

**From:** Garth Bruen

**To:** The At-Large Advisory Committee (ALAC), At-Large Regional Leadership, and the greater Internet community

**Date:** January 12, 2015

**Subject:** ICANN's relationship with the community in terms of its Compliance function

Dear Colleagues,

This memo was prompted by concern over ICANN Compliance handling of complaints from within the At-Large community. Many of the problems listed here have been known for some time within At-Large, but additional details came to light through an article published in the *Wall Street Journal* ("Icann, Regulators Clash Over Illegal Online Drug Sales<sup>1</sup>"). The issues revealed in the article, and this memo, relate directly to accountability and transparency within the current ICANN structure. This is gaining significant importance as the IANA stewardship transition moves forward. While often dismissed as "old" issues by ICANN staff, they remain unresolved, unanswered and unaddressed. There are two overarching issues described here: 1) Questions about ICANN leadership as they relate to compliance, and 2) Technical concerns within the Compliance department. To be specific, the organizational structure of ICANN may not be as presented to the public, and Compliance process failures may be much worse than previously disclosed. This memo closes with critical policy recommendations which could make a number of the concerns moot.

The core case guiding this analysis concerns the domain APPROVEDONLINEPHARMACY[DOT]NET, an illegal web ("rogue") pharmacy that sold controlled substances without a prescription. The drugs were suspected to be counterfeit or diverted. The domain had known false registration information for years. Complaints to ICANN about this domain were ignored, dismissed and denied until public persistence prevailed. Also related to the case was the domain RAPETUBE[DOT]ORG which purported to sell real sexual assault media. The RAPETUBE, and hundreds of other illicit sites, used the same false registration as APPROVEDONLINEPHARMACY. All of the domains were registered through ICANN's contracted party, BizCn, which appeared to tacitly tolerate the abuse. The domain abuse and repeated valid complaints were dismissed by ICANN without explanation. The closure and rejection of these complaints coincided with apparent technical and staff failures within ICANN. Attempts by At-Large to discover the details have been met with long delays, conflicting statements and apparent obfuscation of the most trivial process details. These cases are significant because top ICANN officers Fadi Chehade, Akram Atallah, and Maguy Serad all had full knowledge of and direct involvement in the APPROVEDONLINEPHARMACY and RAPETUBE cases. The events mostly occurred from 2011 to 2014.

The general debate around ICANN's non-enforcement has frequently been improperly framed as one which pits government (particularly the U.S. government) against ICANN. It is also cast as a battle between big brands (here, pharmaceutical companies) against ICANN. In either case, ICANN is often portrayed as a victim attempting to resist external control over Internet management. This is a completely fallacious representation. The issues presented in this memo,

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<sup>1</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

and reflected in the *Journal* article, emerged from with the community<sup>2</sup>, specifically from consumers and Internet users. At-Large has taken a keen interest in these cases and been the chief champion of true accountability. Government and law enforcement took interest in the situation after community efforts failed to produce reasonable results or explanation. Let us be clear, this is not about “policing Internet content.” It is about contractual obligations, multi-stakeholder participation, observing the Affirmation of Commitments, transparency, accountability, and the technical efficiency of ICANN. The fundamental issues contained in this memo all fall within the ICANN mandate.

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<sup>2</sup> <https://community.icann.org/display/atlarge/At-Large+Compliance+Questions+for+Prague+Workspace>

## 1. ICANN Leadership Issues as they relate to Compliance

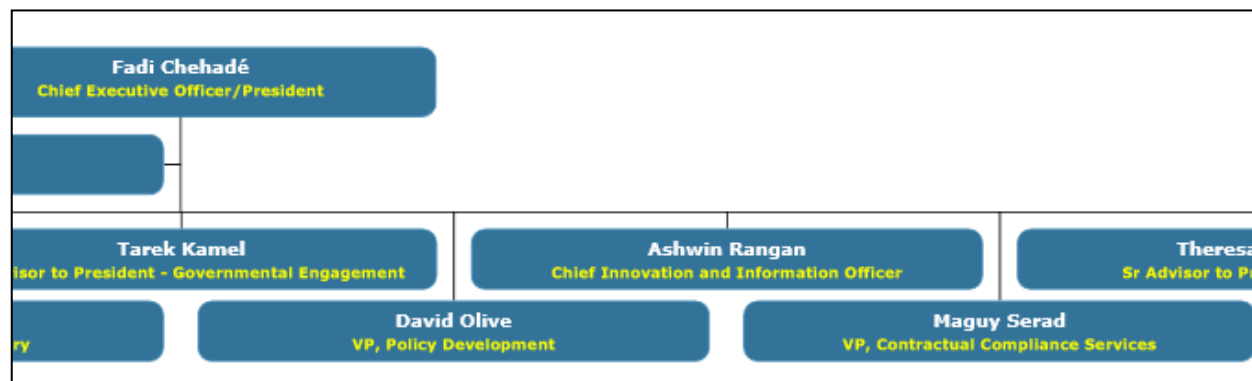
As we are all aware, in September 2012 following a number concerns raised by the community, ICANN Compliance was moved from under the supervision of the Legal department making it a direct report to the ICANN CEO. Quoting the incoming CEO Fadi Chehade in 2012:

