

Consultation on Registrar Accreditation Agreement Amendments: Analysis of Section F of the Synthesis of Public Comments

As part of the Consultation on Registrar Accreditation Agreement Amendments ICANN solicited public comments and published a summary of those comments. One of the sections (Section F) of the summary listed a number of the recommendations with the comment that they “may not be suitable as amendments”. Concerns were raised by members of the community about this and a request for further elaboration was made. This document is an attempt to provide some additional detail

Background:

ICANN is in the process of negotiating recommendations for amendments to the Registrar Accreditation Agreement. One part of this process is to solicit public comment and suggestions. Several such comments were received and a synthesis of those comments was drafted and posted on the ICANN website on 23 October 2007 (see <http://www.icann.org/announcements/announcement-23oct07.htm>). At the subsequent ICANN meeting held in Los Angeles, members of ALAC expressed concern about the classifications used and requested further clarification from staff.

ICANN’s efforts to amend the RAA are guided by the Core Values detailed in its Bylaws (<http://www.icann.org/general/bylaws.htm#I-2>). See endnote for a complete list.¹

The contributions made during the Public Comment period, including those provided by ALAC, demonstrate a sincere and thoughtful approach to improving the ICANN-registrar relationship and protecting registrants. A summary, of course, must distinguish between suggestions that can be instituted through contract amendments, and those that can be achieved through other means. The analysis must also decide how and to what extent suggestions are consistent with ICANN’s Core Values. By classifying certain suggestions as “not suitable as amendments to the RAA”, the summary is not commenting on the quality of the substance of the suggestion, but rather on the appropriateness of the implementation mechanism.

Below is an itemized listing of each proposal and an analysis of the rationale for placement in this category.

Proposal 1: ICANN should limit disclaimers in registration agreements and require registrars to accept some legal liability

Analysis: ICANN’s role in the DNS is limited to enhancing operational stability, reliability, security, and global interoperability of the Internet. For this reason, ICANN staff does not believe that its contractual relationship should be used to interfere in the marketplace relationship between registrars and their customers. Customers should be

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able to select a registrar based on its willingness to be responsive to its customer's desires.¹ Where this fails, there are consumer protection and legal remedies, along with the mobility available to customers to move among registrars. In those rare instances where customers are prevented from moving their names due to poor customer service, existing policy and contract requirements can be enforced.

Proposal 2: ICANN should require standardized Acceptable Use Policy in registration agreements to address criminal fraud

Analysis: The present ICANN RAA requires registrars to "abide by applicable laws and governmental regulations." Criminal fraud is more appropriately addressed by governmental law enforcement and other legal mechanisms. ICANN does not view its limited mandate to include the uses made of domain names. While there may be many uses – "proper" and "improper" – made of domain names that one entity or another may disagree with (e.g., political, religious, pornographic, as well as those that may be used to perpetrate fraud), it is not ICANN's role to define what is and is not acceptable unless it directly affects the operational stability, reliability, security, or global interoperability of the Internet.

Proposal 3: Registrars should be required to offer a 30 day auto-renew grace period after expiration of a registration

Analysis: Registrars have never been required to offer more than one year's worth of service for the payment of a one year registration fee. The post-expiration periods that have been defined, such as Auto-Renew Grace period and the Redemption Grace Period have never been adopted as consensus policies that are required of registrars and registries. These are voluntary periods. Registrants should be in a position to select the companies with which they do business based on that company's policies with respect to their renewal practices. It is a requirement of the present RAA that registrars reveal their deletion and renewal policies upon registration and at any time those practices are materially changed (as detailed in EDDP Sec 3.7.5.4). And, while we are not necessarily disagreeing with this recommendation, the RAA requires that the policy development process be used to implement any change that would require all registrars to follow a specific post-expiration grace period.

Proposal 4: ICANN should take steps to ensure impartial, equal, and fair access by preventing special access to domain speculators

Analysis: The registrar competition model is premised on the ability of registrars to customize services and price in offerings to their customers. Customers have freedom to choose registrars accordingly and registrars are free to create market mechanisms to promote and sustain a competitive environment without interference from ICANN. And, as mentioned above, ICANN would consider any policy or contract term addressing how a name will be used to be outside of ICANN's mandate.

¹ This analysis applies to many of the recommendations below and is not repeated there.

Proposal 5: Revoke domain names that are sold for more than “face value”

Analysis: This proposal is problematic as there is no defined “face value” for a domain name and any intervention in the secondary market for domain names is beyond ICANN’s limited mission. In fact, as in most marketplaces, the market value is the price someone is willing to pay. Registrars are free to charge any fee they choose for new registrations. ICANN depends on market mechanisms to promote and sustain a competitive environment and avoids any involvement with price controls.

