

GNSO Briefing Paper on Proposed RAA Amendments

I. Executive Summary

In early 2007 a dialogue began within the ICANN community concerning possible improvements in the Registrar Accreditation Agreement (RAA) that would provide enhanced protections for registrants and deter abuse. In the process, the ICANN Board adopted a set of resolutions directing ICANN staff to undertake a process of consultation that would inform the Board on recommended changes and community views. One step in the process outlined by the Board was to solicit input from the GNSO. This paper is intended to provide background of what has been done thus far and to set the stage for the consultations envisioned in the Board resolutions.

At the San Juan meeting in June 2007 the Board directed staff to:

- solicit and consider the input of the Internet community, including the At-Large community and the GNSO constituencies, regarding proposed changes to the RAA, registrar accreditation process, and related policies.
- engage with the Registrars Constituency in order to arrive at, and post for public comment, a set of proposed amendments or alternative version to the RAA, that is intended to address to the extent feasible the concerns raised by the Internet community.
- allow the At-Large Advisory Committee, the GNSO, and other interested parties to review the proposed revised RAA and provide advice to the Board in its review.

The first two steps have been completed and most of the third. ALAC has submitted its comments to the Board and those have been published in the public comment forum. What remains of the third step is for the GNSO to review the proposed revisions and provide advice to the Board.

Options for possible adoption of changes are detailed that include a mandatory option, requiring a consensus process or an optional process involving incentives.

II. Background

The RAA Amendment project grew out of the concerns raised during the RegisterFly registrar failure. In March 2007, Paul Twomey issued a call for a major review of the RAA and the registrar accreditation process in order to better protect registrants and provide for business continuity. The key issues identified at that time became the building blocks of subsequent amendments. This statement is located online at <<http://www.icann.org/announcements/announcement-21mar07.htm>>.

A workshop was held in June 2007 at the Puerto Rico meeting where issues of data escrow, registry failover, compliance and RAA amendments were discussed. At that same meeting the Board resolved to direct staff to solicit community input related to RAA amendments, engage with registrars to arrive at a set of proposed RAA amendments to be posted for public comment, and solicit advice from ALAC, the GNSO, and other interested parties to inform the Board's review of the amendments. The exact wording of the resolutions follows (online at <<http://www.icann.org/en/minutes/resolutions-29jun07.htm#k>>:

Resolved (07.50), the Board directs staff to solicit and consider the input of the Internet community, including the At-Large community and the GNSO constituencies, regarding proposed changes to the RAA, registrar accreditation process, and related policies.

Resolved (07.51), the Board requests that staff engage with the Registrars Constituency in order to arrive at, and post for public comment, a set of proposed amendments or alternative version to the RAA, that is intended to address to the extent feasible the concerns raised by the Internet community.

Resolved (07.52), that when the RAA is published for public comment, that notice be provided to allow the At-Large Advisory Committee, the GNSO, and other interested parties to review the proposed revised RAA and provide advice to the Board in its review.

To achieve the first step above a page was established on the ICANN website for "Consultation on Registrar Accreditation Agreement Amendments" at

<http://www.icann.org/topics/raa/>>. An initial set of amendments were drafted based primarily on the Twomey list of issues and posted for public comment between July and September. During this period initial discussions were also held with registrars.

At the conclusion of this public comment period a Synthesis document was produced <http://www.icann.org/en/topics/raa/comment-summary.html> that detailed the recommendations received in a total of 53 submissions. Each recommendation was classified into one of five categories ranging from “in line with initial amendment proposals” to better “handled through the Consensus Policy process.” By classifying the recommendations in this way, a structure was provided for staff and registrars to proceed with a dialogue, as directed by the Board, that was focused on what were considered the most feasible and appropriate changes to the RAA. Several of the recommendations received through this public comment round were eventually incorporated in some form in the set of proposed amendments that were eventually published.

The Registrar Constituency created a working group, led by Constituency Chair Jon Nevelt, to enter into an ongoing dialogue with ICANN staff on the RAA issues under consideration. Several iterations were drafted and revised as the dialogue between the working group and staff progressed. Both face-to-face and telephone conferences were held over several months.

The ALAC also created a working group to review the RAA and has contributed to the dialogue. In part, as a result of the ongoing dialogue, communications between the registrars and ALAC have improved. (These groups met in Delhi and Paris and have plans for a meeting in Cairo.)