*“I will be frankly bringing a lot more weight and a lot more independent management from my office to the compliance function... This is important both in substance and as well as in sending a clear message of the importance of this area to the community.”<sup>3</sup>*

Raising the profile and accountability of the department, as well as becoming personally involved, seemed the right choice. This was followed, in 2013, by the creation of a new Generic Domains Division which would be focused on the business of ICANN, presumably separating that from the policy portions of ICANN. According to Chehade in the related press release:

*“[The] creation of the new division is necessary because ICANN’s new gTLD Program ... will see a tremendous increase in scale and responsibility to ensure that ICANN continues to deliver operational excellence<sup>4</sup>.”*

The community has always been concerned with the closeness between ICANN and the commercial contracted parties (e.g. registrars and registries), placing a firewall between business and compliance appeared important for gaining public trust. The ICANN organizational chart showed this change with Compliance Vice President Maguy Serad reporting directly to the CEO<sup>5</sup>, placing her on equal footing with Generic Domains Division President Akram Atallah:



However, additional documents discussed below show a different organizational structure from the one presented to the public.

<sup>3</sup> <http://domainincite.com/10458-fadi-chehade-starts-at-icann-today-immediately-shakes-up-senior-management>

<sup>4</sup> <https://www.icann.org/en/system/files/press-materials/release-06jun13-en.pdf>

<sup>5</sup> <https://www.icann.org/en/system/files/files/management-org-19nov13-en.pdf>

## 1.1. Budget documents show ICANN Business controls Compliance funds

According to the ICANN FY14 Draft Budget Proposal<sup>6</sup>, the entire Compliance budget is under the direction of Akram Atallah.

Deliver Core Internet Functions - Akram Atallah	\$10,976,094
Contractual Compliance Functions - Maguy Serad	\$2,044,499
Contractual Compliance Complaint Processing and Monitoring Activities	\$1,473,201
Other Programs for Contractual Compliance Functions	\$571,298
Contractual Compliance Initiatives - Maguy Serad	\$1,381,202
Contractual Compliance Audit Program	\$1,115,853
Contractual Compliance Contract & Policy-driven Initiatives	\$103,286
Contractual Compliance New gTLD Program Readiness	\$162,063

Additionally, a budget line item for “Contractual Compliance Reports to Community” is under the direction of John Jeffrey, ICANN Legal Counsel.

Ethics and Transparency - John Jeffrey	\$640,484
☐ Conflicts of Interest Management - John Jeffrey	\$48,771
Annual Conflicts of Interest Reporting	\$5,245
Board Conflicts of Interest Policies and Processes	\$11,377
Contractor Conflicts of Interest Policies and Processes	\$22,545
Other Programs for Conflicts of Interest Management	\$9,605
☐ Contractual Compliance Reports to Community - Maguy Serad	\$157,698
Contractual Compliance Annual Report	\$0
Contractual Compliance ICANN Meeting Updates	\$157,698

The document shows Compliance as a Portfolio “Goal” for Akram Atallah. Atallah is primarily responsible for “Registrar Engagement & Relationship Management” and “Registrar Contract Management.” There is nothing in the documents which show Serad controlling the Compliance budget in the way that other ICANN Vice Presidents control their departmental budgets (e.g. Costerton, Kamel, etc.). It is difficult to believe that there is a separation between business and compliance within ICANN as claimed. This appears to be a rather concerning conflict of interest coupled with a misrepresentation of ICANN’s structure to the public. While the operational Compliance budget is filtered through ICANN’s business division, financing for community reports is filtered through the legal department. Business directors are typically motivated by profits and legal counsel works to protect an entity from lawsuits. If a compliance department takes direction from business and legal, there is little incentive to enforce rules in an independent or transparent way. There is no organizational motivation for effective compliance in this scenario.

<sup>6</sup> <https://www.icann.org/en/system/files/files/proposed-opplan-budget-projects-fy14-16may13-en.pdf>

## 1.2. Prior Connections between ICANN’s Leaders as they relate to Compliance

It has been known for some time that ICANN CEO Fadi Chehade and former COO Akram Atallah are childhood friends and long-time associates. What is not widely known is that Compliance director Maguy Serad’s husband, Roger Serad<sup>7</sup>, was a corporate officer at CoreObjects Software along with Atallah and Chehade (*composite image from venturedeal.com*):

<b>Company Name</b>	CoreObjects Software										
<b>Compar</b>	<b>COMPANY MANAGEMENT</b>										
<b>Mailing</b>	<table border="1"><thead><tr><th>Title</th><th>Name</th></tr></thead><tbody><tr><td>Chief Operating Officer</td><td>Akram Atallah</td></tr><tr><td>Chief Technical Officer</td><td>Fadi Chehade</td></tr><tr><td>Founder</td><td>Girish Venkat</td></tr><tr><td>Vice President</td><td>Roger Serad</td></tr></tbody></table>	Title	Name	Chief Operating Officer	Akram Atallah	Chief Technical Officer	Fadi Chehade	Founder	Girish Venkat	Vice President	Roger Serad
Title	Name										
Chief Operating Officer	Akram Atallah										
Chief Technical Officer	Fadi Chehade										
Founder	Girish Venkat										
Vice President	Roger Serad										
<b>Company Description</b>	CoreObjects brings strategic value to the process of software development and is considered an infrastructure provider in the world of product development.										

