

21 June 2018

Members of the Board of Directors
Goran Marby, President and CEO
John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers

Dear Members of the Board of Directors:

While the Business Constituency (BC) is well advised of the temporary specification (Temp Spec) to the Registrar Accreditation Agreement (RAA) and Registry Agreement (RA) that represents an interim model for compliance with the European Union's General Data Protection Regulation (GDPR), we grow more concerned by the day with the disruption and fragmentation it has caused in the domain name system and with operations that rely on WHOIS, and the resulting difficulties that our members are experiencing in fighting against a myriad of online harm to consumers and businesses. Much of this difficulty arises from the uncertainty created by the Temp Spec.

As such, this letter sets forth initial questions that are meant to help clarify some of those uncertainties. These clarifications hopefully will help businesses and consumers in their efforts to mitigate harms and help the BC in its collaboration with the community as we urgently work toward the immediate adoption of a credentialing and access model (such as the AAA Model developed by a cross-section of the ICANN community), and the eventual permanent compliance model.

Our questions:

1. How is "reasonable access" defined, as noted in Appendix A, Sections 4.1 and 4.2? How will such reasonable access be provided, and what are contracted parties' response obligations (e.g., timeframe, content, etc.)? Is ICANN planning to provide guidance to contracted parties on how to provide "reasonable access"?
2. At Section 5.7, the Temp Spec dictates that contracted parties "MUST provide reasonable access to Registration Data to ICANN...for the purpose of investigating compliance-related inquiries and enforcement of the Registry Agreement, Registrar Accreditation Agreement, and ICANN Consensus Policies." Again, how is "reasonable access" for ICANN defined, and how will such access be provided? What are contracted parties' obligations to reply with regard to timing, content, etc.? And how will ICANN enforce if such access is not duly provided?
3. Given the amount of good faith effort the BC, IPC and others put into their proposed accreditation and access model, will ICANN Org provide substantive input about or engage with the community on this important issue? Will the org look to integrate the workable parts of both proposals?
4. Data inaccuracy is a known problem within WHOIS. Given determining accuracy will be more difficult for data that is not available for review, what requirements will ICANN put into place to ensure accurate data, and how have ICANN's WHOIS inaccuracy report procedures changed in light of the Temp Spec?
5. The temporary specification supports the continued ability to contact the Registrant or Administrative and Technical contact through an anonymized email or web form and obligates registrars to do so in Section 2.5.1. How will ICANN compliance enforce this obligation if an anonymized email or web form is not published?
6. With regard to Section 4.4.7 of the Temp Spec (Enabling the publication of technical and administrative points of contact administering the domain names at the request of the Registered Name Holder), how will ICANN Compliance enforce in instances when a registrant requests publication, but the request is denied or not acted upon?

7. Has provisioning of zone files been impacted by the Temp Spec? If so, how?
8. Considering that this Temp Spec is not a consensus policy developed by the community, but has significant impact on the community, how will the community be represented in negotiations regarding service level agreements (SLAs)?
9. For the purpose of conducting audits, does ICANN Compliance have access to accurate, reliable and uniform registration data?
10. For the purpose of carrying out ICANN's security, stability and resiliency commitments, does ICANN's relevant staff have access to accurate, reliable and uniform registration data?
11. Concerning Section 8.2 (Modifications to Temporary Specification), should the community anticipate amendments to the Temp Spec by the Board? If so, how would such modifications impact community work through the expedited PDP?
12. With regard to Appendix A, Section 1.1 (Registrar and Registry Operator MUST operate an RDAP service, with appropriate profiles to be developed by 31 July 2018), specifically how will ICANN org involve the community in definition of appropriate profiles, given the short time frame involved? The BC is concerned that this profile will be developed without input from those who will need to access the profile.
13. Section 4.5.5 (requirements to ensure appropriate records of Processing activities will be maintained to meet GDPR's accountability obligations), who will review and audit Processing, and how will this be carried out, to ensure the meeting of accountability obligations?
14. Will contact details of a Registrar's data protection officer (where applicable) be provided in published registration data? If not, will ICANN be making this information publicly available?
15. How is "commercially reasonable" defined as stated in Section 7.2.1 (as soon as commercially reasonable, Registrar must provide the opportunity for the Registered Name Holder to provide its consent)? The BC believes a deadline is more appropriate, with requirements to adhere to such a deadline. The BC requests that ICANN issue an advisory that provides a timeline for satisfying this request.
16. In Section 6.1, could ICANN provide a more precise definition of "periodic access" to bulk registration data from Registry Operators?
17. In Section 4.1 of Appendix A, who decides "except where such interests are overridden by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject", and how is that specifically decided? (The same question applies to Section 2 of Appendix C.)
18. Acknowledging that ICANN Org has published a proposed "Framework Elements for Unified Access Model for Continued Access to Full WHOIS Data," what, specifically, are ICANN's plans for substantive support for the remainder of the important items listed in "Annex: Important Issues for Further Community Action"? Each of those is a critical task and should not be unduly delayed.
19. With regard to the following language in Section 4.2 of Appendix A, does it imply that, for example, if the United States passes a competing law, registrars are forced to comply? "Notwithstanding Section 4.1 of this Appendix, Registrar and Registry Operator MUST provide reasonable access to Personal Data in Registration Data to a third party where...applicable legislation or regulation has provided guidance that the provision of specified non-public elements of Registration Data to a specified class of third party for a specified purpose is lawful."

20. In Section 7, does this language apply just to the Whois data collected by Registrars? More specifically, would clause 7.1.15, for example, apply to an account holder (customer) at a Registrar regardless of Whois?
21. When should the community anticipate availability of RDDS search capability, as referenced in Appendix A, Section 1.2.1?
22. With regard to transfers, we're concerned about potential opportunity for social engineering and domain name hijacking due to lack of availability of registration data for validation of transfer request credibility. As revised, the new transfer procedures enable anyone to request transfer of a domain name, but the "actual" registrant is to receive notice of that request. How will that party be notified of the transfer request?

Thank you for your attention to these important questions. Please be aware that previous comments the BC sent to the Board and staff about the application of GDPR to WHOIS and the Temp Spec have gone unanswered. This is of grave concern to the BC, and we renew our request that the Board and staff that the BC's submissions be carefully considered and fully addressed. We look forward to your timely replies.

Sincerely,

ICANN Business Constituency