



## **IPC Comments on Proposed 2013 RAA**

**<http://www.icann.org/en/news/public-comment/proposed-raa-07mar13-en.htm>**

**Submitted March 28, 2013**

### **Introduction**

The Intellectual Property Constituency (IPC) of the ICANN Generic Names Supporting Organization appreciates this opportunity to comment on the proposed revised Registrar Accreditation Agreement (RAA).

We note that the revision of the RAA is a project that has been in gestation for at least four years (since the Mexico City ICANN meeting), and active negotiations have been underway since the fourth quarter of 2011, shortly after the Dakar meeting, at which the Board directed that the results be presented to the community prior to the Costa Rica meeting in March 2012. The current public comment period, which opened almost a year later, on March 7, 2013, represents the first opportunity ever accorded to the IPC (and to the rest of the ICANN community) to review and comment upon the proposed revisions.

The RAA is one of the central contractual underpinnings of the entire ICANN framework for management of the Domain Name System, and thus of the multi-stakeholder model that ICANN purports to embody. Allowing a mere 21 days for public comment on the numerous and complex documents released on March 7 is grossly insufficient, and inconsistent with ICANN's oft-stated (but not always honored) commitment to accountability and transparency. While IPC is offering preliminary comments on some of the main issues presented, we reserve the right to supplement, modify or reformulate these comments, at least through the end of the reply comment period on April 19, if not beyond. This excessively compressed timeframe also forces us to dispense with any detailed comments regarding positive features of the proposed revisions, which are numerous and significant, and instead to focus mainly on the areas where the drafts presented are ambiguous, inadequate, or fall short of what should be demanded for this central pillar of the ICANN model. We ask that these comments be read with these caveats in mind.

### **Section 3: Registrar Obligations**

Section 3 of the proposed 2013 RAA describes the obligations of Registrars under this Agreement, including details of what data is to be provided, how the access to that data shall be structured, and how long it will be retained. This section also describes Registrar requirements for compliance with laws and dispute resolution policies, technical specifications, and it governs the Registrars' responsibility for its resellers, and relationships with privacy and proxy services and domain name holders.

The IPC believes the revised Section 3 includes some significant changes representing positive steps toward addressing issues that have long plagued IP rights holders – such as better access to more accurate WHOIS data and enforcement of rules compliance against rogue registrars, resellers, and privacy and proxy services – but we believe some of these provisions still require revision to be fully effective. Our comments on specific items in Section 3 include the following:

#### **3.2 Submission of Registered Name Holder Data to Registry**

The provisions of 3.2.1 set forth data elements that a Registrar is required to submit to the Registry, such as the name, IP addresses and names of primary and secondary name servers, identity of the Registrar, and expiration date of the registration. These elements are required today, and, while better verification of those elements needs to be provided for under the RAA, the IPC naturally supports the requirement to continue to provide this data. Since the overwhelming majority of registries in which registrars will sponsor registrations pursuant to this agreement will be “thick” registries, it would make more sense to include the full list of data elements (as in section 3.3) in this section, with the statement that the list could be reduced to the six elements listed here solely in the case of “thin” registries, of which there are only 3. (We note that a PDP is underway that could lead to all registries adopting the thick structure, which has strong if not unanimous support from the ICANN community.)

Of even greater concern, 3.2.1 goes on to state that even its minimum requirements could be changed by agreement between the Registry and Registrar, if the agreement is approved by ICANN. *“The agreement between the Registry Operator of a gTLD and Registrar may, if approved by ICANN in writing, state alternative required data elements applicable to that gTLD in which event, the alternative required data elements shall replace and supersede Subsections 3.2.1.1 through 3.2.1.6 stated above for all purposes under this Agreement but only with respect that the particular gTLDs.”* While we respect the desire for registry operators and registries to modify, with ICANN's blessing, some contractual provisions under some circumstances, the IPC believes that the elements set forth in 3.2.1 must remain static and represent the bare minimum set of data elements to be furnished by Registrars to the Registry. It should be clear that no matter what agreements are reached between the Registry and Registrar, as approved by ICANN, access to these basic elements will be provided across all registries.