The dialogue between ICANN staff and the Registrar working group arrived at an agreed-upon set of amendments that was posted prior to the Paris meeting, thus completing the second step in the Board resolutions.

As directed by the Board, the second step included a second public comment period to consider the proposed amendments arrived at in this period and was open from 18 June 2008 to 4 August 2008. An extended comment period was held with members of ALAC beyond those dates to permit translation of pertinent documents and to allow for

interaction with staff on the issues for non-English speaking participants. The proposed amendments and supporting documents were translated into Spanish, French and Portuguese, while copies of the RAA and a redline version showing the proposed changes were also translated into Chinese, Japanese, and Korean for delivery at the Asia/Pacific Registry-Registrar Outreach Gathering held in Seoul in September. ALAC approved a Statement to the Board that was also submitted to the public comment forum, <<http://forum.icann.org/lists/raa-consultation/pdfVt8QtSUuxc.pdf>>.

Before staff reverts to the Board to consider next steps, it wishes to engage the GNSO in a dialogue to the extent desired to fully inform and advise the Board.

III. Proposed RAA Amendments

A set of fifteen amendments is under consideration. This set has been developed following extensive consultation as detailed above and with numerous modifications and refinements that attempt to reflect as many of the comments received as possible. A full set of the proposed changes in contract language is available online in redline form <<http://www.icann.org/en/topics/raa/redline-2001-raa-18jun08.pdf>> and in chart form comparing current and proposed language for each change <<http://www.icann.org/en/topics/raa/raa-provisions-comparision-18jun08.pdf>>. Below are brief descriptions intended to provide a “high level” sense of what each proposed change is intended to accomplish:

1. Enforcement tools
 - a. Registrar Audits – Allowing ICANN to conduct site visits and audits of registrars upon at least 15 days notice.
 - b. Sanctions & Suspension – Providing for escalated compliance enforcement tools such as monetary sanctions and suspension of registry access.
 - c. Group Liability – Preventing “serial misconduct” by registrars when another affiliated (by common control) registrar’s RAA is terminated.
 - d. Registrar Fees – Revising registrar fee provision to be aligned with recent and current ICANN budgets; assessing interest on late fee payments.
 - e. Registrations by Registrars – Creating liability by registrars to ICANN for any registrations created by a registrar for its own use (in lieu of a registration agreement between the registrar and itself).
 - f. Arbitration Stay – Eliminating the existing automatic 30-day stay of termination registrars receive by initiating arbitration or litigation to challenge an RAA termination.

2. Registrant protections
 - a. Private Registration & Registrar Data Escrow Requirements –Registrars are required to either escrow underlying customer data in the case of private or proxy registrations or, alternatively, give prominent notification that such data will not be escrowed.
 - b. Registrant Rights and Responsibilities – Requiring registrars to include on their websites a link to a “Registrant Rights and Responsibilities” document to be created in consultation with the ICANN community.
 - c. Contractual Relationships with Resellers – Protecting registrants who are customers of resellers by obligating resellers to follow ICANN policies and requiring that they either escrow privacy/proxy customer data or, alternatively, give prominent notification that such data will not be escrowed.

3. Promoting stable and competitive registrar marketplace
 - a. Accreditation by Purchase – Requiring registrars to notify ICANN upon a change of ownership and to re-certify the registrar’s compliance with the RAA.
 - b. Operator Skills Training and Testing – Providing for mandatory training of registrar representatives to ensure better registrar understanding of ICANN policies and RAA requirements.
 - c. Use of ICANN-Accredited Registrars – Maintaining ICANN’s general policy of requiring registries to use ICANN-accredited registrars (in the absence of a reasonable and noted exception).

4. Agreement modernization
 - a. Notice Provision – Streamlining ICANN’s obligation to provide notice to registrars of new consensus policies applicable to registrars.
 - b. References to the Department of Commerce – Acknowledging ICANN’s movement toward independence from the DOC by removing certain references within the RAA to a requirement of DOC approval.
 - c. Registrar Data Retention Requirements – Clarifying data retention requirement for registrars to allow for more uniform practices.

IV. GNSO Advice

GNSO is encouraged to provide its advice to the Board as envisioned in the Board resolution. Staff is prepared to provide assistance and background details as desired by the council for this purpose.

