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Please find attached my comments in response to the stewardship transition proposal.

Regards,

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Comments In Response To IANA Stewardship Transition Proposal

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Due to the three proposals being developed independently by each community, ICANN has been attributed two different types of roles post-transition. In its first role, ICANN is the steward for the names community while PTI becomes the new IANA Functions Operator (for names). In its second role, ICANN continues to be the IANA Functions Operator (IFO) for the protocols and numbers community while the IETF and RIRs become the new stewards (for protocols and numbers respectively). This dual role of ICANN as both the Steward (for names) and the IFO (for numbers and protocols) leads to a number of institutional challenges:

1) *Subcontracting to PTI*: It has been suggested in the CWG Proposal that ICANN should subcontract the IFO operations for numbers and protocols to PTI. However, the CWG has also rightly recognized that such an arrangement is outside the scope of the CWG charter. Since such a subcontracting contract is outside the scope of the charters of all three working groups (CWG, CRISP and IANAPLAN), I believe the ICG is the right entity to ensure that such an arrangement is put in force to ensure compatibility between the three proposals. Accordingly,

a) the ICG should specifically mandate in the combined proposal that ICANN is mandatorily required to subcontract all IANA Functions Operations to PTI for the numbers and protocols community. This is necessary to avoid any conflict in interest as a result of ICANN's dual role as IFO and steward, and to ensure logistical coherence in the performance of all three services.

b) while the IANA Functions Contract between ICANN and PTI for the names function has been annexed to the CWG proposal, no responsibility has been taken for developing the subcontracting contract (for numbers and protocols) between ICANN and PTI. Since such a subcontracting contract is outside the scope of the charters of all three working groups (CWG, CRISP and IANAPLAN), the high level details of this subcontracting contract should be developed by the ICG and placed in the public domain prior to finalising the proposal. ICG is requested to ensure that reasonable checks and balances are built into the subcontracting contract.

c) the ICG needs to convey to the protocol and numbers communities that the MoU between ICANN and IETF, and the SLA between ICANN and the RIRs, should allow for subcontracting of the IANA Functions from ICANN to PTI.

2) *Institutional Separation of IANA*: it is imperative that each of the three IANA functions be made functionally and institutionally separate from the other two IANA functions so that the power of separability remains in the hands of respective stewards. While each of the three communities has endorsed separability (and the ability to move the IANA functions), the constraint that all three IANA functions are currently performed together using shared human and material resources, hampers the practical implementation of the separability envisioned by the three communities. It is feared that if institutional separation between the three IANA functions is not achieved then the ability of each of the three communities to move the IFO will be at the whims and fancies of the other two communities, each with different priorities, working methods, service level expectations and timelines. For example, if the names community is unsatisfied with PTI, but IETF is satisfied with ICANN (sub contracted to PTI), then the power of separability with the names community should not be unintentionally constrained by IETF's refusal to change the IFO. In order to ensure such institutional separation, ICG should require PTI to produce a document explaining how such institutional and functional separation can be achieved within a period of three years; or how such separation can be achieved at the time of separation if only one of the communities decides to move IANA.

3) *Continuity and Contingency Document*: I would like to bring the attention of the ICG to the "Continuity and Contingency Plan" developed by ICANN under clause C.7.3 of the present IANA

Functions Contract. This document operationalises separability and outlines how continuity will be ensured in case IANA functions are transferred from ICANN to another operator. In its present form, there are numerous deficiencies that have been highlighted by the CWG. However, this document is extremely relevant to the numbers and protocol communities as well, and has presently not been reviewed by them at all. This can lead to serious implications for the security and the stability of the Internet. Further, the plan needs to be revised for how continuity will be ensured if IANA were to be split into three parts and only one community decides to move IANA. The ICG is requested to take serious note of this document and include the revised version of this document in its final proposal.

4) *Conflict of Interest*: In ICANN's post-transition role as the steward (for names) and IFO (for numbers and protocols), there is expected to be serious conflict of interest in which the incumbent IFO can be reasonably expected to resist any attempt to change the IFO in the future. The ICG is the appropriate entity to stress test the possibility that ICANN may leverage its position as the steward (for names) to resist any attempt to change ICANN as the IFO (for numbers and protocols). This conflict of interest is of grave concern if the three IANA functions are kept practically inseparable; and can possibly be avoided by making each of the IANA functions functionally and institutionally separate.

