

1 ALAC Statement on the CWG on Naming Related 2 Functions Draft Transition Proposal

3 *This Statement may be revised to provide further detail and clarity prior to the*
4 *end of the Public Comment period.*

5 Overview

6 The CWG is to be commended for its work at analysing options of replacing the NTIA stewardship of
7 IANA. The resultant model has many good characteristics which will support the transition. The model
8 has four basic components:

- 9 • Contract Co., the entity which to which NTIA will transfer the responsibility for IANA.
- 10 • The Multistakeholder Review Team (MRT) which will oversee most of the aspects of the IANA
11 contract.
- 12 • The Customer Standing Committee (CSC) composed primarily of representatives of registry
13 operators and will do routine review of IANA operations (set service levels and review reports).
- 14 • The Independent Appeal Panel (IAP) which will provide a mechanism for any affected party to
15 challenge whether IANA has implemented policy properly.

16 The ALAC strongly supports the IAP. Although there have not been many cases where this has been
17 needed, it is important to provide an appeal process should any of the concerned parties need it in the
18 future. With the potential for redelegation of New gTLDs, this becomes even more important.

19 The ALAC supports the CSC, but does have some problems with both the composition of the CSC and the
20 assignment of certain specific duties to it.

21 The ALAC supports the MRT concept, but has some very strong reservations about how it can be
22 implemented in this proposed model.

23 The ALAC strongly opposes the concept and implementation of Contract Co. The creation of this entity is
24 driven by the principle of separability – the ability to sever all ties between the IANA function and
25 ICANN. All parties seem to believe that the current service level is high, and that there is no reason to
26 consider such separation at the moment. Given that the price of the service is already zero, the only
27 motivation for moving is that at some time in the future, the service level degrades or that ICANN
28 otherwise mismanages or attempts to manipulate IANA. The ALAC believes that the Accountability
29 CCWG can introduce changes to ICANN to ensure that such problems can be remedied without having to
30 risk a transition to a brand new and untested IANA service to manage the Root Zone and without risking
31 having to break the IANA Root Zone management from the other IANA functions (since it is unclear that
32 the IETF and RIRs will be dissatisfied at the same time, or would choose to work with the MRT and
33 Contract Co. to select a new IANA operator.

34 The core question is whether the complexity, cost and risks of the proposed model is worth the benefits
35 of being able to separate from ICANN, or can we ensure that ICANN can be suitably controlled so as to
36 allow a far simpler stewardship transition, and one where we preserve the current level of stability and
37 security.

38 The ALAC understands that the CWG proposal is still being refined. When and if the issues raised in this
39 paper are addressed, these changes will be duly considered.

40 **Analysis**

41 **Contract Co.**

42 There are a number of perceived potential problems with the concept of Contract Co. Some of them are
43 unlikely, but since we are only establishing Contract Co. to cover the *possible* need to move from
44 ICANN, we cannot ignore any problem areas with the solution. The security and stability of the root zone
45 depends on it.

46 The following examples are not exhaustive, but will serve to illustrate the level of concern and potential
47 for disruption.

48 **Cost**

49 It is unclear who will bear the costs associated with Contract Co. A suggestion has been made that the
50 IANA contractor (ICANN for the moment) should bear all costs associated with Contract Co. (and of the
51 other components of this model). There has been no formal assessment of these costs, but some
52 estimates of the entire operation have been as high as a multiple of current IANA costs.

53 The possibility of litigation (see below) could push costs much higher.

54 Cost will either have to be borne by the direct customers of IANA (none of who now pay for the service)
55 or by the IANA operator (currently ICANN). Although the contract allows for fees to be levied under
56 certain controlled circumstances, it has never been seriously considered, and if it were, the contract
57 requires that they be based on direct costs and resources, not the infrastructure of Contract Co.

58 Although out of scope for this Names-related CWG, it is unlikely that the IETF and the RIRs would
59 appreciate fees being levied. gTLD registries would likely be willing to pay fees if necessary, but would
60 likely be unwilling to bear costs dis-proportionate with their usage of IANA. Although some ccTLDs might
61 be willing to pay reasonable cost-based fees, that cannot be said of ccTLDs in general.

62 If costs are borne by the operator, to start, that would imply that ICANN pays for the infrastructure (and
63 presumably start-up costs). ICANNs prime source of revenue is gTLD registrations and that implies that
64 gTLD registrants, through registrar and registry fees, would bear the total cost.

65 **Jurisdiction**

66 The issue of “in what jurisdiction Contract Co. should be incorporated” has been raised repeatedly. The
67 decision of which jurisdiction is ultimately selected may not have a great impact on Contract Co.’s
68 operation, but it could ultimately be a question that is very difficult to resolve. There is some indication
69 that the US government might require that it transfers the responsibility for IANA to a US-based
70 corporation (in fact, the draft CWG proposal has place-holder text which says just that). There is,
71 however, strong pressure from some quarters that this transition be used as the opportunity to reduce
72 the US-centric control over core Internet resources.