Various complaints, public and anonymous, have been lodged about ICANN’s “culture of cronyism<sup>8</sup>”. The particular relationship between Serad, Atallah and Chehade has specific implications for the issues described in this memo. It is commonly known that Atallah brought Chehade to ICANN, but it now appears Serad was also brought into the organization by Atallah. The prior Compliance director was quietly removed, for undisclosed reasons, which left many At-Large collaborative projects incomplete<sup>9</sup>. The Compliance director position had had been vacant for an extended period, but was suddenly filled by Serad who rapidly moved through the organization and benefited from restructuring by Chehade.

<sup>7</sup> <http://www.venturedeal.com/CompanyProfiles/CoreObjects%20Software.aspx>

<sup>8</sup> <http://domainincite.com/13058-whistleblower-claims-cronyism-and-fear-at-icann>

<sup>9</sup> <http://forum.icann.org/lists/bc-gnso/msg01875.html>

### 1.3. Obfuscation of staffing levels

One of the stranger controversies within ICANN concerns the lack of disclosure of Compliance staff counts<sup>10</sup>. While this is of general concern, it had specific bearing on the case of APPROVEDONLINEPHARMACY. In summary, broad assertions that Compliance staff had “doubled” are not supported by available fact. When specific numbers were provided by staff they were difficult or impossible to verify (for example: 20 claimed employees turned out to be 14<sup>11</sup>).

Compliance staff actually shrank in recent years. In December 2012 ICANN suddenly and quietly closed the Sydney office, firing all employees at that location<sup>12</sup>. Compliance staff from the Sydney office was working on crucial issues with the At-Large community; the firings effectively ended this collaborative work. ICANN claimed the office closure was part of a planned move to Singapore. However, June 2012 budget documents make no mention of this change and in fact state the desire to “*expand ICANN’s operations in Sydney to support the Asian regions*”<sup>13</sup>. The ongoing budget for Sydney was approved at that time. One of the fired Sydney personnel was Pam Little, a seasoned and effective senior Compliance staffer. During a previous ICANN meeting members of the community specifically requested that “*Pam get on an plane*”<sup>14</sup> to resolve issues at registrars like BizCn, but instead Little was actually removed from her post. The community relationship with Compliance became strained after losing Little.

More specifically, the case of APPROVEDONLINEPHARMACY was being investigated by Los Angeles-based Compliance staff-member Khalil Rasheed. Rasheed was directly collaborating with At-Large in this matter. Rasheed indicated there was a problem with the registrar of APPROVEDONLINEPHARMACY, BizCn, in late 2011. Rasheed assured the community of follow-up after giving BizCn a deadline for response. However, Rasheed effectively disappeared in 2012 and Serad took over all communication. While Rasheed was still listed publicly as an ICANN employee he did not respond to emails or phone calls and no longer attended ICANN meetings. Hope of resolving the APPROVEDONLINEPHARMACY case seemed to disintegrate without Rasheed’s involvement. Not only did ICANN seem to lose Compliance staff in 2012, but the particular personnel were in fact crucial to the operation as well as communication with the community.

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<sup>10</sup> <http://blogs.wsj.com/digits/2014/10/28/icanns-contradictory-answers-to-a-simple-but-important-question/>

<sup>11</sup> <http://mm.icann.org/pipermail/atrt2/2013/001030.html>

<sup>12</sup> <http://domainincite.com/11490-three-icann-staffers-laid-off-in-aussie-closure-other-offices-safe>

<sup>13</sup> <https://www.icann.org/en/system/files/files/adopted-opplan-budget-fy13-24jun12-en.pdf>

<sup>14</sup> <http://audio.icann.org/meetings/prague2012/compliance-registrar-27jun12-en.mp3>

## 2. Compliance Failures in the case of APPROVEDONLINEPHARMACY

Advertised with unsolicited email in 2011, APPROVEDONLINEPHARMACY was discovered to have false registration records and was reported to ICANN through its ticket system in June 2011<sup>15</sup>. The site remained operational, selling drugs, with the false record past the 45 day ICANN complaint cycle. Additional complaints meet with the same results. The issue was brought directly to ICANN Compliance. The details and timeline of the APPROVEDONLINEPHARMACY case are extensive and only briefed here; a full reference is provided at: [knujon.com/icann/APPROVEDONLINEPHARMACY\\_public.pdf](http://knujon.com/icann/APPROVEDONLINEPHARMACY_public.pdf).

Compliance staffer Khalil Rasheed was put in charge of the investigation and coordinated directly with the community<sup>16</sup>. Rasheed indicated there was a problem with the registrar and promised action. In early 2012, without explanation, Rasheed ceases communicating about the APPROVEDONLINEPHARMACY case. Compliance director Maguy Serad asserted the case was “closed” and BizCn was in compliance. APPROVEDONLINEPHARMACY remained active with the same false registration information, selling drugs. Serad refused to discuss the issue further.

