

MEMORANDUM

To: Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (“CWG”)

From: Sidley Austin LLP (“Sidley”)

Re: Proposed ICANN Bylaws Matrix

Date: September 8, 2015

The matrix set forth below has been prepared by Sidley on the basis of the Cross Community Working Group on Naming Related Functions (CWG-Stewardship) Final Proposal (11 June 2015) (“CWG Final Proposal”). It does not include ICANN Bylaws that are being prepared by the CCWG-Accountability that have no direct relationship to the work of the CWG-Stewardship, ICANN Bylaws that relate to the proposals of the protocol or number communities, or the articles and bylaws of the Post-Transition IANA (“PTI”).

The draft of this matrix dated August 11, 2015 outlined which ICANN Bylaws would be designated as fundamental bylaws and which would be designated standard bylaws. The CCWG proposes to make fundamental bylaws more difficult to amend than standard bylaws, by sharing the authority to authorize amendments between the ICANN Board and the ICANN community (organized through its SOs and ACs in the Community Mechanism as Sole Member), and by requiring higher thresholds to authorize amendments than is the case for standard bylaws. Based on discussions with the CWG, the determination of which ICANN Bylaws will be fundamental and which will be standard will be addressed separately.

The matrix proposes an allocation of drafting responsibility for the ICANN Bylaws between CWG and CCWG. In this proposed allocation, the ICANN Bylaws that apply generally to accountability mechanisms that are not specific to CWG have been allocated to CCWG; those Bylaws that are specific to CWG mechanisms, such as the IANA Function Review, have been allocated to CWG.

Bylaw Subject Matter	Drafting Responsibility (CWG or CCWG)
1. PTI Governance	
(a) PTI Articles: Requirement that the ICANN community approve any amendment (other than immaterial amendments) by ICANN as sole member of PTI of PTI’s articles of incorporation, including without limitation, amendments relating to: <ul style="list-style-type: none"> (i) corporate structure of PTI (i.e., to convert PTI to something other than a non-profit public benefit corporation); (ii) jurisdiction of incorporation of PTI (i.e., to change the place of incorporation of PTI from California to another jurisdiction); 	CWG

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<ul style="list-style-type: none"> (iii) corporate purposes and powers; (iv) membership (including voting, classes of membership, rights, privileges, preferences, restrictions and conditions); (v) powers of ICANN as the sole member of PTI; (vi) powers of the PTI Board; (vii) indemnification of directors and officers; and (viii) approval requirements to amend the PTI Articles and Bylaws. 	
<p>(b) PTI Bylaws: Requirement that the ICANN community approve any amendment by ICANN as sole member of PTI of the provisions of the PTI Bylaws relating to the following matters:</p> <ul style="list-style-type: none"> (i) membership and other matters dealt with in the PTI Articles; (ii) PTI Board powers, responsibilities, structure, quorum and voting requirements; (iii) powers and responsibilities of PTI officers; and (iv) approval requirements to amend the PTI Bylaws. 	CWG
<p>(c) PTI Board Composition: Requirement that the ICANN community approve any change in the structure of the PTI Board as it relates to the allocation of board seats between independent directors and employees of ICANN or PTI, and/or the procedure for nominating the independent directors.</p>	CWG
<p>(d) Membership: Requirement that the ICANN community approve any resignation by ICANN as sole member of PTI or any transfer by ICANN of its membership in PTI or any right arising from its membership in PTI.</p>	CWG
<p>(e) Asset Transfers: Requirement that the ICANN community approve any transfer or relinquishment of PTI assets (absent a separation process that mandates a transfer), including, without limitation, intellectual property rights, processes, data and know how. [Note to CWG: Will there be any ordinary course asset dispositions by PTI (i.e., does ICANN currently dispose of IANA assets)? If so, exception for these types of dispositions could be included.]</p>	CWG
<p>(f) Significant Corporate Actions: Requirement that the ICANN community approve any merger, dissolution or bankruptcy of PTI.</p>	CWG