#### **3.3 Public Access to Data on Registered Names**

Section 3.3.1 provides for continued provision of certain data elements, including the contact information for the Registered Name Holder, and the technical and administrative

contacts for the domain, via Port 43 and web access. The IPC supports the continued provision of Port 43 Whois service for all gTLDs, and is concerned that present day access is threatened by the new mechanism in 3.3.1 that allows Registries to enter into agreement with the gTLD Registry operator and, with the approval of ICANN, provide “*alternative*” data elements. Revision to these elements to require less data, or replace the current elements with alternative data, threaten the ability for law enforcement and IP owners alike to take action against a Registered Name Holder when necessary.

The IPC also notes, and opposes, the proposed change to 3.3.4. Under this revised provision, Registrars could be required to contribute data to a cross-registrar Whois service if (and only if) ICANN adopts a Consensus Policy to that effect. Given the historical pace of ICANN’s consensus policy development, this change to the RAA effectively forecloses the hope of a timely implementation of a cross-registrar Whois service – even if a majority of Registrars decide to support and provide it. Our concerns are deepened by the Registrar proposal to remove from the list of topics that are appropriate for consensus policies both “the development of a distributed capability that provides query-based Whois search functionality across all registrars” and “the development of a centralized Whois database for the purpose of providing comprehensive Registrar Whois search capability.” See Registrar Proposed Text for Section 1.3.4 of the Consensus Policies and Temporary Policies Specification. To insist that steps toward centralized Whois can only be taken as the result of a Consensus Policy, and then to delete the authorization for Consensus Policies to address this topic, would be a huge step backward, especially in light of the strong recommendations of the cross-community Whois Policy Review Team for ICANN to provide a centralized portal for such cross-registry access. See <http://www.icann.org/en/about/aoc-review/whois/final-report-11may12-en.pdf>, Recommendation 11.<sup>1</sup> IPC urges the current language to be maintained in Section 3.3.4, and for the Registrar proposed text for the Consensus Policy Specification to be rejected.<sup>2</sup>

### **3.3.8 Whois**

The IPC agrees that Registrars should meet or exceed the requirements set forth in the Whois specification.

### **3.4 Retention of Registered Name Holder and Registration Data**

The IPC does not support the change of the data retention term specified in 3.4.2 from three years to two years, as good data retention is critical to law enforcement efforts, both in the public and private sectors. Particularly in cases where the identity of the Registered Name

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<sup>1</sup> “It is recommended that the Internic Service is overhauled to provide enhanced usability for consumers, including the display of full registrant data for all gTLD domain names (whether those gTLDs operate thin or thick WHOIS services) in order to create a one stop shop, from a trusted provider, for consumers and other users of WHOIS services.”

<sup>2</sup> IPC also opposes the Registrar proposal to place outside the scope of Consensus Policies any dispute resolution policy that “take[s] into account use of the domain names.” Section 1.2.4, Consensus Policies and Temporary Policies Specification. The UDRP, which turns on whether a domain name has been registered AND USED in bad faith, is a Consensus Policy and must remain so.

Holder is fraudulent or otherwise obscured, it may take years to build evidence and identify all of the implicated domains. The sooner evidence is destroyed, the lower the likelihood that full enforcement is feasible. In the absence of a compelling necessity for this change, the IPC supports a minimum retention term of three years and no less.

### **3.7 Business Dealings, Including with Registered Name Holders**

The IPC applauds the change to Section 3.7.7 which requires Registrars to enter into agreement with a Registered Name Holder other than the Registrar and *enforce compliance with the provisions of the registration agreement*. If vigorously enforced by ICANN, this could be a significant step toward the goal of reducing the instances of non-compliance by registrants who flout current rules and regulations due to a lack of effective enforcement provisions in the existing RAA.