73 The possible threat of nationalization is of course a critical decision point (see next point), as is the
74 availability of litigation immunity if it is decided that it is a mandatory requirement.

75 **Capture**

76 The potential problem of Contract Co being “captured” has been discussed at length and the proponents
77 of the model feel comfortable that it can be avoided. Many of these discussions have focused on the
78 entire operation being taken over, and indeed, that may not be too likely. However, a more subtle form
79 of capture is when the balance among stakeholders favors one group preferentially, effectively
80 disenfranchising one or more other groups. With the unknown composition or formation processes for
81 the MRT (which directs Contract Co.), this is potential problem.

82 One version of capture that has not been discussed is nationalization by the country in which Contract
83 Co is incorporated or operates. One can readily imagine a situation where “in the interests of national
84 security”, a government takes over Contract Co., violating one of the principle constraints on the NTIA
85 transfer. Nationalization is not uncommon - <http://en.wikipedia.org/wiki/Nationalization>.

86 **Litigation**

87 Given that Contract Co. will be awarding a contract for a perceived valuable resource, and more
88 particularly since some proponents of this model believe that there should be a mandatory RFP with the
89 potential for moving the IANA resource, it is quite possible that an entity that loses the contract, or a
90 bidder that is not selected could sue Contract Co. Contract Co. could also be the subject of malicious
91 lawsuits. Regardless of the cause, such lawsuits could be expensive and time-consuming.

92 One particularly intriguing case study would be a losing contractor suing because IANA is about to be
93 transferred to another entity, but at the same time, (as described under Costs), the losing contractor
94 who still was the IANA operator at that moment, would be bound to cover the costs of defending it
95 against its own lawsuit.

96 It has been proposed that in some jurisdictions, Contract Co. might be given immunity from civil lawsuit.
97 That would certainly address this problem, but could ultimately cause others.

98 **Rigidity**

99 By its design, Contract Co would be very restricted in what it does. By its Articles of Incorporation and
100 Bylaws it would be strictly bound to follow the instructions of the MRT, and its Board would be

101 restricted from changing these rules. Such rigidity has been deemed to be necessary to ensure that its
102 founding principles are honoured and it is bound to support its multistakeholder masters.

103 However, this very rigidity presumes that the world around Contract Co. will be stable and unchanging
104 for the possible unlimited future. It is unclear how it might change if that was required to meet some
105 unforeseen eventuality.

106 The only apparent option would be to give the MRT a capability of altering (or ordering to be altered)
107 the core Contract Co. This presumes that there is no possibility whatsoever that the MRT itself could be
108 corrupted (more on this later).

109 **Contract Co. Misbehaviour**

110 One cannot ignore the possibility of the Company Co. Board not following the rules under which it
111 should be operating, or a Company Co. employee or contractor not following instructions and the Board
112 not taking suitable corrective action.

113 The normal recourse in such a case is to have some harmed or interested party sue. If Company Co had
114 received the protection from litigation that some proponents believe would be necessary, this recourse
115 would not be available.

116 **Risk**

117 Any change implies some level of risk. A major change such as removing IANA from ICANN, with a
118 potential result of it being taken over with no overlap of employees or systems would have a great risk
119 of impacting security and stability. The concept of a mandatory RFP every N years has been pushed very
120 strongly by some proponents of the model. Aside from the cost in both money and time on both the
121 MRT and the RFP responder(s), such a process, regardless of a perceived need – essentially, change for
122 the sake of change, is frightening!

123 **Multistakeholder Review Team - MRT**

124 The Multistakeholder Review Team is the core of the proposed model. It is essentially the operating arm
125 of Contract Co., since it is delegated responsibility for determining the content of RFPs, evaluating their
126 responses, determining the terms and conditions of contracts, evaluating overall performance,
127 determining any remedial action necessary (up to and including breach and termination), budget review
128 and performing a variety of activities currently performed by the NTIA. In earlier version of the model, it
129 was named the Periodic Review Team with that the intent that it would only be convened when there
130 was a specific task (such as an annual review) It has now been acknowledged that although it might not
131 need to meet very regularly, it needs to be ready.

132 Quite simply, if the MRT cannot be assured to be 100% reliable, the entire model collapses.

133 It is unclear what entity or entities is envisioned as convening the MRT, establishing who is and is not an
134 eligible stakeholder, how that evolves over time, whether the participants are remunerated or not and
135 who funds it.