Proposal 6: Restrict the number of domain names that can be registered by a single entity in a specified period of time

Analysis: Due to its commitment to competition and a free marketplace, ICANN does not intend to restrict access to registrations. Even if it were to decide to do so, limits could be easily gamed through the use of multiple entities. This proposal could hurt registrants, registrars, and registries and is counter to the competitive environment envisioned in the Bylaws.

Proposal 7: ICANN should disallow domain name parking

Analysis: As previously explained, ICANN does not have a role to play in the uses made of domain name registrations.

Proposal 8: Expired domain names should be available to original registrant for an extended period of time

Analysis: See analysis above. Registrars have never been required to offer a free service, such as providing more than one year’s worth of service for the payment of a one year registration fee. In addition, it would be an undue restriction on the marketplace to prevent another entity from registering a domain name that is not in use.

Proposal 9: Unauthorized registrar switching (“domain name slamming”) should be prevented

Analysis: It is unclear what change to the RAA is intended by this recommendation, but ICANN believes there are safeguards in the Transfer Policy and in the contractual relationship that exists between registrant and registrar. To the extent that registrants are uncomfortable with the security provided by a specific registrar, the marketplace offers alternatives.

Proposal 10: Actual registrant should control name, not a third party registration service

Analysis: There is no enforceable contractual means to require a registrar to ascertain who the underlying user may be that benefits from a domain name registration. There is no feasible way for the RAA to prevent parties from working through other entities when choosing how to register a domain name, nor does such an approach appear consistent

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with promoting competition. As a corollary, the RAA cannot prevent registrants from allowing others to use domain names they have registered.

Proposal 11: ICANN should publicly display all registrar officers and directors, particularly when a registrar's accreditation is terminated

Analysis: This does not require an amendment to the RAA. To date ICANN has not published such information, but there is nothing in the RAA that would prevent it. A decision to make such information public under specific circumstances has been considered within the context of compliance enforcement.

Proposal 12: ICANN should include penalties from registrars to registrants for poor service as an enforcement tool

Analysis: As explained above, the registrar competition model is premised on the ability of registrars to customize services and price in offerings to their customers. Customers have freedom to choose registrars accordingly and may include service quality among their considerations just as they do in any other marketplace decision.

Proposal 13: ICANN should create penalties for registrars to discourage typosquatting

Analysis: Dispute mechanisms are already in place that obligate registrars to facilitate enforcement of abusive registration policies such as the UDRP. Registrars that have a disproportionate number of abusive registrations already must devote additional resources to this enforcement. Beyond this, requiring registrars to accept responsibility for actions of registrants exceeds ICANN's limited mandate. And, to the extent that this is an issue of "use," ICANN does not have a role to play in the uses made of domain name registrations.

Proposal 14: Create common RAA and Whois requirements across all TLDs (including ccTLDs)

Analysis: This recommendation is beyond the scope of the RAA, which only covers gTLD registrars. ICANN does not have the authority to enforce specific Whois requirements on ccTLD operators or their registrars.

Proposal 15: Registrars should be required to offer DNSSEC

Analysis: DNSSEC is still under study by the ICANN community. Should that study conclude that such a requirement is warranted, it could be implemented through the Policy Development Process. Alternatively, registrars may voluntarily decide to offer DNSSEC as an optional service.

Proposal 16: ICANN should require registries to notify ICANN when accounts become under-funded; ICANN must issue Public Alerts when this occurs

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Analysis: This cannot be accomplished through an amendment to the RAA, which governs ICANN's relationship with registrars, however, the option of providing public notice when financial concerns about registrars arise are being considered by ICANN as part of a more comprehensive compliance program.

Proposal 17: Terms of Service Agreements should not be used to circumvent Consensus Policies

Analysis: ICANN's relationship with registrars and registrar relationships with registrants are governed by contracts and contract law. This permits registrars within a competitive marketplace to use contracts to define how the registrar-registrant relationship functions and permits registrants to choose a registrar accordingly. Nevertheless, registrars already owe an obligation to ICANN to comply with consensus policies that cannot be contracted-away.

