

May 28, 2009

## Registrar Constituency Position on Registrar Disqualification Procedure

### BACKGROUND

In May 2009, the Registrar Constituency ("RC") was asked to provide feedback regarding the Proposed Registrar Disqualification Procedure ("DQ Procedure"). This Position Paper captures the overall sentiment expressed by the RC Members who provided feedback about this matter. Due to time constraints, however, no formal vote regarding this Position Paper was taken.

### RC POSITION

The RC agrees that it is appropriate to have mechanisms to protect the domain name system from bad actors; this includes protection from registrars who are not compliant with ICANN's Registrar Accreditation Policy. Accordingly, the RC generally supports the spirit of the proposed DQ Procedure, but the RC wishes to call attention to certain sections of the proposal that deserve further clarification and consideration before a new DQ Procedure is adopted.

#### Section 1: Circumstances That May Trigger The Registrar Disqualification Procedure.

The Triggering Actions defined in sections 1.2 are insufficiently defined, and require additional clarification and definition. For example, consider the following:

1.2.3: "Termination of a registrar's Registry-Registrar Accreditation Agreement ("RRA") with any gTLD registry due to material breach of the RRA."

In the event that the "material breach" is in dispute, this section could be read to give precedence to the registry position in all situations.

Additionally, Section 1.2.5 provides: "Action by a registrar that threatens or compromises the security or stability of the domain name system."

It would seem reasonable that an "action" be defined with a greater standard, such as intentional and/or knowingly. With the present wording it would be possible for an unintentional action to lead to this clause being invoked, which may not be reasonable if a registrar were to accidentally cause a security issue. In the RC's view, a registrar should not be subject to the same level of censure for an accidental act as for an act that is intentionally malicious.

Similarly, there are multiple instances where the phrase "harm to registrants" is mentioned, but is not defined. In the RC's view, this language deserves clarification.

#### Section 2: People and Entities.

The draft procedure provides in relevant part as follows: "...any officer, director, manager, employee (including contractors), or owner (including beneficial owners)..." are subject to possible disqualification in case of a triggering action as outlined in Section 1.

In this section, the RC is concerned that the potential scope of liability is too broad. As this section is currently drafted, the improper actions of one registrar employee or contractor could jeopardize a registrar's accreditation.

In the RC's view, disqualification should only be an available remedy when the bad actor is an individual who meets the disqualification consideration criteria. Accordingly, to be considered for disqualification, an individual must be shown to have:

- (a) knowledge and awareness of the triggering action; and
- (b) the ability to remedy the triggering actions during the prescribed cure period, but failed to do so; and
- (c) derived some personal benefit from the triggering action.

By ensuring that any disqualification procedure is applied only to those individuals who meet all three criteria, ICANN can focus on those truly culpable and who are in a position to benefit. Individuals who are minimally involved in the triggering actions will avoid being considered for disqualification.

### Section 3: Determination of Disqualification.

Section 3.2.3 provides: "In the event a registrar company is disqualified pursuant to this Procedure, and action(s) described in section 3.1 occurred within one year of a prior change in ownership of the registrar, the previous owner of the registrar may also be disqualified under this Procedure."

This section unnecessarily exposes an entity selling a registrar to liability for the succeeding owner's actions. In the RC's view, this clause, as it is currently drafted, has the potential to unfairly penalize a registrar seller who conducted their business ably and in good faith; accordingly that owner should not be subject to penalty for the potential bad actions of a subsequent owner.

The RC suggests that this section be carefully worded to clarify that liability may apply to the first owner only in situations where clear and convincing evidence exists of bad faith actions.

Furthermore, Sections 3 and 4 describe the material facts that ICANN will consider during a disqualification review, and the mitigating circumstances that will determine the duration of the disqualification. Both areas require additional definition to eliminate any unclear language, such as "permanent or irreparable harm to registrants," and "reckless disregard."

Also, it is not clear how each of the circumstances described in section 4.2 will contribute (lengthen or shorten) the duration of the disqualification. This is particularly true with respect to section 4.1, which seems to establish one year as the minimum length of a disqualification period.

#### Section 5: Communication and Review.

Section 5.1 provides: "After determining that an individual or entity will be disqualified under this Procedure, but at least 30 days prior to publication of the disqualification as described in section 5.3, ICANN will notify the individual or entity of the determination and provide instructions for requesting a staff review of the decision."

If an individual or entity makes a request for a staff review of a DQ Process decision, will the disqualification be stayed pending the outcome of the review?

Section 5.3 provides: "A list of all disqualified individuals and entities will be published on ICANN's website, with the date and term of disqualification."

Although the RC agrees that there may be attractive deterrence benefits from this policy, the RC is concerned that ICANN may be unnecessarily impacting professional reputations and consequently the livelihoods of those who work in the domain name community.

Accordingly, the RC strongly suggests that ICANN carefully consider the impact of this proposed policy. There may be a viable alternative which would provide the desired benefits without the negative consequences arising from a "scarlet letter" on an individual's professional reputation.

#### Consideration of RAA Amendments.

The RC believes that the proposed DQ Procedure should be considered in light of the amendments to the RAA which have been adopted by the GNSO council and ICANN Board.

This set of amendments includes many additional registrar compliance options for ICANN, including conditions for terminating accreditation. In light of this, will certain elements of this draft procedure be obsolete?

#### DQ Procedure Decisions and Appeals Process.

The RC desires clarification regarding which staff entities will be involved in DQ decision making. For example, will Registrar Liaison, Compliance, and/or Legal staff be charged with making DQ Procedure related decisions? On a related note, if a DQ decision is appealed, will a different set of reviewers be involved, similar to the federal court appellate process in the United States?

In general, RC Members believe the proposed DQ procedure needs to provide more detail

regarding the processes involved in decision making and/or appeals.

### When Can DQ Procedure Be Applied?

Some RC Members have expressed a lack of clarity regarding when, precisely, the DQ Procedure can be applied. For example, it is not clear whether the DQ Procedure could be applied at RAA renewal time as well as when a registrar applicant applies for a new or additional accreditation.

In the RC's view, these questions should be considered and answered before moving ahead with adoption of a DQ Procedure.

### **CONCLUSION**

The RC eagerly anticipates additional opportunities to more fully review and consider subsequent versions of the proposed DQ Procedure in the near future. The opinions expressed by the RC in this Position Paper should not be interpreted to reflect the individual opinion of any particular RC member.