

Staff Report of Public Comment Proceeding

Draft PTI Articles of Incorporation			
Publication Date:	09 August 2016		
Prepared By:	ICANN Staff		
Public Comment Proceeding		Important Information Links	
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Section I: General Overview and Next Steps			
<p>Now that the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) proposals have been transmitted to the National Telecommunications and Information Agency (NTIA), one of the key implementation planning items is to incorporate an affiliate, referred to as PTI, for the performance of the naming-related IANA functions. ICANN also intends to subcontract the performance of the numbering- and protocol parameter-related IANA functions to PTI.</p> <p>In order to incorporate an affiliate, which is a necessary step in ICANN's planning efforts for the implementation of the ICG Proposal, a first step is to file articles of incorporation. There are legal requirements for the content of articles of incorporation.</p> <p>The proposed draft of the PTI Articles of Incorporation was developed collaboratively by the ICANN legal team and the independent counsel hired to advise the IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship).</p> <p>These proposed draft Articles were out for a 30-day public comment from 01 July – 31 July to allow any interested party to review and provide feedback. This timeline allows for comments to be analyzed and incorporated in time for an adoption of the PTI Articles by the ICANN Board and filing for the incorporation of PTI by mid-August.</p> <p>Next Steps:</p> <p>The PTI Articles have been updated to reflect changes to address comments. The updated document is provided along with this Summary. ICANN will be presenting this document to the ICANN Board to authorize the formation of PTI.</p>			
Section II: Contributors			

At the time this report was prepared, a total of **three (3)** community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Non Commercial Stakeholder Group	Matthew Shears	NCSG
Cross Community Working Group on IANA Stewardship Transition	Jonathan Robinson	CWG-Stewardship
Registry Stakeholder Group	Stephane Van Gelder	RySG

Individuals:

Name	Affiliation (if provided)	Initials

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above ([View Comments Submitted](#)).

The RySG comments noted its view that the “sole and the most important purpose of [PTI] is to carry out the IANA functions” and suggested a modification of Article 3 (Purpose) to remove the language “for the benefit of” and replace it with “perform the IANA functions”. The RySG also noted its concern with the language on amendment of the Articles (Article 13), and suggested some revision.

The CWG-Stewardship submitted comments as well as a proposed draft modification to the PTI Bylaws. The CWG-Stewardship provided specific suggestions of edits to refine the purpose of PTI as set forth at Article 3 of the Bylaws, that both reflect the tax concerns that need to be included in the document and that more appropriately tailor the document to reflect the role of the PTI. On Article 13 (amendments), the CWG-Stewardship proposed a modification to the language to better reflect the state of discussions within the CWG-Stewardship and align with the PTI Bylaws as contemplated for adoption.

The NCSG provided comments on four Articles:

Article 3 (Purpose) – The NCSG questioned whether language should be added to the purpose to allow for a change in membership to PTI or a change in contracting with ICANN for the performance of the IANA functions. The NCSG recommended modifying the reference to ICANN in the purpose section to a reference to “its members.”

Article 9 (Distribution of Assets) – The NCSG suggests that there should be a specification in this section that the IANA Functions are not assets for the purposes of this provision, and inserting language on the limitation of the distribution of the naming functions based on the processes for separation included in the CWG-Stewardship proposal.

Article 10 (Disqualified Purposes) – The NCSG requested information on why Section 4946 of the U.S. IRS code should be relied upon, as opposed to Section 4958. The NCSG also requested information

on how this would need to be modified in the event PTI separates from ICANN. Finally, the NCSG requested a clarification on whether the code reference is required by law.

Article 11 (Limitation to Exempt Purposes) – The NCSG questioned whether the scope of the language in this provision had the effect of allowing activities beyond the narrow purpose and mission of PTI. The NCSG was specifically concerned with the wording “reasonably related to or in furtherance of its stated purpose.”

