The ICANN GNSO "Business Constituency"

Response to WHOIS Policy Review Team Discussion Paper

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Commercial & Business Users Constituency Submission

GNSO//CSG//BC

Submission:

The Business Constituency ("BC") has long supported the need for greater WHOIS accuracy and access to ensure the protection and safety of Internet users and to enable brand owners to protect their intellectual property. We support the goals of the WHOIS Review Team to assess the extent to which WHOIS policy in the gTLD space is effective, meets the needs of law enforcement and promotes consumer trust, and its additional assessment of ICANN's performance in this area.

The WHOIS Review Team poses a number of important and thoughtful questions in its paper, which the BC is pleased to respond to below.

Question 1: What measures should ICANN take to clarify its existing WHOIS policy?

Response: In paragraph 9.3.1 of the Affirmation of Commitments ("AoC"), ICANN committed to a number of important and clear WHOIS obligations, including "enforcing its existing policy relating to WHOIS," including its existing obligations to maintain "timely, unrestricted and public access to accurate and complete WHOIS information."

Likewise, the GAC has consistently emphasized the importance of WHOIS accuracy and access:

> The 2007 GAC Principles regarding WHOIS highlighted the importance of accurate WHOIS data to ensure Internet security and stability, for fraud prevention, for law enforcement and IP enforcement purposes and for the overall promotion of reliable e-commerce. The GAC Principles require that WHOIS data should include sufficient and accurate information about domain name registrations and call for more work to improve the accuracy of WHOIS data.

> In 2008, the GAC submitted recommendations regarding the terms of reference for WHOIS studies, seeking "a factual record that documents the uses and abuses of WHOIS data recognized by the GAC WHOIS Principles."

> In its Singapore Communiqué, the GAC reiterated its "concerns about privacy and proxy services; the potential benefits of WHOIS data validation; and the need for effective compliance activities, noting that legitimate users of WHOIS data are negatively affected by non-compliance."

ICANN's existing policies touch on accurate WHOIS in several areas, but unfortunately, ICANN lacks a definitive and comprehensive WHOIS policy as discussed further below:

1. ICANN's Registrar Accreditation Agreement ("RAA") clearly requires that all Registrars provide third party bulk access to WHOIS data in paragraph 3.3.6. In contrast, the Registrar's obligation to provide accurate WHOIS data is much less clear and is subject to loose contractual language and vague promises to comply with future ICANN policies. The absence of clear contractual obligations regarding WHOIS accuracy stands in strong contrast to ICANN's clear obligations to provide accurate WHOIS in the AoC.

   Paragraph 3.3.4 of the RAA only requires the Registrar to "abide by any [future] ICANN specification or policy established by Consensus Policy…" This convoluted provision goes on to say that "if the WHOIS service implemented by registrars does not in a reasonable time provide reasonably robust, reliable, and convenient access to accurate and up-to-date data, the Registrar shall abide by any [future] ICANN specification or policy as established by Consensus Policy….if reasonably determined by ICANN to be necessary (considering such possibilities as remedial action by specific registrars), to supply data from Registrar's database to facilitate the

development of a centralized WHOIS database for the purpose of providing comprehensive Registrar WHOIS search capability."

2. Similarly, in paragraph 3.78, the Registrar agrees to abide by "any [future] specifications or policies requiring reasonable and commercially practicable verification of contact information at the time of registration, including periodic re-verification of such information. Registrars are required, however, to take reasonable steps to investigate claimed inaccuracies in their WHOIS data after receiving notification from a third party. Further, if registrars learn of inaccurate contact information associated with a particular name, they are required to take reasonable steps to correct the inaccuracy.

3. The only clear current obligation in ICANN policy to provide accurate WHOIS data both at the inception of the registration process and throughout the term of a registration is placed on the domain name registrant. Paragraph 3.7.7.1 states that the domain name holder must provide "accurate and reliable contact details and promptly correct and update them" during the term of the registration. Paragraph 3.7.7.2 provides that the willful provision of inaccurate or unreliable information or failure to promptly correct or update such information for over 15 days to inquires by the Registrar "shall constitute a material breach" of the contract and "be a basis for cancellation of the domain name registration." However, the provision does not state that such failure SHALL be a basis for cancellation. There does not appear to be any contractual obligation on the registrar to actually report its false and inaccurate WHOIS numbers to ICANN or act on cancelling a domain name registration.