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2. ICANN Budget and IANA Budget	
(a) Requirement that ICANN provide funding to PTI in accordance with the agreed-upon budget. [Note to CWG: <i>Alternatively, this could be included in the IANA Functions Contract.</i>]	CCWG
(b) Requirement that the ICANN Budget and its operating plans include comprehensive information and itemization of all IANA operations costs to the project level and below as needed. [Note to CWG: <i>This could also be included in the IANA Functions Contract.</i>]	CCWG
(c) Requirement for PTI to submit an annual budget for IANA functions to the ICANN Board at least nine months in advance of the fiscal year, to ensure the stability of the IANA services. [Note to CWG: <i>This could also be included in the IANA Functions Contract; the contract could specify the procedures PTI would be required to undertake in preparing its budget (including a customer consultation process) and ICANN's ability to reject the PTI-prepared IANA budget. The IANA budget would continue to be subject to community veto per 2(d) below.</i>]	CCWG
(d) Requirement that the ICANN community have the power to veto the IANA Budget after it has been approved by the ICANN Board but before it has come into effect. ¹	CCWG
3. IANA Functions Contract	
(a) Requirement that certain material amendments to the IANA Functions Contract between ICANN and PTI be subject to approval by the empowered community.	CWG
4. Community Empowerment Mechanisms	
(a) Mechanism for the ICANN community to appoint and remove individual members of the ICANN Board.	CCWG

¹ The CWG Final Proposal contemplated that the community will have the ability to approve or veto the ICANN Budget after it has been approved by the ICANN Board but before it comes into effect. The CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations (3 August 2015) (“[CCWG 2nd Draft Proposal](#)”) contemplates that the community will have the power to veto the ICANN Budget, and that a veto would require a 66% level of support in the community mechanism; a second veto of the same IANA Budget would require a 75% level of support. The CCWG 2nd Draft Proposal further contemplates that if no IANA Budget is in place at the start of a new financial year, a caretaker budget struck at the same level as the previous year’s budget will apply, to allow for continued operation of the IANA functions while the disagreement is resolved. In addition, note that the CWG Final Proposal contemplates that the CWG (or a successor implementation group) will develop a proposed process for the IANA-specific budget review, which may become a component of the overall budget review.

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(b) Mechanism for the ICANN community to recall the entire ICANN Board and create an interim board to ensure continuity of operations.	CCWG
5. Customer Standing Committee (“CSC”)	
(a) Creation of a CSC that is required to regularly monitor the performance of the IANA naming functions according to contractual requirements and service level expectations, resolve issues directly with PTI where possible and escalate non-remediated issues to the ccNSO and/or GNSO. (The CSC is required to act in accordance with its charter; charter amendments are subject to public comment and must be ratified by the ccNSO and GNSO. ²)	CWG
6. IANA Problem Resolution Process	
(a) Creation of an IANA Problem Resolution Process for considering and addressing persistent performance issues or systemic problems associated with the provision of IANA naming services. [Note to CWG: <i>Alternatively, this could be included in the IANA Functions Contract.</i>]	CWG
7. IANA Function Review (“IFR”)	
(b) Creation of an IFR led by a multistakeholder team that is required to conduct periodic reviews of PTI’s performance of the IANA naming functions against the ICANN-PTI contract and the statement of work (“SOW”), and review and make recommendations with respect to the SOW (but not including issues relating to policy development and adoption processes, or contract enforcement measures between contracted registries and ICANN). The first review must take place two years after the transition is complete and thereafter at intervals of no more than five years. (IFRs to be incorporated into the Affirmation of Commitments mandated reviews set forth in the ICANN Bylaws. The general reviews could be drafted by CCWG, with the IFR drafted by CWG.)	CWG
(c) Requirement that the IFR conduct special reviews of the IANA functions (“Special IFRs”) after: <ul style="list-style-type: none"> (i) specified escalation mechanisms have been exhausted (CSC remedial action procedures are followed and fail to address the identified deficiency, and the IANA 	CWG

² The CWG Final Proposal provides that the ccNSO and GNSO should be empowered to address matters escalated by the CSC. The CCWG 2nd Draft Proposal provides that the ccNSO and/or GNSO will be empowered to address matters escalated by the CSC “if not currently within their mandates.” Neither the CWG Final Proposal nor the CCWG 2nd Draft Proposal discuss how to empower the ccNSO and GNSO with respect to the CSC if the requisite power is not currently within their mandates.

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<p>(ii) Problem Resolution Process is followed and fails to correct the deficiency); and each of the ccNSO and GNSO Councils has determined (after meaningful consultation with other SOs/ACs and which may include a public comment period) by supermajority vote that a Special IFR is necessary.</p> <p>The Special IFR must follow the same multistakeholder cross community composition and process structure as the IFR.</p> <p>(Special IFRs to be incorporated into the Affirmation of Commitments mandated reviews set forth in the ICANN Bylaws.)</p>	
<p>(d) Requirement that the recommendations of a Special IFR be approved by a supermajority vote of:</p> <ul style="list-style-type: none"> (i) the ccNSO and GNSO Councils; (ii) the ICANN Board; and (iii) a community mechanism.³ 	CWG
<p>8. Separation Process</p>	
<p>(a) Empowerment of an IFR to, among other things, determine that a separation process is necessary and, if so, recommend that a Separation Cross-Community Working Group (“<u>SCWG</u>”) be established.</p>	CWG
<p>(b) Requirement that an SCWG be established if an IFR has recommended that an SCWG be established and the following approvals have been obtained:</p> <ul style="list-style-type: none"> (i) supermajority approval of each of the GNSO and the ccNSO Councils; (ii) approval of the ICANN Board after a public comment 	CWG

