input from its legal counsel.*** |