5) *Domain Name and IPR*: It has recently been suggested by CWG's legal counsel that ICANN, as the steward, should be allowed to hold the IPR related to IANA. However, given ICANN's dual role as steward (for names) and IFO (for numbers and protocols), this is not a reasonable proposition. ICANN can be expected to leverage the use of this joint IPR to resist change in IFO in the future. Further, if any one community holds the IPR on behalf of the other two communities, then that one community should be accountable to the other two communities. Specifically, if the IETF Trust is allowed to hold the IPR, then the IETF, RIRs and ICANN should enter a joint MoU agreeing that the IETF Trust will allow the other two communities to grant a non-exclusive license of the IPR to any future IFO of their choosing, even if there are three independent IFOs for each of the three communities in the future.

6) *Control of ICANN over IANA*: I would like to highlight serious concerns about strong hold of ICANN over PTI, making separability extremely weak, and practically unenforceable, thus resulting in IANA being gifted to ICANN in perpetuity. While RIR's and IETF (as stewards) do not have direct control over the IANA operator, ICANN (as steward) has direct control over the IANA operator. This sets a dangerous precedent where one community has greater control over the IANA functions than the other two communities creating an asymmetric relationship between the three communities. Further, PTI can be held accountable through two mechanisms - either externally accountable as part of the names contract, or internally accountable as a result of ICANN control over PTI. It is stressed that there should be higher dependence on external accountability and lower dependence on internal accountability because if the IANA operator is changed to a third party in the future internal accountability mechanisms will not be available. As a result the proposal lacks foresight and may affect the stability and security of the domain name system.

Process Related Comments:

I would also like to state for the record that the Stewardship Transition process is not legitimate for the following reasons:

- a) The unilateral imposition of 4 principles for any transition proposal by the US Government; and the requirement that the US Government will need to approve any transition proposal deem the process as not legitimate as no one government should have special stakeholder status in Internet Governance.
- b) The process adopted by ICG was flawed as it did not require the three communities to distinguish between the '*proposal development process*' and '*approval process*'. This resulted in the names community trying to actively guess what the US Government may eventually approve or disapprove as the final proposal. Many of the decisions of the

CWG were not based on merits but based on the fear that their endless man-hours would go to waste in case the US Government rejected the proposal. For example, the decision to discard Contract Co and the decision to retain US jurisdiction were based on fears that the US Government would not accept any alternative proposal thus putting the CWG's effort to waste. I specifically draw attention to the transcripts of the CWG meeting in which the Contract Co model was sidelined.¹ The motion to drop the Contract Co model began with the following opening statement: *"I've grown to be a little concerned about the fact that it's been repeated many times that the U.S. Department of Commerce might have a problem with a Contract Co. And so I would propose that this gets kindly dropped to the side..."* This opening statement received widespread acknowledgement and support by other members within the CWG: *"If I could also - just also add too I think to Olivier's point I think that if we don't put forward a solution that is acceptable to the NTIA I think we've failed and that's a personal opinion."* Members within the CWG acknowledged that they wanted to drop Contract Co fearing that their efforts would go to waste if the proposal is not accepted by the US Congress: *"If I thought it was just Larry Strickling we had to convince that would be one thing, but there's strong indications it's not just Larry Strickling. It's good parts of the U.S. Congress. I have real aversion to wasting a vast part of my life over the last four or five months, maybe a little bit longer because I really haven't had much other life in a lot of aspects other than this. So I'd like to put something forward that we think we have some chance of getting accepted."* This discussion eventually resulted in Contract Co model being sidelined in the same meeting despite process concerns being raised by various members of the CWG about the elevated status of the US Government in the proposal development process. It is stressed that the ICG could have avoided this flawed guessing game by instructing the communities to distinguish between the 'proposal development process' and 'approval process'; and requiring the communities not to concern themselves with the approval process at this stage.

- c) The opaque process adopted by NTIA, Verisign and ICANN to privately develop the proposal for root zone management (RZM), at the exclusion of the global multi-stakeholder community, lacks legitimacy. Further, since the CWG proposal is closely interdependent and interrelated with the RZM proposal, it is reasonable to question the legitimacy of the CWG proposal for the reason that various members of the community may have expressed support to the CWG proposal under information asymmetry thus failing the test of *"informed"* consensus.
- d) The process has failed in its primary objective of internationalising the IANA functions and removing US oversight (judicial and legislative).

¹ See

<https://community.icann.org/download/attachments/52893304/Transcript%20CWG%20IANA%20F2F%20Session%208%2027%20March.pdf?version=1&modificationDate=1427584692000&api=v2>