In September 2012, ALAC Chair Olivier Crepin-Leblond and North American At-Large Chair Garth Bruen held a conference call with ICANN COO Akram Atallah and incoming ICANN CEO Fadi Chehade to discuss the issue. During the call Chehade requested Bruen provide the details of the APPROVEDONLINEPHARMACY case and related issues. Chehade promises a full and public investigation. Bruen issues the report, but ICANN does not investigate or provide a public response as promised<sup>17</sup>. APPROVEDONLINEPHARMACY remained active, selling drugs, with the same false information. During this period a second site, the “RAPETUBE”, was discovered with the same false registration information.

In February 2013 ICANN a Documentary Information Disclosure Policy (DIDP) request was filed to obtain the details of APPROVEDONLINEPHARMACY<sup>18</sup>. The DIDP request was rejected by ICANN legal because of confidentiality issues<sup>19</sup>. In 2013, a complaint was filed with ICANN’s Ombudsman about the handling of APPROVEDONLINEPHARMACY by Compliance staff, but this complaint is rejected without an actual fact investigation by the Ombudsman<sup>20</sup>. APPROVEDONLINEPHARMACY remained online, selling drugs, with the same false information during this period.

Subsequent investigations by the *Washington Post*<sup>21</sup> and the At-Large Advisory Committee<sup>22</sup> found the records for APPROVEDONLINEPHARMACY and RAPETUBE to be invalid.

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<sup>15</sup> [http://knujon.com/PRAGUE\\_icann\\_378\\_fail\\_BIZCN\\_061612.pdf](http://knujon.com/PRAGUE_icann_378_fail_BIZCN_061612.pdf)

<sup>16</sup> <https://www.icann.org/en/system/files/bm/briefing-materials-3-24jun11-en.pdf>

<sup>17</sup> <https://www.icann.org/en/system/files/correspondence/bruen-to-chehade-22apr13-en.pdf>

<sup>18</sup> <https://www.icann.org/en/system/files/files/bruen-request-05feb13-en.pdf>

<sup>19</sup> <https://www.icann.org/en/system/files/files/bruen-response-07mar13-en.pdf>

<sup>20</sup> <https://forum.icann.org/lists/comments-atrt2-recommendations-09jan14/msg00000.html>

<sup>21</sup> [http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea\\_story\\_4.html](http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea_story_4.html)

<sup>22</sup> <http://atlarge-lists.icann.org/pipermail/alac/2014/007710.html>

APPROVEDONLINEPHARMACY was only finally suspended when BizCn was contacted by the *Wall Street Journal*<sup>23</sup>. ICANN Compliance has since made a number of claims about the APPROVEDONLINEPHARMACY case in the *Journal* which need to be addressed. The two key claims concern core contractual obligations of BizCn to ICANN: 1) record verification and 2) domain suspension. These two requirements are critical to ICANN's Compliance oversight. Beyond these obligations there are also concerns over: lost tickets, process dysfunction, rejection of complaints, and the failure of ICANN's internal accountability procedures.

## 2.1. Fact-Check of Compliance Statement #1 (The Suspension)

Multiple complaints were logged with ICANN over APPROVEDONLINEPHARMACY starting in June 2011 through July 2014. In the *Journal* article it is stated:

*"Icann vice president of compliance, Maguy Serad, says approvedonlinepharmacy was offline or suspended each time there was a pending complaint about the drug seller since 2011<sup>24</sup>."*

Extensive research has shown this statement to be untrue. A suspension of the domain from ICANN's perspective would be indicated by BizCn placing a "**clientHOLD**" status on the record of the domain, which removes it from the Internet. According to collected hosting, DNS, and WHOIS records the only time in this chronology when a "clientHOLD" was placed on the domain was after a reporter from the *Wall Street Journal* contacted BizCn to inquire about the APPROVEDONLINEPHARMACY in 2014. The hosting for the site was also disabled for three days in January 2012 but quickly restored; this did not appear to be a registrar-based suspension. To date, ICANN Compliance has not produced any evidence that the site was suspended as stated.

## 2.2. Fact-Check of Compliance Statement #2 (Validation)

At-Large has been told on several occasions that contractual enforcement was not initiated against BizCn because BizCn, or ICANN, stated that reported invalid registration data had been verified or corrected. In reference to BizCN, APPROVEDONLINEPHARMACY, and RAPETUBE we see the same statement from Compliance in the *Journal* article:

*"May 2012, Icann compliance chief, Ms. Serad, responded that the complaint had been closed because BizCN verified the registration information<sup>25</sup>."*

It was documented again in May 2012 that the registration information for APPROVEDONLINEPHARMACY was invalid<sup>26</sup>. This was demonstrated to ICANN Compliance but they did not respond. This invalid information was then independently examined

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<sup>23</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>24</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>25</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>26</sup> [http://knujon.com/PRAGUE\\_icann\\_378\\_fail\\_BIZCN\\_061612.pdf](http://knujon.com/PRAGUE_icann_378_fail_BIZCN_061612.pdf)



by the *Washington Post*<sup>27</sup>, the At-Large Advisory Council<sup>28</sup>, and finally the *Wall Street Journal*. The fact that ICANN Compliance has maintained its unsupportable claim for three years calls their judgment into question. This is made even more confusing by the Compliance breach notice signed by Serad which states:

*“The email address used by the registrant does not appear to be a valid functioning email address based upon information available to ICANN<sup>29</sup>.”*

In the document, ICANN Compliance finds in its own investigation that the registration information for RAPETUBE and APPROVEDONLINEPHARMACY is invalid, while Serad maintained for several years it was verified.