136 These are not trivial questions. It has been suggested that the MRT could be similar to the CWG itself, or
137 the IANA ICG. But these are convened and funded by ICANN. In a scenario where Contract Co is
138 compelled to separate IANA from ICANN, there is little reason to believe that ICANN would continue
139 participating, or indeed if Contract Co. (and the MRT) would want and trust ICANN to play this role if the
140 intent is complete separation.

141 Whoever convenes the MRT may consciously or unconsciously impact how MRT decisions are made
142 based on the mix of stakeholders allowed to participate. It is easy to see these decisions at work. The
143 IANA CWG (as an example), allows 2-5 Members per stakeholder including those outside the ICANN
144 community and unlimited Participants. The Accountability CCWG also allows 2-5 Members and
145 unlimited Participants, but no Members from outside of ICANN's component organizations. At least one
146 proposal for the MRT called for restricting some stakeholders to fewer seats than other stakeholders
147 (GNSO@4, ccNSO@5, Root Servers@2, GAC, SSAC and ALAC@2 each). Each subtle difference impacts
148 the decisions that the MRT will make.

149 Another unknown about the MRT is just what sort of entity it is. It will be referenced in Contract Co.'s
150 articles of Incorporation and/or its Bylaws as the entity which will give Contract Co. its instructions and
151 perform most of the work associated with Contract Co. It has not been specified just what this
152 relationship is – a contract, a Memorandum of Understanding? Surely there will need to be SOME
153 document describing the relationship and the responsibilities of both parties. We have been told
154 repeatedly that only formally incorporated bodies can enter into such agreements without having the
155 individual participants personally liable for actions of the entity.

156 One possible option that removes this unknown is to have the MRT as a component part of Contract Co.
157 But at that stage, Contract Co. is no longer a bare-bones entity and in fact has become a mini-ICANN,
158 soothing that we were trying to avoid. So we are back with a large question mark here.

159 **Customer Standing Panel - CSC**

160 If the CSC is restricted to making mechanical decision on IANA performance, the current proposal may
161 well work. The ALAC believe that regardless of the function, there should be a substantive
162 multistakeholder component.

163 The description of the CSC says that it will take over the NTIA responsibility of reviewing redelegations.
164 Later in the draft proposal, it says "Contractor shall submit its recommendations to the [[CSC] or [MRT]
165 or [RZM¹] or [Independent Evaluator]] via a Delegation and Redelegation Report." Certainly if the CSC is
166 largely populated by registry operators, there is no reason to believe that they are the proper authority
167 for this task. More on this later.

168 Since it has been suggested that the MRT will meet only when there is an explicit task for it to do (or
169 perhaps on a monthly basis), and it is not tasked with routine monitoring of IANA, no one is monitoring
170 whether IANA is following policy. Clearly that needs to be rectified. If the MRT is to only meet when
171 called upon, then the only body left to do this is the CSC. If the CSC were to be tasked with monitoring

¹ Root Zone Manager – Currently Verisign.

172 adherence to policy, it MUST have a very significant multistakeholder component. The reason is that at
173 least for the gTLDs, the policy process allows the GNSO to adopt policy which affects registries but
174 without the support of the Registry Stakeholder Group. In such a case, it could be to in the interest of
175 registries, who did not want the policy in the first place, to have IANA not follow it. The body that
176 monitors that policy is carried out, if it is comprised of some stakeholders, must have a composition
177 comparable to the body that set the policy.

178 **Independent Appeal Panel - IAP**

179 The ALAC is largely satisfied with the IAP as specified in the proposal. It has been suggested that there
180 should be an associated mechanism to ensure the pending an appeal, the action being objected to might
181 need to be delayed pending the appeal.

182 **Missing Components**

183 As already mentioned, it is unclear who, on a day to day basis, will be responsible for ensuring that
184 policy is adhered to. Currently the NTIA has the ability to do that. Also, if some part of ICANN notices
185 that there is a problem, they must have standing to take action within ICANN (in a world where ICANN
186 no longer has a connection with IANA).

187 In the new model, even if the GNSO were to notice a problem (and they are not staffed to do so), they
188 would have no standing whereby they could take action.

189 A related issue, as already briefly mentioned, is redelegations. It seems that some parties believe that
190 the IAP is sufficient to rectify any problems, but others feel that the NTIA “backstop” function must be
191 replaced, and it is far from clear how that can be done. In the ccTLD space, the Framework of
192 Interpretation may make redelegations less subject to problems, but in the gTLD space, where such
193 redelegations may have very high financial values attached to them, there must be some level of
194 control.

195 **ALAC Proposal**

196 As indicated by our analysis, the ALAC believes that:

- 197 • there a large number of problems associated with the draft proposal;
- 198 • although many might be solvable, some seem less likely to be addressed in a practical way;
- 199 • The overall structure is complex and will be costly,
- 200 • The benefits it attempts to deliver are available in other less complex and costly ways.