However, the IPC would like to see, at least as a best practice, Registrars adhere to a stricter requirement than 3.7.7's "commercially reasonable efforts" to enforce compliance with the provisions of the registration agreement between Registrar and any Registered Name Holder (that relate to implementing 3.7.7.1 through 3.7.7.12).

IPC agrees with Section 3.7.8 that Registrars should comply with the obligations of the Whois Accuracy Program Specification, but believes that those obligations should be considerably strengthened. Please see below for our detailed comments on this specification. Furthermore, like the corresponding provision referencing the Whois specification, this provision should explicitly authorize Registrars to do more to advance Whois accuracy by exceeding the requirements of the Whois Accuracy Program Specification.

### **3.8 Domain-Name Dispute Resolution**

The IPC supports the requirement for Registrars to comply with the Uniform Rapid Suspension (URS) procedure and is pleased to see this new rights protection mechanism incorporated into the RAA. Furthermore, because of the questionable track record of some resellers in cooperation with the UDRP process, we recommend that it be spelled out in this section that Registrars must ensure compliance by their resellers with UDRP and URS obligations.

### **3.12 Obligations Related to Provision of Registrar Services by Third Parties**

The IPC supports the changes to this section holding Registrar responsible for the compliance of its Resellers and third parties providing Registrar Services, and further supports the requirement for a written agreement between Registrar and Resellers. The IPC further commends the requirements for Registrars to take reasonable steps to enforce agreements with Resellers in an effort to cure non-compliance. However, in light of the significance and potential impact of this provision we would support changing it to require Registrars to take "all necessary steps" to enforce these obligations.

#### **3.12.4 and 3.14 Obligations Related to Proxy and Privacy Services**

The IPC supports the requirement for Resellers and Registrars to comply with “any ICANN-adopted Specification or Policy that establishes a program for accreditation of individuals or entities who provide proxy and privacy registration services (a ‘Proxy Accreditation Program’).” With regard to their obligations in the interim period before the proxy accreditation program comes into force, see our comments below regarding the Specification on Privacy and Proxy Registrations.

#### **3.18 Registrar’s Abuse Contact and Duty to Investigate Reports of Abuse**

The IPC is pleased to see the addition of a requirement for Registrars to provide a publicly designated contact for reports of abuse including “Illegal Activity” and requiring prompt steps to investigate and respond to these reports. We are also supportive of the designated provisions for tracking and publishing these reports. While we recognize the importance for law enforcement and government authorities to have dedicated abuse contact points and mechanisms for quick response (under Section 3.18.2), the IPC similarly believes there should be performance standards identified here for responding promptly to reports of illegal activity and abuse by those who are not law enforcement or acting on behalf of the government.

## **Sections 5 (Term, Termination and Dispute) and 6 (Amendment and Waiver)**

### **Sections 5.2.3 and 5.3 – Right to Substitute Updated Agreement**

The way the proposed RAA 2013 is presently written, adoption of any future Updated RAA by the Registrar is optional up until the point of expiration and renewal. In order to avoid an uneven landscape, where not all accredited Registrars are bound by the same RAA, ICANN should consider incentives to correct this discrepancy or, alternatively, mandatory adoption of any future Updated RAA upon a reasonable notice period to the Registrar.

### **Section 5.5 – Termination of Agreement by ICANN**

The IPC commends the drafters for the addition of language addressing several new bases for termination of the proposed 2013 RAA—particularly those related to cybersquatting. We emphasize the importance of these termination bases, as well as their applicability to Affiliates of the Registrar. Moreover, it is absolutely vital that ICANN reasonably exercise these new provisions, because they are meaningless absent any real threat of enforcement.

