



**GNSO Intellectual Property Constituency Comments on:
Community Working Group (CWG) on Naming Related Functions
Draft Transition Proposal
January 22, 2014**

The GNSO Intellectual Property Constituency (“IPC”) appreciates the opportunity to comment on the Cross Community Working Group (“CWG”) on Naming Related Functions Draft Proposal (the “Proposal”). See <https://www.icann.org/en/system/files/files/cwg-naming-transition-01dec14-en.pdf>.

1. Process concerns:

The IPC appreciates this opportunity to comment on the merits of the Proposal; however, these comments should be treated as provisional. The current timeline for consideration and approval of the Proposal is unrealistic and incompatible with an effort to achieve thoughtful multi-stakeholder input. Not only is 21 days insufficient time for diverse international constituencies to digest, evaluate, and formulate a considered opinion on such a complex proposal; the Proposal itself is still incomplete, and once it is completed it will not come back to us for review. At that point the SOs and ACs will be allotted even less time to weigh in with their endorsements.

This timeline also appears to be unnecessary. Since it is (or should be) a given that no transition can take place until accountability mechanisms have been identified and either implemented or made subject to “guarantees” that they will be implemented (see p. 61 of the Proposal), and since the timeline of the CCWG-Accountability does not provide for that group to report out even partial recommendations on some of these topics until the end of May, it seems all but inescapable that the timeline set by the IANA Stewardship Transition Coordination Group (“ICG”) (to which the CWG is quite properly responding) is not achievable.

2. Substantive Comments:

A. Contract Co. Structure: The IPC agrees with the shared community sentiment that ICANN should continue to perform the IANA functions, with the important caveat that ICANN should maintain its headquarters in the United States and remain subject to applicable law in the United States. As such, the IPC supports in principle the Contract Co. structural proposal. However, we also sympathize with community concerns favoring primacy for accountability mechanisms and noting the lack of detail regarding defining contours designed to ultimately ensure accountability. In particular, Contract Co.’s domicile, officer structure, and resources to

deal with vexatious litigation all remain undefined in the Proposal. At present, there is also no suggested timeline, limitations on discretion, or other guidelines governing future rebidding of the IANA agreement. These details need to be fully established should the community decide to proceed with the Contract Co. structure.

B. Appeals Mechanism: The IPC also supports in principle the concept of an Independent Appeals Panel. However, we note that the requirements for standing to file an appeal has not been specified within the proposal. Standing should be determined through integration with the CCWG-Accountability in order to avoid having multiple and potentially inconsistent or overlapping review mechanisms, as opposed to a holistic accountability regime.

C. Accountability First: We vigorously agree with the Report's conclusion (see p. 61) that a transition cannot and should not occur until all accountability mechanisms have been identified, those necessary pre-transition have been implemented, and guarantees are in place for the implementation of all others. Unfortunately, history has revealed ICANN's institutional inertia favoring maintaining the status quo and failing to implement new or improved accountability mechanisms in the absence of external pressure. We believe that the IANA transition provides a unique opportunity in time -- where the entire community is focused intently on ICANN's need for better transparency and accountability -- in order to ensure a level playing field for all ICANN participants. If experience is a guide, however, any accountability mechanisms that are not finalized before transition, with confirmed and implementable timeframes, will be placed on the "back burner" in favor of the perceived priority of the moment.

D. MRT Representation/Balance/Mandate: To support and enhance the multistakeholder model of managing Internet resources, the oversight mechanisms associated with the transition of the IANA functions should reflect the full range of private sector interests affected by the management of the IANA Functions, along with other stakeholders. We would not support an MRT which served to re-litigate policy debates, or breathe life back into disagreement and consensus within the policy development process. Adequate representation of the private sector within the post-transition stewardship of IANA is necessary for accountability to ensure that the diversity of private sector stakeholder views and interests are reflected, to avoid capture, to provide legitimacy for the entire model and, overall, to ensure the effective oversight and accountability of the IANA Functions by the global multistakeholder community.

The proposed framework, establishing "Contract Co.," the "Multistakeholder Review Team" ("MRT"), the "Customer Standing Committee" ("CSC"), and the "Independent Appeals Panel," requires balanced representation of non-registries and private sector interests to ensure effective operational and technical oversight of the IANA Functions. For example, in terms of the proposed post-transition oversight structure, the various private sector interests currently placed within ICANN's Commercial Stakeholder Group cannot be adequately represented by one representative "slot," but require broader representation to reflect the full range and diversity of global stakeholder interests within the private sector.

E. Transparency: The IPC applauds the provisions of the Proposal supporting maximum transparency throughout the process (see especially p.76 of the Proposal). This is a potential gain for the community vis-à-vis the status quo. Transparency throughout the process can supply an important element of legitimacy to the model. When the community knows which changes are

being proposed to the root zone and why, and what decisions are made on those proposals and why, affected community members are better able to decide whether to intervene or to invoke the appeals process.

F. Staffing/Secretariat: The current proposal envisions the Contract Co. as a lightweight entity having little or no staff. The CSC is expected to work with the MRT to establish service levels and performance reports for the IANA naming functions, receive reports from the IANA Functions operation and to review these reports against established service levels and escalate any significant issues to the MRT.

The IPC believes there should a dedicated, independent professional staff to assist the CSC in these functions. The IPC proposes a secretariat to assist the CSC with these administrative tasks as well as other administrative tasks for the MRT. We suggest that members of this proposed secretariat be employees or contractors of Contract Co. with no connection to ICANN or any other Internet governance organization or stakeholder group.

G. Authorization Function: A major aspect of the Proposal that has not been resolved is the fate of the Root Zone Management Authorization function currently carried out by NTIA (see p. 74 of the proposal, indicating that this function might be carried out by “CSC? MRT? RZM? Independent Evaluator?”). The IPC believes that the RZM Authorization function is a key accountability mechanism, since ICANN currently self-certifies that it has complied with policy. As such, who exercises the RZM Authorization function and the process for handling such authorizations must be clear before meaningful comprehensive comments can be submitted. IPC looks forward to doing so once there is a proposal that addresses this critical issue.

Respectfully submitted,

Intellectual Property Constituency