Proposal 18: By Code of Conduct or RAA, registrars should heed security-driven recommendations

Analysis: The RAA already contains a provision for a Code of Conduct, which if adopted by a consensus of registrars, could include security requirements. And, while ICANN believes that adoption of a Code of Conduct would be a positive development, its limited mandate supports only a voluntary Code of Conduct requirement. Nevertheless, some registrars do offer higher levels of security than others and position themselves in the marketplace accordingly. Of course, registrants can select a registrar based on the security features offered. As mentioned above, the Policy Development Process can be utilized to implement new security-related obligations for all registrars.

Proposal 19: ICANN should consider transferring the burden of enforcing the RAA from itself to domain name registrants by making domain name registrants third-party beneficiaries of the RAA.

Analysis: The purpose of RAA is to set forth obligations between ICANN and registrars. Among other things, it prescribes certain obligations for registrars to include in their registration agreement with registrants. The registration agreement details the relationship and obligations between registrar and registrant. If there are particular obligations that registrars should be required to owe to registrants (and registrants lack sufficient knowledge or ability to find a registrar that is willing to contract to take on such an obligation), then it might be possible to amend the RAA to require those obligations to be included in every registration agreement. Under ICANN's mission we depend on market mechanisms to promote and sustain a competitive environment where registrants seek out registrars that provide the services and support levels they desire. Making registrants third-party beneficiaries to the contract would open both ICANN and registrars up to unacceptable legal liabilities without necessarily enhancing competition.

Proposal 20: Add a clause in the RAA to require registrars to show a standardized description of registrant rights, to be provided by ICANN in different languages, as an

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appendix to the contract at the time of registration, and also to make it available in the registrant's domain management interface whenever available. Such obligation should also be passed onto resellers.

Analysis: This recommendation has received additional attention and ICANN has worked with registrars to include an amendment that would require registrars and resellers to link to a "registrant rights and responsibilities" page to be developed and hosted by ICANN in consultation with the community and registrars.

Proposal 21: We ask ICANN staff to prepare a summary of the current practices, fees and burdens imposed on registrants by a significant sample of registrars. (The ALAC is ready to ask for an Issues Report if necessary).

Analysis: This is not a request for an RAA amendment.

The following recommendations are a series of suggestions concerning the establishment of an entity to conduct assessments "for the purpose of releasing ratings." While ICANN has long held that such ratings could be a useful means for consumers to evaluate the appropriateness of any given registrar's practices to their individual needs, it has maintained that such ratings must be undertaken by a third party, and that it is not an appropriate role for ICANN to initiate or in any way appear to influence the independence of such assessments. These are not recommendations for amendments to the RAA.

Proposal 22: ICANN should appoint a separate entity, targeted with the task of conducting compliance assessments similar to those delineated in Compliance above. A suitably independent entity could do the assessments both for the purpose of ICANN's compliance verification activity, and for the purpose of releasing ratings. Consumers Union, an ALS in the United States with extensive experience in product ratings, has expressed willingness to assist.

Proposal 23: The delegated entity should continue to conduct assessments at least once a year, and should produce a graded rating published on ICANN's website and on a specific page aimed at final consumers, and disseminated over the Internet through outreach and information campaigns.

Proposal 24: Registrars obtaining top grade evaluations should be allowed to display a specific mark on their website.

Proposal 25: Registrars obtaining a very low grade should be immediately subject to specific corrective measures by ICANN, and, if appropriate, to sanctions according to the compliance provisions of the RAA.

Analysis: None. See comments above.

The next two recommendations concern resellers. In its negotiations with registrars, ICANN has put forth amendments that will establish several new terms concerning registrar-reseller relations. These may limit the need for the following recommendations.

Proposal 26: ICANN should have an inexpensive program to accredit resellers.

Proposal 27: ICANN should consider including resellers in the compliance and rating evaluations described above.

Analysis: ICANN has no direct contractual relationship with the myriad types and numbers of resellers active in the marketplace. It is difficult to envision a program to accredit resellers that would be inexpensive. The requirements under consideration for RAA amendments go a long way to establishing explicit obligations for registrars that do business with resellers that should address many concerns raised about resellers.

The final two recommendations address internal operating procedures at ICANN and have been taken into consideration as we develop new procedures for monitoring registrar compliance and business continuity. These are not recommendations for amendments to the RAA.

Proposal 28: ICANN should define criteria to determine when a registrar has failed, such as failure to process transfers and registrations in a timely fashion. Voluntary closure of a registrar should be treated as failure unless the closing registrar has taken action to transfer all of its registrants to other registrars.

Proposal 29: ICANN should use the results from the compliance and rating assessments, as well as any other available information, to monitor which registrars appear subject to possible failure in the near future.

ⁱ In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.