### **Section 6.3 – Alternative Amendment Procedure**

The IPC strongly supports in principle the alternative amendment procedure spelled out in proposed section 6.3. For entities accredited by ICANN to be able to exercise veto power over changes to the accreditation standards that ICANN concludes, after an open and transparent process, are necessary to protect the public interest, is simply unsustainable. ICANN must retain the ability to easily modify its agreements to ensure it keeps with its mission with respect to the security and stability of the Internet. Put another way, the Policy Development Process should not stand as an impasse against vital improvements, to the new gTLD program or otherwise, which can only be effectuated through changes to the RAA.

However, we also recognize the concerns expressed by some registrars about the scope of this provision. Registrars have duties to shareholders and in some cases to governmental oversight authorities that make it difficult for them to accept the flexibility that ICANN requires for its public interest mission. We encourage all interested parties to continue to work on modifications to this provision, both with regard to subject matter of potential amendments and to applicable procedures, that can help address these concerns while preserving the vital ability of ICANN to change accreditation standards even if without the formal support of a majority of registrars that sponsor a supermajority of registrations.

## **Whois Accuracy Program Specification**

While IPC welcomes inclusion of this specification as an enforceable part of ICANN's contract with Registrars, we believe it needs significant improvements if it is to be effective in advancing the goal of improved Whois accuracy.

1. Section 1 (pages 1-3):

A. Chapeau

IPC supports the inclusion of customer account holder information as subject to verification (as per ICANN proposed text). This data, which registrars have strong incentives to keep accurate and current, is useful in pursuing enforcement activities, even though it generally is not currently publicly accessible via registrar Whois.

IPC believes that registrars should be required to validate and verify domain name registration data before registrations go live. However, in the event that this is not achievable, we believe the time frame for required validation and verification should be much shorter than the 15 days proposed. A reasonably diligent registrar should be able to accomplish the validation process within 24 hours and the verification process within 5 days. To allow a registration to continue to resolve for two full weeks or more, even if associated with clearly false Whois data, undermines the entire purpose of the Whois Accuracy Program and cannot be tolerated.

B. Validation steps (1(a) – (e))

IPC supports the first four validation requirements, and notes that all could be accomplished in an automated fashion in close to real time upon receipt of the Whois information from the registrant.

With respect to 1(e), IPC supports the text proposed by ICANN. The standard of requiring validation of postal address fields only if the data “readily available” is subject to gaming. IPC recognizes that such data is not equally available for all countries but registrars should be obligated to make a diligent effort to obtain and use such data for validation.

Also with respect to 1(e), the validation requirement should be expanded so that the street address is validated as to whether the numerical address exists on that street.

C. Verification ((1(f))<sup>3</sup>)

IPC strongly urges that the final word of 1(f)(i) be changed from “or” to “and.” The probability of identifying a bad actor increases significantly if both the e-mail address and phone number are checked. (In practice, registrars can be expected to employ method (i) the vast majority of the time, meaning that a dummy e-mail account is all that is needed for a bad actor to surmount the verification “hurdle.”)

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<sup>3</sup> As noted above, IPC supports requiring accurate information as to account holders paying for registered names.



#### D. Carryover Text for Section 1<sup>4</sup>

This text is defective in two ways. First, in a case in which verification has not been achieved, it provides the registrar the option to “verify the applicable contact information manually,” with no time limit or explanation of what is required. This means that a registration with unverifiable e-mail or phone contact information could remain active for weeks or months, until “manual” verification is carried out. Instead, registrars should be required, at a minimum, to suspend the registration until there is verification.

Second, neither this provision nor anything else in the specification clearly sets forth what should be done when contact information cannot be validated, per section 1(a)- (e). The treatment should be the same – at least suspension until validation occurs.

Furthermore, it should be spelled out that nothing in the specification prevents a registrar from cancelling or suspending a registration at any time when it has a reasonable basis to believe that false contact data has been submitted in connection with the registration. For example, when contact information submitted is substantially identical to information that the registrar has previously been unable to validate or verify, the registrar can and should simply reject the registration (or suspend/cancel it if registration has already occurred).