### 2.3. Lost or Unaddressed Compliance complaints which remain unaccounted for

Questions about missing tickets have been raised repeatedly since 2011 but Compliance staff has declined to comment on them<sup>30</sup>. The Journal article states:

*“One member of an independent review team said the problem meant that complaints about illegally registered websites were disappearing into a black hole of death<sup>31</sup>”*

Published reports show as many as seven thousand complaints with no follow-up from ICANN during the same period<sup>32</sup>. Compliance has refused to answer questions about those tickets and the ICANN Ombudsman declined to investigate the issue.

### 2.4. Technical collapse of Compliance system was not transparent

In July 2012, the Compliance director arbitrarily shut off the ICANN Bulk Complaint system for unspecified maintenance. During this time period, the ability of ICANN to respond to complaints appears to decline<sup>33</sup>. While these problems were observable from outside ICANN and questions were raised, Compliance would not discuss the process. At the same time U.S. Commerce Assistant Secretary Lawrence Strickling made special note of the needs for transparency and automation:

*“ICANN needs to take steps to centralize and automate the complaint process as well as make it more transparent by the end of the third quarter 2012.<sup>34</sup>”*

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<sup>27</sup> [http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea\\_story\\_4.html](http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea_story_4.html)

<sup>28</sup> [singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf](https://www.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf)

<sup>29</sup> <https://www.icann.org/en/system/files/correspondence/serad-to-guanghui-08may14-en.pdf>

<sup>30</sup> [http://knujon.com/icann\\_compliance\\_2012.pdf](http://knujon.com/icann_compliance_2012.pdf)

<sup>31</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>32</sup> [http://knujon.com/icann\\_compliance\\_2012.pdf](http://knujon.com/icann_compliance_2012.pdf)

<sup>33</sup> [http://knujon.com/icann\\_compliance\\_2012.pdf](http://knujon.com/icann_compliance_2012.pdf)

<sup>34</sup> <http://www.ntia.doc.gov/speechtestimony/2012/keynote-speech-lawrence-e-strickling-assistant-secretary-commerce-communication>

What is now known is that the Compliance system did fail in 2012. According to the Journal article:

*“Internal documents reviewed by The Wall Street Journal show that thousands of complaints about suspicious online pharmacies and other websites in 2012 weren't reviewed for months because **ICANN stopped maintaining one of its computer systems after an information-technology employee left**<sup>35</sup>.”*

This is the first time the community is learning of this incident. The quote speaks for itself, when an employee left a process went unattended and complaints were not processed. The 2012 ICANN Annual Compliance report does not mention any of the technical or staffing problems that occurred in 2012<sup>36</sup>.

## 2.5. Rejection of complaints by Compliance

Since its inception, ICANN Compliance has been severely limited by its tools. One limiting factor is its ability to only accept complaints one-at-a-time. At-Large has been trying to impress upon ICANN the importance of accepting patterns of abuse which can be attributed to a single party. In addition to the RAPETUBE and APPROVEDONLINEPHARMACY, there were over five thousand domains, all of an illicit nature, using the same false registration data from 2011 - 2014. During a March 2014 meeting with Compliance, the ALAC showed Serad how the RAPETUBE managed to evade ICANN enforcement long after ICANN considered the case closed<sup>37</sup>. In essence, the site was briefly removed from the Internet to satisfy ICANN and then quickly placed back in the Domain Name System after ICANN closed the case. The public demonstration of the failure of ICANN's Compliance process seemed to finally convince staff of the problem and spur them into action. In response, Compliance director Maguy Serad stated in the meeting:

*“if we can have access to that presentation, that would be helpful<sup>38</sup>”*

Later, Serad confirms the request for patterns of abuse:

*“But if have certain examples in existence today, that will be helpful. Send us an e-mail at [compliance@ICANN.org](mailto:compliance@ICANN.org) to kind of just put some framework on it, and we can work with the community and with yourselves on addressing those issues<sup>39</sup>.”*

For a third time in the same meeting, Serad confirms:

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<sup>35</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>36</sup> <https://www.icann.org/en/system/files/files/annual-2012-06feb13-en.pdf>

<sup>37</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

<sup>38</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

<sup>39</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

*“Please send us [whoever] has knowledge as a pattern of the issues, because it’s going to be of a different nature. It depends where it’s coming from. If you would send it to [compliance@ICANN.org](mailto:compliance@ICANN.org), **you have our commitment of the review, follow-up and follow-through**. Follow up and follow-through may require clarification from the submitter so that we know we’re looking at it from the right perspective, and then we will commit to following up, following through and responding to it.”<sup>40</sup>*

In the same meeting, Compliance specifically requests the list of domains:

*“e-mail [compliance@ICANN.org](mailto:compliance@ICANN.org) and provide details and facts about those”<sup>41</sup>.*

Per Serad’s request, At-Large forwarded a list of BizCn domains in violation to ICANN staff. However, Compliance immediately rejected the complaints via email:

*“Regarding the additional 709 complaints, ICANN cannot accept those submissions”<sup>42</sup>.*

This blatant denial of collaboration with the community underscores a common practice of promising one thing on transcript and then contradicting it in private. Regardless of the rejection and contradiction, ICANN leadership claimed in the *Journal* article:

*“Atallah says employees are doing a very good job”<sup>43</sup>.*

The inability of ICANN to recognize patterns of domain abuse is ongoing. As of this writing, rogue pharmacy domains like `PILLSONLINENOPRESCRIPTION[DOT]COM`, `VIAGRAWITHOUTPRESCRIPTIONNOW[DOT]ORG`, and others are still using the identical false registration information used by the `RAPETUBE` and `APPROVEDONLINEPHARMACY`. ICANN eventually breached BizCn over these false records, but more illicit domains continue to exist with the same data. How ICANN could reject a list of these domains from the community, especially after a specific request, is beyond explanation.