ICANN cannot live up to its commitments in the AoC unless all stakeholders, including registries and registrars, are required by contract to ensure the accuracy of WHOIS data at all stages of the domain name process. The BC recommends:

- The RAA should be amended to require contracted parties to take reasonable steps to verify the accuracy of WHOIS information when a registration first occurs and when a registrant renews their domain name. ICANN can look to best practices from other industries, including the financial sector and e-Commerce industries, which have employed successful online data verification systems to ensure the accuracy of information and to prevent fraud and abuses. After all, processes to gather accurate information are already undertaken by Registrars in the collection of credit card and other forms of payment. Valid WHOIS data should not be an exception and should be a prerequisite to complete the registration of a domain name.

- ICANN should develop guidelines for contracted parties and registrants informing them as to what data elements would be considered valid for WHOIS purposes and what processes apply to verifying WHOIS data.

- ICANN should also amend the RAA or develop guidelines instructing registrars on how best to correct false and inaccurate WHOIS data, including establishing a regular practice of cancelling registrations in appropriate circumstances.

- Finally, ICANN should also consider mechanisms to create and maintain a centralized WHOIS database, as referenced in the RAA. For all the issues related to WHOIS accuracy and WHOIS access obligations, the BC has long supported the inclusion of a series of contractually imposed graduated sanctions to ensure compliance.

Question 2: How should ICANN clarify the status of the high level principles set out in the Affirmation of Commitments and the GAC Principles on WHOIS?

Response: In addition to urging the adoption of a comprehensive policy on WHOIS, as discussed above, ICANN must create accountability mechanisms that are specific and measurable. ICANN should undertake a full audit of the WHOIS record set and measure it for accuracy. Third parties have already volunteered to assist in that effort. That audit, combined with additional studies on inaccurate WHOIS data, would become the baseline by which to measure whether ICANN is in compliance with its obligations under the AoC. ICANN must require the contracted parties to live up to their contractual obligations to support accurate WHOIS information on the front end, and must enforce failure by such parties to actively correct false and inaccurate legacy WHOIS information on the backend.

ICANN must also beef up general WHOIS enforcement, while allowing flexibility for the way in which Registrars comply with their obligations. All stakeholders would have a clear view (perhaps a WHOIS dashboard could be created) by which to measure ICANN's ongoing performance.

Question 3: What insight can country code TLDs (ccTLDs) offer on their response to domestic laws and how they have or have not modified their ccTLD WHOIS policies?

Response: One aspect of ccTLDs that is worth considering is whether accuracy is improved by having "thick" WHOIS data maintained at the registry level.

Question 4: How can ICANN balance privacy concerns of some registrants with its commitment to having accurate and complete WHOIS data publicly available without restriction?

Response: The GAC Principles correctly note that WHOIS service should provide "sufficient and accurate data about domain name registrations and registrants subject to national safeguards for individuals' privacy" in a manner that supports the stability, reliability, security and interoperability of the Internet and facilitates continuous, timely and world-wide access.

In other words, there must be a balance that allows access to accurate WHOIS information to exist while building in any processes to address privacy concerns. It is important to note, however, that most countries require businesses and NGOs to provide accurate information when they apply for services such as a business license, tax-exempt status, or inclusion in a directory of trademarks.   Some countries have established that their privacy laws apply to the display of country code WHOIS data.

Question 5: How should ICANN address concerns about the use of privacy/proxy service and their impact on the accuracy and availability of the WHOIS data?

Response: At one level, the availability of privacy/proxy services provides an alternative mechanism for registrants who have legitimate concerns about individual anonymity. At the same time, the BC has long been concerned about the ongoing abuses of proxy and privacy services both by providers and registrants to evade legal process and law enforcement. ICANN's own studies verify "critical failures" among entries associated with privacy/proxy services. Many privacy/proxy services are not responsive and do not act as responsible actors. Given that registrants are willing to pay an extra fee to protect their information using a proxy service, by which both the registrant and the proxy service reap a benefit, both must also adhere to the requirement to provide prompt and accurate WHOIS information.

BC members have also experienced situations where the registrar's "proxy service" is simply a shell behind which to shield the registrar's own cybersquatting and other illegal activities. ICANN should

create an official set of guidelines for what constitutes a valid privacy/proxy service and best practices for such entities. The BC also supports stepped up compliance audits into any privacy/proxy service, which has been the subject of ongoing complaints from the stakeholder community or whose misconduct has otherwise been brought to ICANN's attention.

WHOIS studies that were approved by GNSO Council earlier this year should provide fact-based data on the nature of registrant using privacy/proxy services. The GAC first proposed a registrant identification study in 2008, and Council finally arrived on a workable design for the study in May-2011:

> The revised registrant study now seeks a foundational understanding of the types of entities and kinds of activities observed in gTLD domains that use privacy or proxy services. Accordingly, the categories of entities and activities are not pre-determined in this study, but will be generated as researchers examine representative samples of active websites and their WHOIS data.