³ **Note to CWG:** The CCWG 2nd Draft Proposal contemplates the ability of the community to reconsider and reject the Board decision on the Special IFR. CWG to discuss.

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<p>period. A determination of the ICANN Board to not approve an SCWG that has been approved pursuant to (b)(i) above must follow the same supermajority thresholds and consultation procedures as ICANN Board rejection (by a supermajority vote) of a PDP recommendation that is supported by a GNSO supermajority; and</p> <p>(iii) approval of a community mechanism.⁴</p>	
<p>(c) Requirement that any SCWG that is established will review issues that have been identified, manage any separation process and make recommendations. (For example, an SCWG could make a recommendation ranging from “no action required” to the initiation of an RFP and the recommendation for a new IFO, or the divestiture or reorganization of PTI. The separation process could include establishing RFP guidelines and requirements for the performance of the IANA naming functions, soliciting participation in the RFP process, reviewing responses to the RFP, selecting a new IFO or any other separation process.)</p>	CWG
<p>(d) Requirement that the selection of a new IFO or any other separation process must be approved by the ICANN Board and the ICANN community. A determination of the ICANN Board to not approve an SCWG recommendation that has been supported by a supermajority of the ccNSO and GNSO Councils must follow the same supermajority thresholds and consultation procedures as ICANN Board rejection (by a supermajority vote) of a PDP recommendation that is supported by a GNSO supermajority.⁵</p>	CWG
<p>(e) Requirement that ICANN, as the sole member of PTI, take whatever actions are necessary to facilitate a separation if approved pursuant to the process described above, including by transferring its membership in PTI and/or assets, removing its directors from the PTI Board and bearing all costs related to any transition, selection of a new IFO and the ongoing operating</p>	CWG

⁴ **Note to CWG:** The CCWG 2nd Draft Proposal contemplates the ability of the community to reconsider and reject the Board decision on the creation of an SCWG. CWG to discuss.

⁵ **Note to CWG:** The CCWG 2nd Draft Proposal contemplates the ability of the community to reconsider and reject the Board decision on the separation process. CWG to discuss.

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costs of the successor IFO. (In bearing such costs, ICANN must not raise fees from TLD operators (registries, registrars and, indirectly, for registrants) in order to do so.)	
9. Appeal Mechanism	
(a) Creation of an appeals mechanism, for example in the form of an Independent Review Panel (“ <u>IRP</u> ”) for issues relating to the IANA naming functions, with the exception of ccTLD delegations re-delegations. ⁶ (For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC would have access to an IRP.) ⁷	CCWG
10. [Root Zone Management]	
(a) [Requirement that the ICANN Board approve any major architectural and/or operational changes in the management of its root zone.] [Note for CWG: Please advise whether to include. This ICANN Board approval requirement is referenced in paragraphs 155, 175 and 194 of the CWG Final Proposal.]	[CWG]
11. Fundamental Bylaws	
(a) Requirement that any amendments to Fundamental Bylaws must be approved by the community and may require a higher approval threshold than Standard Bylaw amendments (for example, a supermajority vote). ⁸	CCWG

⁶ The CWG Final Proposal contemplates that the appeal mechanism with respect to issues relating to ccTLD delegation and re-delegation is to be developed by the ccTLD community post-transition. The ICANN Bylaws would contemplate that the ccTLD delegation and re-delegation, once developed by the ccTLD community post-transition, would be incorporated into the ICANN governance once determined.

⁷ The CCWG 2nd Draft Proposal contemplates that: (a) the IRP will be comprised of independent panelists selected through a community-driven process who serve a judicial/arbitral function for the ICANN community; (b) the IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA functions; (c) the IRP’s standard of review will be based on ICANN’s Mission, Commitments and Core Values (which includes compliance with documented policies); and (d) the decisions of the IRP will be binding on the ICANN Board.

⁸ The CCWG 2nd Draft Proposal contemplates that amendments to Fundamental Bylaws must be approved by the ICANN Board by a 75% vote of all directors then in office, and the ICANN community by a 75% vote of all votes in the community mechanism.