

Center for Democracy & Technology (CDT)

Response to the request for public comment on the Cross Community Working Group (CWG) on Naming Related Functions Draft Transition Proposal.

22 December 2014

CDT is pleased to respond to the call for public comment on the draft proposal of the Cross Community Working Group (CWG) on Naming Related Functions Draft Transition. CDT's Matthew Shears has been participating in the work of the CWG and has contributed to and supported the drafting of the current proposal.

CDT broadly supports the proposed draft. However, we recognize, as do many others in the community, that there is still much work to be done, many details to be worked through and a raft of procedures and mechanisms to be explored and agreed. We fully expect that there will be further elaboration of the proposal based upon the inputs of the community and look forward to the consensus that will emerge.

This said we believe that the proposal is one that encompasses some important key principles, including: 1) independence of IANA function operator oversight; 2) separability of the IANA contract from the IANA functions operator; 3) a clear commitment to and structures that reflect multistakeholder principles; and 4) a desire to see a non-capturable, neutral and robust IANA going forward.

We offer the following comments with regards to the component parts and substance of the draft proposal:

- CDT agrees with the broadly supported points that preface the proposed post-transition oversight and accountability mechanisms. In particular, there is no doubt in our minds that the post transition arrangements should provide for the ability to tender for the IANA functions and to replace ICANN as the IANA functions operator.
- We agree that the separation of ICANN as a policy body and ICANN as the IANA functions operator is essential and this, in our view, can be reinforced through the ability to remove the contract from ICANN should that separation be proven elusive and/or be abused.
- We agree that the replacement should not recreate a “mini” ICANN and that oversight should be as simple and as effective as possible while ensuring its multistakeholder nature, independence and robustness.
- Much of the uncertainty expressed by parties with the overall draft proposal revolves around the lack of detail as to how the Contracting Co. is organized, its legal structure, the relationship between it and the MRT, etc. Further CWG discussion of the Contracting Co. and legal advice is critical at this stage. This lack of clarity is significantly contributing to

undermining the draft proposal as a whole.

- Clarity is also needed in terms of the roles and responsibilities of the CSC and the MRT, the way in which issues are escalated to the MRT from the CSC, and to what degree can the MRT act on the escalated issue. There has been talk about stress testing the draft proposal as a whole, but the WG also needs to better understand how its component parts would work in practice.
- There is a related concern that the MRT is increasingly looking like a permanent structure or organization. When one factors in the ongoing discussions as to how the various constituencies are going to be represented it look increasingly bureaucratic. We need to remind ourselves of the purpose of the MRT – it is about oversight over largely technical and administrative issues related to the performance of the IANA functions. It is not about policy decisions, unless changes that were agreed as a result of those policy decisions have been poorly or inaccurately implemented by the IANA functions operator.
- There are fundamental differences among communities as to the need for or desirability of separability of the contract from the contractor. CDT believes that periodic rebidding is the right approach to ensuring stability, accountability and predictability. We recognize that such rebidding should not be too short as to incur uncertainty nor too long as to encourage complacency. A reasonable periodicity in and of itself will encourage greater performance and responsiveness. We do not believe that the IANA contract should be placed with an operator in perpetuity.

We believe that the final proposal should incorporate the following key elements: 1) oversight over the IANA functions that is independent of the operator; 2) separability of the IANA functions contract from the IANA functions operator; and, 3) periodic rebidding on the IANA contract through RFPs and, if the current operator is not meeting a set of defined criteria, the ability to withdraw the contract. We are not comfortable with the “alternative proposal” outlined in the consultation document which would see the IANA function remain with ICANN without any independent oversight or ability to rebid the contract.

And, of course, there is the imperative of ensuring that the work and recommendations of the CCWG on Enhancing ICANN's Accountability are also taken into account, particularly given those discussions have only just begun. CDT supports very close linkages with the work of work-stream 1 in the CCWG on Enhancing ICANN Accountability. The IANA transition work cannot be disassociated from the work of enhancing ICANN's accountability. At the same time we cannot depend on accountability changes at ICANN to ensure the IANA function's accountability or integrity. CDT sees both independent oversight and separability of the IANA contract on the one hand and enhancements to ICANN's accountability on the other as desirable, indeed essential, to ensuring appropriate levels of accountability and performance once the USG steps back from its administrative and stewardship roles.