



## Comment on Draft Bylaws for Post Transition IANA (PTI)

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**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter<sup>1</sup>:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

## Comment on Draft Bylaws for Post Transition IANA (PTI)

The draft PTI Bylaws generally reflect the community recommendations for the performance of the naming-related IANA functions. We recognize that ICANN also intends to subcontract the performance of the numbering- and protocol parameter-related IANA functions to PTI, which the BC supports.

As proposed by ICANN staff, the BC will address four specific items identified for further community comment:

1. Selection of the PTI Chair;
2. Recommended quorum for meetings; and
3. Higher PTI Board voting thresholds for certain issues.
4. Limiting PTI's remit

In addressing these issues, the BC will elaborate further on elements that provide a strong governing foundation as well as those that we feel warrant further consideration or, at minimum, refinement.

**Selection of the PTI Chair** – The [final ICG IANA Transition proposal](#) stipulates that the PTI Board be composed of three directors who are employed by ICANN and two additional independent directors nominated via the ICANN NomCom process<sup>2</sup>. The draft bylaws call for the chairperson of the PTI Board to be selected from among the two Nominating Committee-nominated Directors elected to the PTI Board. The request for comments states that the PTI Board Chair language is “supposed to be a suggestion of limitation of who can serve in the Chair role, though not a mandate.”

The BC notes that the criteria for selection of the PTI Board Chair at this level of specificity was not included in the final IANA Transition proposal and therefore not subject to review and comment by the community. Although the request for comments states that this requirement is offered as a “suggestion” and should not be regarded as a “mandate,” broader community consideration of the PTI Board Chair proposal remains imperative.

The BC certainly appreciates the intention behind this criteria – ostensibly to ensure that the PTI Chair truly has no vested interests in ICANN. However, we share concerns reportedly expressed by other community members about the feasibility of this criteria for selecting the PTI Board chair. While not

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<sup>1</sup> Business Constituency Charter, at <http://www.bizconst.org/charter>

<sup>2</sup> IANA Transition Proposal, Mar-2016, at <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>

impossible to realize, we concur that it likely will be very difficult to identify independent PTI Director candidates who possess the skill set to chair the PTI Board.

Thus, the BC would like to propose an “aspirational” approach to the selection of the PTI Board chairperson. By this we mean that the Nominating Committee would be given a set period – we propose four months – to conduct a search for an independent PTI director with potential to serve as chairperson. If after four months, the search does not yield a sufficient number of qualified candidates, the criteria for selecting the PTI Board Chair would then be relaxed to include ICANN-nominated directors. Employing a more flexible approach for selecting candidates for the PTI Board chair will help to ensure that PTI governance functions are not compromised by delays.

In addition, the BC appreciates the Additional Qualifications outlined in Section 5.3. By prohibiting any official of a national government or multinational entity to serve as a PTI director, this element further safeguards against any potential government capture or undue influence over management of the DNS. Furthermore, similar restrictions on individuals serving in any capacity on any Supporting Organization, Advisory Committee, the Nominating Committee, or the EC Administration help to ensure that no one segment of the community enjoys greater influence in PTI governance.

**Recommended Quorum for PTI Board Meetings** – This is another instance in which the ICG final proposal did not specifically define what would constitute a quorum for a PTI Board meeting. The BC is pleased to have an opportunity to comment. Section 5.11.1 defines a quorum as “a majority of Directors then in office provided at least one ICANN Director and at least one Nominating Committee Director are present...” (i.e., three Directors).

The BC supports this definition of a quorum. We agree that by requiring a quorum to include the participation of at least ICANN-nominated director and one independent director, this approach will help to strengthen the perceived legitimacy of the PTI Board’s work.

**Higher PTI Board Voting Thresholds for Certain Issues** – Section 5.11.3 specifies possible PTI Board actions requiring 4/5’s of the Directors:

- (a) Approval of contracts or transactions in which a Director has a material financial interest (provided that the vote of any interested Director is not counted); provided, that, a Director shall not be deemed to have a financial interest if the source of such financial interest is solely based on such Director’s employment with ICANN, service on ICANN’s board of directors or any compensation related to such employment or service;
- (b) Creation of, and appointment to, Committees (but not advisory committees) as described in Section 6.1;
- (c) Indemnification of Directors as described in Article 8;
- (d) Any sale, transfer or other disposition of the Corporation’s assets, other than (i) in the ordinary course of the Corporation’s business, (ii) in connection with an IANA Naming Function Separation Process (as defined in the ICANN Bylaws) or (iii) the disposition of obsolete, damaged, redundant or unused assets;
- (e) Any merger, consolidation, sale or reorganization of the Corporation; and
- (f) Any dissolution, liquidation or winding-up of the business and affairs of the Corporation or the commencement of any other voluntary bankruptcy proceeding of the Corporation.

The ICG final proposal includes repeated references to “super-majorities,” but leaves it to each stakeholder group to define what that would mean. It therefore is not only necessary but also appropriate for the community to review and comment on the proposed definition of “higher threshold” votes for the PTI Board.

As the request for comments notes, subsequent to approval of the ICG final proposal, the CWG-Stewardship suggested that for these higher threshold decisions, both of the Nominating Committee-nominated Directors on the PTI Board should approve.

The BC agrees with ICANN staff that this requirement creates the potential for a single Director to block action on one of the six priority issues even though all of the other PTI Directors support the action in question. The BC further agrees that the 4/5’s majority will help to avoid a scenario in which one Director may hold up timely action by the PTI Board on a matter ultimately affecting the safety, security, and resilience of the DNS. Moreover, to safeguard against ICANN domination of PTI Board actions, the 4/5’s formula also would require at least one of the Nominating Committee-nominated Directors to support the action in question.

**Limiting PTI’s remit** – The BC has previously commented on the need to ensure that PTI has a very clear and limited remit – the operational oversight of IANA naming functions. As compared to the ICANN bylaws adopted by the board on May 27, 2016, the proposed PTI bylaws are could be improved when it comes to clearly defining the mission and purpose of PTI.

In particular, we note in the ICANN bylaws, section 1.1(a) outlines ICANN’s overall mission. Section 1.1(b) specifically limits ICANN from acting outside of its Mission.

By comparison, the PTI bylaws simply state “The specific purpose of the Corporation is to operate exclusive for the benefit of, to perform the function of and to carry out the purposes of the Internet Corporation for Assign Names and Numbers.”

While this is a good starting point, we suggest that the PTI bylaws be modified to include stronger language that clearly limits PTI to operational aspects of the IANA functions. Without such modifications, we continue to be concerned that PTI could become a venue to re-litigate policy decisions that have occurred upstream from PTI.

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This comment was drafted by Barbara Wanner, with edits from Hibah Hussain and Jay Sudowski.

It was approved in accordance with the BC charter.