## 2.6. The WHOIS Accuracy Program Specification failed

Due to the unenforceability of ICANN’s previous registrar contract (“WHOIS Review Team Report”, p79<sup>44</sup>), intense negotiations followed which produced a new version in 2013 that was supposed to give additional enforcement powers to ICANN Compliance<sup>45</sup>. One of the key improvements is called the WHOIS ACCURACY PROGRAM SPECIFICATION which, in part, requires the registrar to prevent transfers of domains registered with *willfully* inaccurate data (i.e. fraud). Specifically, the **Status** field of the domain record must be set to “**clientHold** and

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<sup>40</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

<sup>41</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

<sup>42</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

<sup>43</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>44</sup> <https://www.icann.org/en/system/files/files/final-report-11may12-en.pdf>

<sup>45</sup> <http://www.techrepublic.com/article/icann-sends-registrars-and-domain-owners-into-panic-with-2013-raa/>

**clientTransferProhibited**<sup>46</sup> (clientHold removes it from the Internet; clientTransferProhibited prevents the domain from being moved to a new registrar).

Following three years of complaints and a breach notice, BizCn finally changed the status of APPROVEDONLINEPHARMACY to **clientHold** but failed to set the transfer block (“clientTransferProhibited”). As a result, APPROVEDONLINEPHARMACY was allowed to be transferred to a new registrar. Technically, this is a violation of the contract by BizCn but for one problem: ICANN chooses who to enforce the contract against. While the policy was fixed, it bears no value in non-enforcement.

## 2.7. The ICANN Documentary Information Disclosure Policy (DIDP) failed

Because ICANN ceased answering questions about the APPROVEDONLINEPHARMACY case a Document Information Disclosure Policy (DIDP) request was filed with ICANN in 2013 to obtain the critical details about the case. The purpose of the DIDP is:

*“intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality”<sup>47</sup>.*”

ICANN rejected this request because their relationship with the registrar could be compromised, and this concern outweighs the public’s need for transparency:

*“ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN’s internal Contractual Compliance processes by the requested disclosure”<sup>48</sup>.*”

This could not make the problem clearer: ICANN’s relationship with BizCn is more important than their relationship with the global Internet user. The secret compliance process is not subject to transparency because transparency threatens ICANN’s income. No actual harm has ever been shown, only the implied possible harm for which ICANN provides no factual basis.

These disclosure requests are necessary, not only to determine the specifics of ICANN’s process, but also to ensure there in fact was a process. It is still an open question considering BizCn claimed to have not been contacted about the particular cases. In response to questions about APPROVEDONLINEPHARMACY and RAPETUBE, the registrar BizCn claims it “*was not aware of having been contacted by ICANN about problems*”<sup>49</sup>. In another case highlighted in the *Journal* article, the registrar EasyDNS stated “*ICANN never contacted*”<sup>50</sup> them about a site

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<sup>46</sup> <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy>

<sup>47</sup> <https://www.icann.org/resources/pages/didp-2012-02-25-en>

<sup>48</sup> <https://www.icann.org/en/system/files/files/bruen-response-07mar13-en.pdf>

<sup>49</sup> [http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea\\_story\\_4.html](http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea_story_4.html)

<sup>50</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

which sold a fatal dosage of codeine phosphate. This appears to be in contradiction to a statement made by Serad that compliance had launched an investigation<sup>51</sup>.

## 2.8. The Ombudsman Office failed in its function

Complaints about the handling of APPROVEDONLINEPHARMACY and RAPETUBE were filed with ICANN's Ombudsman in 2013<sup>52</sup>. The function of ICANN's Ombudsman is described as an "*independent, impartial, and neutral...reviewer of facts; An investigator of complaints about unfairness*" concerning "*Things done (or not done) by one or more members of ICANN staff*"<sup>53</sup>. Despite the overwhelming facts, the Ombudsman declared there was no substance to the complaint, citing that:

*"Compliance informed me that Bizcn.com is a registrar that is prompt & cooperative with Compliance inquiries, including Whois inaccuracy complaints"*<sup>54</sup>

There are multiple problems with the Ombudsman response, but mainly the office failed to conduct an actual investigation of facts. Its response is entirely based on what the Compliance department says about BizCn. Compliance would later contradict its own statements on BizCn by issuing a breach notice to BizCn for not cooperating with Compliance inquiries in WHOIS inaccuracy complaints, specifically in the case of the RAPETUBE and rogue pharmacies related to APPROVEDONLINEPHARMACY<sup>55</sup>. The language, signed by Serad, in the breach directly contradicts the Ombudsman statement above:

*"Since January 2014, the monthly Whois inaccuracy complaints based on domain registration for Bizcn has rapidly increased. Furthermore, in March 2014, Whois inaccuracy complaints for Bizcn were 18% of the total Whois inaccuracy complaints received by ICANN."*

ICANN cited eight violations in the breach, four of which had nothing to do with RAPETUBE or APPROVEDONLINEPHARMACY, demonstrating that BizCn was not the compliant registrar as described by the Ombudsman in his decision. The lack of a fact investigation by the Ombudsman is left even more confusing by data presented within ICANN's own security team discussions concerning BizCn's relationship to "Fast Fluxing" abuse (a technique for masking the origin of malware and phishing)

*"Most of the .CN domains we see registered and fluxing come through a registrar like BIZCN, whom we now treat with some suspicion. This could be due to them being negligent or completely subverted, but either way we're not surprised to see a BizCN registration of a fluxy .CN domain name"*<sup>56</sup>

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<sup>51</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>52</sup> [http://knupon.com/registrars/BizCN\\_icannComp\\_09132013.pdf](http://knupon.com/registrars/BizCN_icannComp_09132013.pdf)

<sup>53</sup> <https://www.icann.org/resources/pages/ombudsman-2012-02-25-en>

<sup>54</sup> <https://omblog.icann.org/?p=1023>

<sup>55</sup> <https://www.icann.org/en/system/files/correspondence/serad-to-guanghui-08may14-en.pdf>

<sup>56</sup> <http://forum.icann.org/lists/gnso-ff-pdp-may08/msg00847.html>

The Ombudsman statement about BizCn appears in contradiction to ICANN's own data. Regardless of this, the Ombudsman received a risk-based performance bonus this year. The amount and details of the bonus are not public and "*not subject to community comment*"<sup>57</sup>." While the Ombudsman is supposed represent the community, and be independent of ICANN, his employment is determined by the ICANN Board and is described as "*an Organizational Administrative Function*"<sup>58</sup>." The lack of independence is supported by the Ombudsman citing the confidential relationships between ICANN and registrars as being more important than public transparency<sup>59</sup>. It is also important to note that the BizCn contract with ICANN was renewed while the complaints about APPROVEDONLINEPHARMACY and RAPETUBE were still open and unresolved. The rejection of document disclosure (DIDP) and the complaint rejection by the Ombudsman occurred while BizCn's contract was being renewed. Throughout this period APPROVEDONLINEPHARMACY was still selling drugs.

## 2.10. Non-enforcement and ICANN Income

An important question we need to ask is: Does ICANN have a financial incentive to not enforce the contract? In trying to understand the routine failures, it is necessary to examine the cost-benefits especially as the situation approaches a personal benefit through bonuses granted to specific officers involved in compliance activities. ICANN is registered as a Non-Profit corporation in the state of California, which exempts it from taxes. By its own statements, ICANN maintains this tax exempt status by being "*operated, exclusively for charitable, educational, and scientific purposes...for the benefit of the Internet community as a whole*"<sup>60</sup>."

Based on ICANN transaction reports<sup>61</sup>, BizCn paid an estimated **\$420,482.50** to ICANN since APPROVEDONLINEPHARMACY was first reported. It is important to note that BizCn's contract was in fact renewed while these complaints were open and the debate around them raged. This incident was not even the first time BizCn had an illicit domain which slipped through ICANN's process. In 2010 BizCn sponsored a domain which was at the source of a mass malware attack which infected thousands of web servers<sup>62</sup>. The domain had an unenforced ICANN complaint. The lack of follow up allowed the BizCn domain to continue operating as part of the malware network. However, had ICANN enforced the contract at this time and terminated BizCn they would have lost closer to half a million dollars in fees.

Given that the CEO claimed personal responsibility for Compliance oversight, these issues would appear to be on his watch yet the CEO received a performance bonus of **\$270,000.00**<sup>63</sup> which is not subject to community comment. The bonus is roughly two-thirds of the post-incident intake from BizCn. While this is not a direct connection, we must wonder how the bonus is justified considering that the CEO pledged enhanced Compliance accountability.

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<sup>57</sup> <https://www.icann.org/resources/board-material/resolutions-2014-07-30-en#3.b>

<sup>58</sup> <https://www.icann.org/resources/board-material/resolutions-2014-07-30-en#3.b.rationale>

<sup>59</sup> <https://omblog.icann.org/?p=1015>

<sup>60</sup> <https://www.icann.org/resources/pages/articles-2012-02-25-en>

<sup>61</sup> <https://www.icann.org/resources/pages/reports-2014-03-04-en>

<sup>62</sup> <http://blog.sucuri.net/2010/06/godaddy-sites-hacked-with-cloudisthebestnow.html>

<sup>63</sup> <https://www.icann.org/resources/board-material/resolutions-2014-07-30-en#3.c>

Balance this against the fact that terminating BizCn would have cost ICANN more than the bonus. In terms of ICANN's mission, what is the benefit offered to the community by allowing sites like APPROVEDONLINEPHARMACY and RAPETUBE to operate in violation for years? There simply is no benefit to the community; there is only a profit benefit to ICANN.