201 **Recommendation 1**

202 The Contract Co. entity should be eliminated and the assignment of IANA should be made by the NTIA to
203 ICANN. This will drastically reduce the cost one-time and ongoing costs of the transition.

204 The Accountability CCWG should be charged with ensuring that the objectives associated with the
205 Contract Co. can be met within the ICANN structure.

206 Although the details of such measures are outside of the scope of the IANA Stewardship CWG, the ALAC
207 feels that it is necessary to demonstrate that the task presented to the Accountability CCWG is not an
208 impossible one. Towards that end, the ALAC offers some measures that the CCWG could implement
209 should it so decide:

- 210 • Requirement that MRT recommendations are adhered to. This is essentially the exact same rule
211 as Contract Co. would have been subject to. Should that not be possible under applicable
212 corporate law, binding arbitration could be used to ensure that advice is duly considered. ICANN
213 already accepts the concept of binding arbitration in its contracts.
- 214 • In addition to the MRT, and IANA Support Organization could be established. Conceivably, with
215 suitable powers, the IANA Supporting Organization (ISO?) could be one and the same
216 organization. But that would presume that an entity within ICANN could be given the necessary
217 authority.
- 218 • Changes with respect to IANA would be subject to advance notice, public comment and MRT
219 approval, and would require significant Board voting thresholds (percentage of those voting for
220 a change and/or absolute number of votes required).
- 221 • ACs and SOs could be allowed to recall their Board members. Such action could temporarily
222 reduce the size of the Board (until replacement members are appointed) to freeze any Board
223 action on critical IANA issues.
- 224 • In extreme cases, the MRT could require mandatory divestiture of IANA, with the same ultimate
225 effect of Contract Co. moving IANA to a new contractor. The MRT would specify the details of
226 such divestiture, and the attributes of the prospective recipient of the IANA functions. If
227 necessary, the MRT could even require the creation of a Contract Co.-like entity, but this would
228 only need to be done if it was clear that ICANN was no longer a suitable vehicle for IANA. This
229 last option provides the separability of ICANN and IANA, but does not build the entire
230 infrastructure required to do so until and unless there is evidence that it is required.

231 The net impact would be that ICANN would be subject to constraints with respect to IANA similar to
232 those of Contract Co, without the complexity and cost of building, supporting and defending the new
233 infrastructure.

234 **Recommendation 2**

235 The MRT should be convened by ICANN, similar to how it has convened the Stewardship CWG, the
236 Accountability CCWG, and most particularly, the IANA ICG. ICANN has demonstrated an ability and
237 willingness to create such groups. Moreover, in the process we have learned a lot about how this should
238 be done, so the process should only get better.

239 Convening the MRT under the auspices of ICANN, in conjunction with its ACs and SOs and the I* family
240 of organizations can ensure that all MSs are covered and treated equitably.

241 Whether the MRT resides within the bounds of ICANN, or is created as an entity external to ICANN is an
242 issue that the Accountability CCWG would have to investigate (depending on which structure would be
243 optimal given any corporate law restrictions).

244 As another way forward, the MRT could be replaced by a dual-pronged vehicle similar to that used by
245 the addressing community. In that case, there is the Address Supporting Organization (ASO) and the ASO
246 Address Council contained wholly within ICANN, and the Number Resource Organization (NRO) external
247 to ICANN. In the case of IANA, there might be an IANA Support Organisation (ISO) and the IANA
248 Resource Organization (IRO). The latter could be established in coordination with the other I*
249 organizations and would afford a strong measure on continuity should the option of divesting IANA ever
250 be needed.

251 **Recommendation 3**

252 There is a serious gap in all proposals related to a viable way to replace the NTIA backstop functions,
253 particularly those sensitive ones related to redelegations. The IAP may be a way of correcting a
254 perceived error, or with suitable delay and injunctive procedures, perhaps even a way to prevent them,
255 but there should be “standard operating procedure” way of catching most such errors without resorting
256 to the appeals process.

257 There is no evidence that any solution or partial solution proposed to date is directly related to the
258 presence of Contract Co or not (since Contract Co. itself only follows instructions from other bodies that
259 will continue to exist in the ALAC proposal).

260 Although the ALAC does not have specific recommendations at this time, we believe that identifying an
261 equitable solution is critical to an effective stewardship transition

262 **Recommendation 4**

263 Ongoing monitoring ensuring that IANA is adhering to policy is an essential part of any transition.
264 In the ALAC proposal, this could be done with relation to names/root zone by some combination of
265 the appropriate SOs (with suitable staff support), since they are the ones that have created the
266 policies, the MRT, the CSC (with suitable MS components added), or an IANA Support Organization
267 if that were to be created. The Accountability CCWG would no doubt need to ensure that they had
268 standing to take action on perceived violations.
269