V. Possible Adoption Paths

Once the Board has received the input and advice from all segments, there might be two options for implementing the changes in a new form of RAA to govern ICANN’s relationship with registrars:

1. The RAA includes a provision for the adoption of changes that can be incorporated in a new contract that can be made mandatory for all registrars upon renewal. Specifically, RAA Subsection 5.4 details the process for RAA renewal and substitution of revised forms of the RAA, and sets forth a path that includes undertaking a consensus process as set forth in RAA Subsection 4.3. (The full text of RAA Subsections 5.4 and 4.3 are reprinted in Appendix I.) This process is similar in several respects to the current GNSO policy development process, encompassing community outreach and public comment, a written report and supporting materials documenting areas of agreement and disagreement and a recommendation adopted by at least a two-thirds vote of the Council. It is expected that such a consensus process would consider the set of proposed amendments as a whole. Consideration of changes to the set might require use of the formal GNSO PDP process.

2. An alternative approach would leave the determination for approving the new form of RAA with the Board. However, since the consensus process described above would not be followed under this approach, the new form RAA might not be imposed mandatorily on registrars due to the RAA requirement. In order to gain acceptance under this approach, there might be incentives to encourage voluntary adoption of the new contract. One advantage to this approach would be that adoption could proceed without waiting for a renewal cycle to pass. There might be several potential incentives for registrars to adopt the new form of RAA immediately upon approval by the Board:
 - a. Recognition of those registrars agreeing to the new terms with a “higher standards” status by ICANN and the community (a “gold star” approach);
 - b. Fee incentives;
 - c. Heightened accreditation and renewal standards going forward;
 - d. Community and peer support for adopting the new form RAA.

Appendix I

Relevant Provisions from Current RAA

RAA 5.4:

RAA Subsection 5.4 requires ICANN to “adopt” any new form of the RAA just as though it were a “Consensus Policy.”

5.4 Term of Agreement; Renewal; Right to Substitute Updated Agreement. This Agreement shall be effective on the Effective Date and shall have an initial term running until the Expiration Date, unless sooner terminated. Thereafter, if Registrar seeks to continue its accreditation, it may apply for renewed accreditation, and shall be entitled to renewal provided it meets the ICANN-adopted specification or policy on accreditation criteria then in effect, is in compliance with its obligations under this Agreement, as it may be amended, and agrees to be bound by terms and conditions of the then-current Registrar accreditation agreement (which may differ from those of this Agreement) that ICANN adopts in accordance with Subsection 2.3 and Subsection 4.3. In connection with renewed accreditation, Registrar shall confirm its assent to the terms and conditions of the then-current Registrar accreditation agreement by signing that accreditation agreement. In the event that, during the Term of this Agreement, ICANN posts on its web site an updated form of registrar accreditation agreement applicable to Accredited registrars, Registrar (provided it has not received (1) a notice of breach that it has not cured or (2) a notice of termination of this Agreement under Subsection 5.3 above) may elect, by giving ICANN written notice, to enter an agreement in the updated form in place of this Agreement. In the event of such election, Registrar and ICANN shall promptly sign a new accreditation agreement that contains the provisions of the updated form posted on the web site, with the length of the term of the substituted agreement as stated in the updated form posted on the web site, calculated as if it commenced on the date this Agreement was made, and this Agreement will be deemed terminated.

[Note: Subsection 2.3 mentioned above generally obligates ICANN to operate transparently, promote competition, act fairly, and provide adequate appeal procedures.]

RAA 4.3:

RAA Subsection 4.3 <<http://www.icann.org/registrars/ra-agreement-17may01.htm#4.3>> sets forth the “Manner of Establishment of New and Revised Specifications and Policies.” RAA 4.3.1 provides as follows:

4.3 Manner of Establishment of New and Revised Specifications and Policies.

4.3.1 "Consensus Policies" are those specifications or policies established based on a consensus among Internet stakeholders represented in the ICANN process, as

demonstrated by (a) action of the ICANN Board of Directors establishing the specification or policy, (b) a recommendation, adopted by at least a two-thirds vote of the council of the ICANN Supporting Organization to which the matter is delegated, that the specification or policy should be established, and (c) a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support and opposition to the proposed policy.