BizCn is singled out in this memo but it is only one of many contracted parties with protracted compliance issues. ICANN was informed of the felony conviction related to a Dynamic Dolphin officer in 2008<sup>64</sup> but did not terminate the registrar until 2013. The registrar AB Systems had an unenforced UDRP decision which had been reported to ICANN in 2011<sup>65</sup> but it took two years to terminate them for an unrelated issue. In the AB Systems and Dynamic Dolphin cases the companies continued to pay accreditation and domain fees to ICANN for years.

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<sup>64</sup> <https://www.icann.org/en/system/files/files/krebs-response-22dec08-en.pdf>

<sup>65</sup> <http://domains.adrforum.com/domains/decisions/1411024.htm>

### 3. Conclusions

In reviewing the facts it becomes apparent that ICANN in its current structure may not be optimized for accountability. The inability for ICANN to accurately see its conflicts is apparent in this quote from Akram Atallah in the *Journal* article:

*“I don’t know how contractually we could do something different than we are doing,’ says Akram Atallah, president of Icann’s global domains division. Enforcement efforts by the organization are limited to making sure that registration companies like BizCN.com abide by terms of their contracts, he adds<sup>66</sup>.”*

There are multiple problems with this statement, but the most concerning is that it comes from ICANN’s business director. The fact that apparent compliance policy is being stated by the division that manages relationships with contracted parties represents the inherent conflict of interest in ICANN management. While Chehade and others insist ICANN “*doesn’t need outside oversight*<sup>67</sup>,” documented conditions suggest otherwise. BizCn did not abide by its contract and for unknown reasons ICANN did not properly investigate or enforce the contract for several years. The following facts are now apparent:

**3.1. ICANN’s internal structure is not as presented:** While ICANN claims the Compliance director reported directly to the ICANN CEO, this does not appear to be the case. For the period being examined, it appears that Compliance reported to ICANN’s business division.

**3.2. Compliance is not independent:** If ICANN Compliance does not report to the CEO, but rather to ICANN’s business division, there cannot be independence.

**3.3. Compliance is too close to ICANN business:** With Compliance being funded through the same division which manages relationships with contracted parties, it would seem compliance efforts could be easily influenced. Evidence of this close relationship can be seen in a transcribed quote from a registrar speaking to the Compliance director during an ICANN meeting about increased enforcement efforts:

*"If you need to push back internally inside of your organization, we can support you. And - but we can't lead that, we can't make that happen, it's got to be you guys to do that. So you've got to be the ones who first say you know what, this is ridiculous and a waste of our time, we're not solving any real problem and we have real problems that we're not getting to. It's you guys who have to be the ones who push back and please come to us to help you do that<sup>68</sup>."*

In short, enhanced oversight pushed by the community is hurting the registrars. The implication is that the registrars can use their clout to halt compliance efforts, but Compliance itself needs lead in this effort of not enforcing the contract.

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<sup>66</sup> <http://online.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403>

<sup>67</sup> <http://blogs.wsj.com/digits/2014/10/28/icanns-contradictory-answers-to-a-simple-but-important-question/>

<sup>68</sup> <http://icannregistrars.org/documents/Durban-2013-Transcript-2.doc>



**3.4. Compliance functions failed on a technical basis:** Throughout the period when various ICANN complaints about APPROVEDONLINEPHARMACY and RAPETUBE were filed, lost tickets and critical unattended systems were not previously made public. Additionally, the community became aware of “*problems, globally, in Compliance with issues and communications difficulties*”<sup>69</sup> specifically within ICANN’s Uniform Dispute Resolution process.

Decisions impacting billions of Internet users are being made by a very small number of people behind closed doors. In terms of issues which really matter to consumers there is no transparency. ICANN top leadership was directly involved and aware of the problems with APPROVEDONLINEPHARMACY and RAPETUBE but remain unaccountable. ICANN is only advocating for itself and the parties who directly fund its operations. ICANN does not serve the billions of web consumers who indirectly fund ICANN.

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<sup>69</sup> <http://singapore49.icann.org/en/schedule/sun-alac-regional/transcript-alac-regional-23mar14-en.pdf>

## 4 Recommendations

In order for ICANN to be truly accountable and multi-stakeholder ICANN needs fully independent, separate functions. Even the appearance that Compliance is embedded within the business portion of ICANN should be cause for concern. In order to provide for a more transparent and accountable structure, some fundamental changes are required:

4.1. **Compliance should be completely independent:** It should be the position of At-Large that ICANN's compliance function operates outside of ICANN's other functions.

4.2. **The Ombudsman should be further removed from ICANN:** It should be the position of At-Large that the Ombudsman office be further distanced from ICANN's organizational structure by removing board-approved compensation.

4.3. **IANA should be separate:** The combination of ICANN and IANA begins to resemble a global monopoly. Keeping them as distinct organizations may provide more checks and balances.

4.4. **At-Large should regularly evaluate the performance of specific functions:** Regardless of the Board's assertion that various functions are *not subject to community review*, At-Large should provide its own evaluation of specific performance within ICANN and object when performance bonuses are not in fact merited.

4.5. **At-Large should create its own abuse reporting and tracking system:** If ICANN is unable to operate a transparent and effective complaint system. An independent system would benefit the global Internet user if we fill this gap.