#### 2. Section 2 (page 3)

A number of conforming changes need to be made to this section. As with initial verification and validation, there is no reason why it should take 15 days for registrars to complete this process. The defects noted above concerning unvalidatable information and the results of failure to validate or verify should also be corrected.

#### 3. Section 3 (page 3)

The wording of this provision is ambiguous in some respects. “Possession of facts” and “possession of ... knowledge of circumstances” are somewhat strange locutions. The standard should be whether the registrar has received information suggesting that the contact information, even though previously validated or verified, is no longer accurate or current. (The reference to “valid” at the end of this section could give rise to confusion since only five data elements are required to be “validated,” while two (or one, in the text now proposed) are required to be “verified.” )

One scenario that neither this section nor the following section adequately deals with is when a third party provides evidence indicating that contact information is false or inaccurate, including (but not limited to) through the Whois Data Problem Reporting System. While recognizing that this system could be abused, third party reports could quite commonly be a circumstance in which section 4, and even section 3 (dealing with previously validated/verified information) could be triggered. This should be specified.

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<sup>4</sup> As noted above, account holder information should also be verified.



4. Section 4 (pages 4-5)

Conforming changes will be needed to this section as well, to the extent that IPC's suggested changes to the preceding sections are adopted. In particular, a reference to a third-party complaint must be included here as a source of "information suggesting" incorrect contact information.

There is also a mismatch in this section between the category of incorrect information identified (sections 1(a) through 1(g)) and the type of reverification required (e-mail address only). If the physical address is incorrect then reverifying e-mail will not cure the problem.

5. Section 5 (page 4)

IPC strongly supports the inclusion of this provision, which for the first time specifies when registrars must cancel, suspend or render unresolvable (by placing on Client Hold status) registrations based on false contact data. It should be accompanied by a savings clause spelling out that nothing in the specification prevents a registrar from cancelling, suspending or placing on Client Hold a registration for any other reason consistent with its terms of service or contract with registrants.

6. Section 6 (page 4)

IPC supports the concept of review of the Specification, but this should not be an opaque and bilateral consultation between ICANN staff and the Registrar Stakeholder Group. Other stakeholders that rely on access to accurate Whois data, including but not limited to intellectual property interests, must have an opportunity to be meaningfully involved.

7. Section 7 (page 4)

While the goal of this section is somewhat unclear, IPC agrees that customer account holder information need not be verified if it is not correlated with any active domain name registration.

8. Section 8 (pages 4-5)

IPC supports the ICANN proposed carryover text. Implementation of the new directory service model should not be delayed pending completion of a consensus policy development process (i.e., for 2-3 years on average). However, the wording of this provision needs to be modified to clarify that a new model "emerges from this effort" only upon approval by the ICANN Board after a full opportunity for public comment (including reply comments and a reasoned and comprehensive response by ICANN to comments received). In other words, registrars should not be obligated to "adopt the output of such Expert Working Group," but rather to implement the model approved by the Board at the end of the process.

## **Specification on Privacy and Proxy Registrations**

The IPC supports the addition of the proposed interim specification on privacy/proxy services ("Interim Specification"). The serious problems created by unregulated privacy/proxy services has been the subject of repeated comment from the IPC, which has repeatedly urged ICANN to address these issues in connection with negotiation of the amended RAA.<sup>5</sup> Nor has the IPC been the only organization urging ICANN to pro-actively engage the registrars on the issues arising out of privacy/proxy services during RAA amendments.<sup>6</sup>

In view of proposed and/or pending policy development processes on issues which overlap with those issues addressed in the Interim Specification, the IPC acknowledges that the Interim Specification is not intended to represent a permanent resolution of these issues, but is instead a temporary measure designed to satisfy ICANN's minimum obligations pending completion of those policy development processes.

Notwithstanding this consideration, the IPC notes the following issues which, if not corrected, risk seriously undermining the objectives the Interim Specification seeks to address.