> For instance, researchers will characterize potentially commercial uses of websites in finer detail, such as: marketing of services, publishing events or merchandise, hosting paid advertising, soliciting donations, paying membership dues, etc.   In addition, researchers will characterize uses for all sampled domain names, making no assumption about implied commercial use of domain names registered by legal persons.

> We are confident that the finer distinctions captured in this study will provide the raw data needed to understand the entities and activities of registrants using WHOIS privacy and proxy services. This data will enable Council to respond to GAC questions and will create a baseline for evaluating potential policy changes that may be indicated by other WHOIS studies.   Moreover, we believe the revised Registrant Identification Study will be deliverable by the same vendors that bid on the earlier RFP, providing data of significantly greater value at just slightly higher cost.

Question 6: How effective are ICANN's current WHOIS related compliance activities?

Response: Although ICANN has begun some additional recent compliance in this area, including an audit of Port 43 access by registrars, and an inquiry into whether ICANN registrars were sending reminders to registrants regarding their WHOIS data (per the WHOIS Data Reminder Policy), these activities represent just the tip of the iceberg in terms of needed compliance in this area. ICANN's own look into the accuracy of WHOIS records show at that best, no matter how one analyzes the data, only 23% of records were deemed fully accurate. If either a business or government organization, had a 23% data accuracy record, that organization would be considered failing.

Huge compliance resources are needed to fix this situation and the matter of WHOIS accuracy only becomes more urgent with ICANN's planned rollout of hundreds of new gTLDs. ICANN's compliance organization has already been made aware from its own work, from reporting from third parties, including Knujon, of continuing frauds and abuses occurring in the WHOIS space. As part of the AoC, ICANN's continued performance in the compliance area should be carefully measured to assess whether it is meeting its WHOIS commitments.

Question 7: Are there any aspects of ICANN's WHOIS commitments that are not currently enforceable?

Response: See response to Question 1. ICANN cannot live up to its commitments in the AoC unless all stakeholders, including registrars, are required by contract to ensure the accuracy of WHOIS data. The RAA should be amended to require contracted parties to take reasonable steps to verify the accuracy of WHOIS information when a registration first occurs and penalties and fines are need to ensure compliance with all WHOIS obligations related to data accuracy and data access.

ICANN manages the conduct of its registries and registrars through contracts, so anything that can be made part of those contracts should be enforceable. That includes new consensus policies adopted by ICANN that automatically become enforceable on contract parties. Given this, the BC believes that all aspects of ICANN's WHOIS commitments can be made enforceable.

Question 8: What should ICANN do to ensure its WHOIS commitments are effectively enforced?

Response: See responses to Questions 1, 5 and 6.

Question 10: How can ICANN improve the accuracy of WHOIS data?

Response: See responses to Questions 1, 2, 5 and 6.

Question 11: What lessons can be learned from approaches taken by ccTLDs to the accuracy of WHOIS data?

Response: One aspect of ccTLDs that is worth considering is whether accuracy is improved by having "thick" WHOIS data maintained at the registry level.

Question 12: Are there barriers, cost or otherwise, to compliance with WHOIS policy?

Response: In the short term, the only barrier to improved WHOIS compliance is a lack of management attention to enforcement of existing RAA provisions, as described above. In the medium term, the lack of fact-based data on WHOIS and privacy/proxy registrations is a barrier to policy development, but the studies now underway should provide results in 2012. In the longer term, a significant barrier to improving WHOIS will arise if contract parties block new policy development processes and contract amendments.

Question 13: What are the consequences or impacts of non-compliance with WHOIS policy?

Response: As indicated in the BC's responses to the review team's thoughtful questions, non-compliance with WHOIS policy has a material and deleterious effect on ICANN's mission and its ability to meet its AoC commitments. Inaccurate and false WHOIS negatively impacts the Internet's security and stability, impairs the ability of consumers to understand the genuine source of legitimate products/services, facilitates fraud, impairs law enforcement investigations, impairs IP enforcement and generally harms e-commerce. Non-compliance creates a faulty foundation upon which to expand the DNS system. Existing problems in the WHOIS space combined with non-compliance will likely lead to a crisis of confidence after the introduction of new gTLDs. The BC strongly supports a comprehensive review of the WHOIS system and prompt implementation of recommendations coming out of that review, preferably before the rollout of any new gTLDs.

Constituency Support:

Rapporteur for this Discussion Draft: Sarah Deutsch

Level of Support of BC Members:

This document was posted to BC members for review and comment on 9-Jul-2011.

9-Jul-2011 – Steve DelBianco provided edits regarding GAC and WHOIS studies

23-Jul-2011 -- comments deemed approved per BC Charter, and submitted to ICANN