The NCSG also raised a general question of the power of the PTI Board to ignore the findings of one of the reviews called for within the ICANN Bylaws of the PTI Operations, such as the IANA Functions Reviews or a Separation Cross Community Working Group. Finally, the NCSG asked whether the Articles could be used to prevent a separation.

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

Based on the comments received, some edits are being made to the PTI Articles of Incorporation.

Article 3 – Purpose

Understanding the concerns raised by the RySG, CWG-Stewardship and the NCSG, the purpose section has been re-worded to the language included within the CWG-Stewardship’s submission. This wording limits PTI’s purpose to the performance of the IANA Functions, while also addressing legal concerns that the wording needs to be appropriate to form PTI as a specific “supporting organization” of ICANN (using a U.S. Tax Code meaning of “supporting organization”) for tax exemption purposes. As a result, the language of concern to the RySG has been removed.

On the NCSG’s further concerns about the possibility of additional members in the future, and the removal of the reference to ICANN, neither of those comments can be taken on. The CWG-Stewardship proposal did not call for PTI to be developed as an entity that could take on more members; it specified PTI as having a sole member. As a result, the wording at Article 3 (as well as Article 6, specifying ICANN as the sole member) is appropriate for consistency with the Proposal. Additionally, the reference to ICANN within Article 3 is not based on ICANN’s role as the sole member of PTI, but rather based on the fact that PTI will be a “supporting organization” to ICANN by performing the IANA functions. Therefore, the specific reference to ICANN is appropriate in this instance.

Article 9 – Distribution of Assets

As the IANA functions are services, and not assets, the NCSG’s request for specification that the services are not assets for the purposes of the Articles would likely cause confusion as opposed to adding clarity to this section. Because this section is about distribution of assets – and not about identification of a new provider for the IANA naming functions – the concerns raised by the NCSG to specify that the naming functions cannot be distributed outside of the processes specified in the CWG-Stewardship Proposal do not appear to require a change.

Article 10 – Disqualified Persons

In response to the NCSG's query, the reference to Section 4946 is appropriate in this section because PTI will be a "supporting organization" of ICANN (using a U.S. Tax Code meaning of "supporting organization"). The tax code setting out supporting organization requirements, Section 509(a)(3)(C), states that such an organization must not be "controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) or (2)." Given this explicit reference in the tax code, it is important to have Article 10 reflected within the PTI Articles.

To the NCSG's question of what would happen if PTI separates from ICANN, the impact of such a separation on PTI's governing documents would have to be evaluated at that time, and taking into consideration the specific circumstances of the separation.

Article 11 – Limitation to Exempt Purposes

The NCSG raised a valuable concern of upholding PTI's limited, narrow purpose. The primary purpose of this Article is to require PTI to act only in furtherance of charitable purposes, and not engage in impermissible activities that 501(c)(3) organizations may not engage in. This language does not authorize PTI to act outside of the purpose as stated at Article 3.

Article 13 – Amendment

Since the time that the Articles were posted for comment, there has been substantial conversation within the CWG-Stewardship on areas where the PTI Board would need to apply a higher threshold to its decisions, including on Amendments to the PTI Articles. The language presented by the CWG-Stewardship in its comments, which presents a straightforward 4/5 majority approval, has been adopted. This is also aligned with the RySG's comment.

RESPONSE TO GENERAL QUESTIONS

In developing the PTI Articles, the focus was on delivering Articles that are consistent with the CWG-Stewardship Proposal. Implicitly, that includes making sure that there is nothing in the Articles that would allow for the PTI Board to ignore or act contrary to the accepted IFR recommendations (or recommendations from other reviews), or to stand in the way of separation. ICANN has already made commitments on how it will consider the outcomes of these reviews, and there is nothing in the PTI Articles that would impair those requirements. ICANN, as the sole member of PTI, also has incentive to make sure that PTI is acting in alignment with the recommendations. We thank the NCSG for raising these concerns.