First, the specification could be clearer in insuring that its terms apply to registrars, their affiliates, and to third parties in privity with the registrars (e.g., resellers). In particular there appears to be a disconnect and/or ambiguity as between paragraphs 2 and 3 of the Interim Specification. The IPC believes this should be clarified and/or reconciled in a manner which makes clear that "Registrar" - as that term is used in paragraph 3 - includes "Resellers and Affiliates" - as that term is used in paragraph 2. As currently drafted it may be argued that the obligations applicable to privacy/proxy services do not apply to such third parties in privity with the registrar, thereby seriously limiting (even potentially emasculating) effectiveness of the Interim Specification.

Second, while the specification does impose an obligation to escrow customer information, it does not appear to impose any obligation upon privacy/proxy providers to verify such information. This is a fundamental flaw. A failure to make explicit that privacy/proxy providers are subject to the same data verification protocols as apply to registrars will seriously undermine effectiveness of those obligations during the lifetime of this Interim Specification. The purposes for requiring Whois verification will be largely frustrated if a registrant seeking to avoid providing accurate contact information can simply use a proxy registration for which it provides unverified or unvalidated data.

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<sup>5</sup> See, e.g., "Topics for RAA Amendments, submitted by IPC November 9, 2009 and included as Annex F to Final Report on Proposals for Improvements to the Registrar Accreditation Agreement, <http://gnso.icann.org/issues/raa/raa-improvements-proposal-final-report-18oct10-en.pdf> ; see also IPC comments on Whois Review Team report, at [http://ipconstituency.org/PDFs/IPC%20comments%20Draft%20IPC\\_Comments\\_Whois\\_Review\\_Team\\_Report-3-29-2012.pdf](http://ipconstituency.org/PDFs/IPC%20comments%20Draft%20IPC_Comments_Whois_Review_Team_Report-3-29-2012.pdf) , and on Whois Review Team Discussion Paper, <http://forum.icann.org/lists/whoisrt-discussion-paper/docHWpLd2gnMe.doc> .

<sup>6</sup> See generally Section 5 of Annex E to the "Final Report" of the GNSO-ALAC Drafting Team referenced in the preceding note, reflecting proposals from ICANN staff, law enforcement, and individuals, as well as from IPC, for new provisions regarding proxy and privacy services to be included in the RAA.

Third, while under section 3.1.2 the privacy/proxy provider must specify the circumstances under which its customer's data will be revealed, this provision should also state that if this information proves to be inaccurate or insufficient to enable contact with the customer, this data will be treated as changed Whois data for the registration (and the customer will be treated as a Registered Name Holder) for the purposes of section 3.7.7.2 of the RAA and relevant sections (including Section 5) of the Whois Accuracy Program Specification. In other words, if the customer cannot be contacted using the "revealed" data, the registration will be subject to suspension or cancellation on the same basis as if the data had been submitted to the Registrar as Whois data.

Finally, the IPC believes that there is no justification for a five day window for fulfillment of the relay obligation in paragraph 3.4. The provision already specifies a limitation where legal prohibition prevents relay, but in the context of the harms which may be at issue and the means of communication available, there seems little if any reason for a delay of "up to five days" before relaying notices received by privacy/proxy services.

The IPC believes that, with these improvements<sup>7</sup>, the proposed interim measures can go a long way towards minimizing the issues pending development of a more permanent and comprehensive policy to address privacy/proxy services.

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IPC urges ICANN to give serious consideration to these views. We look forward to reviewing ICANN's analysis of how they will be used to improve the current proposed revised RAA.

Respectfully submitted,

INTELLECTUAL PROPERTY CONSTITUENCY  
by Steven J. Metalitz, Vice President

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<sup>7</sup> Of course, as noted in the introduction to this submission, in light of the insufficient period allotted for review and analysis, IPC reserves the right to supplement or modify the list of changes needed to the Interim Specification in order for it to achieve the goal stated in the text.